FILED
AUG 26 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

| | | |
|---|---|---|
| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | |
| vs. | ) | Filed August 26, 1987 |
| **RONALD L. McLAIN,** | ) | 7-65<br>86-409 |
| Defendant-Appellant. | ) | 335 |

Appeal from the Iowa District Court for Muscatine County (No. 1617C-885), Margaret S. Briles, Judge.

The defendant appeals from his conviction, following a jury trial, for the crime of theft in the second degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Stephen J. Peterson, Muscatine County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

**OXBERGER, C.J.**

336

The defendant, Ronald McLain, appeals from his conviction for the offense of theft in the second degree in violation of Iowa Code sections 714.1(4) and 714.2(2) (1985). He contends the trial court erred in instructing the jury on an affirmative defense which was unsupported by the evidence. He also alleges he was denied effective assistance of trial counsel. We affirm.

Since this action is a criminal case, our review is on assigned errors only. State v. Brookhiser, 375 N.W.2d 287, 288 (Iowa 1985). Turning to the first assignment of error, McLain asserts the trial court erred by giving an instruction which was unsupported by the evidence. He claims the instruction amounted to an affirmative defense which neither he nor any other defendant raised at trial. In response, the State claims McLain did not properly preserve the error. The State contends the trial court gave McLain the opportunity to correct the error and he failed to act upon it. The State also argues McLain failed to request the court to specifically tailor the instruction to exclude him.

The record shows that after McLain's counsel objected to the instruction, the following took place:

> THE COURT: Yes. I find your comment interesting. Because if that's the burden on the State, they have to prove it.
>
> MR. MILLAGE: Yeah.
>
> THE COURT: But if you want it out, I'll take it out, if the other defendants don't want it in.
>
> MR. MILLAGE: Well, along those lines —
>
> THE COURT: Now the State may wish to move that I strike it on the grounds that it's similar to a justification defense, but I don't think they will, since there is evidence in the case concerning what somebody intended.
>
> I'm going to overrule your objection.
>
> Anything else?
>
> MR. MILLAGE: No.

From the foregoing, it is clear the court offered to remove the instruction but did not give McLain a chance to consult with the other defendants, and in fact changed its mind and withdrew the offer. Accordingly, we reject the State's argument that McLain waived the error because he failed to act upon the court's proposal.

It is also clear that McLain did not request the court to specifically tailor the instruction to exclude him. The State relies on State v. Hraha, 103 N.W.2d 484 (Iowa 1972), as support for their contention. In Hraha, the defendant objected to an instruction arguing it was an incorrect statement of the law and that it limited the jury's consideration of the evidence. Id. at 486. The supreme court held that the error was not preserved since the defendant failed to request an additional or more explicit instruction. They stated "[w]here the instruction is correct as given but not as explicit as a party may desire, he must request an additional instruction before the jury is charged in order to preserve any claimed error as a basis for appeal." Id.

In this case, McLain did not question the correctness of the law, the explicitness of the instruction, or that an additional instruction should have been given; he questioned the correctness of giving the instruction in relation to any defendant in the case. The case, therefore, is different from Hraha, and thus Hraha is not controlling. Ordinarily, to preserve error on a jury instruction, a defendant must make an objection prior to jury arguments. State v. Blackford, 335 N.W.2d 173 (Iowa 1983). In addition, the objection must be specific so as to alert the court to any possible error. State v. Le Compte, 327 N.W.2d 221, 223 (Iowa 1982). These steps were followed in this case and the error was preserved.

We now turn to the instruction itself. The marshalling instruction given by the court required the jury to find that the State had proven the following elements beyond a reasonable doubt:

> 1. That lawn mowers or lawn tractors and a car trailer were stolen.
> 2. That on or about the 9th day of August, 1985, such defendant exercised control over the property.
> 3. That at the time such defendant exercised control over the property, he knew or believed that the property had been stolen.
> 4. That such defendant did not intend to promptly restore it to the owner or to deliver it to an appropriate public officer. (Emphasis added.)

McLain argues the final part of the instruction corresponds to an affirmative defense available to defendants in cases of this nature.[1] He contends the evidence given at trial was not sufficient to justify such an instruction and that he was prejudiced because the instruction vitiated his defense theory.

In giving instructions to the jury, a court must "instruct fully on all material issues stating applicable legal principles supported by requisite evidence." State v. Miller, 359 N.W.2d 508, 512 (Iowa App. 1984). The court must also tailor the instructions to the evidence. State v. Kern, 307 N.W.2d 22, 27 (Iowa 1981). The question we must resolve is whether there was substantial evidence to support the instruction. After a thorough review of the record, we conclude there was not substantial evidence to support the instruction.

The defendant's theory was that he did not know the property was stolen. This theory was also urged by defendant, Housenga. The final codefendant, Houston, did not testify but put on evidence trying to show he was merely the pawn of Hester. He was trying to show that Hester "framed him" because his girlfriend rejected Hester's romantic overtures. The State argues that Houston's evidence of the business relationship with Hester created an inference that Houston

---

[1]The pertinent part of Iowa Code § 714.1(4) states:

> 4. Exercises control over stolen property, knowing such property to have been stolen or having reasonable cause to believe that such property has been stolen, unless the person's purpose is to promptly restore it to the owner or to deliver it to an appropriate public officer. (Emphasis added.)

intended to return the property to the rightful owner, Hester. We disagree. The record reveals that Houston was one of the driving forces behind the sale. His actions make it clear that he did not intend to return the property to Hester but to sell it to the DCI agents. The record does not support the instruction and the trial court erred in giving it.

We must now decide if the trial court's error warrants a reversal and a new trial. Normally, an error in jury instructions does not necessitate a reversal unless prejudice has resulted. State v. Gansz, 376 N.W.2d 887, 891 (Iowa 1985); State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983). Such error is presumed prejudicial, though, unless the contrary appears beyond a reasonable doubt from a review of the whole case. State v. Davis, 228 N.W.2d 67, 73 (Iowa 1975). The inquiry is whether the evidence was so dispositive of the issue that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the instruction. See Rose v. Clark, ____ U.S. ____, ____, 106 S.Ct. 3101, 3109, 92 L.Ed.2d 460, 474 (1986) (discussing harmless error analysis in the context of Sandstrom error and citing Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983) (Powell, J., dissenting)).

McLain objected to the present instruction as being irrelevant and confusing since no defendant raised it at trial. We note that the challenged portion is in the nature of an affirmative defense, and as such, it is inconsistent with the balance of the instruction. Under 714.1(4) the crux of the charge is the defendant's knowledge that the property was stolen and his exercise over it. The jury would have to find beyond a reasonable doubt that McLain knew the property was stolen and that he exercised control over it before they reached the question of whether he intended to return it. Once they were satisfied the first two elements were proven, thereby rejecting McLain's theory, they could address the question of

whether McLain intended to return the property. If they found that he did, they were compelled to acquit him. The instruction clearly was beneficial to McLain since it gave the jury a final opportunity to acquit him. We find it difficult to say the defendant was prejudiced by an instruction that in operation could benefit him. Without the instruction, the jury could only acquit McLain if they found the State had not proven its case. We hold that the jury would not have had to rely on the instruction to reach a verdict, and any resulting error was harmless.

McLain also argues he was denied effective assistance of trial counsel. He asserts his council failed to timely object to prejudicial hearsay testimony, failed to timely move for severance from defendant Housenga, and failed to object to the State's unlawful use of defendant's silence.

Generally, we decline from entertaining a claim of ineffective assistance of counsel on direct appeal. We prefer to resolve the question of ineffective assistance in a postconviction proceeding where a full record can be developed explaining the basis for the attorney's actions. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982).

The defendants in this case were tried jointly. As in any joint trial, special problems arise. Defense counsel is forced to make difficult tactical decisions throughout the proceedings. The present trial was especially difficult at times, and we do not feel the record before us is adequate to determine McLain's ineffectiveness claim.

**AFFIRMED.**