

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2019-0099, State of New Hampshire v. Kyle Perkins, the court on January 17, 2020, issued the following order:

The defendant, Kyle Perkins, was convicted in Superior Court (McNamara, J.), following a jury trial, on a class A felony charge of receiving stolen property, consisting of 26 iPads. See RSA 637:7 (2016); RSA 637:11, I(a) (2016). The defendant appeals an order denying his motion to set aside the verdict and dismiss based upon the ineffective assistance of trial counsel. He contends that the trial court erred by concluding that his counsel did not provide ineffective assistance by: (1) not basing his motion for a directed verdict at the close of the State's case upon the State's alleged failure to present evidence of the value of the stolen property; (2) "eliciting" testimony from the defendant regarding the present value of the property; and (3) not requesting an instruction defining "value." We affirm.

The defendant's claim of ineffective assistance of counsel rests upon Part I, Article 15 of the State Constitution and the Sixth Amendment to the Federal Constitution. We first address the defendant's arguments under the State Constitution and rely on federal law only to aid in our analysis. State v. Ball, 124 N.H. 226, 231-33 (1983).

Both the State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel. State v. Cable, 168 N.H. 673, 680 (2016). To prevail upon his claim, the defendant must demonstrate that his counsel's: (1) representation was constitutionally deficient; and (2) deficient performance actually prejudiced the outcome of the case. Id.

To meet the first element of this test, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Id. We judge the reasonableness of counsel's conduct based upon the facts and circumstances of the particular case, viewed from the time of the conduct. Id. Judicial scrutiny of counsel's performance must be highly deferential. Id. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making this evaluation, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; the defendant must overcome the presumption that, under the circumstances, the challenged action might be

considered sound trial strategy. Id. Because the proper measure of attorney performance is simply reasonableness under prevailing professional norms, to establish that his trial attorney's performance fell below this standard, the defendant has to show that no competent lawyer would have engaged in the conduct of which he accuses his trial counsel. Id. at 680-81.

To establish the second element, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 681. A reasonable probability is sufficient to undermine confidence in the outcome. Id. The prejudice analysis considers the totality of the evidence presented at trial. Id.

Both elements of the ineffectiveness inquiry are mixed questions of law and fact. Id. Therefore, we will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and we review the ultimate determination of whether each element is met de novo. Id. If, on appeal, we determine that the defendant has failed to establish either element of the test, we need not consider the other one. Id.

We first address whether trial counsel's decision not to base the motion for a directed verdict upon the State's alleged lack of evidence of the value of the stolen iPads was unreasonable. Instead, counsel based this motion upon the State's alleged failure to establish the defendant's intent to retain the property, which was counsel's avowed theory of the case. A challenge to the sufficiency of the evidence raises a claim of legal error; therefore, our standard of review is de novo. State v. Leith, 172 N.H. 1, 11 (2019). To prevail upon a challenge to the sufficiency of the evidence, the defendant must demonstrate that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found the disputed fact beyond a reasonable doubt. Id.

To establish that a defendant has committed Class A felony receiving stolen goods, the State must show that the value of the property exceeded \$1,500, RSA 637:11, II(a), or, in this case, that each stolen iPad was worth approximately \$58. For the purpose of determining the degree of offense in receiving stolen property, RSA 637:2, V (2016) defines "[v]alue" to "mean[] the highest amount determined by any reasonable standard of property or services." The commentary to the Model Penal Code explains that the purpose of this language is "to put the transaction in a higher rather than a lower category where any one of several possible criteria of value justifies the higher classification." Leith, 172 N.H. at 12 (quoting Model Penal Code and Commentaries § 223.1 cmt. 3(b), at 141 (1980)). Value is a matter of fact to be determined by the jury. State v. Hammell, 128 N.H. 787, 790 (1986). The evidence need not be infallible because determining the weight given a particular piece of evidence is the very essence of a jury's function. Id.

In this case, the trial court concluded that it would have denied a motion for directed verdict at the end of the State's case based upon the State's alleged lack of evidence regarding the property's value. This is supported by the evidence adduced in the State's case, which included: (1) evidence of the iPads' purchase date (the assistant principal testified that "[t]hey were relatively new"); (2) their purchase price (the media specialist testified that they were purchased new for \$479 each); (3) their condition when stolen (the media specialist testified that all the iPads were "in good condition" when they were stored for the summer, approximately two months prior to the theft); (4) their condition when the defendant acquired them (the person who delivered the iPads to the defendant represented to the defendant that they were in "mint" condition); (5) the approximate number of weeks between the theft, the defendant's receiving the iPads, and their recovery by the police; (6) the iPads' salvage value (one detective testified that an iPad screen could be sold for \$15 to \$20 and another detective testified that someone with a buyer in China "could make good money off of parts of iPads and computers"); and (7) the iPads' current replacement cost (one detective testified that a new iPad would cost \$429, thereby contradicting the defendant's argument that the stolen iPads were subject to rapid obsolescence).

Even if we assume, without deciding, that RSA 637:2, V incorporates prior common law regarding value, *see, e.g., State v. Belanger*, 114 N.H. 616, 618-19 (1974) (pre-dating RSA 637:2, V), viewing the evidence in the light most favorable to the State, we conclude that a rational jury could have inferred that the aggregate value of the 26 iPads exceeded \$1,500. Accordingly, counsel was not ineffective for not basing his motion for a directed verdict upon this ground. *See Cable*, 168 N.H. at 685 (stating failing to advance meritless argument does not constitute ineffective assistance of counsel (quotation omitted)).

We next address whether counsel was ineffective because he "elicited" testimony from the defendant relevant to the present value of the stolen iPads. In a sworn statement, presented to the trial court in conjunction with the State's objection to the motion to set aside the verdict, counsel represented that the defendant chose to testify and that counsel understood that the defendant would say that the iPads were valueless because they required a password to access the internet. In fact, the defendant actually testified that, at the time when the iPads were stolen, he sold used iPads for \$50 to \$75.

The defendant challenges the veracity of counsel's statement that he did not expect the defendant to testify that the iPads were worth \$50 to \$75. The defendant further complains that counsel "compounded his deficiency" by referring to the defendant's testimony in his closing argument. However, we need not decide whether counsel's representation fell below an objective standard of reasonableness because, as discussed above, the State presented ample evidence from which the jury could have determined that the total value of the iPads exceeded \$1,500. *See id.* at 681. The defendant cannot establish that there was a reasonable probability that "but for" counsel's alleged error, the outcome of the

trial would have been different. See id. Thus, based upon the totality of the evidence, the defendant cannot establish that he was prejudiced by the alleged error. See id.

Finally, we address whether counsel was ineffective because he did not request an instruction defining “value.” We assume, without deciding, that the defendant’s arguments are preserved. In his sworn statement, counsel represented that he made a tactical decision not to request a specific instruction on the meaning of “value” because: (1) he hoped that the jury would recall that the defendant testified that the iPads he received were valueless; and (2) he feared that an instruction involving terms like “market value” would suggest that the defendant intended to sell the iPads and remind jurors of buying expensive electronics. We note that an instruction based upon RSA 637:2, V would not have assisted the defendant. Given the circumstances of this case, viewed from the time of counsel’s conduct, we cannot conclude that no competent lawyer would have adopted this strategy. See id. at 680.

Counsel stated, and the defendant does not contest, that he and the defendant agreed to focus upon the defendant’s lack of intent to retain the iPads as their trial strategy. See State v. Candello, 170 N.H. 220, 229 (2017) (stating that we must give great deference to choices made under client’s direction). If successful, this strategy would have led to an acquittal. On this record, we cannot say that no competent attorney would have employed this theory of the case.

For all of these reasons, we conclude that the defendant has failed to establish that he received constitutionally defective assistance of counsel. See Cable, 168 N.H. at 680. Because the standard for determining whether a defendant has received ineffective assistance of counsel is the same under both constitutions, we necessarily reach the same result under the Federal Constitution as we do under the State Constitution. See Candello, 170 N.H. at 233.

Affirmed.

HICKS, BASSETT, and DONOVAN, JJ., concurred.

**Timothy A. Gudas,
Clerk**

Distribution:

Merrimack County Superior Court, 217-2016-CR-00047

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