State of New Hampshire
Supreme Court

NOTICE OF DISCRETIONARY APPEAL

This form should be used only for an appeal from a final decision on the merits issued by a superior court or circuit court in (1) a post-conviction review proceeding; (2) a proceeding involving a collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) from an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A, except that an appeal from a final divorce decree or from a decree of legal separation shall be a mandatory appeal.

1. CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

State of New Hampshire v. Kyle Perkins
217-2016-CR-00047

2. COURT APPEALED FROM AND NAME OF JUDGE

Merrimack Superior Court (*Richard B. McNamara*, J.)

3A. APPEALING PARTY

Kyle Perkins
22 Hammond St.
Concord, NH 03301

3B. APPELLANT'S COUNSEL

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4A. OPPOSING PARTY

State of New Hampshire

4B. OPPOSING COUNSEL

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5. OTHER PARTIES AND COUNSEL IN TRIAL COURT

Defendant's trial attorney whose ineffectiveness is at issue:

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6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING

December 4, 2018 (order denying motion to set aside verdict)

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION

January 15, 2019 (clerk's notice on order denying motion to set aside verdict)

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

12 months House of Corrections, all but 3 months suspended; 2 years of probation upon release; $379 restitution; bail pending resolution of motion to set aside verdict and this appeal.

8. APPELLATE DEFENDER REQUESTED?

No.

9. IS ANY PART OF CASE CONFIDENTIAL? IDENTIFY WHICH PART AND CITE AUTHORITY

There no known basis for confidentiality.

10. NAMES OF PARENT, SUBSIDIARIES AND AFFILIATES OF CORPORATE PARTIES

n/a

11. ANY KNOWN REASON WHY A SUPREME COURT JUSTICE WOULD BE DISQUALIFIED

None known.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY?

Yes. A transcript order form is attached.

13. NATURE OF CASE AND RESULT

Kyle Perkins was charged with a class A felony alleging he received 26 iPads which were the property of the Manchester School District, knowing or probably knowing they were stolen, contrary to RSA 637:7, I. An element of the crime, and the indictment, required the State prove the value of the iPads was greater than $1,500. The defendant stood trial on January 17 and 18, 2017, represented by Keith Mathews, Esq. The jury returned a verdict of guilty, and Mr. Perkins was thereafter sentenced.

Although Mr. Perkins initially took a direct appeal, he withdrew it and replaced it in April 2018 with a Motion to Set Aside Verdict and Dismiss Based upon Ineffective Assistance of Counsel. The motion alleged that Mr. Perkins's trial counsel was ineffective in three ways:

- At the end of the State's case, counsel failed to move for a directed verdict. The State offered no evidence of the property's alleged value, and a directed verdict would have been granted had it been requested.

- By eliciting testimony regarding value from the defendant, counsel supplied a necessary element, the absence of which would have prevented the State from meeting its burden of proof.

- At the close of evidence, counsel failed to request a complete jury instruction on the definition of value. Because the iPads at issue swiftly become obsolete and rapidly decline in value, because fair market value must be measured at the time of the theft, because delay between the theft and the defendant's receipt of stolen property affected value, and because the condition of the items at the time of receipt also affected value, the pattern theft instruction given was insufficient and not reflective of the evidence adduced. Counsel's failure thus resulted in an inadequate jury instruction which did not apprise the jury how it was required to determine whether the State proved the value element beyond a reasonable doubt.

The superior court denied Mr. Perkins's motion, by order dated December 4, 2018 (clerk's notice dated January 15, 2019). This appeal follows.

14. ISSUES ON APPEAL

The New Hampshire Supreme Court reviews each discretionary notice of appeal and decides whether to accept the case, or some issues in the case, for appellate review. The following acceptance criteria, while neither controlling nor fully describing the court's discretion, indicate the character of the reasons that will be considered.

1. The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire courts.

2. The decision below conflicts with a statute or with prior decisions of this court.

3. The decision below is erroneous, illegal, unreasonable or was an unsustainable exercise of discretion.

Separately number each issue you are appealing and for each issue: (a) state the issue; (b) explain why the acceptance criteria listed above support acceptance of that issue; and (c) if a ground for appeal is legal sufficiency of the evidence include a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

✦ ✦ ✦ ✦ ✦

I. VALUE OF STOLEN ITEMS AT THE TIME OF THEFT IS AN ESSENTIAL ELEMENT OF THE CRIME OF RECEIVING STOLEN PROPERTY

To be convicted of the class A felony of receiving stolen property, the State must prove beyond a reasonable doubt that the value of the property received is greater than $1,500. RSA 637:11, II(a).

Failure to prove value is fatal to the State's case. *State v. Gray*, 127 N.H. 348 (1985) (conviction reversed). If the State proves a value of less than $1,500 (and a lesser-included instruction were given), it may be able to prove a class B felony or a misdemeanor. RSA 637:11, I(a); RSA 637:11, III; *State v. French*, 146 N.H. 97, 100 (2001).

Value in receiving stolen property prosecutions is measured "as of the time and place the item was stolen." *State v. Belanger*, 114 N.H. 616, 618 (1974). The condition of the stolen item at the time of receiving, if the time is different from the time of theft, is relevant to value. *State v. Hammell*, 128 N.H. 787 (1986) (repairs to car between time of theft and receiving). The value of stolen goods is defined as "the market value, or the price which the property will bring in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price for it." *State v. Moody*, 113 N.H. 191, 192 (1973). There is no allowance for

special value to a particular owner. *Id.*

All known New Hampshire cases concerning the value of stolen goods involved property that had relatively stable values. *See, e.g, State v. Wong*, 138 N.H. 56 (1993) (outboard boat motor); *State v. Hammell*, 128 N.H. 787 (1986) (6-year-old Oldsmobile); *Gray*, 127 N.H. at 348 (snowmobile); *State v. Belanger*, 114 N.H. 616 (1974) (spools of copper banding, office equipment); *Moody*, 113 N.H. at 191 (generator).

The iPads Mr. Perkins was alleged to have received, unlike the items in earlier cases, did not have stable value. Evidence was presented that, because they are consumer technology products with short intended lifespans, they become quickly obsolete, and therefore rapidly lose value from their purchase price. In addition, the iPads were locked so that no one but their registered owner could sell them as working devices – for anyone else they were valuable only for parts. Moreover, when the police found them in Mr. Perkins's shop, some were obviously non-functioning, lacking screens or other components.

Mr. Perkins was alleged to have received the stolen iPads on or about September 15, 2015. The State offered testimony regarding the price the owner paid for the items years before the theft, and the condition of the items several months before the theft. But the State offered no evidence regarding their value at the time of the theft, sometime in the summer of 2015.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Criminal defendants have a right to reasonably competent counsel pursuant to the Federal and New Hampshire constitutions. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Henderson*, 141 N.H. 615 (1997). Ineffective assistance is deficient attorney performance combined with prejudice, *State v. Seymour*, 140 N.H. 736 (1996), which is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Cable*, 168 N.H. 673, 681 (2016) (quotations and citations omitted).

Deference is made to strategic decisions of counsel, *State v. Candelo*, 170 N.H. 220, 225 (2017); *State v. Brown*, 160 N.H. 408, 412-13 (2010), but only upon proof that the attorney recognized an issue, investigated it, and made a strategic decision regarding it. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). Where there is no strategic explanation for counsel's lapse, and it results in admission of evidence necessary to convict, counsel has been ineffective. *State v. Thompson*, 161 N.H. 507, 529 (2011) (ineffective assistance when attorney inexplicably failed to make hearsay objection to the only evidence inculpating defendant).

The remedy for ineffective assistance of counsel is to put the defendant back in the same position as if he had been properly represented. *Lafler v. Cooper*, 566 U.S. 156 (2012).

III. Issue 1: Counsel was ineffective by not moving for a directed verdict based on the State's failure to present evidence of value

"It is virtually the universal practice of defense counsel to move for a directed verdict at the close of the State's case." 2A Richard B. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 43.47 at 57 (6th ed. 2017). The purpose of a motion for a directed verdict at the close of the State's case is to contest that the State has presented sufficient evidence to convict. *State v. Burke*, 122 N.H. 565, 571 (1982). The consequence of not moving for a directed verdict is that the issue is waived. *State v. Scott*, 167 N.H. 634 (2015).

Failure to move for a directed verdict when the State has not presented sufficient evidence to convict constitutes ineffective assistance of counsel. *See, e.g., State v. Thompson*, 161 N.H. 507, 532 (2011) ("counsel's deficient performance likely allowed the State's case to withstand a motion to dismiss"); *State v. McGurk*, 157 N.H. 765, 769-70 (2008) (failure to file a non-meritorious motion is not ineffective assistance); *State v. Kepple*, 155 N.H. 267, 273 (2007) ("In order for the defendant to demonstrate actual prejudice …, he must show that a motion for dismissal, a directed verdict, or a JNOV based upon the State's failure to establish [an] element … would properly have been granted.").

The State presented no evidence of the value of the iPads at the time of the alleged theft, but Mr. Perkins's counsel did not alert the court to the omission in the State's case. Had counsel moved for directed verdict, it likely would have been granted. There was no conceivable reason to refrain from pressing the motion; a motion for directed verdict is made to the bench in the absence of the jury, and therefore cannot be said to confuse or weaken a defense conducted on some other basis. The remedy for counsel's deficient performance is to put Mr. Perkins back in the position where he would have been but for counsel's deficient performance – dismissal of the indictment.

This case presents this court with an opportunity to squarely address the consequences of counsel's failure to move for a directed verdict when the State fails to present evidence of a necessary element. This court should also accept this case to repair the constitutional violation.

IV. ISSUE 2: COUNSEL WAS INEFFECTIVE BY ELICITING TESTIMONY ON THE VALUE OF THE IPADS

Even if the State had survived a motion for directed verdict at the close of its case, there still would have been no evidence of the fair market value of the iPads at the time of theft. If the defense had then promptly rested, a defense motion for directed verdict at the close of evidence would have likely been granted.

While by testifying the defendant takes a chance that he will fill gaps in the State's case, *State v. Tabaldi*, 165 N.H. 306, 314 (2013), it was defense counsel who deliberately elicited testimony regarding value. Defense counsel's questions to the defendant were:

> Q: And what are these iPads worth used?
>
> A: Used? Like now, probably like $30, maybe. I sell them in my store for like 40, 50 bucks.
>
> Q: **Okay. What were they worth used in 2015?**
>
> A: **Probably like 50 to maybe 75 bucks, maybe more**, if – depending on gigabytes. But these are – these – they don't need – they didn't need 128 gigabytes on these for some reason. So they're not the big ones.
>
> Q: And that $75 figure, that's for you as a store owner?
>
> A: Yeah, of course. Yeah. I mean, that's what I was selling them for so – yeah. And I'm pretty fair with my prices. I usually – the way I do my pricing is if something online that goes for say 100 bucks, I would sell it for like 80 to avoid – in my store so people have a good deal, and I would have to – I would avoid paying like the seller fees on that website.

Day 2 Trn. at 164.

Although the State provided evidence of purchase price years before, without the defendant's testimony as to fair market value in 2015, which counsel asked for, there would have

been no evidence as to fair market value of the iPads at the time of the theft. Dooming the defendant were his answers to his own counsel's questions. Moreover, in his closing argument, defense counsel compounded his deficiency by emphasizing that, "Mr. Perkins got up there, and he testified that these items are worth 60 to $70 each, and I would ask that you take that into consideration in your deliberations." *Day 2 Trn*. at 206.

Had counsel even emphasized the lowest figure to which Mr. Perkins testified – $50 per – that would multiply to $1,300, less than the $1,500 threshold. Rather, counsel did the State's work by citing an erroneous $60 minimum, which multiplies to $1,560, just above the felony threshold.

Defense counsel elicited the only evidence on a necessary element, thus filling a fatal hole in the State's case. Without that constitutionally deficient action, Mr. Perkins could not have been found guilty. Defense counsel also argued the fact to the jury – as though Mr. Perkins had two prosecutors.

There is no conceivable advantageous strategy for a defendant's own lawyer to elicit evidence necessary for conviction.

The remedy for ineffective assistance is to put the defendant in the position he would have been had there been no deficient performance. Without counsel's deficient performance, Mr. Perkins could not have been found guilty. Thus the remedy for counsel's ineffective assistance is to dismiss the indictment.

This court should accept this case to address counsel's obligations when the State neglects to prove a necessary element of a crime, and to correct the constitutional violation.

V. ISSUE 3: COUNSEL WAS INEFFECTIVE BY NOT REQUESTING A COMPLETE AND ACCURATE JURY INSTRUCTION REGARDING VALUE OF THE STOLEN ITEMS

The purpose of jury instructions is to "adequately and accurately explain each element of the offense" and to "fairly cover the issues of law in the case." *State v. O'Leary*, 153 N.H. 710, 712 (2006).

Although not necessarily in the exact language a party suggests, when a party requests an instruction, the court must so instruct when the proposed instruction is relevant to "some evidence" adduced at trial. *State v. Furgal*, 164 N.H. 430, 436 (2012). The court has a duty to explain to the jury technical terms and the "law applicable to the case." *State v. McDonald*, 163 N.H. 115, 126 (2011).

Failure of the defense to request an instruction constitutes waiver of the issue. *State v. Blackstock*, 147 N.H. 791, 798 (2002) (untimely request was waiver); *State v. Letourneau*, 133 N.H. 565, 567 (1990) (same); *State v. Lister*, 122 N.H. 603, 607 (1982) ("a defendant waives his right to a specific jury instruction unless the request is timely made").

A request for an instruction is generally made well in advance of the charge, to give the court "ample time to consider" it. *State v. Williams*, 137 N.H. 343, 346 (1993) (overruled on other grounds by *State v. Quintero*, 162 N.H. 526 (2011)). Because the request is made away from the jury, there is no valid argument that defense counsel strategically omitted the request to avoid emphasizing an unwelcome issue, as competent counsel might deliberately do regarding a during-trial evidentiary objection. *See, e.g.*, *State v. Bean*, 120 N.H. 946, 949 (1980) ("court could reasonably conclude that the defendant would prefer not to have the prior conviction emphasized by an instruction relating to it").

In this case, the court's instructions on the elements of the crime were:

> In order to obtain a conviction, the State must prove the following four elements. One, the defendant received or retained property belonging to another person. Two, the defendant knew the property had been stolen or believed that it had probably been stolen. Three, the defendant acted with a purpose to deprive the owner of the property, and four, the value of the property was more than $1500.

Day 2 Trn. at 226 (paragraphing and capitalization altered).

The instruction is accurate insofar as it goes. But it omits essential limiting factors regarding the value of the property.

The instruction does not specify that "value" is measured "as of the time and place the item was stolen." *Belanger*, 114 N.H. at 618. It does not notify the jury that the condition of the stolen items at the time of receiving, when that time is different from the time of theft (as it was here), is relevant to value. *Hammell*, 128 N.H. at 787. The instruction does not explain that "value" of stolen goods means "the market value, or the price which the property will bring in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price for it." *Moody*, 113 N.H. at 192. It does not include that value is not to be measured by any special importance the owner might place on it. *Id.* The instruction makes no mention of a feature of consumer electronic goods, which, distinguished from many items, are subject to rapidly declining value. The instruction does not point out that value would also be affected by the electronic lock, which prevents sale other than for parts.

Accordingly, the instruction did not "adequately and accurately explain" the value element of the offense, nor "fairly cover the issues of law in the case." *O'Leary*, 153 N.H. at 712.

Because of the court's duty to instruct, it can be presumed that, had counsel requested an instruction reflecting *Belanger*, *Hammell*, and *Moody*, the court would have fairly instructed

the jury on the nuance and timing of valuation, and on the peculiarities of valuing consumer electronics. It appears, however, that defense counsel was not aware of New Hampshire law regarding measuring value, or even that value was an issue in the case.

By not requesting an instruction, the issue was waived, and it was therefore ineffective assistance for counsel to neglect it. Had an accurate and complete instruction been given, there is a probability that the $1,500 threshold would not have been met, and Mr. Perkins would have therefore been acquitted. Consequently, the remedy for the lawyer's deficiency is to set aside the verdict.

This court should accept this case to definitively determine whether failure to request an instruction is ineffective assistance, to review courts' and counsels' duties regarding the nuances of valuation of particular items in criminal cases, and to correct the constitutional violation.

15. Attachments

Attach to this notice of appeal the following documents in order: (1) a copy of the trial court decision or order from which you are appealing; (2) the clerk's notice of the decision below; (3) any court order deciding a timely post-trial motion; and (4) the clerk's notice of any order deciding a timely post-trial motion.

Do not attach any other documents to this notice of appeal. Any other documents you wish to submit must be included in a separate appendix, which must have a table of contents on the cover and consecutively numbered pages.

16. Certifications

I hereby certify that, upon information and belief, every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

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Joshua L. Gordon, Esq.

I hereby certify that on or before the date below copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Supreme Court Rules 5(1) and 26(2) and, if applicable, with Rule 18 of the 2018 Supplemental Rules of the Supreme Court.

February 14, 2019

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Joshua L. Gordon, Esq.

ATTACHMENTS