IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. KAMIE JO SCHIEBOUT, Defendant–Appellant.	)))))))))	S.CT. NO. 18–0081

APPEAL FROM THE IOWA DISTRICT COURT
FOR SIOUX COUNTY
THE HONORABLE PATRICK H. TOTT, JUDGE
(Trial & Sentencing)
THE HONORABLE JEFFREY A. NEARY, JUDGE
(Hearing on Sheriff's Claim)

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 6, 2019

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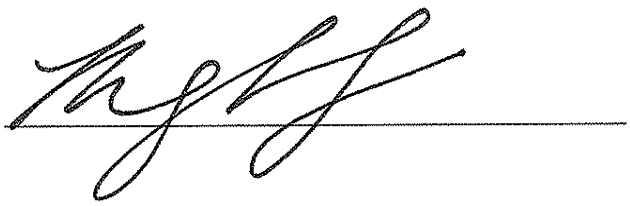
CERTIFICATE OF SERVICE

On November 25, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Kamie Jo Schiebout, 2767 400th St., Sioux Center, IA 51250.

STATE APPELLATE DEFENDER



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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in finding there was sufficient evidence that the Defendant obtained property, use of property, or services in exchange for the checks when the only evidence the State presented in support was that the checks were made out to "South Ridge", "Shell", "Nearly New Town", and "Kum & Go"?

II. Did the State fail to present sufficient evidence of theft, which requires knowledge that the checks would not be paid when presented, when the bank actually paid the checks when they were presented?

III. Was the Defendant entitled to a new trial because the district court did not properly instruct the jury on which of the checks it was allowed to aggregate to find the Defendant guilty of theft in the second degree?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This Court should grant the application for further review because the Court of Appeals has entered a decision in conflict with a decision of the Supreme Court: State v. Webb, 648 N.W.2d 72, 75 (Iowa 2002)). See Iowa R. App. P. 6.1103(1)(b)(1) (2019). Pursuant to the Court's decision in State v. Webb, the evidence the State presents "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." Webb, 648 N.W.2d at 76 (citing State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)).

In this case, the State charged the Defendant with theft under Iowa Code section 714.1(6), which provides that a person commits a theft when the person:

> makes, utters, draws, delivers, or gives any check . . . and obtains property, the use of property . . . , or service in exchange for such instrument, if the person knows that such check, share draft, draft, or written order will not be paid when presented.

Iowa Code § 714.1(6) (2015). Here, the State presented no evidence for five of the seven checks in question that the Defendant ever obtained property, use of property, or any

services. Rather, the *only* evidence the State presented was the copies of the checks themselves, which were simply made out to "South Ridge", "Kum & Go", "Shell", and "Nearly New Town," while one is illegible. (Ex. 1) (Conf. App. pp. 4-8). There is simply nothing in the record to establish that Schiebout received anything in exchange for checks 1383, 1384, 1387, 1388, and 1392 other than "speculation, suspicion and conjecture." See Webb, 648 N.W.2d at 76 (citation omitted). Accordingly, this Court should find that in order to commit theft, the State must show that a defendant actually received something in return for the check.

Additionally, this Court should grant further review because the Court of Appeals has misinterpreted the plain language of Iowa Code section 714.1(6), and the Supreme Court should ultimately settle this important question of law. See Iowa R. App. P. 6.1103(1)(b)(2) (2019). The plain language of Iowa Code section 714.1(6) requires knowledge that the check "will not be paid when presented." Iowa Code § 714.1(6) (2015). Here, all the checks that constituted the basis for the

theft charge were actually paid when presented to the bank. Therefore, under the plain language of the statute, Schiebout cannot be guilty of theft under subsection six, under which the State charged her. See id.

Lastly, this Court should grant further review because the Court of Appeals erred in finding that the Defendant was not entitled to a new trial despite the trial court's jury instructions which did not delineate which checks the jury could appropriately aggregate in order to find Schiebout guilty of theft in the second degree.

For the reasons above, Defendant–Appellant Kamie Jo Schiebout respectfully requests the Court grant further review of the decision of the Court of Appeals on November 6, 2019.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Kamie Jo Schiebout seeks further review of the decision of the Court of Appeals affirming her conviction, sentence, and judgment following jury trials and verdicts finding her guilty of Theft in the Second Degree as a Habitual Offender.

Facts: The Court of Appeals' statement of the background facts is essentially correct. Any additional relevant facts will be discussed below.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE THAT SCHIEBOUT KNEW THE CHECKS WOULD NOT BE PAID WHEN PRESENTED AND THAT SHE OBTAINED PROPERTY, USE OF PROPERTY, OR SERVICES IN EXCHANGE FOR THE CHECKS, AS REQUIRED UNDER IOWA CODE SECTION 714.1(6).

A. Preservation of Error: Schiebout moved for judgment of acquittal based on the lack of evidence that she knew that the checks would not be paid for by the bank. (Trial Tr. vol.2 p.31 L.16–p.32 L.23, p.35 L.13–p.36 L.2). The district court denied the motion. (Trial vol.2 p.86 L.10–p.88 L.4).

Therefore, error was preserved on this challenge. See State v. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004). If the Court determines it was not properly preserved, Schiebout asks this Court to review it under the familiar ineffective-assistance-of-counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

However, counsel failed move for judgment of acquittal based on the fact that the State presented insufficient evidence Schiebout received property, services, or money in exchange for the checks. As such, this challenge is unpreserved, and Schiebout requests the Court review it as an ineffective-assistance-of-counsel claim. See id.

B. Standard of Review: The Court reviews claims of insufficiency of the evidence for correction of errors at law. State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012).

It reviews claims of ineffective assistance of counsel de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C. Discussion: "In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts

consider all of the record evidence viewed 'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.'" Sanford, 814 N.W.2d at 615 (citation omitted). The Court should uphold the verdict only if it is supported by substantial evidence in the record as a whole. Id. "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." State v. Kemp, 688 N.W.2d 785 (Iowa 2004) (citing State v. Webb, 648 N.W.2d 72, 75 (Iowa 2002)). However, consideration must be given to all of the evidence, not just the evidence supporting the verdict. State v. Petithory, 702 N.W.2d 854, 856–57 (Iowa 2005) (citation omitted). "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." Webb, 648 N.W.2d at 76 (citing State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)).

The State has the burden of proving "every fact necessary to constitute the crime with which the defendant is charged." Webb, 648 N.W.2d at 76 (citing State v. Gibbs, 239 N.W.2d

866, 867 (Iowa 1976)); see also State v. Limbrecht, 600 N.W.2d 316, 317 (Iowa 1999) (citing State v. Harrison, 325 N.W.770, 772–73 (Iowa Ct. App. 1982)) ("That record must show that the State produced substantial evidence on each of the essential elements of the crime."). Iowa Code section 714.1(6), the statute under which the State charged Schiebout, defines theft as when a person:

> [m]akes, utters, draws, delivers, or gives any check, share draft, draft, or written order on any bank, credit union, person, or corporation, and obtains property, the use of property, including rental property, or service in exchange for such instrument, if the person knows that such check, share draft, draft, or written order will not be paid when presented.

Iowa Code § 714.1(6) (2015).

In this case, the State had to prove substantial evidence that Schiebout "kn[ew] that such check. . . [would] not be paid when presented." See id. It failed to do so. There was no evidence presented that Schiebout knew the bank would not pay the checks when she presented them. In contrast, the evidence presented establishes the opposite. First, the Tooker,

the vice president of the bank, testified that the bank did actually pay the payee for all the checks Schiebout presented that comprised the underlying theft charge. See (Trial vol.1 p.29 L.21–5) (Ex. 1 p. 4) (Conf. App. p. 7). Second, one of the first checks written forming the theft charge that Schiebout presented was to Walmart on December 12, 2015. (Trial vol.1 p.57 L.6–p.62 L.16) (Ex. 4) (Conf. App. p. 9). The State presented evidence that Walmart converted those checks to ACH and the amount was automatically taken out of the checking account immediately. (Trial vol.1 L.13–p.32 L.3). Therefore, Schiebout, upon using the check to pay for goods at Walmart, was on notice that the bank was in fact paying the checks as she presented them. Likewise, the evidence suggested that once Schiebout was told by a bank employee to stop writing checks out of the account and thereby notified that the bank would not honor them, she complied and did not write any more checks. (Trial vol.2 p.37 L.16–p.38 L.13, p.39 L.25–p.40 L.6). Moreover, the record also establishes that Schiebout had used a different account of Matthew's prior

to writing checks out of the Sandy Hollow Ducks Unlimited Account and that the bank had paid that check as well despite that she was not an authorized user of the account. (Trial vol.1 p.50 L.6–p.52 L.15).

There is nothing in the record that suggests Schiebout knew the checks would not be paid by the bank when she presented. While the State argued Schiebout would have known the bank would not honor the checks because she was not an authorized signer on the account, the evidence established this was simply not true—the bank did honor the checks and the payee was paid. The evidence that the State did present on Schiebout's knowledge did not raise a fair inference of Schiebout's guilt, only "speculation, suspicion and conjecture" of it. See Webb, 648 N.W.2d at 76 (citation omitted). It is possible that the State could have proven a theft under these circumstances by charging Schiebout under a different subsection of the statute. See generally State v. Nall, 894 N.W.2d 514 (Iowa 2017) (discussing the interplay between the various subsections of the theft statute).

However, in this case, the State presented insufficient evidence to show Schiebout committed a theft under section 714.1(6) as charged. See id. Therefore, the district court erred in failing to sustain Schiebout's motion for judgment of acquittal.

In addition, there was insufficient evidence that Schiebout received any property, services, or money in exchange for checks 1383, 1384, 1387, 1388, and 1392,[1] as required for her to be found guilty under section 714.6. See Iowa Code 714.1(6). The State did not call anyone related to the places or people that were written these checks to explain what, if anything, Schiebout received in exchange for writing the checks. It is just as likely that the checks were a donation to the different places as it is that Schiebout actually received property or services. Moreover, the record is unclear as to whom several of the payees actually were, making it even more speculative that the payee was a business or service provider.

[1] The district court found there was sufficient evidence for seven checks to be submitted to the jury for consideration of the theft charge. (Trial vol.3 p.55 L.5–p.62 L.15). Those checks were numbers 1383, 1384, 1386, 1387, 1388, 1391, and 1392. (Trial vol.3 p.55 L.5–p.62 L.15) (Ex. 1, Verdict Forms) (Conf. App. pp. 4-8; App. pp. 31-33).

Nor are there any notations or other writings in the memo lines of the checks that make it clear Schiebout would have received some property or service in exchange for writing the check. (Ex. 1) (Conf. App. pp. 4-8). On the evidence presented by the State, there is simply nothing to establish that Schiebout received any property, services, or money in exchange for checks 1383, 1384, 1387, 1388, and 1392 other than "speculation, suspicion and conjecture." See Webb, 648 N.W.2d at 76 (citation omitted). In contrast, Schiebout acknowledges the State did present some evidence that she received property in exchange for the checks 1386 and 1391, presented at Walmart on December 12, 2015 and December 24, 2015. (Trial vol.1 p.57 L.6–p.61 L.4; vol.2 p.14 L.4–p.16 L.18) (Ex. 6-A 12/12/15 04:45–10:21, 12/24/15 00:00–11:05) (Ex. 1, Ex. 3, Ex. 4) (Conf. App. pp. 4-8; App. p. 19; Conf. App. p. 9).

In the event the Court reviews the claims under ineffective assistance of counsel, then it should find trial counsel was ineffective. The U.S. Constitution and the Iowa

Constitution both guarantee defendants of criminal cases the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10; see also State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015). To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (quoting Lamasters v. State, 821 N.W.2d 856, 866 (Iowa 2012)). The defendant must show both elements by a preponderance of the evidence. Id. (citing State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006)).

If the Court determines trial counsel's challenge to the sufficiency of the evidence did not properly preserve the issues above, then trial counsel provided ineffective assistance of counsel. See State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983) (citation omitted) (noting the failure to preserve error can deny a defendant the right to effective assistance of counsel). Counsel has a duty to preserve error and challenge insufficient evidence. See State v. Schories, 827 N.W.2d 659,

664–65 (Iowa 2013) ("[T]here is no conceivable strategic reason for failing to preserve a potentially valid motion to dismiss for lack of sufficient evidence."). Because such challenges are meritorious, as discussed above, Schiebout was prejudiced by the breach of duty. See State v. Brubaker, 805 N.W.2d 164, 174 (Iowa 2011) ("Having found that the district court would have sustained trial counsel's proper objection, Brubaker was prejudiced by his trial counsel's failure to object to the sufficiency of the evidence and move for judgment of acquittal citing this specific reason. Therefore, Brubaker's trial counsel was ineffective as a matter of law.").

Therefore, if this Court determines there was insufficient evidence Schiebout knew the bank would not pay the checks, this Court should reverse her conviction and remand for dismissal. In the alternative, if the Court determines there was sufficient evidence that Schiebout knew the checks would not be paid, but finds insufficient evidence that Schiebout received any property, services, or money in exchange for checks 1383, 1384, 1387, 1388, and 1392, then the remedy is

for "remand [of the] case for entry of a judgment of conviction for the lesser offense . . . ." State v. Ortiz, 905 N.W.2d 174, 183 (Iowa 2017) (citations omitted). In this case, the conviction would be for the lesser offense of Theft in the Third Degree based on the aggregate amount of the goods obtained from Walmart in exchange for checks 1386 and 1391,[2] of which the State presented sufficient evidence. Thus, the Court should reverse her conviction and remand to the district court for entry of a judgment of conviction for the lesser offense and resentencing.

II. SCHIEBOUT IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED ON WHICH OF THE CHECKS IT WAS ALLOWED TO AGGREGATE TO FIND HER GUILTY OF THEFT IN THE SECOND DEGREE.

A. Preservation of Error: The traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel. State v. Ondayog, 722 N.W.2d 778, 784

[2] Check 1386 was for $374.24, while check 1391 was for $355.33; together they totaled $729.57. (Ex. 1, Ex. 4) (Conf. App. pp. 4-9). Theft "exceeding five hundred dollars but not exceeding one thousand dollars in value . . . is theft in the third degree." Iowa Code section 714.2(3).

(Iowa 2006) (citing State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)).

B. Standard of Review: Because they involve a constitutional right, the Court reviews claims of ineffective assistance of counsel de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012) (citing Brubaker, 805 N.W.2d at 171).

C. Discussion: Both the federal and state constitutions guarantee the right to effective assistance of counsel to criminal defendants. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10; see also Ambrose, 861 N.W.2d at 555. To prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. Brothern, 832 N.W.2d at 192 (citation omitted). The defendant must establish both elements by a preponderance of the evidence. Id. (citation omitted).

The Court examines whether counsel breached a duty by measuring the attorney's "'performance against the standard of a reasonably competent practitioner.'" Clay, 824 N.W.2d at

495 (quoting State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008)). The Iowa Supreme Court has stated:

> There is a presumption the attorney performed his duties competently. The claimant successfully rebuts this presumption by showing a preponderance of the evidence demonstrates counsel failed to perform an essential duty. A breach of an essential duty occurs when counsel makes such serious errors that he or she was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. We do not find such a breach by second-guessing or making hindsight evaluations.

Id. (citations omitted). The Court examines the attorney's performance by objectively determining whether his actions were reasonable under the prevailing professional norms. Id. (citing State v. Lyman, 776 N.W.2d 865, 878 (Iowa 2010)). Counsel's performance is reviewed by examining the totality of the circumstances. State v. Lane, 743 N.W.2d 178, 181 (Iowa 2007) (citing Risdal, 404 N.W.2d at 131).

"Competent representation requires counsel to be familiar with the current state of the law." Clay, 824 N.W.2d at 496 (citing State v. Hopkins, 576 N.W.2d 374, 379–80 (Iowa 1998)). Trial counsel is not expected to predict changes in the

law, but counsel must "exercise reasonable diligence in deciding whether an issue is 'worth raising.'" State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999) (citing State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982)). However, counsel does not have a duty to raise an issue that is meritless. Brubaker, 805 N.W.2d at 171 (citing State v. Greene, 595 N.W.2d 24, 29 (Iowa 1999)). The Iowa Supreme Court has stated "that 'failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel.'" Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983) (quoting Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)).

Once the Court has determined the attorney failed to perform an essential duty, it must examine whether prejudice resulted by that failure. Clay, 824 N.W.2d at 496 (citations omitted). There is prejudice to the defendant if "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing

Strickland v. Washington, 466 U.S. 668, 694 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999) (citing Osborn v. State, 573 N.W.2d 917, 922 (Iowa 1998)). In examining whether prejudice exists, the Court "'must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial.'" Maxwell, 743 N.W.2d at 196 (quoting Bowman v. State, 710 N.W.2d 200, 203 (Iowa 2006)). The "'benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985) (quoting Strickland, 466 U.S. at 686).

While the Court usually considers claims alleging ineffective assistance of counsel in postconviction relief proceedings, the Court will address ineffective-assistance-of-

counsel claims on direct appeal when the record is sufficient. See Iowa Code § 814.7(2)–(3) (2015); see also Clay, 824 N.W.2d at 494 (citations omitted). The Court also considers ineffective-assistance-of-counsel claims when the trial attorney's actions, or lack thereof, cannot be explained by plausible strategic or tactical considerations. Hopkins, 576 N.W.2d at 378 (citing State v. Ceron, 573 N.W.2d 587, 590 (Iowa 1997)).

In this case, counsel was ineffective for failing to object to the jury instructions. Counsel failed to ensure that the district court instructed the jury that it could only consider the seven checks for which there was substantial evidence presented in determining whether the value of the theft was over $1000. Because the jury instructions did not make this distinction and it is unclear that the jury did not use other checks as a basis for finding the value of the theft, Schiebout was prejudiced by this breach of duty.

The district court "is required to 'instruct the jury as to the law applicable to all material issues in the case . . . .'"

State v. Marin, 788 N.W.2d 833, 837 (Iowa 2010), overruled on other grounds by Alcala v. Marriott Intern., Inc., 880 N.W.2d 699 (Iowa 2016) (quoting Iowa R. Civ. P. 1.924) ("The rules pertaining to jury instructions in civil cases apply equally to the trial of criminal cases."). "[T]he court is not required to give any particular form of an instruction" but "must . . . give instructions that fairly state the law as applied to the facts of the case." Id. at 838. "[T]he instruction must be a correct statement of the law and the instructions as a whole should adequately and correctly cover the substance" of the applicable law. State v. Monk, 514 N.W.2d 448, 451 (Iowa 1994).

As discussed above, the district court found there was sufficient evidence for seven checks to be submitted to the jury for consideration of the theft charge. (Trial vol.3 p.55 L.5–p.62 L.15). Those checks were numbers 1383, 1384, 1386, 1387, 1388, 1391, and 1392. (Trial vol.3 p.55 L.5–p.62 L.15) (Ex. 1, Verdict Forms) (Conf. App. pp. 4-8; App. pp. 31-33). Under Iowa Code section 714.3, if the checks were attributable to a

single scheme or plan, then the checks "may be considered a single theft and the value may be the total value of" all the checks written. See Iowa Code section 714.3. Thus, the State argued and the judge found if the jury believed the checks were part of a single scheme, it could aggregate the amount of the checks written; therefore, the district court instructed the jury on this accordingly. (Pretrial Conference Tr. p.15 L.23–p.18 L.1; Trial vol.2 p.31 L.12–16, p.33 L.11–p.25 L.1) (Instruction No. 15) (App. p. 29).

Therefore, in this case, the jury was allowed to add together any checks it believed were part of a single scheme in order to reach the threshold of over $1000 required to convict Schiebout of Theft in the Second Degree, as opposed to a lesser degree of theft. However, the jury instructions never limited the checks the jury could aggregate to only the seven of which that the State presented sufficient evidence that Schiebout was guilty of theft for.

The jury heard evidence that the only "valid" check written for Sandy Hollow Ducks Unlimited was check 1225 to

Walmart for $16.48. (Trial vol.1 p.30 L. 20–24; p.45 L.12–22) (Ex. 1 p. 4) (Conf. App. p. 7). While the district court found it insufficient to present to the jury regarding the theft charge Schiebout was facing, the State did present some evidence of other unauthorized withdrawals from the checking account, including check 1380 for $401.91, check 1381 for $64.19, check 1389 for $348.23, and check 1393 for $185.72. (Ex. 1 pp. 2, 4) (Conf. App. pp. 5, 7). The State hinted that Schiebout was responsible because the checks were close in number and were out of a different checkbook than the valid check 1225. (Trial vol.2 p.70 L.22–p.71 L.12, p.85 L.2–6). Despite that the evidence regarding these checks was insufficient to form a basis for the theft charge against Schiebout, the district court never instructed the jury that they could not consider checks 1380, 1381, 1389, and 1393 in determining whether Schiebout was guilty of the theft in general and that the jury could not use their respective amounts to find Schiebout committed a theft over a thousand dollars, as required by Theft in the Second Degree.

The marshalling instruction for Theft in the Second Degree is also misleading in this respect. It reads:

> The State must prove all of the following elements of Theft in the Second Degree:
>
> 1. On or between *November 5, 2015* and December 31, 2015, the Defendant did make or deliver to local organizations or businesses in Sioux County checks in an amount greater than $1000 but less than $10,000.
>
> 2. The checks were drawn on a bank.
>
> 3. The Defendant received property, services, or money in exchange for the checks.
>
> 4. The Defendant knew at the time she gave the checks to local organizations or business that they would not be paid by the bank because the Defendant was not an authorized signer on the account.
>
> If the State has proved all of the elements, the defendant is guilty. . . .

(Instruction No. 14) (emphasis added) (App. p. 28). It, nor any other instruction, ever instructs the jury on which checks they may aggregate. Moreover, by the dates given in the marshalling instruction, it suggests that the jury may in fact use the checks for which insufficient evidence was presented.

Both checks 1380 and 1381 were written on or after November 5, 2015 but before the first of the seven checks for which the court found substantial evidence existed was written—check 1383 on November 29, 2015. At the very minimum, the instruction should have stated between November 29, 2015 and December 31, 2015. However, even that time period would have included checks 1389 and 1393 for which there was insufficient evidence.

The fact that the jury could consider only seven checks was not instructed by the court or made known to the jury until the verdict forms. (Verdict Forms) (App. pp. 31-33). Even in the forms, the first suggestion comes in Question 2, which states: "In executing the 7 checks at issue herein were the Defendant's actions part of a single scheme or plan?" (Verdict Forms) (App. pp. 31-33). This is the first mention, and it is passing, that the jury could only consider seven of the checks when aggregating the total value of the theft. Moreover, the next question asks the jury to mark the level of

offense and then reads: "Upon answer Question No. 3 stop." (Verdict Forms) (App. pp. 31-33).

While Questions Nos. 4–10 do outline each of the seven checks, it is only after the jury has already found Schiebout guilty of Theft in the Second Degree and been told to stop. Perhaps most tellingly that the jury obeyed this stop order is that these questions remain unanswered. Presumably, if the jury had not stopped and read through each of the seven checks they would have marked either guilty or not guilty. Then, it would be clear that the jury only used the checks for which there was sufficient evidence to find Schiebout guilty of the theft of over $1000, or alternatively, it would be harmless error if they considered the other checks in totaling the value, assuming the jury found Schiebout guilty of enough checks to put the value over $1000.

Here, the instructions did not adequately convey the applicable law in a way that would give the jury a clear understanding of the checks it was allowed to aggregate to identify the total value of the theft and the checks it was not to

consider. See State v. Benson, 919 N.W.2d at 241 (Iowa 2018) (citation omitted) (finding the instructions did not convey "the applicable law in such a way that the jury ha[d] a clear understanding of the issues."). It was only after the instructions, in the verdict forms, that the seven checks were mentioned. For reasons discussed above, this was insufficient to remedy the error in the instructions and ensure the jury only considered evidence properly before it regarding the value of the checks.

Trial counsel has a duty to know the applicable law, protect the defendant from conviction under a mistaken application of the law, and make sure the jury instructions correctly reflect the law. See State v. Goff, 342 N.W.2d 830, 837–38 (Iowa 1983); State v. Allison, 576 N.W.2d 371, 374 (Iowa 1998) (finding counsel ineffective for failing to notice mischarging error in aggregation of offenses and obtain a dismissal of charge); Hopkins, 576 N.W.2d at 379–80 (stating counsel breached duty by not objecting to error in jury instruction defining element of offense). In addition, trial

counsel has a duty to preserve any district court error for appellate review. See Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982); State v. Oliver, 588 N.W.2d 412, 414 (Iowa 1998). To preserve error, counsel must make a specific objection to the instructions in final form. State v. Deases, 518 N.W.2d 784, 792 (Iowa 1994).

Thus, although the district court had a duty to properly instruct the jury and ensure they only considered those checks for which there was sufficient evidence presented, trial counsel did not preserve error by timely objecting. See State v. Taggart, 430 N.W.2d 423, 425 (Iowa 1988) (citations omitted). Therefore, by failing to object to the flawed instructions, trial counsel breached his duty to know the applicable law, to protect the defendant from a conviction under a mistaken application of law, and hold the State to its burden. See Goff, 342 N.W.2d at 837–38; Allison, 576 N.W.2d at 374; Hopkins, 576 N.W.2d at 379–80. Furthermore, the record establishes that counsel's failure to object cannot be explained by a plausible strategic or tactical decision. See Hopkins, 576

N.W.2d at 378 (citing Ceron, 573 N.W.2d at 590). There is no strategic reason to allow the jury to consider even more checks that were written on the account, especially when the court found insufficient evidence to submit them to the jury for consideration.

Schiebout was also prejudiced by this breach of duty. Matt Schiebout testified, and the State highlighted in closing, that all of the withdrawals in December were unauthorized except for the $16.48 check 1225 to Walmart. (Trial vol.1 p.12–22; vol.2 p.67 L.9–15). Checks 1389 and 1393, for which there was not sufficient evidence to form the theft charge, were written in December. (Ex. 1) (Conf. App. pp. 4-8). The State also argued that Schiebout was responsible for the 1300 checks because they were all close in number and not from the 1200 checkbook, which was the valid one. (Trial vol.2 p.70 L.22–p.71 L.12, p.85 L.2–6). All of the four checks for which there was insufficient evidence were out of the 1300 checkbook as well. (Ex. 1) (Conf. App. pp. 4-8). Moreover, the defense counsel hotly contested the validity and proof that

Schiebout committed any theft on the basis of the evidence from Walmart based on the fact that the State had failed to present the checks at trial or Schiebout's signature at the checkout. (Trial vol.2 p.78 L.6–19). Because there is no way to tell if the jury used the checks for which there was insufficient evidence in aggregating the value of the theft, a new trial is the proper remedy. See State v. Tyler, 873 N.W.2d 741, 753–54 (Iowa 2016) (finding a new trial necessary when a theory of guilt that was unsupported by sufficient evidence should not have been submitted to the jury). As such, Schiebout can show prejudice because confidence in the verdict is undermined. See Carrillo, 597 N.W.2d at 500 (citing Osborn, 573 N.W.2d at 922).

Because the incomplete and misleading instructions raise doubts about the fundamental fairness of the trial and undermines confidence in the outcome of the proceedings, Schiebout was prejudiced by her trial counsel's failure to object to the instructions and ensure the jury could only aggregate the seven checks for which the district court found

there was sufficient evidence. Accordingly, Schiebout's conviction should be reversed and his case remanded for a new trial.

CONCLUSION

Defendant–Appellant Kamie Jo Schiebout respectfully requests this Court accept her application for further review, vacate the decision of the Court of Appeals, and remand her case for further proceedings.

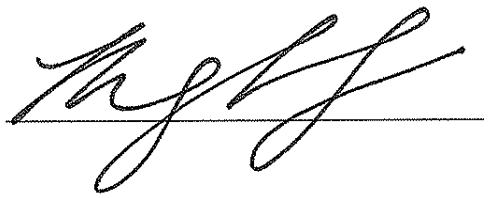
ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.17, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,444 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



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