

**IN THE COURT OF APPEALS OF IOWA**

No. 2-230 / 11-1059  
Filed April 25, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JODY LEE OVERTON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Michael D. Huppert,  
Judge.

Defendant appeals his forgery conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Daniel Burstein, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Justin Allen, Assistant County  
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

**EISENHAUER, C.J.**

Jody Overton appeals his conviction for forgery. Overton argues the evidence is insufficient to support his conviction. Additionally, Overton contends his counsel was ineffective. We affirm his conviction and preserve his ineffective-assistance claim for a possible postconviction proceeding.

**I. Background Facts & Proceedings.**

In September 2010, Kyle Connor used Craigslist to offer \$700 of stereo equipment for sale. A potential buyer contacted Connor and, after negotiations, used a forged check to purchase the equipment. During a photographic lineup, Conner identified Overton as the buyer. Overton was charged with forgery. At trial, Conner identified Overton as the person who gave him the check and recounted the transaction.

During their initial phone conversation, Overton told Conner he only had \$250, so his parents would write a check to Conner. Because Connor was leery of “getting a check from Craigslist ads,” Overton gave him the checking account number and the bank’s phone number. Connor called the bank and was told the check would clear.

Connor met Overton in Urbandale, and Overton identified himself as “Tommy.” Overton looked over the stereo equipment and offered Connor \$645 for just the amplifier and the speaker. As they continued talking, Overton told Conner he “could get another fifty from them” if Conner added extra wires and an in-dash equalizer to the sale. Connor believed Overton meant his parents because Overton said the check was from his parents.

Conner agreed to Overton's proposal, they transferred the stereo equipment to Overton's car, and Overton gave Connor a check for \$695. The check was drawn on the joint account of Diane and Sherwin Buls, payable to Connor, and allegedly signed by Diane Buls. The check was entered into evidence at trial.

Subsequently, Connor went to the Ankeny bank to cash the check and was told there were insufficient funds. While still at the bank, Connor called Overton about the check's failure to clear. Overton told Connor his mother lived down the street from the bank and would come straighten things out. Connor waited an hour, but no one came to the Ankeny bank.

Connor noted the Ankeny address on the check, left the bank, and went to the Bulses' home. Connor showed the check to Diane Buls. Diane testified she first became aware of the check when Connor "came to my door" and the handwriting on the check was not hers. Diane also testified she did not give anyone permission to write the check, to be in possession of the check, or to present the check to purchase anything.

Shortly thereafter, Overton called Connor, complained about the stereo equipment, and set up a meeting at a QuikTrip so Overton could return Connor's stereo equipment. Although Connor waited at the QuikTrip, Overton did not show up. Next, Connor called the police.

Detective Taylor conducts fraud and forgery investigations. During his investigation of the forged check, he learned the Bulses' grandson lived with them. Detective Taylor testified the grandson's appearance and Connor's physical description of the buyer were similar. Because Detective Taylor

considered the grandson to be a possible suspect, he showed Connor a photographic lineup that included the grandson's picture. Connor was unable to identify anyone in this lineup as the person who had presented the check.

As detective Taylor's investigation continued, Overton became a suspect. Detective Taylor testified he showed Connor another photographic lineup and Connor selected Overton as the person who presented the check.

Sherwin Buls testified he did not recognize the handwriting on the check and he did not give Overton permission to possess, write, or use a check.

The jury returned a verdict of guilty, and this appeal followed.

## **II. Insufficient Evidence—Jury Verdict.**

Overton argues the evidence is insufficient to support his forgery conviction. Specifically, he claims the evidence does not prove: "Overton was the one who uttered or presented the check to Connor; Overton knew that the check was forged; and Overton specifically intended to defraud anyone."

We review for correction of errors at law. *State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006). We apply a deferential standard and review the evidence in the light most favorable to the State. *Id.* at 213.

First, Connor's testimony established Overton presented the check to him. Second, we recognize knowledge and intent may be inferred by the surrounding circumstances. *See State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004). "[A]n actor will ordinarily be viewed as intending the natural and probable consequences that usually follow from his or her voluntary act." *Id.* Additionally, direct and circumstantial evidence are equally probative. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). No purpose would be served by restating the

evidence described in detail above. We conclude substantial evidence supports Overton's conviction for forgery.

### **III. Ineffective Assistance of Counsel.**

Overton did not testify at trial. Overton claims trial counsel was ineffective by not objecting to the court's instruction to the jury that no inference could be drawn from the fact he did not testify. The record does not show any request by Overton for such an instruction.

Our review of ineffective-assistance-of-counsel claims is de novo. *State v. Fannon*, 799 N.W.2d 515, 520 (Iowa 2011). To prevail, Overton must show his attorney failed to perform an essential duty and prejudice resulted. See *id.* at 519. "Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal." *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for a possible postconviction relief proceeding. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Such a proceeding allows an adequate record of the claim to be developed "and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203. An adequate record is important because "[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981).

In 1970, the Iowa Supreme Court ruled a no-inference-of-guilt instruction should not be given unless it is requested by the defendant and "it will be considered error if it is given, absent such request." *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970). See *State v. Morrison*, 183 N.W.2d 696, 697

(Iowa 1971) (stating “any instruction on defendant’s failure to testify, even one which cautions the jury to draw no inference therefrom, [is] reversible error unless specifically requested by the defendant”).

The *Kimball* court recognized the no-inference-of-guilt instruction is a comment on the defendant’s failure to testify, and the instruction may be more harmful than helpful to the defendant by causing the jurors to consider certain adverse inferences which they would not otherwise consider. 176 N.W.2d at 869; see *State v. Nelson*, 234 N.W.2d 368, 371 (Iowa 1975) (holding silence of an accused may not be used directly or indirectly to aid the prosecution). Given this recognition, we cannot say on the basis of the existing record that Overton was or was not prejudiced by the instruction. Overton’s trial attorney has had no opportunity to explain the lack of objection or to inform the court of any discussions on the issue with Overton. See *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) (holding a lawyer is entitled to “his day in court, especially when his professional reputation is impugned”). Accordingly, we preserve Overton’s claim of ineffective assistance of counsel for a possible postconviction proceeding.

**AFFIRMED.**