NOTICE
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2014 IL App (5th) 130052-U

NO. 5-13-0052

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Crawford County.
	)	
v.	)	No. 11-CF-107
	)	
KELLY R. SPADE,	)	Honorable
	)	Christopher L. Weber,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court is vacated and the cause remanded where the defendant received ineffective assistance of counsel.

¶ 2 Initially, we address that we have ordered multiple motions taken with this case, including the State's motion to strike portions of the defendant's brief that cite to documents that are not included in the record on appeal; the defendant's objection thereto; and a subsequent motion from the defendant to supplement the record with those certified documents from Crawford County. Upon consideration, we deny the State's motion to strike and grant the defendant's motion to supplement the record.

¶ 3 The defendant-appellant, Kelly R. Spade, was convicted of one count of felony theft (720 ILCS 5/16-1(a)(4)(A) (West 2010)) for obtaining control of stolen property valued over $500. He was sentenced to 24 months' probation, confinement in jail for 60 days with work release, and ordered to pay a $500 fine plus costs, work release fees, DNA fees, and $864 in restitution. The defendant directly appeals the judgment of the court below, and for the reasons that follow, we vacate and remand.

¶ 4 Private counsel Robert Douglas entered his appearance for the defendant on July 20, 2011. On January 27, 2012, the State filed a supplemental disclosure to the defendant which stated that "the State offered to Jeffrey S. Otte a plea to 24 months probation, on a charge of Theft, Class 3 Felony, -0- fine, court costs, restitution to Jannsen J. Williams in the amount of $4,594 joint and several with [the defendant], Otte to testify truthfully against [the defendant]. See attached copy of Judgment Order."

¶ 5 On May 25, 2012, the defendant waived trial by jury. On July 25, 2012, the parties stipulated that if a representative of the Evansville, Indiana-based "Deal Brothers Pawn" were to testify at the defendant's trial, he would authenticate a bill of sale showing that on December 30, 2010, the defendant pawned a woman's yellow gold ring, a man's yellow gold watch, and a man's yellow gold bracelet for $40. The bill of sale was entered as Exhibit 1 at the defendant's trial.

¶ 6 Douglas filed a supplemental disclosure on July 30, 2012, stating that the defendant went to his son Drew Spade's home on Christmas Day 2010 between 2 and 2:30 p.m. and remained until he left for his brother Chris Spade's home around 6:30 p.m. The disclosure noted that the defendant arrived at his brother's house in Newburgh,

Indiana, at approximately 8:30 p.m., stayed until noon on December 26, 2010, and subsequently left for Robinson, Illinois, at appropriately 2:30 p.m. that same day.

¶ 7 The State filed a first amended information on August 24, 2012. Count I charged the defendant with residential burglary (720 ILCS 5/19-3(a) (West 2010)), a Class 1 felony, in that he knowingly entered the Robinson, Illinois, home of Janssen and Diane Williams with the intent to commit a theft. Count II charged the defendant with theft (720 ILCS 5/16-1(a)(1) (West 2010)), a Class 3 felony, in that the defendant knowingly exerted unauthorized control over the Williamses' property, one 50-inch LG plasma TV (large TV), one 32-inch Samsung LCD TV (small TV), one Magnavox Blu-ray disc player (Blu-ray), and a woman's yellow gold diamond ring, having a total value in excess of $500, intending to deprive the Williamses permanently of the use of the property. Count III charged the defendant with theft (720 ILCS 5/16-1(a)(4)(A) (West 2010)), a Class 3 felony, in that the defendant knowingly obtained control over the Williamses' stolen property, including the aforementioned Samsung TV, Blu-ray, and ring, having a total value in excess of $500, under such circumstances as would reasonably induce the defendant to believe the property was stolen and with the intent to deprive the Williamses permanently of the use of the property.

¶ 8 On September 27, 2012, Douglas filed a "motion to dismiss" regarding the defendant's alibi defense, stating that he received from the State Attorney's office a copy of a report from Detective Dave Mullins concerning interviews with Drew Spade and Chris Spade. The motion asserted that the statement was "incorrect" because Chris Spade told Mullins that the defendant arrived on Christmas evening, not on Christmas Eve, and

that he knew so because he was working from 3 p.m. until 11:30 p.m. on Christmas Eve and therefore "would not have been home to see [the defendant]." The motion also asserted that the defendant was at Chris Spade's residence on Christmas Day until 11 a.m. on December 26, 2010, and "therefore [the defendant] was not in Crawford County in the early morning hours of 12/26/2010 when the burglary occurred." The motion requested that the court dismiss the matter in light of this new evidence.

¶ 9 The motion to dismiss was introduced and taken up at the defendant's bench trial, which commenced that same day. After some confusing statements made by Douglas in his argument on the motion, the court learned that Mullins's report on his phone interview with Chris Spade was disclosed to both parties only the day before. The court ruled that because it presented only a factual contest to the defendant's alibi defense and did not require calling additional witnesses, proceeding to trial that day would not prejudice the defendant. The court denied the motion to dismiss and the oral motion to continue. Both parties waived opening statements.

¶ 10 Janssen Williams testified that he and his wife, Diane Williams, returned from a trip on December 27, 2010, and found that their home had been burglarized. Janssen made a list of the stolen items and their value; the Blu-ray was valued at $118, the small TV was valued at $348, and the gold ring, described as "marquese [*sic*] diamond ring 1/4 carat, 14kt yellow gold" was valued at $398. The electronic items' values were determined based on their receipts, which were still in the Williamses' possession. The list was entered as Exhibit 1. Williams identified Exhibit 2 as the large TV, Exhibit 3 as the Blu-ray, and Exhibit 4 as the small TV. Williams stated that he did not give anyone

permission to enter his home while he was away, and to his knowledge, no fingerprinting occurred.

¶ 11 Diane Williams testified that one of the items taken was a ring, which she last saw on a cabinet shelf. She noted that she "could tell [the cabinet] had been disturbed" upon her return from the trip. She described the ring as a quarter-carat marquis diamond ring, with smaller diamonds on the gold band. She stated that she determined its value by looking at the prices of similar rings.

¶ 12 Robinson Police Chief Bill Ackman testified that on June 24, 2011, he received an anonymous phone call reporting that several months ago, the caller had been a visitor in Jeffrey Otte's apartment and had observed a large flat screen TV. The caller stated that Otte had bragged that he had stolen it, along with his girlfriend, Leah Gowen, and another male participant. Ackman testified that he attempted to locate Otte, and discovered that the Williamses' residence was across the street from Otte's former apartment complex. Ackman stated that he and Officer Mullins made contact with Otte, who agreed to cooperate. Otte retrieved the large TV from a friend's residence and turned it over to the police.

¶ 13 In regard to the small TV, Blu-ray, and remote control, Ackman testified that those items were recovered on June 25, 2011, from the common area in the basement of Otte's former apartment building. Ackman stated that he and Mullins interviewed Otte and Gowen at the Robinson police department regarding the investigation. Without objection, Ackman testified that Otte and Gowen were truthful in their respective police interviews. Douglas then conducted a cross-examination, in which he asked confusing,

incomplete, and often only tangentially relevant questions. It was eventually elicited that the anonymous caller had only revealed that he was a male relative of Otte, and that the TV was retrieved from Otte's friend Lucas Williams's residence.

¶ 14 Jeffrey Otte testified that in December 2010, he resided in a third-floor apartment with his girlfriend, Leah Gowen, and her roommate, Shayna Breedlove. He stated that the defendant lived in the second-floor apartment below them. Otte testified, without objection, that in the early morning hours of December 26, 2010, "[m]e and [the defendant] committed a burglary charge on the house across the street." He stated that he and the defendant kicked in the back door of the Williamses' residence, roamed around, and grabbed the big screen TV. He noted that they carried it out the front door, took it to Otte's apartment, and subsequently returned to the Williamses' residence. There, they opened some Christmas presents and eventually took the Blu-ray and the small TV to the defendant's apartment. Otte stated that during this second entry, the defendant showed him a ring that he had taken out of the Williamses' bedroom nightstand; when asked whether he actually witnessed the defendant take the ring, Otte responded that he "s[aw] [the defendant] take the ring out of the dresser drawer and open a, a box and show it to me and put it into his pocket, and after that I had never seen [*sic*] the ring again." Otte described the ring as "a gold ring with a diamond on it" and stated that the defendant told him that he later pawned the ring in Evansville, Indiana. Otte testified, again without objection, that he and the defendant were intoxicated that night, but not intoxicated to the extent that he could not recall the night's events.

¶ 15 Otte testified that neither Gowen nor Breedlove was home that night, and neither was aware that the TV had been stolen until the police came looking for him; Otte had told them that it was a Christmas present that he bought off of his sister. When Otte learned that the police were looking for him, he took the TV to Lucas Williams's house. He admitted to lying to the police about the date of the incident, because "it sounded a lot worse" to have robbed the house on Christmas night. When Otte was asked whether he had reached an agreement with the State to testify in this case, Douglas objected; however, after several attempts, the court could not elicit his reasoning for the objection. Douglas eventually stated: "I object. I just object." The court responded, "Okay. Overruled." Otte then testified that he pled guilty to a Class 3 felony burglary in exchange for probation, his truthful testimony against the defendant, and restitution to the Williamses.

¶ 16 After finishing the State's line of questioning with Otte, the court took a brief recess at Douglas's request. On cross-examination, Douglas began by asking the court "if I could just not inquire from Otte, could–and we want to put on the plastic of television set [*sic*]. Will you give me the same credit?" The court requested clarification, to which Douglas stated: "The police department, the P.O.D., had, had, had under, P.O.D. under a disk. And that will be for whatever. It's like this. And, and that's all. I'll do it, I'll do it if you'll let me do that." The court eventually learned that Douglas wanted to play the State's DVD of Otte's police interview. The court told Douglas that they were not at his case right now, and currently the issue was whether Douglas wished to cross-examine Otte. Douglas declined.

¶ 17 Detective David Mullins testified that on June 29, 2011, he questioned the defendant at his apartment building. Mullins asked the defendant if he knew about the small TV and Blu-ray player found in the building's basement, and the defendant told him that he had discovered them there and alerted his landlord, Bob Johnson. The defendant told Mullins that he had seen those items before, as Otte had previously tried to sell them to him, and that he had actually taken possession of them for a few days. However, the defendant had felt that they were stolen and returned them to Otte. Mullins stated that the defendant told him that he had no knowledge as to how the small TV and Blu-ray got into the basement. Mullins testified that to his knowledge, the defendant had not contacted the police regarding the items. He noted that he asked the defendant why he did not tell Ackman about the small TV when Ackman first spoke with him, and the defendant responded that he did not want Otte to know that he was talking to the police. Mullins stated that the defendant also told him that he knew about the large TV in Otte's apartment, because around Christmastime of 2010, he had helped Otte and Gowen carry it into their apartment.

¶ 18 Mullins testified that the defendant admitted to pawning a woman's ring, a bracelet, and a man's watch in Evansville; according to the defendant, he received the items from Gowen for this purpose, who had told him that the jewelry came from her grandmother. Mullins stated that the defendant indicated that he was willing to do this because of some kind of sexual relationship with Gowen. The defendant told Mullins that he gave Gowen the proceeds from the pawned jewelry. Mullins identified Exhibit 7 as a copy of a bill of sale from Deal Brothers Pawn Shop, dated December 30, 2010.

¶ 19 The receipt lists the defendant's personal information, followed by a list of the items that he sold that day. The first line reads, "Ring Womens YG Other Other Other," and below is described as "10K" and "3D." The next line reads, "Watch Mens YG Other Other Other," and is described as "OK" and "OD." The last line reads, "Bracelet Mens YG Other Other Oth," and is described as "OK" and "OD." Mullins stated that he received the copy after contacting the shop by phone, and he was told that the shop no longer had the jewelry in its possession and could not tell him to whom it had been sold. After asking to see it, Douglas had no objection to the entry of Exhibit 7. Douglas declined to cross-examine Mullins.

¶ 20 After a brief recess, the court allowed Douglas to call a witness out of order, by stipulation. Douglas called Christopher Spade. Chris Spade testified that he was related to the defendant. The following exchange occurred during the direct examination:

> Q. [MR. DOUGLAS]: Now, did have a, a, Chris Spade, as evidence that it was not Christmas Eve as Officer Mullins stated because he was working 3:00 p.m. until 11:30 p.m. Christmas Eve and would not have been home to see [the defendant]?
>
> A: That is correct."

At this point, the State requested that Douglas lay a foundation for the year, and it was ascertained that the witness was describing Christmas 2010. Douglas then repeated his question, following it with, "Is that a fair statement?" The State objected to the leading nature of the question, which the court sustained.

"MR. DOUGLAS: Okay. Mr. Spade, have you worked at your, your employment, and, and because you're a Christmas Eve as an officer of, of what–come on. I'll have, just have you put–I'll have to have your, your–I'm going, I'm going to object to every, everything he does.

THE COURT: Object to who?

MR. DOUGLAS: Tom. He always does it to me."

The court asked that Douglas "just focus on the direct examination of this witness."

¶ 21 Douglas next showed Spade what was presumably his work schedule from December 2010; this document was intended to be the defense's exhibit A, but it was never admitted into evidence. Spade testified that the document showed that he was at work on December 24, 2010, from 2:59 p.m. until approximately 11:30 p.m. After another confusing exchange with Douglas, Spade testified that the defendant came to his home around 7:30 p.m. on Christmas evening. The defendant stayed overnight, departing around 10:30 or 11 a.m. the next day.

¶ 22 On cross-examination, Spade admitted that his work schedule did not indicate where the defendant was on that evening. Spade testified that he recalled speaking to Mullins, but denied telling him that the defendant had come to his house on Christmas Eve, reiterating that he told Mullins it was "Christmas evening." He stated that he did not recall being asked by Mullins if he was "sure" that the defendant came on Christmas Eve.

¶ 23 Resuming its case, the State called Shayna Breedlove. Breedlove testified that she shared an apartment with Gowen and Otte in December 2010. She stated that on June 24, 2011, she was speaking with the defendant in the hallway of the building when she saw

Ackman in the back of the building writing down her license plate number, so the defendant went down to investigate. The defendant later told her that Ackman was asking about Otte and that he thought that the TV upstairs was stolen; Breedlove understood him to be referring to the large TV. She testified that Exhibit 2 was the large TV that had been in her apartment, Exhibit 4 was the small TV that had been in the defendant's apartment, and Exhibit 3 was the Blu-ray that had been in both her apartment and the defendant's apartment. She noted that the small TV and Blu-ray were in the defendant's apartment from approximately Christmas 2010 to mid-June of 2011.

¶ 24 Breedlove testified that on June 29, 2011, the defendant told her that he believed that Otte was trying to implicate him in a burglary. She stated that the defendant told her that Gowen gave him a watch and a ring to pawn, and that he thought the small TV and Blu-ray had been stolen, so he put them in the basement's laundry room because he did not want to get into trouble. To her knowledge, he did not notify the police. Douglas declined to cross-examine the witness.

¶ 25 Robert Johnson testified that he was the landlord of the building in which Otte, Gowen, Breedlove, and the defendant had resided. He stated that on June 25, 2011, he went to the basement of the building to do laundry. He noticed a box with a TV in a nearby storage room, and called the police. The police determined that the TV was stolen, and removed it. Johnson could not positively identify the State's Exhibit 4 as the TV that he saw in the basement, but thought "it looked like it." Douglas declined to cross-examine the witness.

¶ 26 The State's last witness was Leah Gowen. She testified that she was not present when the large TV was stolen and that, upon her return to the apartment on December 26, 2010, Otte had told her that his sister had purchased it from a friend in the Army. Gowen denied asking the defendant to pawn any jewelry, and also denied having a sexual relationship with him. Gowen testified that she did not ask the defendant to help carry the large TV into her apartment, and did not know anything about the small TV or Blu-ray before talking to the police. Douglas declined to cross-examine the witness, and the State rested its case. No motion was made at the close of the State's case.

¶ 27 Drew Spade, the defendant's son, testified that the defendant came to his home around 2 p.m. on Christmas Day, and departed around 5:30 or 6 p.m. Spade testified that the defendant stated that he was going to visit a friend, and then go to Evansville to visit his brother. Douglas showed Spade an Exhibit B, and Spade stated that his father worked at "the store" from 8:30 to 3:30; no clarification was given as to whether the witness meant morning or evening. Spade agreed that his father "came back at 12/26/10" from 5 p.m. to 9 p.m.

¶ 28 On cross-examination, Spade agreed that Exhibit B did not show whether an employee actually appeared for work. He noted that he was at work on both December 24 and 26 of 2010, but agreed that he could not account for the whereabouts of his father between 6 p.m. on December 24 until 5 p.m. on December 26, 2010.

¶ 29 At Douglas's request, Otte's June 28, 2011, interrogation at the Robinson police department was viewed by the court. Though not offered or admitted into evidence at

trial, this court granted the defendant's motion to supplement the record on appeal and thus it was available for our review.

¶ 30 The DVD shows Ackman reading Otte his *Miranda* rights, and Otte confirming that he understood. Otte confessed to burglarizing the house across the street from his former apartment, saying that he was intoxicated and got greedy. He told Ackman that he kicked in the back door and took "just a couple of TVs." Ackman then referred to a list of stolen items, and Otte agreed that a Blu-ray player and what was perhaps a VCR had also been stolen. Ackman asked Otte where the VCR was, and Otte responded that "the people I had help with" had taken it. Ackman asked him where the small TV was, and Otte stated that the "other guy also" took it. He named the defendant as the "other guy" who took the small TV, VCR, and Blu-ray, and he told Ackman that the night of the burglary was the last time that he saw the Blu-ray. Otte told Ackman that the defendant was "ruthless," and "ripping up [the Williamses'] Christmas presents."

¶ 31 Otte told Ackman that the defendant took the ring and pawned it somewhere out of state, perhaps Evansville. Otte stated that the defendant said that "the guy told him that the ring was not worth much." Otte said that he thought that the burglary took place the "day after Christmas," in the early morning, but later clarified that it was two days after Christmas. He stated that he and the defendant decided to do it because they were intoxicated and knew that the owners were not at home. Otte agreed with Ackman that the defendant "dumped and stashed" the items that were later found in the basement. Otte stated that the last he knew, the small TV was in the defendant's living room, but he

denied having been in the defendant's apartment since the incident. Otte also denied that Gowen was involved in or knew about the burglary.

¶ 32 After the DVD concluded, the defendant took the stand. The defendant stated that he lived in Robinson, Illinois, and was employed at the Robinson IGA. Douglas elicited from his witness that he had been charged with assault and battery in 1993. The defendant testified that he went to his son's house from about 2 p.m. to 5:30 p.m. on Christmas Day 2010, and then went to his brother's home in Newburgh, Indiana. He stated that he stayed over that night, and left Newburgh the next morning between 11 a.m. and 12 p.m.

¶ 33 The defendant testified that Otte told him that the large TV had been a gift from his sister, and that he was unaware of the break-in until the day he saw Ackman looking at Breedlove's license plate. He stated that the Blu-ray was in Otte's apartment for approximately two months before Otte brought his Xbox over, and subsequently gave the defendant the Blu-ray as a gift for helping him carry the large TV upstairs that night. The defendant noted that Otte tried to sell him the small TV several times, and thought he had tried to sell it to others. Otte later told the defendant that he needed money, and asked the defendant to take the TV and "try it out for awhile." The defendant took the TV, but never paid Otte. The defendant testified that within four to five weeks of taking possession of the TV, the police began their investigation. The defendant noted that Otte had very few belongings in the apartment he shared with Gowen and Breedlove, and thus he "figured [the small TV] was probably stolen."

¶ 34 The defendant denied Otte's version of the events, stating that on December 26, 2010, when he returned home from work, Gowen and Otte asked him to help carry a big screen TV from their deck to their apartment. The defendant stated that they told him that it was a gift from Otte's sister. The defendant noted that Gowen's SUV was nearby, with its tailgate up.

¶ 35 On cross-examination, the State inquired as to why the defendant did not disclose his alibi witness until July 30, 2012; the defendant responded that he was not sure of the date. The defendant admitted to having the small TV in his apartment from late March or early April until early June, 2011, and that he moved it to the basement of his building. He denied knowing it was stolen, but stated that he moved it because he "just had a gut feeling" about it. After Ackman's June 25, 2011, visit to the apartment, the defendant stated that he told Breedlove that the small TV was "probably hot."

¶ 36 The defendant testified that on the day after Ackman's visit, he called the police department. Ackman was unavailable, so the defendant said that he met with Officer Bill Rutan, who took him on a ride and told him of the officers' suspicions regarding Otte. The defendant told Rutan that Otte had tried to sell him a smaller TV, and that Otte had a large screen TV that he claimed was from his sister. Rutan told the defendant that he thought Otte's story was "buyable."

¶ 37 At this point in the proceedings, the State noted that "this is the first time that any of us has heard anything about this [ride]," to which the defendant responded: "Yeah. Isn't that amazing? Why?" The State asked the defendant if he had told his attorney about it. Though no objection was raised to that question, the court barred the defendant

from answering on the basis of attorney-client privilege. Douglas declined redirect examination, and the defense rested.

¶ 38 The State recalled Mullins, who stated that he interrogated Christopher Spade by phone. Mullins testified that Christopher said that the defendant came to his home on December 24, Christmas Eve, around 7:30 p.m. and left the next morning. The State inquired whether Mullins had found that response strange, but before Mullins answered, Douglas objected, saying: "Object, object to this gentleman. He's a nice guy but he can't, he doesn't, he doesn't, he doesn't comport to the world [*sic*]." The court did not understand Douglas's objection, and had the question read back by the reporter. Though still not understanding the basis of Douglas's objection, the court sustained the objection on other grounds. Mullins stated that he found Christopher's statement strange because another witness had indicated that the defendant went to Christopher's home on Christmas Day, yet Christopher insisted that the visit occurred on Christmas Eve.

¶ 39 On cross-examination, Douglas showed Mullins the document marked Exhibit A. After Douglas began reading the document to Mullins, the court sustained the State's objection that no foundation had been laid for the witness's knowledge of the document. After another attempt and a renewed objection, the court requested that Douglas ask the witness questions that would lay foundation. In response, Douglas asserted that the information from the Exhibit A document belied Mullins's testimony, and that Christopher could not be in two places at the same time. The court asked Douglas if that was a question, and Douglas replied affirmatively. Douglas then asked Mullins: "[N]ow we find out that, that 12/24 and it goes 14:59 in and 23:26 out. How do you explain

that?" The court sustained the State's objection that the question was incomprehensible. Douglas attempted another question, and after having the question read back by the court reporter, the court asked Douglas to rephrase the question. Douglas responded that he "just can't make it go," and told the court: "I've got the data. I've got the court. I've got the 24th, which is through, and 25. I just can't do it [*sic*]." The court told Douglas: "[Y]ou have to ask [the witness] questions that are somewhat intelligible. And some of them I don't understand what you're asking or if you're even asking a question." Douglas made another statement, drawing another objection from the State. Douglas then stated that Christopher Spade was "an officer of the court," to which the court again asked Douglas to explain his meaning or rephrase the question. Finally, Douglas said that "we've already got it in our evidence so what the heck" and declined further examination of Mullins.

¶ 40 The State rested, and the court asked if Douglas had subrebuttal. Douglas asked the defendant, "[D]o you have, do you want, do you have anything, do you have something that will help you?" The court recessed so that Douglas could speak to his client.

¶ 41 The court asked if the parties were ready to proceed to closing arguments, to which Douglas stated that he "prefer[red] tomorrow," because his wife was "in one of the clubs" and he needed to be there by 4:30. At the court's request, Douglas elaborated that he needed to be at his office because "somebody will want for me to do something." Douglas could not explain why a delay was necessary, stating: "I don't know. But I know they're going to all go away." The court eventually deciphered that Douglas's wife was at

his office and needed to leave to attend a meeting. The court ruled that it would not delay closing arguments, and the State proceeded with its argument.

¶ 42 In the defendant's closing argument, Douglas again asserted that the statement from Mullins was "incorrect" and Christopher Spade would not have been home on Christmas Eve to see the defendant. Douglas then told the court, "I know you took, took it away from me but I'm sure that the high, higher court will take this down to, back down here." The court requested that Douglas explain his meaning, and Douglas referred to the State's supplemental disclosure regarding the date of the offense, and the motion to dismiss. He stated: "And there's one, one situation on for 14:59 to 25, 23:26, and it's all down here. And Kelly had tried five p.m. to nine p.m. so on, on 12/26/2010. So I don't see why the police or the court is trying to knock off a guy." This concluded Douglas's argument. The court found the defendant not guilty of residential burglary (count I) and theft (count II), but guilty of receiving stolen property (count III).

¶ 43 The defendant's version of the events is detailed in his November 13, 2012, presentence investigation report. The defendant claimed that he had nothing to do with the burglary or theft, and knew nothing about Otte or Gowen's involvement in such matters. He also stated that the ring he pawned was not diamond but cubic zirconia, with no real value other than the gold. He noted that the ring was just "10K" gold, and was "a single stone ring (cz), not a multi-stone diamond ring that Mrs. Williams testified had been stolen from her home."

¶ 44 At the defendant's November 19, 2012, sentencing hearing, Douglas attempted to reopen proof and argue that the stolen items' value totaled less than $500, but was

unsuccessful. With no stipulation from the defense regarding the admittance of the defendant's presentence investigation report, the State called probation officer Stevi Holscher, who testified that she prepared the report and it was correct to the best of her knowledge. On cross-examination, Douglas attempted to elicit the witness's knowledge of the cost of the stolen items. The court sustained the State's objection, and Douglas answered: "[W]ell then, nobody can, can work ... we've worked very hard to get, to get what the situation was. I've got all the files." Douglas agreed that he had no more questions for the witness.

¶ 45 Diane Williams testified as to restitution, stating that the value of the Blu-ray, small TV, and diamond ring totaled $864. However, when the defendant testified, he noted that he had checked the current value of the items at issue, and a Magnavox Blu-ray player was under $80, a 32-inch Samsung LCD TV was about $279. He also noted that the pawn shop ticket stated that the ring was only worth $30.

¶ 46 In closing, Douglas argued that the defendant was unaware that the TV and Blu-ray were stolen at the time, and was never in possession of the ring; thus, the value of the remaining items was less than $500 and "should only carry a charge of misdemeanor."

¶ 47 In his statement in allocution, the defendant reiterated that he was never knowingly in possession of anything stolen, and that he did not know if it had been proved that the ring that was pawned was Diane Williams's ring. The court reviewed the factors in mitigation and aggravation, and sentenced the defendant.

¶ 48 Douglas filed a "motion to reconsider sentence" on December 7, 2012, arguing that the sentence was excessive since the defendant did not take part in the "robbery" and

never had possession of Diane Williams's ring. Excluding the ring, the value of the stolen merchandise fell below $500, and thus the defendant "should have only been convicted on a misdemeanor charge." The motion was denied at a hearing on January 14, 2013.

¶ 49 The defendant appeals his conviction and sentence, raising multiple issues for our review. However, because we vacate and remand for the reasons that follow, we will address only whether the State proffered sufficient evidence to support the defendant's conviction of possession of stolen property beyond a reasonable doubt, and whether the defendant received ineffective assistance from his trial counsel.

¶ 50 The defendant argues that no rational trier of fact could have found that the State proved the essential elements of theft over $500 beyond a reasonable doubt. Specifically, he asserts that the evidence failed to show that, at the time the defendant possessed the small TV and Blu-ray, he had reason to believe that they had been stolen or intended to permanently deprive the owners of the goods; and, that the State failed to prove that the ring pawned by the defendant was the same ring stolen from Diane Williams, therefore even assuming *arguendo* that he wrongfully possessed the other items, the value of the property fell below $500. On this point, we affirm the trial court's judgment.

¶ 51 Traditionally described as "receiving stolen property," section 16-1(a)(4) of the Criminal Code of 1961 provides that an act of theft occurs when a person knowingly "[o]btains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen." 720 ILCS 5/16-1(a)(4) (West 2010); *People v. Walton*, 2013 IL App (3d)

110630, ¶ 25. This subsection proscribes the initial act by which a defendant first gains control of the property. *Walton,* 2013 IL App (3d) 110630, ¶ 28. Knowledge may be established by proof of circumstances that would cause a reasonable man to believe that the property had been stolen. *People v. Kaye,* 264 Ill. App. 3d 369, 383 (1994). Thus, in regard to count III, the State had the burden to prove beyond a reasonable doubt that the defendant, at the moment he took possession of the stolen items, knew or reasonably should have known that they were stolen. Upon review, we conclude that the circuit court did not err in finding that the State met this burden.

¶ 52 When reviewing the sufficiency of the evidence in a criminal case, a reviewing court's inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Davison,* 233 Ill. 2d 30, 43 (2009). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *Davison,* 233 Ill. 2d at 43. The trier of fact determines the credibility of witnesses and the weight to be given their testimony, and a reviewing court does not reweigh the facts and will not set aside a finding of guilty unless the evidence is so palpably contrary to the finding or so unreasonable, improbable, or unsatisfactory as to cause a reasonable doubt as to the guilt of the accused. *People v. Ferguson,* 204 Ill. App. 3d 146, 151 (1990).

¶ 53 The defendant admits that his "gut" eventually told him that the items were stolen, but he denies that he knew that the items were stolen when he took possession of them. However, an inference of the defendant's culpable state of mind can be drawn from his exclusive and unexplained possession of recently stolen property; the defendant may

rebut this inference with an explanation, though he must offer a reasonable story or be judged by its improbabilities. See *People v. Ferguson*, 204 Ill. App. 3d 146, 151 (1990). We cannot say that it was unreasonable for the trial court to disbelieve that the defendant was an unknowing victim of the circumstances in this case. The defendant did not consider Otte a friend, yet readily accepted an expensive video player in exchange for a few minutes of aid. Though the defendant points out that the gift of a Blu-ray player was not as generous at it appeared, given that Otte's Xbox system negated his need for it, we note that the defendant himself stated that Otte had few worldly possessions. It is not unreasonable to conclude that the defendant should have been highly suspicious of this generous gift from an individual who appeared to have need of the money that selling nearly new electronics can provide–as evidenced by Otte's repeated attempts to sell the defendant the small TV. With regard to the small TV, then, it becomes even more improbable that the defendant would not suspect it was stolen when he accepted it: Otte had already given him a Blu-ray player, and was clearly keen on selling the TV quickly and cheaply. We will not disturb the trial court's finding that the defendant's intuition likely warned him of the illicit nature of these items at the time he took them, and not months later as he claims.

¶ 54 In regard to Diane Williams's ring, the defendant correctly notes that Gowen disputed his account of how he came into possession of the pawned ring, and it was up to the trial court to determine which witness was more credible. However, the defendant asserts that the State failed to prove that the pawned ring was in fact Williams's ring, as it was not recovered and no testimony in support of this contention was provided by the

State. However, the defendant also contends that the evidence that was introduced–the pawn shop receipt–did not support the conclusion that it was the same ring. On this point, we will not reweigh the contested facts but find that the trial court could have reasonably interpreted the receipt otherwise.

¶ 55 Williams described her ring as a quarter-carat diamond ring with smaller diamonds on a 14-carat yellow gold band. The defendant described the ring he pawned as a single-stone cubic zirconia ring with a yellow gold band. The defendant maintains that the receipt describes the pawned ring as 10-carat ("10K") yellow gold ("YG"), with a value of $30, and that there was "no indication that the ring contained one diamond, let alone several, a conclusion supported by the $30 pawn value." However, a look at the receipt offers another, and we think more likely, reading. We first note that the difference between 10-carat and 14-carat gold is probably not easily ascertained, even by a pawnbroker; therefore, the receipt's discrepancy with Williams's description is not all that informative to the fact finder. More instructive, we think, is that what the defendant reads as "$30," the State reads as "3D," indicating that the ring had three diamonds. As it is reasonable to assume that all the shop's purchased jewelry would be described consistently, the "3D" interpretation is further supported by the remaining items' descriptions, which do not list individual values but are described as "OK" (presumably, zero carat) and "OD" (presumably, zero diamonds); this could reflect that the remaining items were indeed costume jewelry, as the defendant noted in his testimony. This evidence, in conjunction with the remaining circumstances, supports a reasonable inference that the pawned ring was indeed Williams's ring. We will not disturb the trial

court's conclusion that the defendant knew this upon taking possession of the ring and subsequently pawning it.

¶ 56 Although we have concluded that, based on this record, the State has proven the defendant's guilt beyond a reasonable doubt, we turn to the defendant's claim that remand is warranted because he was denied the effective assistance of his trial counsel. Here, we find that Douglas's performance so drastically hindered the defendant from adequately presenting his case, we cannot say that the State would have met its burden without Douglas's failures.

¶ 57 The defendant argues that his counsel's performance was so nonexistent, even harmful, that prejudice is presumed under the principles set forth in *United States v. Cronic*, 466 U.S. 648 (1984), and adopted by the Illinois Supreme Court in *People v. Hattery*, 109 Ill. 2d 449, 464-65 (1985). Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* requires a defendant to show both that (1) his attorney's performance fell below an objective standard of reasonableness and (2) the attorney's deficient performance resulted in prejudice to the defendant; the failure to satisfy either element will preclude a finding of ineffective assistance of counsel. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). In certain exceptional situations, however, the two-part *Strickland* test need not be applied and prejudice may be presumed. When "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659. We conclude that the defendant

received ineffective assistance from his counsel, but that we must evaluate his claim under the *Strickland* standard.

¶ 58 When distinguishing between the rule of *Strickland* and that of *Cronic*, the differences in evaluating trial error are not in degree, but in kind. *Bell v. Cone*, 535 U.S. 685, 697 (2002). While there are few Illinois cases discussing the *Cronic* standard, examples of such failures include employing a trial strategy that concedes a defendant's guilt when the defendant has pled not guilty (see *Hattery*, 109 Ill. 2d at 464), insisting on raising an unavailable defense (see *People v. Kozlowski*, 266 Ill. App. 3d 595 (1994)), introducing extensive and inflammatory evidence that ultimately negates a trial strategy of appealing to the jury's sympathy (see *People v. Morris*, 209 Ill. 2d 137, 187-88 (2004)), and stipulating to the admission of testimony that is inadmissible against a defendant by supreme court rule (see *People v. Hoerer*, 375 Ill. App. 3d 148, 152 (2007)). Because it is the kind of error–*i.e.*, an error that for all practical effect, leaves a defendant with no defensive strategy whatsoever–and not the egregiousness of the error that guides this evaluation, we conclude that Douglas's performance must be evaluated under *Strickland*.

¶ 59 Douglas's representation in the instant case, however, certainly meets the criteria set forth in *Strickland*. Frankly, the statement of facts presented above cannot fully reflect the dismay induced by a review of Douglas's performance, which clearly fell below an objective standard of reasonableness. The State points to specific instances where Douglas purportedly acted correctly. However, the court considers the totality of trial counsel's conduct in determining competence. *People v. Wilson*, 392 Ill. App. 3d

189, 198 (2009). We agree with the defendant that the State's highly exaggerated examples consist of only potentially competent performance, and, even if an attorney performs some tasks competently, this does not somehow negate his accountability for poorly performing the remaining tasks.

¶ 60 Douglas's pretrial "motion to dismiss" contested an issue of fact and did not state valid grounds for dismissal. Douglas's posttrial "motion to reconsider sentence" did not attack the sentence. Rather, the motion ultimately requested for reconsideration of the trial court's judgment based on insufficient evidence, which is properly presented as a motion for a new trial (725 ILCS 5/116-1 (West 2010)) or a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)). The starkest examples of Douglas's ineptitude, however, are provided in tortuous detail in the trial transcript. Failure to cross-examine key witnesses when significant impeachment is available may support an ineffective assistance claim. *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994). His questions during his examination of witnesses were generally irrelevant, inappropriate, nonsensical, or, in the case of the cross-examination of key witnesses, nonexistent. He impeached his own client and objected to the impeachment of Otte, the State's key witness. He failed to seek admission of exhibits supporting his witness's testimonies, and failed on numerous occasions to object to admission of testimony that should not have been considered by the court. Mostly, however, Douglas was simply unintelligible to the court, the State, and this reviewing court.

¶ 61 Having demonstrated that his counsel's performance was objectively unreasonable, we find that the defendant also meets his burden regarding prejudice, the second prong of

Strickland. 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; that there was "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The aggregation of errors in Douglas's performance leaves no doubt that it is, at the very least, "reasonable to conclude that a different result was plausible in the absence of the deficient representation." (Internal question marks omitted.) *People v. Fletcher*, 335 Ill. App. 3d 447, 455 (2002). Douglas's performance may have been the product of circumstances outside of his control, but this does not negate the consequences of his actions and omissions.

¶ 62 In sum, we find that based on the evidence presented at trial, a rational trier of fact could have found the essential elements of count III, felony theft by receiving stolen property per section 16-1(a)(4) of the Criminal Code of 1961 (720 ILCS 5/16-1(a)(4) (West 2010)), beyond a reasonable doubt. The defendant's acquittals on count I, residential burglary, and count II, felony theft, are constitutionally protected by our prohibition against double jeopardy. See *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). However, where the evidence is sufficient to prove the defendant guilty beyond a reasonable doubt, double jeopardy does not bar a retrial. *Wilson*, 392 Ill. App. 3d at 202. We also find that the defendant was prejudiced by the ineffective assistance of his attorney. Accordingly, we vacate the trial court's judgment on count III and remand this cause for proceedings not inconsistent with this order.

¶ 63 Circuit court judgment vacated; cause remanded.