

IN THE COURT OF APPEALS OF IOWA

No. 1-606 / 11-0236
Filed August 24, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALLAN NOLEN HAMMA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

A defendant appeals from a restitution order. **REVERSED AND
REMANDED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Michael J. Walton, County Attorney, and Joe Grubisich, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J.,
takes no part.

VOGEL, P.J.

On June 29, 2011, this court reversed Allan Hamma's conviction for second-degree criminal mischief in violation of Iowa Code section 716.1 and 716.4 (2009).

State v. Hamma, No. 10-1862 (Iowa Ct. App. June 29, 2011). In doing so, we found:

Hamma was convicted of second-degree criminal mischief, which requires the State to prove damages exceeding \$1000 but not exceeding \$10,000. See Iowa Code § 716.4. Third-degree criminal mischief requires proof of damages between \$500 and \$1000 and fourth-degree criminal mischief requires proof of damages between \$200 and \$500. [*Id.*] §§ 716.5, .6. Criminal mischief in the fifth degree is: "All criminal mischief which is not criminal mischief in the first degree, second degree, third degree, or fourth degree." *Id.* § 716.6.

We conclude there is not substantial evidence by which a rational jury could determine "the cost of replacing, repairing, or restoring the property" exceeds a fifth-degree criminal mischief charge. At trial, Martin testified the air conditioning unit originally cost \$1600 and his total cost of purchase plus installation was "[s]omewhere around \$8100." However, Martin did not testify to when the unit was purchased or installed. . . . [T]he State presented no evidence on the estimated amount to repair, replace or restore the air conditioning unit. Further, the State presented no evidence as to the value of the unit at the time it was damaged.

Because there was not substantial evidence presented to support Hamma's conviction for second-degree criminal mischief, the district court erred in denying his motion [for judgment of acquittal]. Accordingly, we reverse Hamma's conviction for second-degree criminal mischief and remand with directions to enter a conviction for fifth-degree criminal mischief.

Id.

In this appeal, in which the briefs were filed prior to our June 29 opinion, Hamma asserts his trial counsel was ineffective for failing to elicit testimony at the January 12, 2011 restitution hearing as to the value of the air conditioning unit just before it was damaged. "The general rule in Iowa for repairs or for replacement is the fair and reasonable cost of replacement or repair, but not to exceed the value of the property immediately prior to the loss or damage." *State v. Urbanek*, 177 N.W.2d 14, 16 (Iowa

1970). The district court ordered Hamma (and his co-defendant, jointly and severally), to pay restitution in the amount of \$6950. Because we reversed Hamma's conviction for second-degree criminal mischief, and remanded for entry of judgment for fifth-degree criminal mischief, we need not determine the effectiveness of Hamma's trial counsel. Instead, we reverse the district court's entry of \$6950 restitution and remand for a new restitution hearing based on our prior opinion and the new judgment entry of fifth-degree criminal mischief.

REVERSED AND REMANDED.