IN THE COURT OF APPEALS OF IOWA

No. 1-804 / 10-1438
Filed December 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LOUIS HENDERSON BRANCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Louis Henderson Branch appeals his convictions for theft in the first degree and burglary in the third degree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, Olu Salami, Assistant County Attorney, and Tyler Buller, Student Legal Intern, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

DANILSON, P.J.

Louis Henderson Branch appeals his convictions for theft in the first degree and burglary in the third degree, in violation of Iowa Code sections 714.2(1) and 713.6A (2009). Branch contends the record does not contain substantial evidence to support his convictions. He alternatively argues his trial counsel was ineffective should we find error was not preserved on his sufficiency of the evidence claim. Branch further alleges the jury instructions incorrectly stated the elements of theft and he received ineffective assistance counsel because trial counsel failed to object to the instructions. Upon our review, we find error was not preserved on the sufficiency-of-the-evidence claim now raised on appeal. We further find trial counsel's failure to preserve error at trial supports Branch's claim for ineffective assistance of counsel because the State failed to establish sufficient evidence to support the theft conviction under section 714.2(1). We conclude Branch's theft conviction under section 714.2(1) must be reversed. We remand for dismissal of that charge and for entry of an amended judgment of conviction with respect to the lesser-included offense under section 714.7, operating without owner's consent. We affirm the judgment and sentence of the district court for Branch's remaining convictions.

I. Background Facts and Proceedings.

Shortly before midnight on March 16, 2009, an intoxicated Branch was walking along Locust Street in downtown Des Moines. He wandered to American Dream Machines, a car dealership specializing in classic cars, located at 1500 Locust. The dealership was closed, and Branch stood outside looking at the cars in the showroom through the dealership windows. He picked up a

concrete rock and threw it at the windows. After several attempts, Branch managed to break a window and enter the dealership. Branch was able to start the ignition of a 1957 Chevrolet Bel Air[1] that was on display. He drove the vehicle out of the building through a closed glass garage door, sounding an alarm. He turned west onto Locust and drove the wrong way down the one-way street.

Surveillance videos from American Dream Machines depicted Branch breaking into the dealership and driving away with the vehicle. Meredith Corporation security guard Roger Murray saw the vehicle break through the dealership's glass garage door and travel the wrong direction on Locust. Ryan Wallace, a driver who saw the vehicle coming toward him on Locust, noted part of the glass garage door was still stuck to the front of the vehicle as it headed into oncoming traffic.

Robin Swank, an off-duty Des Moines police officer, heard about the theft from dispatch while he was traveling on Grand Avenue. Officer Swank observed the vehicle pulling into a parking spot at 3215 Grand, approximately one mile from American Dream Machines. He pulled in behind the vehicle, drew his weapon, and identified himself as a police officer. Branch complied with Officer Swank's order to remain in the vehicle. Officer Swank held him at gunpoint until uniformed officers arrived.

[1] The vehicle was being sold for $32,900. Doug Klein, the owner of American Dream Machines, testified at trial the vehicle sustained approximately $10,000 in damage from the events of the evening, and the replacement value of the dealership's damaged garage door was approximately $4000.

Officer Mandy Bernlohr, an operating while intoxicated specialist certified to administer field sobriety tests, was dispatched to the scene to administer field sobriety tests to Branch based upon officer suspicions he was intoxicated. When Officer Bernlohr arrived, she noticed Branch emanated the smell of alcohol; had red, bloodshot and watery eyes; and had slightly slurred speech. Because Branch was already handcuffed, Officer Bernlohr was only able to perform the horizontal gaze nystagmus test, which Branch failed.

Branch was taken into custody. He refused to provide a breath sample. He was belligerent, used profanities, and repeatedly threatened to "blow off one officer's head." He was able to dial a memory button in his cell phone to call his sister. Branch's statements on the booking video indicate he was aware he was at a jail.

On April 22, 2009, the State filed a trial information charging Branch with burglary in the third degree (Count I), theft in the first degree (Count II), criminal mischief in the second degree (Count III), and operating while intoxicated, third offense (Count IV). A jury trial was held over three days in June 2010. At trial, Branch raised the defense of intoxication and testified on his own behalf. For the most part, he did not dispute the facts presented by the State. He admitted he was the person on the surveillance videos from American Dream Machines. He claimed he was so intoxicated he had blacked out and could not remember anything. He stated he only remembered going for a walk in the evening and then waking up in the Polk County Jail detox. He stated he did not intend to commit the crimes. Branch's sister, Luvenia Butler, also testified about his longstanding drinking problem and stated he was intoxicated on that evening.

The jury found Branch guilty on all counts.[2] The district court sentenced Branch to terms of imprisonment that totaled a maximum of twenty years. Branch now appeals his theft and burglary convictions. His remaining convictions for operating while intoxicated and criminal mischief are not at issue on appeal.

II. Sufficiency of the Evidence.

Branch argues the record does not contain substantial evidence to support his convictions for theft in the first degree and burglary in the third degree. Specifically, he contends there was no evidence from which a reasonable jury could find or infer he had the intent to permanently deprive the owner of the vehicle for purposes of his theft conviction. He further alleges that because the evidence does not establish he had the intent to commit a theft, the evidence is also insufficient to support his conviction for burglary.

A. Scope of Review. Our review of claims of insufficient evidence to support a conviction is for correction of errors at law. Iowa R. App. P. 6.907; *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). Substantial evidence exists to support a verdict when the record reveals evidence that could convince a rational trier of fact a defendant is guilty beyond a reasonable doubt. *Brubaker*, 805 N.W.2d at 171. In making this determination, we consider all of the evidence in the record in the light most favorable to the verdict and make all reasonable inferences that may

[2] Following the verdicts, Branch stipulated to prior OWI convictions for purposes of enhancing the OWI charge to a third offense.

fairly be drawn from the evidence. *Id*. "However, it is the State's 'burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.'" *Id*. (quoting *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004)).

B. Preservation of Error. The State contends Branch did not preserve error on the issue of insufficiency of evidence to support a conviction on the theft and burglary counts under the theory he lacked the intent to deprive the owner of the vehicle. To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal. *State v. Crone,* 545 N.W.2d 267, 270 (Iowa 1996). An exception to this rule is recognized, however, "when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel." *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

In this case, Branch's trial counsel moved for judgment of acquittal at the close of the State's case, stating as follows:

> [TRIAL COUNSEL] At this point I would ask for a directed verdict. That the State has not met its burden of proof and ask the Court to rule on that. I believe that, yeah, they have not met their burden of proof, so I would ask for a directed verdict at this time.

The motion was overruled by the court as follows:

> [COURT] I must view the motion of directed verdict taking the evidence in a light most favorable to the State. Doing that, there is no doubt that this Court believes that there has been sufficient evidence generated to generate fact questions for the jury to decide as to all four counts. Therefore, your motion for directed verdict is denied and overruled.

Trial counsel renewed its motion at the close of all the evidence, which the court again overruled.

Based on trial counsel's motion and the court's ruling, we find Branch's motion for judgment of acquittal did not preserve the specific argument he is now making for the first time on appeal, nor does the record indicate the grounds for the motion were obvious and understood by the trial court and counsel. *See Williams*, 695 N.W.2d at 27; *Crone,* 545 N.W.2d at 270. Branch was charged with four different counts—theft, burglary, operating while intoxicated, and criminal mischief. The record reveals the motion made by Branch's trial counsel did not mention the "intent" element of the theft or burglary counts. Indeed, the motion did not specify arguments related to those charges. *See Brubaker*, 805 N.W.2d at 170 ("The motion for directed verdict of acquittal by Brubaker's trial counsel lacked any specific grounds, and thus, the error was not preserved."). Branch must establish his trial counsel rendered ineffective assistance in failing to preserve error on the claim to reach the merits of this issue on appeal. *See State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) ("Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules.").

III. Counsel's Failure to Raise Sufficiency of Evidence Claim.

Branch argues his trial counsel was ineffective in failing to raise the sufficiency-of-the-evidence claim now asserted on appeal. He alleges the record does not show he had the intent to permanently deprive the owner of the property, in this case a motor vehicle. Branch contends trial counsel therefore breached an essential duty by failing to move for judgment of acquittal "on this

specific ground," and prejudice resulted. He argues that but for counsel's error, the court would have granted the motion "in light of the foregoing pronouncements" in *State v. Schminkey*, 597 N.W.2d 785, 789-92 (Iowa 1999), and the facts of this case.

A. Scope of Review. Our review of ineffective assistance of counsel claims is de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *Fountain*, 786 N.W.2d at 265-66. The claim fails if either element is lacking. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). The applicant must overcome a strong presumption of counsel's competence. *Brubaker*, 805 N.W.2d at 171; *see also Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S. Ct. 1388, 1404, 179 L. Ed. 2d 557, 560-61 (2011).

B. Preservation for Postconviction Relief Proceeding. "The failure of trial counsel to preserve error at trial can support an ineffective assistance of counsel claim." *State v. Truesdell*, 679 N.W.2d 611, 615-16 (Iowa 2004). Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim. *Bearse*, 748 N.W.2d at 214. In some instances, however, the appellate record can be adequate to address the claim on direct appeal. *Berryhill v. State*, 603 N.W.2d 243, 246 (Iowa 1999). When the record is adequate, the appellate court should decide the claim on direct appeal. *See State v. Rubino,* 602 N.W.2d 558, 563 (Iowa 1999). "Preserving ineffective

assistance of counsel claims that can be resolved on direct appeal wastes time and resources." *Truesdell*, 679 N.W.2d at 616.

As our supreme court has instructed, "[a] claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal." *Id*. If the record fails to reveal substantial evidence to support the convictions, then counsel was ineffective for failing to properly raise the issue and prejudice resulted. *Id*. However, if the record reveals substantial evidence, then counsel's failure to raise the claim of error could not be prejudicial. *Id*. Regardless, Branch's claim of ineffective assistance of counsel on this ground can and should be addressed on direct appeal.

C. Theft Conviction. The offense of theft has two elements. A person commits theft when he (1) takes possession or control of the property of another, or property in the possession of another (2) *with the intent to permanently deprive the other thereof*. Iowa Code § 714.1(1) (emphasis added); *see Schminkey*, 597 N.W.2d at 788-89. We acknowledge section 714.1 requires only an *intent to deprive* the owner of his or her property; however, our supreme court has interpreted section 714.1 to require "an *intent to permanently deprive* the owner of his property." *Schminkey*, 597 N.W.2d at 789 (emphasis in original). In *Schminkey*, the court stated the intent to permanently deprive the owner of property "is an essential element of theft under section 714.1(1)."[3] *Id*.

[3] We acknowledge the argument that "[t]he legislature did not include a time period for the word deprive in the definition of theft" and "we should be reluctant to change the meaning of the statutes through the addition or subtraction of words." *State v. Berger*, 438 N.W.2d 29, 32 (Iowa Ct. App. 1989) (Donielson, J., dissenting). However,

Proof the defendant acted with the purpose to permanently deprive an owner of property requires a determination of what the defendant was thinking when an act was done. *Id*. When determining criminal intent, the condition of the mind at the time the crime is committed is rarely susceptible of direct proof but depends on many factors. *Id.* Specific intent may be inferred from the facts and circumstances surrounding the act, as well as any reasonable inferences to be drawn from those facts and circumstances. *Id.*

This case again presents us with the problem of attempting to read a defendant's mind at the time the alleged crime was committed in order to determine the defendant's motives. This problem is unique to cases involving theft of a motor vehicle because our state legislature has made operating a vehicle without the owner's consent a separate crime. See Iowa Code § 714.7. That offense was also submitted to the jury in this case as a lesser-included offense of theft. A person commits operation of a motor vehicle without the owner's consent when he (1) possesses or controls any self-propelled vehicle (2) without the consent of the owner of such, *but without the intent to permanently deprive the owner thereof. Id.* § 714.7 (emphasis added).

Our supreme court has instructed that the mere fact a defendant took the vehicle without consent of the owner does not "give rise to an inference that he intended to permanently deprive the owner of the vehicle." *State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004); *but see People v. Morales*, 24 Cal. Rptr. 2d 847,

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as observed by the majority in *Berger*, "intent to deprive needs definition to clarify the length of time necessary to deprive the owner of his property to constitute theft," in order to differentiate between theft of a vehicle and operating a motor vehicle without owner's consent. *Id*. at 31.

853 (Cal. Ct. App. 1993) (noting an intent to permanently deprive "may be inferred" when one unlawfully takes the property of another). The court has further guided that apprehension of a defendant within a short time of the taking of the vehicle "is a circumstance that severely limits the circumstantial evidence" from which the intent to permanently deprive the owner of the vehicle can be inferred. *Morris*, 677 N.W.2d at 788.

In *Schminkey*, 597 N.W.2d at 787, the defendant was intoxicated after spending an evening drinking. The defendant had no recollection leaving the bar, but witnesses testified he departed the bar driving a vehicle without permission that was owned by a man he did not know. *Schminkey*, 597 N.W.2d at 757. The defendant drove the vehicle erratically and in excess of the speed limit, and shortly thereafter, crashed into two vehicles. *Id*. He then proceeded down the road for another block or so before crashing into a fence. *Id*.

The *Schminkey* court analyzed a number of cases in reaching its determination that no facts or circumstances allowed an inference the defendant intended to permanently deprive the owner of his vehicle, which was necessary to support a factual basis for the defendant's guilty plea. *Id*. at 789-92. The court distinguished cases from other jurisdictions where a permanent intent to deprive had been found upon the defendant's taking of a vehicle; in particular, cases in which the defendant had intentionally damaged the vehicle, or the defendant had been using the vehicle as his own. *See State v. Winkelmann*, 761 S.W.2d 702, 705, 708 (Mo. Ct. App. 1988) (finding sufficient evidence of an estranged husband's intent to permanently deprive wife of her car after he intentionally drove the car into a brick wall in "aggravation of the divorce," inflicting severe

damage to the vehicle, and later admitted "if he couldn't have the car, [and] she was going to sell it, [he] was going to wreck it"); *see also Morales*, 24 Cal. Rptr. 2d at 853 (finding jurors could reasonably conclude the car thieves intended to permanently deprive owner of her vehicle "based on the circumstances surrounding the break-in"; including that the break-in occurred late at night by two brothers who were armed; one brother served as "look-out" while the other smashed in the car window to take vehicle, and the brothers used deadly force in trying to avoid being apprehended); *State v. Mitchell*, 939 P.2d 879, 885 (Kan. 1997) (finding defendant's intent to permanently deprive where he stole a number of vehicles, drove them until he got caught, and then stole another; admitted "to using stolen vehicles as his own"; and caused "damage" to the vehicles by removing a stereo, spare tire, and punching a steering column); *State v. Guay*, 543 A.2d 910, 915 (N.H. 1988) (concluding defendant acted with "purpose to deprive," a finding that required evidence the defendant "withheld property permanently or for so extended a period or used under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost," by causing approximately $1600 worth of damage to a ten-year-old Chevrolet).

Specifically, the *Schminkey* court noted no facts indicated the defendant "intended to do anything more than temporarily use the vehicle to go home or to another bar." 597 N.W.2d at 791. And because the defendant wrecked the vehicle "before he could dispose of it," the court found there were no inferences that could be drawn from the defendant's actions subsequent to the taking. *Id*. (suggesting "permanently deprive" under Iowa law does not require a defendant

intend to restore stolen vehicle to its owner in a condition that would have the same economic value); *but see Mitchell*, 939 P.2d at 885 (noting "deprive permanently" under the Kansas statute a defendant to take from the owner the possession, use, or benefit of his or her property, *without an intent to restore the same* (emphasis added)). In addition, the court placed weight on the fact the record contained "no admissions by the defendant or statements from other witnesses" that would indicate the defendant's purpose in taking the vehicle. *Schminkey*, 597 N.W.2d at 792; *but see Winkelmann*, 761 S.W.2d at 708; *Mitchell*, 939 P.2d at 885.

Subsequently, in *Morris*, 677 N.W.2d at 788, our supreme court affirmed this court's reliance on *Schminkey* in concluding the evidence was insufficient to permit a finding, beyond a reasonable doubt, of the defendant's intent to permanently deprive the owner of his vehicle. In *Morris*, the defendant took a vehicle that was parked outside the owner's residence in the early morning hours just after the owner had started the vehicle to allow it to warm up before driving it to work. 677 N.W.2d at 787. Approximately thirty minutes later and about five miles from the owner's residence, an officer spotted the vehicle being driven the opposite direction from the owner's residence. *Id*. at 788. When the officer gave pursuit to the vehicle, the defendant stopped the vehicle, got out, and fled toward nearby houses. *Id*. The court again noted the defendant's apprehension "within a short time of the taking of the vehicle" was a circumstance that severely limited the circumstantial evidence of his intent that could be inferred. *Id.* And the court rejected the State's argument the defendant's abandonment and flight from a vehicle was "indicative of the requisite intent." *Id*.

In this case, an intoxicated Branch took a vehicle from American Dream Machines without permission. The mere fact Branch took the vehicle without consent does not give rise to an inference he intended to permanently deprive American Dream Machines of the vehicle. *Schminkey*, 597 N.W.2d at 791. Branch drove through a glass garage door and began driving the wrong direction down a one-way street. Branch did not cause damage to the vehicle with any admitted purpose or apparent plan to destruct the vehicle. *But see Winkelmann*, 761 S.W.2d at 708 (estranged husband destroyed wife's vehicle in aggravation of divorce); *Mitchell*, 939 P.2d at 885 (defendant routinely drove stolen vehicles until he was caught, admitted to using the vehicles as his own; removed various parts of the vehicles). In essence, damage alone, without other circumstantial evidence reflecting an intent to damage the vehicle to deprive the owner of the vehicle is not enough.[4] *See Schminkey*, 597 N.W.2d at 789-91. Shortly thereafter, Branch was spotted pulling into a parking space in a parking lot approximately one mile from American Dream Machines. Branch complied with the officer's request to show his hands and remain in the vehicle until other officers arrived. *But see Morales*, 24 Cal. Rptr. 2d at 853 (defendants used deadly force upon being discovered with stolen vehicle). Because Branch was discovered within a short distance and a short time after he took the vehicle, "we do not have the typical inferences that can be drawn from [his] actions subsequent to the taking," and the circumstantial evidence from which intent to deprive can be inferred is "severely limited." *Schminkey*, 597 N.W.2d at 791.

[4] We also note the argument made by defense counsel during closing arguments insinuates this point—if Branch intended to permanently deprive the owner of the vehicle, then why would he purposely damage it?

Further, there were no admissions by Branch or statements from other witnesses that would indicate his "purpose in taking the vehicle." *Id*. at 792. Indeed, Branch's sister testified Branch was an alcoholic who suffered from blackouts and she and other family members had to take care of him. She stated he had been drinking all day long prior to the evening he took the vehicle. Branch testified he did not remember anything after he went for a walk and the next thing he knew, he was waking up in Polk County Jail detox. He further stated he had not driven a car in years and had not intended to take a vehicle. Although the jury was free to reject the testimony of Branch and his sister as not credible, *State v. Leckington*, 713 N.W.2d 208, 214 (Iowa 2006), there is little other evidence by which to judge Branch's state of mind at the time he took the vehicle.

Under these circumstances, the record does not reveal substantial evidence to support a finding Branch intended to permanently deprive the owner of the property. *Schminkey,* 597 N.W.2d at 792. Accordingly, we find there was insufficient evidence to support a conviction under section 714.2(1). *Id*. As a matter of law, counsel was ineffective for failing to properly raise the issue and prejudice resulted. *Truesdell*, 679 N.W.2d at 616, 619.

D. Burglary Conviction. In conjunction with his insufficiency of the evidence claim to support his conviction for theft, Branch argues that "[b]ecause the State failed to present sufficient evidence [he] had the intent to permanently deprive the owner of the vehicle, i.e., the intent to commit a theft, the State also did not prove the crime of third-degree burglary." Indeed, the offense of burglary requires the State to prove, in part, that "the defendant broke and/or entered . . .

with the intent to commit a theft." *See* Iowa Code § 713.1. However, a defendant may have the intent to commit a theft at the time he broke or entered the building, but subsequently forgo that intent at the time he took possession or control of the vehicle. Moreover, our supreme court has stated, "An intent to commit theft may be inferred from an actual breaking and entering of a building which contains things of value." *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000) (citations omitted). Here, the evidence is undisputed that Branch broke into the American Dream Machines business, a place where valuable vehicles were stored, by picking up a concrete rock and breaking a window. Accordingly, the ruling in *Schminkey* does not preclude the jury's determination that Branch committed burglary in the third degree, and his claim in regard to his burglary conviction must fail.

E. Remedy. Branch's judgment and sentence for theft in the first degree must be reversed. The State failed to establish sufficient evidence to support the conviction of guilt under section 714.2(1). However, the offense of operating a motor vehicle without the owner's consent in violation of Iowa Code section 714.7 was submitted to the jury as a lesser-included offense. The jury did not reach a verdict on that offense because it found the State had established all elements of the greater offense. In so doing, the jury necessarily found the State had established all elements of the included offense. *Morris*, 677 N.W.2d at 788. In such instances, our supreme court has instructed an amended judgment of conviction be entered with respect to the lesser-included offense. *Id*. at 789.

IV. Counsel's Failure to Object to Jury Instructions.

Branch also contends the marshalling instruction, Instruction No. 22, incorrectly stated the elements of theft, and he received ineffective assistance counsel because trial counsel failed to object to the jury instructions. Instruction No. 22 provides:

> The State must prove all of the following elements of Theft:
> 1. On or about the 17th day of March, 2009, the defendant took possession or control of a 1957 Chevy Bel Aire.
> 2. The defendant did so with the intent to deprive American Dream Machine/Doug Klein of the 1957 Chevy Bel Aire.
> 3. The property, at the time of the taking, belonged to American Dream Machine/Doug Klein.

Branch argues he is entitled to a new trial as Instruction No. 22 failed to require the State to prove he had the intent to permanently deprive the owner of the vehicle. However, because we have concluded there is not substantial evidence to support the theft conviction, we need not further address this issue.

V. Conclusion.

We reverse the judgment and sentence for theft in the first degree. The State failed to establish sufficient evidence to support the conviction of guilt under section 714.2(1). We remand for dismissal of that charge and for entry of an amended judgment of conviction with respect to the lesser-included offense under section 714.7. Branch shall then be resentenced according to law. We affirm the judgment and sentence of the district court for Branch's remaining convictions.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Mullins, J., concurs; Tabor, J., concurs in part and dissents in part.

TABOR, J. (concurring in part and dissenting in part)

I respectfully dissent on the issue of Branch's intent to permanently deprive. When a defendant intentionally damages the car he takes from another, a fact finder is entitled to infer that he intended to permanently deprive the owner of the property. *See State v. Schminkey*, 597 N.W.2d 785, 791–92 (Iowa 1999). Because a reasonable trier of fact could find Branch purposefully "launched" the 1957 Chevrolet Bel Air through a glass door of the American Dream Machine showroom—causing $10,000 in damage to the classic car—I cannot agree with the majority's conclusion that the evidence was insufficient as a matter of law to support his conviction for first-degree theft.

As the majority explains, a court may infer a defendant's intent to permanently deprive from the facts or circumstances surrounding his conduct and reasonable inferences to be drawn from those facts and circumstances. *Schminkey*, 597 N.W.2d at 789. In *Schminkey,* our supreme court did not have "the typical inferences that can be drawn from a defendant's actions subsequent to the taking" because Schminkey accidently wrecked the car he took without the owner's permission. *Id*. at 791. The *Schminkey* court drew a distinction between a theft case where damage to a stolen car "was not purposeful" and could not support an inference of the defendant's intent to permanently deprive, *see, e.g., Slay v. State,* 241 So.2d 362, 364 (Miss. 1970), and a theft case finding sufficient evidence of intent to permanently deprive where the defendant intentionally drove the car into a brick wall, inflicting severe damage to the vehicle, *see, e.g.*, *State v. Winkelmann,* 761 S.W.2d 702, 708 (Mo. Ct. App. 1988). *Id*. at 791–92. In the first example, from the time of the taking, the defendant only intended to

drive the car temporarily, and then restore it to the possession of the owner. The damage resulted from an accidental collision. In the second example, the defendant's purposeful act resulted in serious destruction of the property, signaling the defendant's intent was not to restore the property to its owner in the same condition he found it. Courts from other jurisdictions agree that purposeful damage to a vehicle can support an inference of the intent to permanently deprive. *See, e.g.*, *People v. Morales*, 24 Cal. Rptr. 2d 847, 853 (1993) (recognizing intent to permanently deprive from defendant's act of smashing window of locked car late at night); *State v. Mitchell*, 939 P.2d 879, 885 (Kan. 1997) (finding damage to stolen van supported an inference of intent to permanently deprive); *State v. Guay*, 543 A.2d 910, 915 (N.H. 1988) (concluding "the defendant's causing approximately $1600 worth of damage to a ten-year-old Chevrolet is circumstantial evidence from which a jury could reasonably infer that the defendant intended to use the car in such a way as to destroy a substantial portion of its economic value"). The common thread in these cases is that in each, the defendant intended to damage to the vehicle, and the damage was to such an extent that even if the property was returned to the owner, its value was substantially less than before the taking.

The instant case falls into the second category. After Branch used a rock to break into the car dealership just before midnight on March 16, 2009, he started the Bel Air without a key, turned on its lights, and drove straight through a $4000 glass garage door, causing $10,000 worth of damage to the vehicle. The majority finds "Branch did not cause the damage to the vehicle with any admitted purpose or apparent plan to destruct the vehicle." I believe the jurors were

entitled to infer that the defendant intended the natural consequences of his actions. *See State v. Chang,* 587 N.W.2d 459, 461 (Iowa 1998) (rejecting sufficiency of the evidence challenge to criminal mischief charge where reasonable jury could have concluded that defendant "deliberately rammed officer Tyler's vehicle in order to effect his escape"). A reasonable jury could have inferred from Branch's purposeful acts that Branch intended to permanently deprive the car dealership of the Bel Air. Or at a minimum, a jury could have inferred Branch intended to inflict serious damage to the Bel Air. The fact that law enforcement apprehended Branch a short distance and short time after he took the car did not "defeat the possibility that there was an intent to permanently deprive the owner of the property at the time of the taking." *See State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004).

While I would not reverse Branch's conviction for first-degree theft on the sufficiency of the evidence, I agree with Branch that his trial attorney was ineffective for not objecting to the marshalling instruction for that offense or in seeking a more specific definition of intent to deprive. Branch credibly argues counsel breached a material duty by not asking the court to instruct the jurors that they must find the defendant had the intent to *permanently* deprive the owner of its car. *See Nickens v. State*, 981 So.2d 1165, 1173 (Ala. Crim. App. 2007). Instruction No. 22 advised the jurors that the State was required to prove that defendant took possession of the car with "the intent to deprive" its owner of the property. The instruction tracked the theft instruction at Iowa Criminal Jury Instruction No. 1400.1. But the court did not provide a more specific instruction defining "the intent to deprive." *See* Iowa Crim. Jury Instruction No. 1400.2 & cmt.

(suggesting that when object of theft is automobile, the court may consider modifying definitional instruction to be more specific under *State v. Donaldson*, 663 N.W.2d 882, 887–88 (Iowa 2003)).

Branch suffered prejudice because the erroneous marshaling instruction allowed the jury to convict him of first-degree theft without having the benefit of a definition of the intent to deprive. *See State v. Schuler*, 774 N.W.2d 294, 300 (Iowa 2009) (remanding for new trial where marshalling instruction was missing element of offense). I would remand for a new trial on the first-degree theft count.