IN THE COURT OF APPEALS OF IOWA

No. 2-1188 / 12-0617
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LORENZO NEIL HAWKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Carroll County, Fredrick E. Breen, Judge.

Lorenzo Hawkins appeals his conviction for theft in the second degree. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Michael L. Bennett, Assistant Attorney General, John Werden, County Attorney, and James Van Dyke, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Lorenzo Hawkins appeals his conviction for theft in the second degree, in violation of Iowa Code sections 714.1 and 714.2 (2011). Hawkins contends his trial counsel was ineffective in failing to request, or object to the omission of, a jury instruction requiring a finding of permanent intent to deprive the owner of the vehicle. We reverse and remand.

***Background Facts and Proceedings*.**

Hawkins lived with Ashlie Kluver for approximately five years. They had a child together but were not married. In early 2011, using her tax refund proceeds, Ashlie purchased a 1993 Mercury automobile from her grandmother. Ashlie's name is on the car's title. Ashlie occasionally gave Hawkins permission to drive her car, including "to the store probably a couple times, and [to take their] daughter to daycare."

Hawkins and Ashlie broke up in early August 2011, and Ashlie moved out. Hawkins did not allow her to remove all of her property from the residence, but Ashlie "took what [she] could." She did not allow Hawkins to drive her car after the breakup.

On the morning of September 11, 2011, Ashlie's car was missing from the spot where she had parked it the previous evening. Ashlie suspected Hawkins had taken the car because there was no broken glass on the ground, Hawkins had done other "things to hurt [her]" previously, and she knew there was a spare key with her belongings that remained at the residence she had shared with Hawkins. Ashlie made a stolen vehicle report to the Carroll Police Department that day, September 11.

Ashlie's sister, Alyssa Kluver, subsequently received a message on her Facebook account from Hawkins in which he denied stealing Ashlie's car, denied having possession of the car, and stated he was in California.

On September 24, 2011, the Carroll Police Department received a notice that Ashlie's car had been recovered in Polk County, at the Value Place Hotel in Ankeny. An officer running license plates on cars in the hotel parking lot, including Ashlie's Mercury, noticed the car was reported as stolen. Through hotel management, officers linked the car to Hawkins. The hotel management knew Hawkins because he used to be a manager there. The officers were directed to the room in which Hawkins was staying.

Officers made contact with Hawkins in his room; he denied knowledge of the car. However, when the officers noticed keys belonging to the car in the room, Hawkins admitted the keys belonged to the car, but stated a friend had dropped the car off at the hotel. The car was impounded and Hawkins was arrested the next day.

The State filed a trial information charging Hawkins with theft in the second degree, in violation of Iowa Code sections 714.1 and 714.2. A jury found Hawkins guilty as charged. The district court suspended a five-year prison sentence, placed Hawkins on probation, and ordered him to reside at a residential correctional facility. Hawkins appeals.

***Discussion*.**

Hawkins argues his trial counsel was ineffective in failing to request, or object to the omission of, a jury instruction requiring the State to prove he intended to permanently deprive Ashlie of her car. We review claims of

ineffective assistance of counsel de novo. *State v*. *Clay*, ___ N.W.2d ___, ___, 2012 WL 6217017, at *3 (Iowa 2012). To prevail on his claim, Hawkins must show that counsel (1) failed to perform an essential duty and (2) prejudice resulted. *See Everett v*. *State*, 789 N.W.2d 151, 158 (Iowa 2010).

The State concedes, and we agree, counsel failed to perform an essential duty by not requesting or objecting to the omission of a jury instruction requiring a finding of permanent intent to deprive on the theft charge against Hawkins. *Clay*, ___ N.W.2d at ___, 2012 WL 6217017, at *6 ("Our well-settled law clearly establishes the intent required for committing theft of an automobile is the '*intent to permanently deprive the owner*' of the property." (quoting *State v*. *Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999))); *State v*. *Morris*, 677 N.W.2d 787, 788 (Iowa 2004) (reaffirming *Schminkey*). We find the record is adequate to address Hawkins's claim of ineffective assistance of counsel on direct appeal. *See Clay*, ___ N.W.2d at ___, 2012 WL 6217017, at *3 (observing ineffective assistance of counsel claims are generally preserved for postconviction relief proceedings, particularly where the challenged actions of counsel implicate trial tactics or strategy which might be explained in a record fully developed to address those issues, but we will resolve the claims on direct appeal where the record is adequate); *State v*. *Fountain*, 786 N.W.2d 260, 267 (Iowa 2010) (preserving claim for possible postconviction proceedings to discern whether counsel's failure was improvident trial strategy or ineffective assistance).

So, we turn to whether prejudice resulted from counsel's failure to perform an essential duty. "Prejudice exists where the claimant proves by a reasonable probability that, but for the counsel's unprofessional errors, the result of the

proceeding would have been different." *State v*. *Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008); *see Strickland v*. *Washington*, 466 U.S. 668, 694 (1984). "A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome." *Maxwell*, 743 N.W.2d at 196.

Hawkins alleges he "was convicted based on an erroneous instruction and the omission of the definition of a legal term" and relies on *State v*. *Shuler*, 774 N.W.2d 294, 299-300 (Iowa 2009) to support his contention that prejudice should be presumed in this case. *Shuler* involved a direct appeal on a flawed jury instruction where error was preserved at trial; the court acknowledged a presumption of error standard for misstatements in instructions defining an element of a crime. *Id.* The court's ruling in *Shuler* is inapplicable to this case, however, because the issue before us is raised in the guise of an ineffective assistance of counsel claim. *Maxwell*, 743 N.W.2d at 196 (finding reliance on cases involving challenges to jury instructions on direct appeal "misplaced" in ineffective assistance of counsel context).

In the ineffective assistance of counsel context, "the instruction complained of must be of such a nature that the resulting conviction violates due process." *Id.* Whether a defendant can show prejudice in cases challenging jury instructions as erroneous largely depends on the facts and circumstances of the case.

As our supreme court has reiterated, "'[T]he facial appeal of such an argument [failure to object to an erroneous jury instruction] is diminished in most situations where practical considerations make it unlikely that the inclusion of a particular element in the marshaling instruction would have produced any

difference in the verdict of the jury.'" *State v*. *Tejeda*, 677 N.W.2d 744, 755 (Iowa 2004) (quoting *State v*. *Broughton*, 450 N.W.2d 874, 876 (Iowa 1990)). For instance, there cannot be a showing of prejudice "when there is no suggestion the instruction contradicts another instruction or misstates the law." *Maxwell*, 743 N.W.2d at 197. Moreover, no prejudice results "when the submission of a superfluous jury instruction does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred." *Id.*

In this case, Hawkins's ineffective assistance of counsel claim is premised on the failure of his trial counsel to object to the jury instructions on the ground that counsel failed to require the State to establish intent to permanently deprive as an element of theft. At the outset, we accept Hawkins's contention the instructions were erroneous in regard to the elements of theft. *See*, *e*.*g*., *Schminkey*, 597 N.W.2d at 788–89. 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. *Id.*

Accordingly, we must determine whether there is a reasonable probability the jury would have reached a different verdict assuming a jury instruction requiring a finding of intent to permanently deprive the owner of the vehicle was properly given. This analysis is particularly difficult in this case because 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.* at 789. 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.*

The mere fact Hawkins took Ashlie's car without her consent does not give rise to an inference he intended to permanently deprive her of her car. *See State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004). This case presents a number of other facts, however, which allow an inference Hawkins intended to permanently deprive Ashlie of her vehicle. *See Schminkey*, 597 N.W.2d at 789–92 (analyzing cases from other jurisdictions where permanent intent to deprive had been found upon the defendant's taking of a vehicle).

Significantly, Hawkins took Ashlie's car and kept it for nearly two weeks. *Cf. Morris*, 677 N.W.2d at 788 (observing 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). He took the car in Carroll, drove it to Ankeny, and kept the keys with him in his hotel room. *See Schminkey*, 597 N.W.2d at 791–92 (observing intent to permanently deprive can be indicated by defendant's use of vehicle as his own).

At the time the car was discovered, it was still in Hawkins's possession. Meanwhile, Hawkins denied having possession of the car to Ashlie's sister and claimed he was in California. He denied knowledge of the car to the officers that came to his hotel room; when officers spotted the car keys, he changed his story and claimed an unidentified friend had dropped off the car at the hotel. If indeed Hawkins was merely temporarily using Ashlie's car without her permission, his statements and actions certainly spoke otherwise. *See id*. at 792 (relying 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 to find insufficient evidence of an intent to permanently deprive); *see also Morris*, 677 N.W.2d at 788 ("Abandoning the vehicle and fleeing upon observing the presence of police was an act that would ordinarily assure that the truck would be returned to its owner.").

In addition, Ashlie testified she and Hawkins had recently broken up, she moved out, and she had not allowed Hawkins to use her car since. She also stated she was scared of Hawkins, he had not allowed her take all her belongings from their residence, and that he had done things to hurt her in the past. Although the jury would have been free to reject her testimony as not credible, *see State v*. *Leckington*, 713 N.W.2d 208, 214 (Iowa 2006), it shed some light by which to judge Hawkins's state of mind at the time he took her vehicle.

Hawkins contends Ashlie gave him permission to use her car previously and this time he merely took the car without her permission. The facts and circumstances of this case certainly reveal Hawkins did something more than just take the car for a joyride. However, the prosecution by no means presented overwhelming evidence to show Hawkins intended to permanently deprive Ashlie of her vehicle. *Cf*. *Maxwell*, 743 N.W.2d at 197 (considering the overwhelming evidence of the defendant's guilt coupled with the negligible effect the superfluous jury instruction could have had on the verdict, and finding there was no reasonable probability that but for counsel's failure to object to the instruction the result of the proceedings would have been different).

Further, there is no question the jury instructions misstated the law; they were missing an integral requirement of the crime of which Hawkins was convicted.[1] Here, we cannot say the effect of the omission on the jury was merely speculative. *Cf*. *Tejeda*, 677 N.W.2d at 755 (finding no prejudice resulted in an ineffective-assistance-of-counsel analysis where the effect of the superfluous jury instruction was merely speculative and the prosecution presented ample evidence of the defendant's guilt).

Upon our review, we find Hawkins has proved there is a reasonable probability that had an instruction requiring a finding of intent to permanently deprive the owner of the vehicle been properly given, the jury would have reached a different verdict.[2] Accordingly, Hawkins has shown prejudice resulted from counsel's failure, and that he did not have effective assistance of counsel. He is entitled to a new trial.

REVERSED AND REMANDED.

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[1] As our supreme court has observed, in cases where a "fundamental proposition the State had to establish" was missing from the jury instructions, "the trial court was obligated to instruct on it sua sponte." *State v. Goff*, 342 N.W.2d 830, 837 (Iowa 1983).

[2] Hawkins also argues the record does not contain substantial evidence to support his conviction. Although we have determined, under the ineffective-assistance-of-counsel rubric, there is a reasonable probability that but for the counsel's unprofessional errors the result of the proceeding would have been different, that is not to say the record does not reveal substantial evidence to support a finding Hawkins intended to permanently deprive the owner of the car. We therefore decline Hawkins's invitation to simply vacate his conviction and remand for entry of judgment on the lesser offense of operating without owner's consent.