IN THE COURT OF APPEALS OF IOWA

No. 3-863 / 12-1918
Filed October 2, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WAYNE MICHAEL POWELL,
Defendant-Appellant.

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

A defendant contends (1) the record contains insufficient evidence to support the jury's finding of guilt on a theft charge and (2) his trial attorney was ineffective in failing to object to a marshalling instruction that included an uncharged alternative. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Joe Grubisich, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Tabor, J., takes no part

VAITHESWARAN, P.J.

After large amounts of copper pipe turned up missing from a plumbing store, the State charged Wayne Powell with second-degree burglary and second-degree theft. A jury subsequently found Powell not guilty of second-degree burglary, but guilty of second-degree theft. On appeal, Powell contends (1) the record contains insufficient evidence to support the jury's finding of guilt on the theft charge and (2) his trial attorney was ineffective in failing to object to a marshalling instruction that included an uncharged alternative.

I. Sufficiency of the Evidence—Second-Degree Theft

The jury was instructed that the State would have to prove the following elements of theft:

> 1. On or about the seventh day of June 2012, the defendant did one of the following:
> (a) took possession or control of copper sticks and rolls; or
> (b) exercised control over the copper knowing or having reason to know it was stolen
> 2. The defendant did so with the intent to deprive Triton Plumbing of the copper sticks and rolls.
> 3. The property, at the time of the taking, belonged to Triton Plumbing.

Powell contends the record contains insufficient evidence to establish that he "took the copper." This contention implicates element (1)(a) above.

The State concedes that because the jury found Powell not guilty of second-degree burglary, which required proof of specific intent to commit a theft, "the jury necessarily found" he did not commit the taking. The State argues, however, the evidence "did establish the crime of theft by exercising control over

stolen property" under element (1)(b).[1] Viewing the evidence in the light most favorable to the State, we agree that the evidence established theft by exercising control. *See State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984) (setting forth the standard for reviewing a motion for judgment of acquittal based upon a challenge to the sufficiency of the evidence).

A reasonable juror could have found that Powell had been doing some concrete work at the plumbing store before the copper tubing was found missing. When a store employee discovered the shortfall, she contacted three scrap yards and advised them of the loss.

Meanwhile, Powell drove to one of the scrap yards in his employer's truck. According to the employer, he did not have permission to use the truck that morning. Powell sold the yard "brand-new pieces of copper tubing." The yard gave Powell a receipt, obtained a copy of his driver's license, and noted the license plate number of the truck he was driving. Police located the truck and apprehended Powell as he ran from the vehicle.

A reasonable juror could have found that Powell "exercised control over the copper." A reasonable juror also could have found that Powell knew or had reason to know the copper was stolen. While Powell correctly notes that "there was no testimony" as to "what he knew about the status of the copper," "[k]nowledge can be inferred from a defendant's unexplained possession of an item that was recently stolen." *State v. Stephen*, 537 N.W.2d 792, 794 (Iowa Ct.

[1] The State preliminarily asserts that Powell's motion for judgment of acquittal did not raise the issues he is currently asserting. We disagree.

App. 1995). For that reason, Powell could have known the copper was stolen even if he was not found to have taken it.[2]

Substantial evidence supports the jury's finding of guilt on the "exercising control" alternative of theft. *See* Iowa Code § 714.1(4) (2011).

II. Ineffective Assistance of Counsel

Powell next argues his trial attorney was ineffective in failing to object to element (1)(b) above as an uncharged alternative to theft. *See* Iowa Code § 714.1(4). Citing *State v. Williams*, 328 N.W.2d 504, 505 (Iowa 1983), *State v. Hershberger*, 534 N.W.2d 464, 465–66 (Iowa Ct. App. 1995), and *State v. Conger*, 434 N.W.2d 406, 409 (Iowa Ct. App. 1988), Powell contends:

> [T]he jury did not believe beyond a reasonable doubt that the defendant was the person who initially took the copper and other items. Therefore the jury must have decided that the defendant was guilty of theft under the "exercising control" alternative to theft; a subsection with which the defendant was never charged. Trial counsel should have objected to the "exercising control" alternative included in the theft marshaling instruction.

The State concedes that the "exercising control" alternative was not charged in the trial information and concedes that "[b]ecause Powell was not charged with exercising control, the State would have had to amend the trial information to conform with the evidence presented." *See* Iowa R. Crim. P. 2.4(8) ("Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged."). The State argues Powell's substantial rights would not have been

[2] Powell also argues there is no evidence the copper came into his possession while in Iowa. This issue was not raised in the motion for judgment of acquittal and, accordingly, was not preserved for our review. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

prejudiced by an amendment and, accordingly, Powell cannot prove his ineffective-assistance-of-counsel claim.

"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." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). We preserve this claim for postconviction relief to afford Powell's trial attorney an opportunity to respond to the claim. *See State v. Shortridge*, 589 N.W.2d 76, 84 (Iowa Ct. App. 1998).

AFFIRMED.