

IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1147

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RODNEY L. HANNEMAN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE MARLITA A. GREVE, JUDGE

APPELLEE'S BRIEF

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**STATEMENT OF THE ISSUE PRESENTED FOR
REVIEW**

I. Counsel Effectively Represented the Defendant At Trial; Sufficient Evidence Exists In the Record to Support the Defendant’s Conviction For Theft By Taking.

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State v. Williams, 328 N.W.2d 504 (Iowa 1983)
State v. Zbornik, 248 Iowa 450, 80 N.W.2d 735 (Iowa 1957)
Iowa Code § 714.1(1)
Iowa Code §702.14
Model Penal Code § 223.2(1) (Am. Law Inst. 1962)

ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Rodney L. Hanneman appeals his conviction for second-degree theft as a habitual offender. The Honorable Marlita A. Greve presided over the proceedings in Scott County, Iowa. The issue in the appeal is whether counsel was ineffective in failing to properly challenge the sufficiency of the evidence in the motion for judgment of acquittal.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On February 17, 2017, Davenport police officer Michael Stegall was on patrol when he saw a motorcycle "popping a wheelie" on 3rd Street in the city. Trial Tr. p. 129, lines 12-21. The officer noticed that the motorcycle had no license plates or turn signals. Trial Tr. p. 129, lines 12-24.

When the motorcycle stopped for a traffic light at 4th Street, the officer initiated a traffic stop. Trial Tr. p. 129, line 25 through p. 130, line 10. Officer Stegall approached the vehicle and asked the driver, who he identified as Hanneman, to turn the vehicle off. Trial Tr. p. 130, lines 2-10. Hanneman turned off the motorcycle but could not provide a valid license or registration, proof of insurance for the motorcycle, or a driver's license. Trial Tr. p. 130, lines 2-10. The officer looked for a VIN but most of the seventeen numbers had been scratched off. Trial Tr. p. 130, line 18 through p. 131, line 2. Only five numbers were visible. Trial Tr. p. 130, line 18 through p. 131, line 2. The motorcycle had been painted and no key was required to start it. Trial Tr. p. 130, line 18 through p. 131, line 2. Rather, the motorcycle had an ignition switch. Trial Tr. p. 130, line 18 through p. 131, line 2, p. 132, lines 15-25.

The officer impounded the motorcycle until the owner could provide proof of ownership and insurance. Trial Tr. p. 135, lines 16-19. A few days after the stop, Officer Stegall discovered that Cody Pratt reported his Yamaha motorcycle had been stolen. Trial Tr. p. 134, line 19 through p. 135, line 7. He also noted that the last five

numbers of the VIN were the same as the motorcycle he seized. Trial Tr. p. 134, line 19 through p. 135, line 7.

Police notified Cody Pratt that they may have found his stolen motorcycle. Trial Tr. p. 78, line 10 through p. 79, line 5. Pratt went to the impound lot and identified the motorcycle as his although it had been modified in several ways. Trial Tr. p. 78, line 10 through p. 79, line 5, p. 82, line 1 through p. 96, line 25, Exhs. 3-5; Exh. App. 3-7. Pratt testified that the gas cap was broken, it had been spray painted black, it had a “kill switch” on it, the wiring had been cut, it had no license plate, no mirrors, no turn signals, and the passenger foot pegs had been drilled off. Trial Tr. p. 82, line 1 through p. 96, line 25. Pratt noted that the motorcycle was not a common model and parts for it were hard to find. Trial Tr. p. 106, lines 12-23. He paid between \$3500-\$3800 for the motorcycle when he bought it in 2013 in Wisconsin. Trial Tr. p. 108, lines 4-16. He obtained an estimate of \$2700 to repair the damage and modifications that had been done to the motorcycle after it was stolen. Trial Tr. p. 103, line 18 through p. 104, line 1. Additional facts will be discussed below as relevant to the State’s case.

ARGUMENT

I. **Counsel Effectively Represented the Defendant At Trial; Sufficient Evidence Exists In The Record to Support the Defendant’s Conviction For Theft By Taking.**

Preservation of Error

The State does not agree that Hanneman’s sufficiency challenge was properly preserved. At the close of the State’s case, defense counsel moved for judgment of acquittal in the following manner:

. . . the basis for [the motion for judgment of acquittal] is that the State has not met its burden such that a reasonable juror could find my client guilty of theft in the second degree per the taking theory, *which is to say that while the State, I think, has been able to prove up possession and control*, it has not proved that there is a specific intent by my client to deprive Cody, at least not beyond a reasonable doubt, as to that piece of property. . .

Trial Tr. p. 138, lines 6-18 (emphasis added). In his motion for judgment of acquittal, defense counsel conceded that the State proved Hanneman possessed and controlled the motorcycle. Trial Tr. p. 138, lines 6-18. Notably, that is *not* the claim on which Hanneman now makes on appeal. Rather, he now claims that the State did not prove he “took” the motorcycle.

Hanneman cannot have it both ways. He cannot concede below that sufficient evidence exists on the possession and control and assert the opposite is true on appeal. Because he failed to properly

challenge the claim below, he has not preserved error on his sufficiency challenge. *State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015) (the principles of error preservation are based on fairness: it is fundamentally unfair to fault the court for failing to correctly rule on an issue it was never given the opportunity to consider and it is also unfair for a party to remain silent in the trial court in the face of error and then assert the claim on appeal if the outcome is unfavorable). Error was not preserved.

Hanneman alternatively argues that counsel was ineffective in failing to lodge the proper objection. The State does not contest error preservation as to the claim of ineffective assistance of counsel and will address the claim in this context. *State v. Ondayog*, 722 N.W.2d 778 (Iowa 2006) (ineffective assistance of counsel claims are not bound by traditional error preservation rules).

Standard of Review

A court reviews constitutional challenges such as a claim of ineffective assistance of counsel de novo. *Ondayog*, 722 N.W.2d at 783.

Merits

Counsel effectively represented Hanneman at trial. To prove otherwise, Hanneman must demonstrate that counsel failed to lodge the proper challenge to the evidence in his motion for judgment of acquittal. He cannot do so because counsel neither breached a duty nor can Hanneman establish the requisite prejudice.

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both that counsel’s performance was deficient and that prejudice resulted. *Id.* at 687.

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Counsel is presumed to have acted competently and within the wide range of reasonable professional assistance. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). To overcome this presumption, Hanneman must present an

affirmative basis establishing inadequate representation. *Millam*, 745 N.W.2d at 721.

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Id.* at 722; *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001). A reviewing court may dispose of an ineffective-assistance claim if the defendant fails to prove *either* the duty or the prejudice prong. *State v. Lane*, 743 N.W.2d 178, 184 (Iowa 2007).

A. Breach of duty

Hanneman cannot show counsel breached a duty in failing to challenge the State's evidence regarding the "taking" element of second degree theft. The district court instructed the jury that to convict Hanneman of second-degree theft, the State had to prove:

Alternative A:

1. On or about the 17th day of February 2017, in Scott County, Iowa, the defendant took possession or control of a Yamaha motorcycle.
2. The defendant did so with the specific intent to permanently deprive Cody Pratt of the motorcycle.
3. At the time of the taking, the motorcycle belonged to Cody Pratt.

OR

Alternative B:

1. On or about the 17th day of February, 2017, in Scott County, Iowa, the defendant took possession or control of a motor vehicle.
2. The defendant did so with the specific intent to permanently deprive Cody Pratt of the motor vehicle.
3. At the time of the taking, the motor vehicle belonged to Cody Pratt.
4. The motor vehicle's value did not exceed \$10,000.

Jury Instr. 16; App. 34.

This instruction follows Iowa Code section 714.1(1) which provides that a person commits “theft by taking” when he or she “[t]akes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.” Iowa Code § 714.1(1); *State v. Nall*, 894 N.W.2d 514, 517-18 (Iowa 2017). For purposes of theft by taking, the term “property” includes both “tangible and intangible property, labor, and services.” Iowa Code §702.14.

This theft provision “is modeled after the Model Penal Code, with slight variation.” *State v. Donaldson*, 663 N.W.2d 882, 885 (Iowa Ct. App. 2003). Under the Model Penal Code, “[a] person is

guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.” Model Penal Code § 223.2(1), at 162 (Am. Law Inst. 1962). Use of the term “unlawful” in the Code “implies the lack of consent or authority.” *Id.* cmt. 3, at 166. “[T]he critical inquiry is thus twofold: whether the actor had control of the property no matter how he got it, and whether the actor’s acquisition or use of the property was authorized.” *Id.* cmt. 2, at 166.

The State established Hanneman’s unlawful possession of the motorcycle without the consent of Cody Pratt. Pratt reported the theft of his distinctive Yamaha WR250X motorcycle on February 17, 2017. Trial Tr. p. 78, lines 5-21. Pratt bought the motorcycle in 2013 for a price between \$3500 and \$3800. Trial Tr. p. 108, lines 4-16.

A Davenport police officer saw Hanneman driving a motorcycle on one wheel on February 17, 2017, and stopped him. Trial Tr. p. 129, line 12 through p. 130, line 10. Hanneman did not have a license plate on the motorcycle nor did he have the registration for it. Trial Tr. p. 130, line 2 through p. 131, line 2. In addition, only five of the seventeen numbers of the VIN were visible. Trial Tr. p. 130, line 18 through p. 131, line 12. The other twelve numbers had been scratched

off. Trial Tr. p. 130, line 18 through p. 131, line 12. The motorcycle had been spray painted black, the ignition had been changed and replaced with a switch, the wiring had been cut, the tail pipe removed, the motorcycle had no license plates and no mirrors. Trial Tr. p. 130, line 18 through p. 131, line 12, p. 132, lines 15-25. Despite these modifications, Pratt identified the motorcycle as his. Trial Tr. p. 78, line 14 through p. 79, line 2, p. 79, line 10 through p. 83, line 3. Pratt also testified that he did not give Hanneman permission to possess his motorcycle. Trial Tr. p. 104, lines 2-11.

Pratt took his motorcycle to a repair shop and obtained an estimate to repair the motorcycle. Trial Tr. p. 103, line 20 through p. 104, line 1. The estimated cost of repair the motorcycle was \$2700. Trial Tr. p. Trial Tr. p. 103, line 20 through p. 104, line 1. In light of this evidence, the State established both alternatives of second-degree theft that were marshalled. That is, the State proved Hanneman possessed Pratt's motorcycle without his authority or permission. The evidence also established that Hanneman possessed a motor vehicle without the owner's permission and that the value of the vehicle did not exceed \$10,000. Because the evidence establishes

each and every element, counsel had no duty to claim that the State failed to show a “taking” occurred.

Hanneman argues, however, that the evidence was insufficient to establish that he “took” Pratt’s motorcycle from his porch or when it was taken. Def. Brief at 22. The same issue was raised and rejected in *State v. Hershberger*, 534 N.W.2d 464, 465 (Iowa Ct. App. 1995), a case with a nearly identical factual scenario to the case at bar. In *Hershberger*, Stanley DeYoung moved his Honda motorcycle from his garage to his porch on July 3, 1993, and left the key in the motorcycle. 534 N.W.2d at 465. On July 6th, he noticed that the motorcycle was missing. *Id.* DeYoung contacted the police and reported it stolen. *Id.*

Also on July 6th, a sheriff’s deputy saw Hershberger and Justin Baird replacing parts on a motorcycle of a different color in Baird’s garage. *Id.* The deputy testified that the VIN of the motorcycle Hershberger was working on matched the VIN of DeYoung’s stolen motorcycle. *Id.* Hershberger told the deputy his aunt had given him the motorcycle the night before. *Id.*

The defendant in *Hershberger* admitted that he possessed the motorcycle but challenged the sufficiency of the evidence as to

whether the State proved he “took” the motorcycle. *Id.* at 465. In *Hershberger*, the Court of Appeals found that “a person cannot commit theft by taking without also being in possession of stolen property.” *Id.* at 466 (citing *State v. Conger*, 434 N.W.2d 406, 409-10 (Iowa Ct. App. 1988)). Theft by taking and exercising control over stolen property “represent different points of time within one crime.” *Conger*, 434 N.W.2d at 409-10. They are alternative means of committing the offense. *State v. Williams*, 328 N.W.2d 504, 506 n. 3 (Iowa 1983). The court also stated: “we agree with the State’s position defendant’s possession and control of the motorcycle are sufficient evidence to support a finding that there was a taking.” *Hershberger*, 534 N.W.2d at 466.

The court’s holding in *Hershberger* has been reaffirmed in subsequent cases. In *State v. Donaldson*, 663 N.W.2d 882, 885 (Iowa 2003), the court noted:

We now define theft as the possession or control of another’s property with intent to deprive the owner thereof. The key to our statute is the words “possession or control.” In determining the meaning of “possession” and “control,” we look to the Model Penal Code for guidance as our statute is modeled after it. The Model Penal Code contemplates “control” of the object to begin when the defendant “use[s] it in a manner beyond his authority.” Model Penal Code § 223.2 at 166. The method of exerting control over the object of the theft is important only insofar as it “sheds light on the authority of the actor to behave

as he did.” *Id.* Our statute replaces the common law element of “taking” with “possession.” The Model Penal Code provides a person commits theft if he or she “unlawfully takes, or exercises unlawful control over” the property of another. *Id.* at 162.

Donaldson, 663 N.W.2d at 885. In summary, the court held that “possession or control” begins and a theft is completed when the actor secures dominion over the object and uses it in a manner beyond his authority. *Id.*; accord *State v. Nall*, 894 N.W.2d 514, 520 (Iowa 2017). Thus, Hanneman committed the theft when he possessed the motorcycle and used in a manner that was without the permission of its rightful owner, Pratt.

Hanneman also challenges the State’s lack of direct evidence of the theft. He argues that there were no witnesses to the theft and the State did not present any physical evidence to show Hanneman was present when the motorcycle was taken. Def. Brief at 22-23.

Although the State’s case is circumstantial, circumstantial evidence is equally as probative as direct evidence. *State v. Huser*, 894 N.W.2d 472, 491 (Iowa 2017) (“Direct and circumstantial evidence are equally probative.”) The jury could also infer that Hanneman’s possession of a recently stolen motorcycle with a feeble explanation for how he obtained it, a poor paint job, and no license or registration established he unlawfully possessed the motorcycle and committed a

theft. *State v. Zbornik*, 248 Iowa 450, 456, 80 N.W.2d 735, 738 (Iowa 1957) (“What looks like a duck and walks like a duck, and quacks like a duck is probably a duck.”); *see generally State v. Jones*, 289 N.W.2d 597, 600 (Iowa 1980) (unexplained possession of recently stolen property by the accused justifies an inference he received it with guilty knowledge); *State v. Hall*, 371 N.W.2d 187, 189-90 (Iowa Ct. App. 1985); *State v. Lewis*, 242 N.W.2d 711, 724 (Iowa 1976) (instruction on inference that a defendant’s possession of recently stolen goods could establish he was the burglar was constitutional). Because the evidence supports the jury’s verdict, counsel had no duty to move for judgment of acquittal on whether a taking occurred.

Additionally, defense counsel’s decision to challenge the State’s evidence on whether Hanneman had the specific intent to deprive Cody Pratt of the motorcycle was reasonable, albeit unsuccessful. *Ondayog*, 722 N.W.2d at 786 (improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel.). In the context of the theft of a motor vehicle, there are several cases where the court has reversed a defendant’s conviction for insufficient evidence to

establish the intent to deprive. *State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004) (officers' apprehension of vehicle within a short period of time after it was reported missing "severely limits" the circumstantial evidence from which the defendant's intent may be inferred; abandoning a vehicle in the presence of police was an act that would ordinarily assure the truck would be returned to its rightful owner); *State v. Schminkey*, 597 N.W.2d 785, 790 (Iowa 1999) (the mere fact that defendant took a pickup truck without the consent of the owner did not give rise to an inference that he intended to permanently deprive the owner of the vehicle). Counsel breached no duty in failing to challenge the sufficiency of the evidence on "taking."

B. Prejudice

Hanneman must also demonstrate prejudice. To do so, he must show that had counsel moved for judgment of acquittal on the "taking," the motion would have been successful, and he would not have been convicted of theft. He cannot sustain this burden.

As set forth above, and incorporated by reference herein, the State had a strong case against Hanneman and proved he "possessed and controlled" Pratt's motorcycle without Pratt's consent or

authority. See above I-A. Hanneman cannot demonstrate prejudice and his claim must be denied.

CONCLUSION

The defendant's second-degree theft conviction must be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case involves a routine challenge to the sufficiency of the evidence. Oral argument is not necessary to resolve the issue. In the event that argument is scheduled, the State requests to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,185** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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