

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) Supreme Court 17-1147
)
 RODNEY L. HANNEMAN,)
)
 Defendant-Appellant.)

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

APPELLANT'S BRIEF AND ARGUMENT

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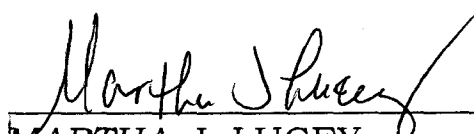
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CERTIFICATE OF SERVICE

On the 7th day of May, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Rodney L. Hanneman, # 6085175, Mt. Pleasant Correctional Facility, 1200 East Washington, Mt. Pleasant, IA 52641.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

DID THE STATE PRESENT SUFFICIENT EVIDENCE TO PROVE HANNEMAN COMMITTED THEFT BY TAKING IN VIOLATION OF IOWA CODE SECTION 714.1(1)?

Authorities

State v. Heard, 636 N.W.2d 227, 229 (Iowa 2001)

State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)

State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981)

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984)

State v. Crone, 545 N.W.2d 267, 270 (Iowa 1996)

State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976)

In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1075 (1970)

Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979)

State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998)

State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984)

State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980)

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Iowa Code § 714.1(1) (2017)

State v. Williams, 328 N.W.2d 504, 506 n.3 (Iowa 1983)

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U.S. Const. amend VI

Iowa Const. art. I, §10

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: Appellant Rodney Hanneman appeals following a jury trial, judgment and sentence, to the charge of theft in the second degree as an habitual offender in violation of Iowa Code section 714.2(2) and 902.9 (2017).

Course of Proceeding and Disposition Below: On March 20, 2017, the State charged Hanneman with theft in the second degree in violation of Iowa Code section 714.2(2). The Trial Information did not specify the theft alternative alleged. (TI) (App. pp. 5-6). Hanneman was arraigned on March 23, 2017. Hanneman stood on his right to a speedy trial. (3/23/17 PTC Order) (App. p. 7). After one continuance, the jury trial was scheduled for May 22, 2017 (4/14/17 PTC Order) (App. p. 10).

On May 17, 2017, the State moved to amend the Trial Information. (5/17/17 Motion to Amend TI) (App. pp. 13-14).

The amended Trial Information charged theft in the second degree in violation of Iowa Code section 714.2(2) and specified the alternative as “theft in the second degree by taking property belonging to Cody Pratt”. The amended Trial Information also included the habitual offender sentencing enhancement.

(5/17/17 Amended TI) (App. pp. 15-16). Hanneman resisted the State’s motion to amend. (5/17/17 Tr. p. 3L17-p. 4L14). The court granted the motion to amend. (5/17/17 Order to Amend TI) (App. pp. 19-20).

Just prior to trial, the State filed another motion to amend the Trial Information. The State sought to amend the Trial Information to charge the general language “theft in the second degree, in violation of Section 714.2(2) of the Code of Iowa.”

(5/23/17 Motion to Amend TI p. 1) (App. p. 21). The prosecution wished to include the theory of the degree of theft based upon the motor vehicle alternative. The State also asserted “[t]hat this case has always concerned the taking of a motor vehicle belonging to Cody Pratt. (5/23/17 Motion to Amend TI p. 2) (App. p. 22). The district court scheduled a

hearing the morning of trial. (5/23/17 Order to Amend TI) (App. pp. 32-33).

At the hearing, the prosecutor acknowledged he had accidentally filed an amended Trial Information he did not want. (Tr. p. 30L9-p. 31L22; 5/23/17 8:08 AM Amended TI) (App. pp. 24-27). The prosecutor wished to amend the Trial Information to charge “theft in the second degree, in violation of section 714.2(2)” and “the habitual offender language.” The State intended to argue multiple theories: taking and exercising control over stolen property. (Tr. p. 32L7-23, p. 46L24-p. 47L6; 5/23/17 9:47 AM Amended TI) (App. pp. 28-31). Hanneman resisted the amendment. (Tr. p. 33L22-p. 17, p. 37L23-p. 39L4). The district court granted the State’s motion to amend the Trial Information to include the broad language of theft in the second degree but ruled the State could not argue the alternative theory of theft by exercising control over stolen property. (Tr. p. 47L7-p. 48L8, p. 55L12-p. 56L20, p. 59L16-p. 60L12).

A jury trial began on May 22, 2017. (Tr. p. 1L1-25). On May 24, 2017, the jury found Hanneman guilty as charged. (Order for PSI) (App. pp. 35-37). On July 6, 2017, Hanneman was sentenced to be incarcerated for a period not to exceed fifteen years. Hanneman was also ordered to pay \$3,395.88 in restitution to Cody Pratt. (Sentencing Order) (App. pp. 38-40). A timely Notice of Appeal was filed on July 12, 2017. (Notice) (App. p. 41).

Facts: On February 17, 2017, Cody Pratt reported his 2008 Yamaha WR250X motorcycle stolen. (Tr. p. 73L7-19, 77L14-17, p. 78L8-13, p. 106L12-14). Pratt had last observed the motorcycle on February 14th. It had been parked in the corner of his back porch area. (Tr. p. 77L6-p. 78L4, p. 107L22-p. 108L1). The motorcycle had a wheel lock in place and was locked. (Tr. p. 77L6-13, p. 114L24-p. 116L8). In order to move the motorcycle, someone would have had to drill through the bracket of the triple clamp to break the wheel lock or they would have had to drag the bike out of the yard. (Tr. p.

16L9-p. 117L20). Pratt checked with his neighbors who did not see anything. (Tr. p. 78L8-13).

Sometime during the evening of February 17th, Officer Stegall observed a motorcycle accelerate “rapidly popping a wheelie bringing the bike off the ground.” The motorcycle did not have a license plate or turn signals. Stegall conducted a traffic stop. Hanneman was the driver of the motorcycle. (Tr. p. 128L18-p. 129L24). Hanneman did not produce proof of registration. Stegall then looked at the VIN which was scratched off except the last five numbers. (Tr. p. 130L11-p. 131L17). Dispatch attempted to run the VIN but they were not able to get any information. (Tr. p. 133L18-p. 134L8). The motorcycle was impounded until the owner had proof of ownership and insurance. (Tr. p. 135L14-19).

Stegall was off work a couple of days after the February 17th traffic stop. When he returned to work, he checked the BOLOS which are things police are looking for, such as stolen vehicles, or missing people. Stegall noticed a Yamaha motorcycle reported stolen and he looked at his notes. The last

five numbers of the VIN matched the bike he had stopped. (Tr. p. 134L19-p. 135L7).

Stegall contacted Pratt about the motorcycle. Pratt met Stegall at the tow yard. Pratt identified the motorcycle as belonging to him. (Tr. p. 78L14-21, p. 79L3-16, p. 82L1-15, p. 135L12-19). All but the last five numbers of the VIN had been scratched off. (Tr. p. 92L1-3, p. 95L24-p. 96L5; Ex. 8) (Ex. App. p. 15). The motorcycle had been painted, the ignition key had been changed to a switch, the tailpipe bracket holding the turn signals and license plate had been removed, the footpegs had been removed, the front turn signals had been removed, and stickers had been removed. (Tr. p. 84L11-p. 86L5; Exs. 1, 2, 3, 4) (Ex. App. pp. 3-10). Pratt paid the tow fee and took the motorcycle home. (Tr. p. 78L14-21).

Pratt did not know Hanneman. Pratt testified he did not give Hanneman permission to possess his motorcycle. (Tr. p. 104L2-11).

Pratt obtained an estimate to repair the motorcycle. The estimate was approximately \$2700. (Tr. p. 103L18-p. 104L1;

Ex. 6a) (Ex. App. pp. 13-14). Pratt believed the motorcycle was valued at \$3500. (Tr. p. 113L5-24).

Kira Pauley testified that Hanneman had a Yamaha motorcycle in early February. (Tr. p. 147L9-23, p. 148L25-p. 149L3). Pauley had several pictures of the motorcycle which were taken on February 7th. (Tr. p. 150L2-p. 152L17; Exs. A, B) (Ex. App. pp. 17-20). Hanneman was driving the motorcycle he had had since early February when he was arrested on February 17th. (Tr. p. 164L9-19). Pauley did not make a claim to get the bike back because she did not have a title for the motorcycle. (Tr. p. 156L13-19).

ARGUMENT

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE HANNEMAN COMMITTED THEFT BY TAKING IN VIOLATION OF IOWA CODE SECTION 714.1(1).

Standard of Review.

The Court reviews challenges to the sufficiency of the evidence for corrections of legal error. State v. Heard, 636 N.W.2d 227, 229 (Iowa 2001). The alternative claim of

ineffective assistance of counsel is accorded de novo review.
State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

Preservation of Error.

Hanneman moved for a judgment of acquittal. (Tr. p. 138L1-p. 140L20). The motion for judgment of acquittal preserved error on the issue presented. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981). If this Court determines defendant's motion for judgment of acquittal was insufficient to preserve error on the deficiency in the State's proof, counsel's failure to preserve error deprived him of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). See State v. Crone, 545 N.W.2d 267, 270 (Iowa 1996) (motion for judgment of acquittal does not preserve error where there was no reference to specific grounds in district court.).

Discussion.

The ultimate burden is on the State to prove every fact necessary to constitute the offense with which a defendant has

been charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1075 (1970)). Due process guarantees that no person shall suffer the onus of a conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of each and every element of the offense. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979).

The jury's findings of guilt are binding on appeal if supported by substantial evidence. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence is such evidence as would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984). In deciding if there is substantial evidence the court views the evidence in the light most favorable to the state, but it considers all the evidence presented at trial and not just the evidence which supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The evidence must raise a fair inference of guilt as to each

essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient. State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992). Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt. State v. Truesdell, 679 N.W.2d 611, 618-19 (Iowa 2004).

The State was required to prove the following elements of theft in the second degree:

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.

(Ins. 16) (App. p. 34). See Iowa Code § 714.1(1) (2017). The State failed to prove Hanneman committed theft by taking in violation of Iowa Code section 714.1(1).

The 1979 revision of the Code consolidated the many separate theft offenses of the pre-revised criminal code into a single offense, theft, under section 714.1. State v. Williams, 328 N.W.2d 504, 506 n.3 (Iowa 1983) (citing 4 J. Yeager and R. Carlson, Iowa Practice: Criminal Law and Procedure §§ 311-12 (1979)). Section 714.1 defines ten ways in which theft may be committed. Iowa Code § 714.1 (2017). Theft is a single offense and the subsections are merely an alternative means of committing the same offense. State v. Williams, 328 N.W.2d 504, 506 n.3 (Iowa 1983).

The Iowa theft statute is modeled after the Model Penal Code, with slight variations. State v. Donaldson, 663 N.W.2d

882, 885 (Iowa 2003)(citing Model Penal Code § 223.2 cmt. 2, at 165 (1980)). The commentaries to the Model Penal Code explain the intended scope of section 223.2(1), theft by unlawful taking or disposition.¹

This consolidation is accomplished by the provision in Subsection (1) that a person is guilty of theft if he “unlawfully takes, or exercises unlawful control over”, the property of another. As is elaborated below, acts traditionally classified as larceny are encompassed principally by the language of “unlawfully takes” the property of another. Acts traditionally classified as embezzlement are covered chiefly by the provision dealing with one who “exercises unlawful control” over another’s property.

Model Penal Code § 223.2 cmt. 2, at 163 (1980).

The words “unlawfully takes” have been chosen to cover the assumption of physical possession or control without consent or authority, which, as noted above, includes the typical common-law category of larceny. The language “exercises unlawful control” applies at the moment the custodian of property begins to use it in a manner beyond his authority and thus includes the typical embezzlement situation. The word “unlawful” in each instance implies the lack of consent or authority and specifically the absence of any defense under Section 2.11, Section 223.1(3) or Article 3.

* * *

The typical charging under the Model Penal Code provision should specify that the actor unlawfully took or exercised

¹ Model Penal Code section 223.2(1) provides: Movable Property. 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.

control over the property of another with the requisite purpose, thus making the method of exercising control relevant only the extent it shed light on the authority of the actor to behave as he did. Apart from the requirement of a purpose to deprive another of his property, the 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. at 165-166.

Iowa's theft statute varies from the Model Penal Code as the Iowa legislature enacted separate alternatives for each type of theft. Iowa Code § 714.1 (2017). Iowa Code section 714.1(1), theft by taking, is the wrongful taking of possession or control. Iowa Code § 714.1(1) (2017); 4 J. Yeager and R. Carlson, Iowa Practice: Criminal Law and Procedure § 313 (1979). The definition of theft by "taking" is derived from the former crime of larceny. Id. "Larceny" is defined as the wrongful taking and carrying away by a person of personal property of another from any place, with a felonious intent to convert it to the taker's own use without the consent of the owner. State v. Jackson, 101 N.W.2d 731, 735 (1960). However, the Iowa theft statute no longer requires "asportation"

or carrying away. State v. Donaldson, 663 N.W.2d 882, 885 (Iowa 2003).

Recently, in Nall, the Supreme Court confirmed the distinction between the alternative means to commit theft. In order to “take” possession or control under section 714.1(1), a person must acquire property without the consent or authority of another. State v. Nall, 894 N.W.2d 514, 524 (Iowa 2017).

This conclusion affirms the importance of the method of obtaining property under section 714.1 and avoids rendering section 714.1(3) and 714.1(6) superfluous. Any other interpretation would have the practical effect of transforming our theft-by-taking statute into a catch-all provision, which we do not believe the legislature intended. To the contrary, it seems clear that the legislature based section 714.1(1) on the prior crime of larceny as modified by the Model Penal Code provision on theft by taking. This interpretation also accounts for the rule of lenity.

Id.

The State failed to prove Hanneman “took” Pratt’s motorcycle from his back porch as required by Iowa Code section 714.1(1). The evidence showed that the motorcycle was removed sometime between February 14th and February 17th. (Tr. p. 77L14-p. 78L11, p. 107L2-8). The record does

not show when it was actually taken as Pratt did not notice the bike was missing until sometime on February 17th. There were no witnesses to the removal of the bike. (Tr. p. 78L8-13). The bike was locked. The only way to move it would have been to drill out the locking mechanism, pick it up or drag it out of the yard. (Tr. p. 77L6-13, p. 114L24-p. 117L20). The State presented no physical evidence from Pratt's back porch or yard to show Hanneman was present when the motorcycle was taken. Hanneman made no admissions to taking the motorcycle.

The State's evidence centered on Hanneman's possession of the motorcycle on February 17th and the alterations made to the motorcycle. The alterations to the motorcycle do not lend any support to the element Hanneman took the motorcycle.

Compare State v. Hershberger, 534 N.W.2d 464, 465-66 (Iowa Ct. App. 1995)(evidence that defendant was in possession of motorcycle and trying to change its appearance sometime after motorcycle was removed from owner's porch was sufficient to support finding that there was a taking.). There was no

evidence presented when the motorcycle was altered or that Hanneman altered it.

The evidence demonstrates Hanneman had possession of the motorcycle. However, this possession alone does not prove he took the motorcycle from Pratt's property. Cf. State v. Lewis, 242 N.W.2d 711, 723 (Iowa 1976)(where a party in possession of recently stolen property is charged with burglary there must be evidence in the record relating to the surrounding circumstances for the jury to consider in determining whether the evidence warrants a finding beyond a reasonable doubt of the presumed fact defendant committed the breaking and entering from the proved fact he possessed recently stolen property.). See also State v. Thornburgh, 220 N.W.2d 579, 585-86 (Iowa 1974)(a jury instruction allowing the jury to infer the defendant stole the property when he had unexplained possession of the recently stolen property was not unconstitutional). The entire record must be considered in assessing the strength of the State's evidence whether an inference Hanneman took the motorcycle based on his

possession of recently stolen property can be made. State v. Lewis, 242 N.W.2d at 723.

“Recent” . . . is not necessarily measured by the number of hours or days or weeks involved. The nature of the articles, and the circumstances of the case are pertinent elements. The length of time is a question to be considered by the jury together with all other factors in the case.

As to the character of the stolen goods it depends to some extent on whether they are readily and easily transferable; light or heavy; easy or hard to identify.

State v. Jones, 289 N.W.2d 597, 599 (Iowa 1980)(other citations omitted).

Pratt did not know when his motorcycle was taken from his property. There is a minimum three-day window in which the bike could have been removed from the porch. When Hanneman was stopped driving the motorcycle, it had already been altered. While it is unclear how much time had passed between the police report and the traffic stop, it is reasonable to conclude the alterations were not made on February 17th because of the extent of the modifications. The motorcycle was easily transferable and there was plenty of time for a transfer to occur. The record does not show a reasonable inference can be

made that there was not an intermediate change of possession between the theft of the motorcycle and the traffic stop. The State presented no additional evidence to make the inference Hanneman was the one who “took” the motorcycle.

A rational juror could find Hanneman had possession of Pratt’s motorcycle. However, from this fact alone, that juror could not reasonably conclude Hanneman was the person who took the bike off the porch. The court erred in failing to grant counsel’s motion for judgment of acquittal. This Court must reverse the conviction and remand for dismissal.

Alternatively, Hanneman received ineffective assistance if error was not preserved. A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). The test for determining whether a defendant received effective assistance of counsel is “whether under the entire record and totality of the circumstances counsel’s performance was within the range of normal competency.” Snethen v. State, 308 N.W.2d 11, 14 (Iowa

1981). In order to establish ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

If trial counsel failed to alert the district court to the deficiency in the State's proof that Hanneman "took" the motorcycle, counsel's failure to preserve error deprived Hanneman of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). As outlined above, the State failed to prove Hanneman committed theft by taking in violation of Iowa Code section 714.1(1) (2017). The Supreme Court decided Nall on May 5, 2017. State v. Nall, 894 N.W.2d 514 (Iowa 2017). Hanneman's trial began on May 22, 2017. (Tr. p. 1L1-25). Counsel had a duty to know the status of the law. Defense

counsel breached an essential duty by failing to make a specific motion for judgement of acquittal. Hanneman was prejudiced by counsel's failure to make a specific motion for judgment of acquittal. Had counsel made the specific motion, the district court would have been informed of the State's failure of proof and granted the motion. Additionally, a specific motion would have preserved error for appellate review. This Court must reverse the conviction and remand for dismissal.

CONCLUSION

Rodney Hanneman respectfully requests this Court reverse his conviction for theft in the second degree as a habitual offender and remand for an entry of judgment of acquittal.

NONORAL SUBMISSION

Counsel requests the case be submitted without oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 2.97, and that amount has been paid in full by the Office of the Appellate Defender.

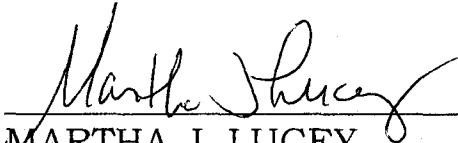
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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION**

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) because:

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