

**IN THE COURT OF APPEALS OF IOWA**

No. 0-662 / 09-0898  
Filed November 10, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**LINDA KAY WILSON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,  
Judge.

A defendant appeals her judgment and sentence for multiple counts of  
theft, claiming ineffective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Justin Allen, Assistant County  
Attorney, for appellee.

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

**VAITHESWARAN, P.J.**

Five Apple iPods were purchased from several Target stores around the Des Moines metro area. The iPod boxes were returned to the stores sans iPods. Cash was received for the ostensible returns. The iPods were later sold on eBay.

The State charged Linda Wilson with two counts of theft in connection with this series of transactions. A jury found her guilty of both charges. On appeal, Wilson claims her trial attorney was ineffective in failing to properly challenge the sufficiency of the evidence supporting the jury's findings of guilt.<sup>1</sup>

A claim of ineffective assistance of trial counsel based on the failure of counsel to challenge the sufficiency of the evidence can normally be decided on direct appeal. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). If the record

fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted. On the other hand, if the record reveals substantial evidence, counsel's failure to raise the claim of error could not be prejudicial.

*Id.* We find the record adequate to decide this issue.

As to both theft counts, the district court instructed the jury that, (1) during a designated time period, "the defendant took possession or control of property

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<sup>1</sup> "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. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). At trial, defense counsel simply stated, "At this time the defendant would move for a judgment of acquittal on the basis that the State has failed to prove each and all of the elements in the crimes alleged by a reasonable doubt. There is insufficient evidence to submit this to the jury." This was insufficient to preserve error. *See id.* Therefore, Wilson correctly contends we must review her sufficiency-of-the-evidence challenge under an ineffective-assistance-of-counsel rubric. *See id.* at 616.

belonging to Target Stores,” (2) “[t]he defendant did so with the intent to deprive Target Stores of the property,” (3) “[t]he property, at the time of the taking, belonged to or was in the possession of Target Stores.” See Iowa Code § 714.1(1) (2009) (stating a person commits theft 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”).

Wilson disputes the first element, whether she “took possession or control of property belonging to Target stores.” She characterizes the “property” as the cash received on the return of the empty iPod boxes. Based on this characterization, she argues:

Target willingly gave the money to the Defendant in exchange for the return of the resealed iPod package. No evidence was presented at trial to indicate that Defendant took the money surreptitiously from Target, without the knowledge of Target, or by force. Instead, the evidence merely indicates that, knowingly and willingly, Target gave the money to the Defendant when presented with a package in its original seal.

In Wilson’s view, her conduct may have amounted to “theft by deception” under section 714.1(3), but does not amount to “theft by taking” under section 714.1(1).

“Property” is defined as “anything of value.” Iowa Code § 702.14. We assume without deciding that the “property” was the cash refund Wilson received, rather than the iPod. That cash belonged to Target, not Wilson, and a reasonable juror could have found Wilson “took possession of ” the cash without Target’s knowledge that it was getting nothing in return. This is especially true when the first element of the crime, “took possession of,” is combined with the second uncontested element, “with the intent to deprive Target of the property.” A reasonable juror could have found that Wilson knew the iPod box did not

contain an iPod when she exchanged it for cash. A juror could have made this finding based on the following evidence.

Target employees summarized the store's detailed inventory tracking procedures, offered video stills of the purchases and returns of the five iPods, identified the sale of an iPod on the online auction site eBay which had the identical identifier as one of the iPods Wilson purportedly returned, and followed up with an undercover sham purchase of an iPod through e-mail addresses connected with Wilson. Serendipitously for the State, the Target employee assigned to investigate the thefts ran into Wilson at a grocery store, recognized her from the video stills, and recorded her car's license plate number. Armed with this information, police executed a search warrant on a car and found an envelope addressed to Wilson from the undercover Target investigator who made the sham purchase on eBay.

We conclude the State presented more than substantial evidence that Wilson "took possession of" Target's cash with the intent to deprive Target of the property. As the jury's findings of guilt were supported by substantial evidence, Wilson's ineffective-assistance-of-counsel claim necessarily fails. See *Truesdell*, 679 N.W.2d at 616. We affirm Wilson's judgment and sentences for theft in the third degree and theft in the second degree.

**AFFIRMED.**