IN THE COURT OF APPEALS OF IOWA

No. 0-873 / 10-0071
Filed December 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN AARON DAVOLT,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, Cynthia H. Danielson, Judge.

Justin Davolt appeals from the judgment and sentence entered upon his conviction of first-degree theft. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce McDonald, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

Justin Davolt appeals from the judgment and sentence entered upon his conviction for first-degree theft in violation of sections 714.1(1) and 714.2(1) (2009). Davolt contends there is insufficient evidence to support his conviction for first-degree theft because the State failed to prove he intended to permanently deprive Donald McCullough of the vehicle. Finding no meaningful distinction between the facts and circumstances in the present case and those in *State v. Schminkey*, 597 N.W.2d 785, 790–91 (Iowa 1999), we reverse and remand.

On January 17, 2009, Donald McCullough and three friends drove McCullough's pickup truck from Missouri to the Ridgewood Lounge outside of Fort Madison, Iowa, arriving between 7:30 and 8:30 p.m. McCullough parked his truck in the parking lot, left a set of keys in the ignition, and locked the truck. Approximately an hour later, McCullough discovered his truck was missing from the parking lot and one of his friends reported it stolen.

At 10:50 p.m., Lee County Deputy Sheriff John Farmer was dispatched to a one-vehicle rollover accident less than twenty miles away from the Ridgewood. McCullough's pickup truck was unoccupied and upside down approximately twenty feet from the pavement. Farmer noted a broken cell phone, an opened bottle of whiskey, a marijuana pipe, and a blood stain on the driver-side visor.

It was later determined that a cell phone found in the cab of the pickup belonged to Justin Davolt: a picture on the cell phone included an image of Scott

Smith of Farmington, Iowa;[1] Smith told law enforcement the cell phone belonged to Davolt. Smith also told law enforcement Davolt told him "he had been stranded at the Ridgewood and stole a truck to get home and wrecked it." A DNA test was conducted on the blood on the visor, which was determined to be Davolt's.

We review claims of insufficient evidence for errors at law. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *Id.* (citation omitted). We consider all the evidence, viewing it in the light most favorable to the State, and including legitimate inferences and presumptions. *Id*.

One of the elements of theft is the intent to permanently deprive the owner of the property. Iowa Code § 714.1(1). Proof that the defendant acted with the specific purpose of depriving the owner of his property requires a determination of what the defendant was thinking when an act was done. *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999). 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.*

This case again presents us with the problem of attempting to read a defendant's mind at the time the alleged crime was committed in order to divine

[1] Farmington is about thirty miles from Fort Madison. The accident site was on a road one could take to drive from Fort Madison to Farmington.

the defendant's motives. This problem is unique to cases involving theft of a motor vehicle because our state legislature has made operating a vehicle without the owner's consent a separate crime. *See* Iowa Code § 714.7. In *Schminkey*, 597 N .W.2d at 789, our supreme court said:

> Schminkey correctly argues that an intent to permanently deprive the owner of his property is an essential element of theft under section 714.1(1). The legislature's distinction of the crime of theft from the crime of operating a vehicle without the owner's consent—the existence or absence of an intent to permanently deprive the owner—supports this conclusion.

The mere fact that Davolt took the pickup without McCullough's consent does not give rise to an inference that he intended to permanently deprive McCullough of the vehicle. *See id.* at 791.

In *Schminkey*, the defendant took a pickup without the owner's consent and crashed the vehicle shortly thereafter. The court stated, "Because Schminkey wrecked the pickup before he could dispose of it, we do not have the typical inferences that can be drawn from the defendant's actions subsequent to the taking." *Id.* at 791. Here, like *Schminkey*, the defendant wrecked the pickup shortly after he took it, which limits the circumstantial evidence from which intent to deprive can be inferred. *See also State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004) (noting that law enforcement's apprehension of the suspect within a short time of the taking of the vehicle severely limited the circumstantial evidence from which intent to deprive can be inferred).

The *Schminkey* court also noted there were no admissions by the defendant or statements from other witnesses that would indicate the defendant's "purpose in taking the vehicle." 597 N.W.2d at 792. Under such circumstances,

the court concluded there was insufficient evidence to support a conviction of theft. Here, the only statements from other witnesses that would indicate why the defendant took the vehicle come from Scott Smith, who testified Davolt told him he got stranded at the Ridgewood and took the truck to get home. Although the jury was free to reject the testimony of Smith as not credible, *State v. Leckington*, 713 N.W.2d 208, 214 (Iowa 2006), there is little other evidence by which to judge Davolt's state of mind at the time he took the vehicle. We must conclude that here, as in *Schminkey*, the inferences to be drawn from the facts and circumstances are insufficient to support a finding that the defendant intended to permanently deprive the owner of the property. *Schminkey*, 597 N.W.2d at 792.

Because the evidence is insufficient to support a conviction for first-degree theft, we conclude the district court erred in denying Davolt's motion for new trial. We reverse Davolt's conviction for first-degree theft. We remand to the district court to enter an amended judgment of conviction for operating without owner's consent and resentencing according to law. *See Morris*, 677 N.W.2d at 789.

REVERSED AND REMANDED.