IN THE COURT OF APPEALS OF IOWA

No. 2-292 / 11-0927
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALLEN BRADLEY CLAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Jeffrey L. Poulson, Judge.

Defendant appeals his conviction and sentence asserting his trial counsel rendered ineffective assistance and the district court erred in finding sufficient evidence to support his conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, and Darin J. Raymond, County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Defendant, Allen Bradley Clay, appeals his conviction and sentence for burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5 (2009); operating a motor vehicle without the owner's consent, in violation of Iowa Code section 714.7; and operating while intoxicated, second offense, in violation of Iowa Code section 321J.2. Clay asserts his trial counsel rendered ineffective assistance when she failed to object to hearsay testimony, prejudicing Clay, and resulting in a violation of his right to confrontation. He further asserts his counsel should have objected to what he claims was prosecutorial misconduct. Finally Clay asserts the district court erred in finding sufficient evidence supported his conviction for burglary in the second degree as the State failed to prove he had the requisite intent to commit a theft. We affirm his convictions but preserve some issues for possible postconviction relief proceedings.

I. BACKGROUND AND PROCEEDINGS.

Lucky Overman returned home from his job as a truck driver early in the morning of July 25, 2010. He put the keys to his vehicle on the counter and went to bed. He was awakened sometime later by a noise in the kitchen. Believing it to be his cat, he did not get up to investigate. However, he soon saw through the window the headlights to his vehicle come on. He got up and looked out the window to see his vehicle speed way with one shadowy figure behind the wheel.

Overman called 911 to report the theft. While waiting for the police to arrive, Overman received a text message on his cell phone from Kayla VanEs, Clay's girlfriend, informing Overman that Clay was "three sheets to the wind," had

Overman's vehicle, and was likely heading to Clay's mother's house in South Dakota.

After the arrival of Lieutenant Treloar of the Le Mars Police Department, Overman discovered his storage shed door was open, a putty knife was found stuck into the side of the trailer next to the door handle on the front door, and Clay's bicycle was in his yard. Lt. Treloar was able to open the front door to the house using the putty knife and determined this was likely how the intruder got into the house to take the keys to the vehicle. Overman communicated the information he received from VanEs to Lt. Treloar, who then contacted VanEs directly. VanEs informed Lt. Treloar that Clay had been drinking all day and was possibly en route to his mother's house in South Dakota. Lt. Treloar communicated this information to dispatch in an attempt to locate the vehicle. Lt. Treloar then left Overman's residence to complete paperwork at the station.

A short while later, Overman received a phone call from Ashley Arens, Clay's sister, informing Overman that Clay came to her house and she was driving Overman's car back with Clay. Overman contacted police again to provide the updated information. Arens and Clay arrived at Overman's house with the vehicle shortly before the police returned. Clay entered Overman's house without a word. Arens informed Overman she observed Clay driving down her driveway. She was able to get him stopped and drove the vehicle back to Overman's house.

When the police arrived, they arrested Clay. As Clay was leaving Overman's house, he told Overman's son, "I love f***ing my friends over." Arens was questioned by Lt. Treloar, and she informed the officer she observed

headlights coming down her driveway and thought it was her sister. The vehicle then turned around at a high rate of speed. Arens got in her personal vehicle and chased the car for approximately six miles before it pulled over. She then observed her brother, Clay, get out of the car. He walked up to her and informed her he had stolen Overman's vehicle. Arens believed Clay was intoxicated, and she observed a cut to the back of his head and one on his right elbow. Arens requested that no criminal charges be filed against Clay.

The State filed a trial information on August 13, 2010, charging Clay with burglary in the second degree, operating a vehicle without the owner's consent, and operating while intoxicated, second offense. The case was tried to the jury on April 12, 2011, and the jury returned a guilty verdict on each charge the following day. Sentencing proceeded on June 27, 2011, where Clay was sentenced to an indeterminate term of incarceration not to exceed ten years on the burglary conviction. This sentence was suspended and Clay was placed on probation for three years following his release from prison on the other two counts. Clay was sentenced to two years each on the other two counts, and the sentenced were ordered to be served consecutively. He was also assessed the applicable surcharges, fines, and costs. Clay appeals.

II. SCOPE OF REVIEW.

As Clay's claim that trial counsel rendered ineffective assistance is premised on his Sixth Amendment right to counsel, our review is de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Challenges to the sufficiency of evidence to support a conviction are reviewed for correction of errors at law. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008).

III. INEFFECTIVE ASSISTANCE.

To prove counsel rendered ineffective assistance, Clay must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). Both elements must be proved by a preponderance of the evidence or the claim will fail. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Counsel is presumed to be competent, and we will not find ineffective assistance based on miscalculated trial strategies or mere mistakes in judgment. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). To prove counsel was ineffective, Clay must prove his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Palmer*, 791 N.W.2d 840, 850 (Iowa 2010). Counsel's performance is measured objectively under the prevailing professional norms considering all the circumstances. *Id*.

To prove he suffered prejudice, Clay must demonstrate there is a reasonable probability that the result of the trial would have been different but for counsel's errors. *Ledezma*, 626 N.W.2d at 143. A reasonable probability means a probability "sufficient to undermine confidence in the outcome." *Bowman v. State*, 710 N.W.2d 200, 206 (Iowa 2006).

Generally, ineffective-assistance-of-counsel claims are preserved for postconviction relief actions as this provides the defendant an opportunity to fully develop the evidence at a hearing. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). The hearing also permits counsel an opportunity to explain his or her conduct. *State v. Slayton*, 417 N.W.2d 432, 436 (Iowa 1987). While we may address an ineffective-assistance-of-counsel claim on direct appeal when we find

the record adequate, if we find the record inadequate to resolve Clay's claims, we may preserve them for postconviction proceedings. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010).

Clay asserts counsel was ineffective for failing to object to Overman's testimony regarding the text message he received from Kayla VanEs and the phone conversation he had with Ashley Arens. He also claims counsel should have objected to Lt. Treloar's testimony regarding his conversations with these women. Without a more fully developed record, we are unable to determine whether trial counsel had a strategic reason for not objecting to this testimony. We note both VanEs and Arens were deposed before trial, and both women were subpoenaed for trial, though only Arens appeared. We are also unable to determine whether Clay suffered prejudice as a result of counsel's failure to object. As the record is inadequate, we preserve this ineffective-assistance-of-counsel claim for possible postconviction proceedings.

Clay also asserts counsel was ineffective in failing to object to Lt. Treloar's testimony regarding his conversations with VanEs and Arens,[1] as he claims this testimony violated his constitutional right to confront the witnesses against him under the Sixth Amendment of the United States Constitution and article I, section 10 of the Iowa constitution. The State asserts Clay cannot establish prejudice even if it was assumed the statements violated Clay's right of confrontation, because Lt. Treloar's testimony was merely cumulative of Overman's testimony, to which Clay's counsel did not object. As stated above,

[1] Clay does not assert on direct appeal that Overman's testimony regarding the communication he had with VanEs and Arens violated Clay's right to confrontation. Thus, we will not address it in this appeal.

based on the current record before us, we are unable to determine whether counsel breached an essential duty in failing to object to Overman's testimony pertaining to his communication with VanEs and Arens. As a result, we are not able to conclude whether Lt. Treloar's statements were in fact cumulative. This claim must also be preserved for possible postconviction proceedings.

Finally, Clay asserts counsel was ineffective by failing to object to two instances of what he characterizes as prosecutorial misconduct during the prosecutor's rebuttal closing statement. First, Clay asserts it was improper for the prosecutor to explain his reasons for not calling VanEs and Arens during trial. The prosecutor during rebuttal stated:

> Certainly, the State would have loved to have Kayla VanEs testify live. She was under subpoena and she failed to appear this morning. Officer Treloar testified under oath as a certified veteran officer of many, many years with enormous experience about his conversations with her. He had dictated those into a report. He testified live from memory about them and, again, if there was any concern about the veracity of those statements, any concern in the truthfulness, [defense counsel] in her cross-examination, had an opportunity to take a shot at it and didn't. I will submit to you because they are truthful statements, because they are what happened and what Ms. VanEs relayed to law enforcement is what the police presented.
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> Ms. Arens was here. The State did not call her because of her being a relative of the defendant, being a sister and not wanting to put her through that. Again, the preference was to allow the witness, Lt. Treloar, testify about that briefly about that interview.

Clay asserts the information as to why these witnesses did not testify was outside the record, and the prosecutor was essentially telling the jury to believe the hearsay statements because of this additional information explaining why they did not testify.

The State asserts the prosecutor made these statements in rebuttal only after defense counsel pointed out in her closing argument that these two key witnesses failed to testify. Defense counsel stated:

> It's a difficult process to try to evaluate the credibility of a statement when you haven't seen the demeanor of that witness yourself. Neither of those people were present for you to evaluate the truthfulness, any possible inconsistencies. It's a difficult decision to make as to whether things being said at the time of an incident are accurate. . . . And you're stuck with the job of trying to evaluate who you believe when they're not put before you to testify.

Because the statements made by the prosecutor explaining why the two key witnesses did not testify were made only after defense counsel pointed out their absence, the State asserts the prosecutor did nothing improper. We agree. We find the prosecutor's remarks regarding the reasons VanEs and Arens were not called as witnesses to be an invited and fair comment in light of defense counsel's remarks. *See Brewer v. State*, 444 N.W.2d 77, 84 (Iowa 1989). In addition, we agree with the State that Clay cannot show he was deprived of a fair trial as a result of these statements. *See Graves*, 668 N.W.2d at 869 (holding to prove prosecutorial misconduct, the defendant must prove there was misconduct and the misconduct resulted in prejudice to such an extent as to deny him a fair trial).

The second instance of prosecutorial misconduct that Clay asserts his counsel should have but failed to object to was the prosecutor's statements on rebuttal regarding the law defining the intent to deprive element of the theft jury instruction. In rebuttal the prosecutor said:

> As to the discussion about the theft element, the intent to deprive is an element of every theft and implicitly part of the burden. There's no hiding the ball here, Folks. But there is a

> difference. [Defense counsel's] argument would be absolutely true and I would agree with her if the element of the offense said to permanently deprive, meaning "I took it. I pawned it. You ain't ever getting it back. I burned it. I sold it. I hid it from you so you would never get it back." That's permanently depriving.
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> That is not the definition in this instruction. It's not the definition of the burglary instruction. Just an intent to deprive. And that can be temporary that he took it. It was outside Mr. Overman's control and knowledge and that is a temporary deprivation of the use of that property. Very technical. Sounds like a damn lawyer argument. But I'm sorry. That's what it is.
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> If Mr. Overman woke up with a sick child and needed to go to the hospital and he needed to use that vehicle in the two to three hours it was missing, he was deprived of the use of that vehicle for that two to three hours until he got it back. That's the type of deprivation.
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> Again, if the instruction and other areas of the law did require me to prove a permanent deprivation, then [defense counsel's] argument would be true. In this case it fails. Borrowing a vehicle is enough. Borrowing it without somebody's permission, knowledge, express consent is a temporary deprivation to the owner of the use of that property.

Clay asserts the prosecutor's statement that the State did not have to prove permanent deprivation was correct according to the instruction given but clearly wrong in light of *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999), wherein the supreme court established "an intent to permanently deprive the owner of his property is an essential element of theft under section 714.1(1)." Instruction No. 18 provided the elements of theft to the jury as follows:

> A theft is committed when:
> 1. An individual takes possession or control of property belonging to another.
> 2. An individual has the intent to deprive the owner of the property.
> 3. The property, at the time of the taking, belonged to or was in the possession of the owner.

Because his trial counsel failed to object to the prosecutor's statements in the rebuttal closing argument and the jury instructions were silent with respect to the

necessary length of deprivation,[2] Clay claims the prosecutor was thereby permitted to "instruct" the jury on the use of the wrong standard.

We agree with the State that in this case, even if we assume without deciding the prosecutor's statement was an incorrect statement of the law under *Schminkey*, 597 N.W.2d at 789,[3] Clay cannot prove he was prejudiced by the statement. The jury was instructed that they were to decide the guilt of the defendant based on the law in the instructions, which did not contain the definition of "intent to deprive" under 714.1(1), as construed by our case law. The jury was also told that the statements, arguments, questions, and comments by the lawyers are not evidence. The jury is presumed to follow the instructions of the court, and there is no evidence they did not follow the instructions in this case. *State v. Ondayog*, 722 N.W.2d 778, 785 n.2 (Iowa 2006).

In addition, we find Clay cannot prove there is reasonable probability that the result of the trial would have been different. If defense counsel had objected to the rebuttal argument, the court could have clarified for the jury the intent required under the burglary charge, which is the intent to commit a theft. This

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[2] Clay's trial counsel did not object to the theft jury instruction, and thus, any claim that the instruction did not comply with the supreme court's ruling in *Schminkey*, 597 N.W.2d at 789, is waived. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) ("We have repeatedly held that timely objection to jury instructions in criminal prosecutions is necessary in order to preserve any error thereon for appellate review."). In addition, on appeal Clay does not assert trial counsel was ineffective for failing to object to Instruction No. 18; thus, right or wrong, this instruction became the law of the case. *Id.* ("Failure to timely object to an instruction not only waives the right to assert error on appeal, but also 'the instruction, right or wrong, becomes the law of the case.'" (internal citations omitted)).

[3] As will be discussed below, Clay was charged with and convicted of burglary, not theft. For a conviction for burglary, all the jury needed to find was "an intent to commit a theft," not that the State proved all elements of theft. Thus, failing to inform the jury of the correct definition of intent to deprive under *Schminkey*, 597 N.W.2d at 789, was harmless in this case since Clay was not charged with theft, but rather burglary.

intent "can be inferred from an actual breaking and entering of a building." *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000). The evidence in this case, as will be discussed below, supports a finding Clay had the intent to commit a theft. Therefore, we find because Clay cannot prove there is a reasonable probably the result of the trial would have been different, Clay cannot establish counsel was ineffective. *See Ledezma*, 626 N.W.2d at 142 ("Both elements [of an ineffective-assistance-of-counsel claim] must be proven by a preponderance of the evidence.").

IV. SUFFICIENCY OF THE EVIDENCE.

Finally, Clay asserts the district court erred in denying his motion for judgment of acquittal as there was insufficient evidence to prove he had the intent to permanently deprive Overman of his vehicle. Under a sufficiency of the evidence claim, a jury's verdict is binding on us if it is supported by substantial evidence. *State v. Isaac*, 759 N.W.2d 817, 819 (Iowa 2008). Evidence is considered substantial "if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *Jorgensen*, 758 N.W.2d at 834. We view all evidence in the light most favorable to the State to determine whether the State has proven every fact necessary to constitute the crime charged. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). As Clay does not assert the jury instructions given in this case contained incorrect statements of the law, we will examine his claim based on the law the district court gave to the jury.[4] *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

[4] As stated in the footnote above, trial counsel did not object to the theft jury instruction as not complying with the requirements of *Schminkey*, 597 N.W.2d at 789, nor does Clay

Burglary is defined in Iowa Code section 713.1 as:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Under *State v. Mesch*, 574 N.W.2d 10, 14 (Iowa 1997), when charging a defendant with burglary, the State is required to specify the felony, assault, or theft the defendant is accused of intending to commit after breaking and entering, and the court is required to instruct the jury on the elements of the chosen underlying crime. In this case, the underlying crime was theft, and the district court instructed on the elements of theft, which included an intent to deprive the owner of the property, but the instruction did not specify the necessary length of deprivation. *See* Iowa Code § 714.1; *Schminkey*, 597 N.W.2d at 789. However, identifying the underlying crime does not mean the State must prove the defendant did in fact commit the underlying crime. What is required for burglary to be proven is that the defendant had the intent to commit the underlying crime. *See* Iowa Code § 713.1.

In this case, the jury was instructed on the elements of burglary as follows:

> 1. That on or about the 25th day of July, 2010, the defendant entered or broke into a residence of Lucky Overman at 23 Orchard, Armel Acres, Le Mars, Plymouth County, Iowa.
> 2. The residence was an occupied structure as defined in Instruction No. 17.

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assert on appeal that counsel's failure to object to this jury instruction resulted in the ineffective assistance of counsel. As such, this claim is waived, and we will decide the sufficiency of the evidence claim based solely on the jury instructions which were approved by both sides and the district court.

> 3. The defendant did not have permission or authority to enter the residence.
> 4. One or more persons were present at the time the defendant entered the residence.
> 5. The residence was not open to the public.
> 6. The defendant did so with the specific intent to commit a theft.

Nowhere in the burglary jury instruction was the State required to prove Clay had the intent to deprive Overman of his vehicle, permanently or otherwise. The intent element required to prove burglary is the intent to commit a theft. This intent "can be inferred from an actual breaking and entering of a building." *Oetken*, 613 N.W.2d at 686; *see also State v. Sangster*, 299 N.W.2d 661, 663 (Iowa 1980) ("[D]efendant's intent to commit theft could reasonably be inferred from the evidence of surreptitious entry and other circumstances."); *State v. Clay*, 213 N.W.2d 473, 480 (Iowa 1973) ("An intent to steal may be inferred from the actual breaking and entering of a building which contains things of value or from an attempt to do so.").

In this case, we find the evidence sufficient to prove Clay had the intent to commit a theft when he entered Overman's home. The evidence established on the night in question, the home was locked. Clay's bicycle was found in Overman's yard, but had not been there when Overman came home approximately thirty minutes earlier. The shed doors had been pried open, and Overman's putty knife, which had been in the shed, was stuck in the wall beside the door handle by the trailer's front door. After receiving the text message and phone call described above, Overman observed Ashley Arens drive his vehicle back to his trailer with an intoxicated Clay as her passenger. After being arrested, Clay remarked to Overman's son, "I love f***ing my friends over." With

this evidence along with the intent inference that is permitted in burglary cases, we find there was sufficient evidence to prove each and every element of burglary in the second degree.

V. CONCLUSION.

In conclusion we find the record on direct appeal is inadequate for us to determine whether counsel rendered ineffective assistance when she did not object on hearsay or confrontation clause grounds to Overman's and Lt. Treloar's testimony pertaining to statements made by VanEs and Arens. We preserve these claims for possible postconviction relief proceedings. We find Clay has failed to prove counsel rendered ineffective assistance when his trial counsel did not object to what Clay claims was prosecutorial misconduct in the State's rebuttal closing argument. Finally, we find sufficient evidence supports Clay's conviction for burglary in the second degree.

AFFIRMED.

Bower, J., concurs; Tabor, J., dissents.

TABOR, J. (dissenting)

I respectfully dissent. I would find Clay's trial counsel ineffective for not objecting to the prosecutor's closing rebuttal argument, and would reverse and remand for a new trial.

The prosecutor informed the jury that the State did not have to prove Clay had the intent to permanently deprive the victim of his property when he entered the victim's residence: "That's not the definition in this instruction. It's not the definition of the burglary instruction. Just an intent to deprive. And that can be temporary that he took it. . . . Borrowing a vehicle is enough."

In telling the jurors that it was enough for the State to show Clay had an intent to *temporarily* deprive the owner of his property, the prosecutor misstated the law.[5] In *State v. Fluhr*, 287 N.W.2d 857, 867 (Iowa 1980), *overruled on other grounds by State v. Kirchoff*, 452 N.W.2d 801 (Iowa 1990), our supreme court held the record in a theft case must demonstrate more than the defendant's intent to temporarily deprive the owner of the property under the definition at Iowa Code section 714.1(1). In *State v. Berger*, 438 N.W.2d 29, 31 (Iowa Ct. App. 1989), our court reversed a burglary conviction because the trial court did not instruct the jury that the intent to commit a theft—necessary to establish one alternative of burglary—required proof of the intent to permanently deprive (or to withhold the property for an extended period of time or under circumstances where the property lost its value or the property is disposed of in a manner making it unlikely the owner will recover). Ten years later in *State v. Schminkey*,

[5] The State does not defend the trial prosecutor's comments on appeal, instead arguing: "Assuming, arguendo, that the statements were incorrect, Clay cannot show that he was deprived of a fair trial as a result."

597 N.W.2d 785, 789 (Iowa 1999), our supreme court held the intent to permanently deprive the owner of property is an essential element of theft. Most recently in *State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004), the court reaffirmed in a per curiam decision that the State was required to offer evidence of the defendant's intent to permanently deprive to support a conviction for auto theft.

Trial counsel had a material duty to object to the prosecutor's inaccurate articulation of the intent-to-deprive element and Clay suffered prejudice as a result of counsel's omission. The prosecutor admitted that "if the instruction and other areas of the law did require me to prove a permanent deprivation, then [defense counsel's] argument would be true." In fact, because the evidence did not clearly support Clay's intent to permanently deprive, the prosecutor charged him with operating a motor vehicle without the owner's consent rather than auto theft in the second count of the trial information. But for counsel's failure to object to the prosecutor's closing, a reasonable probability existed that Clay would not have been convicted of burglary.

The majority reasons that Clay cannot show he was prejudiced by the prosecutor's incorrect statement because the instructions did not define the intent to deprive and the jury was instructed that the lawyer's arguments were not evidence. The majority also notes that trial counsel did not object to the instruction listing "the intent to deprive" as one of the elements of theft and that omission is not raised as ineffective assistance on appeal. But the absence of an instruction defining the intent-to-deprive element did not give the prosecutor carte blanche to offer the jury a definition that contradicts more than three decades of

case law interpreting the statutory phrase. *See State v. Mayes*, 286 N.W.2d 387, 392 (Iowa 1979) (limiting counsel's arguments to the trial court's determination of the law through jury instructions, and restricting argument on the law and its application to evidence "[s]o long as [counsel] accurately states the law"). It is improper for the prosecutor to misstate the law in closing argument, and when such a misstatement goes to a critical issue in the case, it compromises the fairness of the trial. *State v. Graves*, 668 N.W.2d 860, 880 (Iowa 2003).

The majority also opines that failing to inform the jury of the correct definition of intent to deprive, per *Schminkey*, was "harmless" in this case because Clay was convicted of burglary, not theft.[6] The majority is correct that the State did not have to prove Clay actually completed the underlying crime of theft to satisfy the elements of burglary. *See State v. Redmon*, 244 N.W.2d 792, 798 (Iowa 1976). But that is a different question from whether the State had to prove Clay had the intent to permanently deprive the victim of his property at the time he entered the victim's residence. As noted above, in *Berger*, we held the intent-to-deprive element of the theft statute underlies the intent-to-commit-theft element of burglary. *See Berger*, 438 N.W.2d at 31 (adopting definition of intent to deprive from uniform theft instruction for burglary case); *cf*. *State v. Rich*, 305 N.W.2d 739, 746 (Iowa 1981) (incorporating intent-to-deprive element of theft into intent-to-commit-theft element of robbery). One cannot have the intent to commit a theft without the intent to deprive the owner of property. Accordingly,

[6] The majority's analysis on this point and on the substantial evidence question differs from the argument advanced by the State on appeal. The State accepts its burden to show an intent to deprive in the burglary prosecution, asserting "[t]he jury was free to infer Clay intended to deprive Overman of the keys permanently or withhold them for so long or under such circumstances that the befit or value was lost."

the State was required to prove that when Clay entered the Overman residence he had the specific intent to permanently deprive the victim of property.

Case law that allows jurors to infer a defendant's intent to commit a theft from the act of surreptitiously entering a building which contains things of value does not relieve the State of its burden to prove that a person charged with burglary intended to permanently deprive the owner of property at the time of entry. *See, e.g.*, *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000) (concluding that defendant did not suffer prejudice in burglary case from lack of instruction defining theft when overwhelming evidence indicated that he broke into private residences to steal firearms, televisions and other personal property).

Had defense counsel properly objected to the prosecutor's misstatement of the law in closing rebuttal argument, the trial court could have clarified for the jury that the intent to commit a theft means the intent to permanently withhold, or withhold for so long, or under such circumstances, that its benefit or value is lost. The prosecutor expressed his own doubt that the evidence could satisfy that more rigorous intent standard.

I also believe counsel had a material duty to object when the prosecutor offered his personal explanation for why the State did not call Kayla VanEs or Ashley Arens as witnesses. *See United States v. Vazquez-Garcia*, 340 F.3d 632, 641–42 (8th Cir. 2003) (holding a prosecutor's comments in closing that argue facts not in evidence may constitute grounds for reserving a conviction). That omission must be considered in combination with counsel's failure to challenge the State's admission of hearsay statements made by VanEs and Arens.

I disagree with the majority that the prosecutor did nothing improper by telling the jury that VanEs was subpoenaed and failed to appear and that he opted not to call Arens as a witness because he did not want to "put her through" the difficulty of testifying against her brother. The majority accepts the State's explanation that these comments were invited by defense counsel's argument that the jury faced a tall order in evaluating the credibility of these two declarants when it did not have the opportunity to hear from them in person and assess their demeanor. Notably, the prosecutor was the first to discuss the significance of the hearsay statements from VanEs and Arens in his initial closing argument. It was defense counsel who was making a fair response by reminding the jury of its role in evaluating the credibility of the evidence. The defense counsel's proper argument did not "open the door" to the prosecutor's infusion of information that was outside the record. *Cf. State v. Parker*, 747 N.W.2d 196, 206–07 (Iowa 2008) (holding that in the field of impeachment, there is no "open the door" principle of evidence that permits the State to engage in unrestricted cross-examination). The prosecutor's rebuttal crossed the line into creating evidence. *See State v. Greene*, 592 N.W.2d 24, 32 (Iowa 1999). Defense counsel breached a material duty by not objecting.

But for counsel's unprofessional errors, a reasonable probability exists that the outcome of Clay's trial would have been different.