

IN THE COURT OF APPEALS OF IOWA

No. 3-964 / 12-1916
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN LOUIS HODGES,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

Defendant appeals his conviction and sentence following a jury's verdict
finding him guilty of burglary in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,
Assistant Appellate Defender, and Brenda Drew-Peebles, Davenport, for
appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney
General, Michael J. Walton, County Attorney, and Kimberly Shepherd, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

John Louis Hodges appeals his conviction and sentence following a jury's verdict finding him guilty of burglary in the third degree, in violation of Iowa Code sections 713.1 and 713.6A(1) (2011). On appeal, he maintains that he received ineffective assistance of counsel at trial. Hodges alleges there was insufficient evidence to support the conviction and counsel was ineffective in failing to properly preserve the issue at trial. He asks that we reverse his convictions and remand to the district court. Because Hodges was not prejudiced by any alleged errors of counsel, we affirm.

I. Background Facts and Proceedings.

On April 7, 2012, Scott County Deputy Dwight West was dispatched to a residence in Lake Canyada Mobile Home Park in Davenport, Iowa. Once he arrived, he met with the residents, Marcus and Caroline Taylor, who reported someone had stolen their television, gaming system, and several items relating to their computer, among other things, while they had been away from home. Deputy West interviewed the Taylors' neighbor, Shawna Howe, who had noticed a silver Pontiac parked outside the Taylors' residence earlier in the day when their car was not home. Deputy West checked the home and did not find any signs of forced entry.

While the deputy was conducting his investigation at the residence, Marcus Taylor received a telephone call from Hodges. Taylor indicated to Deputy West that he suspected Hodges might have taken the possessions. He then put the phone on speaker so the deputy could listen. Taylor asked Hodges

if he had his stuff. Deputy West heard Hodges tell Taylor he had it and then ask Taylor if he had the money.

The parties dispute the money in question: Marcus Taylor testified that he, Hodges, and a third person, Greg Bunyard had been fishing the previous day. He stated Bunyard had asked Hodges to lend him \$500 and Hodges agreed only after Taylor vouched for Bunyard. Bunyard was supposed to pay back the loan the next day, but he did not do so. When Hodges could not get in contact with Bunyard, he enlisted Taylor's help. Taylor traveled with Hodges to Bunyard's home, but Bunyard did not answer the door. Taylor testified he then went to a nearby park with his family while Hodges left in his vehicle, a silver Pontiac. When Taylor returned home with his family, they found the listed possessions were missing. In contrast, Hodges testified he lent Bunyard and Taylor each \$250. He claimed Taylor had given him the items in question as collateral when he was unable to pay back the loan as promised on April 7, before taking him to Bunyard's to collect the other \$250 owed to him.

During the phone call, Marcus Taylor handed the phone to Deputy West, who, pretending to be Bunyard, agreed to meet Hodges at the local Hy-Vee to exchange the borrowed \$500 for the missing possessions. After Deputy West and the Taylors arrived at Hy-Vee, Caroline Taylor noticed Hodges and indicated who he was to West. Deputy West approached Hodges and attempted to arrest him, but he broke free of West's grasp and fled the parking lot on foot. Hodges was apprehended nearby the same day. Meanwhile, the Taylors located Hodges' silver Pontiac in a nearby carwash. Deputy West testified it was clear

the car had not actually been washed and the missing possessions could be seen in the backseat of the vehicle. The police seized the car, obtained a warrant, and impounded it as evidence.

On May 10, 2012, Hodges was charged by trial information with burglary in the third degree, pursuant to Iowa Code sections 713.1 and 713.6A(1). Following a jury trial, Hodges was convicted and sentenced to serve an indeterminate term of imprisonment not to exceed five years. He appeals.

II. Standard of Review.

A defendant may raise an ineffective assistance claim on direct appeal if he has reasonable grounds to believe the record is adequate for us to address the claim on direct appeal. *State v. Straw*, 709 N.W. 2d 128, 133 (Iowa 2006). If we determine the record is adequate, we may decide the claim. *Id.* We review claims for ineffective assistance of counsel de novo. *Id.* This is our standard because such claims have their basis in the Sixth Amendment to the United States Constitution. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

III. Discussion.

On appeal, Hodges maintains counsel was ineffective for failing to preserve error with an adequate and specific motion for judgment of acquittal. While counsel did move for a judgment of acquittal at the close of the State's case and again at the close of all evidence, counsel did not specify which elements of burglary in the third degree were insufficiently supported by the evidence. See *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) ("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.”). The record is sufficient to allow us to address Hodges’ claim. See *id.* at 616 (“A claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal. Clearly, if the record in this case 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.”) (Internal citation omitted).

To succeed on his claim, Hodges must show by a preponderance of the evidence that (1) his counsel failed to perform an essential duty and (2) prejudice resulted. See *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To prove that counsel failed to perform an essential duty, he must show “counsel’s representation fell below an objective standard of reasonableness . . . under prevailing professional norms.” See *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In doing so, he must overcome “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” See *id.* at 689. Prejudice has resulted when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). We can affirm if either prong is absent and need not engage in both prongs of the

analysis if one is lacking. See *Everett v. State*, 789 N.W.2d 151, 159 (Iowa 2010).

Hodges contends the State failed to present sufficient evidence that he specifically intended to commit a theft,¹ as required for a conviction of burglary in the third degree.² More specifically, he argues there was insufficient evidence he intended to deprive the Taylors of their property, and thus a proper motion for acquittal would have been granted by the district court. The intent to deprive “requires more than a temporary dispossessing of another’s property.” *State v. Berger*, 438 N.W.2d 29, 31 (Iowa Ct. App. 1989). It means to permanently withhold, or cause [the property] to be so withheld for so long, or under such circumstances, that its benefit or value is lost; or the property is disposed of so that it is unlikely the owner will recover it. *Id.*

In this case, Hodges is unable to prove prejudice resulted from any errors allegedly made by counsel. “Evidence is sufficient to withstand a motion for judgment of acquittal when, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State’s favor, there is substantial evidence in the record to support a finding of the challenged element.” *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005). Although the State

¹ Iowa Code section 714.1(1) states that 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.”

² The jury instructions required the State to prove four elements to obtain a conviction for burglary in the third degree:

- (1) On or about the 7th day of April, 2012, the Defendant, John L. Hodges, entered [the Taylors’ home address].
- (2) The property was an occupied structure.
- (3) The Defendant did not have permission or authority to enter.
- (4) The Defendant did not do so with the specific intent to commit a theft.

did not offer direct evidence of an intention to deprive the Taylors of their property, “[b]ecause it is difficult to prove intent by direct evidence, proof of intent usually consists of circumstantial evidence and the inferences that can be drawn from that evidence.” *State v. Hennings*, 791 N.W.2d 828, 837 (Iowa 2010). The State presented testimony from Marcus Taylor that Hodges had lent money to Bunyard after his assurance and that Hodges had come to him upset the next day when he was unable to reach Bunyard to recover the funds. The Taylors’ neighbor, Howes, testified she saw a silver Pontiac outside of the Taylors’ home at a time when their vehicle was not parked at the residence. Furthermore, Deputy West testified he witnessed Marcus Taylor receive a call from someone³ who admitted having the possessions and who agreed to meet at the local Hy-Vee to exchange them for money. When Deputy West accompanied the Taylors to Hy-Vee, he found Hodges with the missing possessions located in his car, a silver Pontiac. Although Hodges testified and offered a different explanation for the possessions being in his car, “[t]he jury is free to believe or disbelieve any evidence it chooses and to give weight to the evidence as in its judgment such evidence should receive.” *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). “In fact, the very function of the jury is to sort out the evidence and place credibility where it belongs.” *Id.* (internal citations omitted).

Viewing the evidence in the light most favorable to the State, there was sufficient evidence that Hodges took the possessions with the intent to permanently deprive the Taylors of their property. The jury could conclude that

³ The “someone” was identified by Taylor at the time of the call as Hodges.

Hodges' actions of entering the Taylors' residence without permission, taking the possessions without notice and placing them in his vehicle, driving away, and concealing the possessions in his vehicle in a carwash while meeting the Taylors at Hy-Vee to purportedly trade the possessions for the \$500 ransom was sufficient circumstantial evidence of his intent to permanently deprive the Taylors of their property.⁴ Because there was sufficient evidence to support the finding Hodges entered the Taylors' home with the intent to permanently deprive them of their property, Hodges cannot prove any prejudice resulted from counsel's failure to specify the intent element as insufficiently supported by evidence in the motion for judgment of acquittal, and we affirm.

AFFIRMED.

⁴Hodges' argument would have been stronger if he had left a note or otherwise forewarned the Taylors that he would hold them responsible or take their possessions as collateral if Hodges was not paid by Bunyard.