IN THE COURT OF APPEALS OF IOWA

No. 6-776 / 05-1757
Filed January 18, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON MARTIN POWELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Crawford County, Duane E. Hoffmeyer, Judge.

Jason Martin Powell appeals from the judgment and sentence entered upon his convictions. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Jason Martin Powell, pro se.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Thomas E. Gustafson, County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Jason Martin Powell appeals from the judgment and sentence entered upon his convictions for attempted murder in violation of Iowa Code section 707.11 (2005), first-degree eluding in violation of section 321.279(3)(d), assault on a peace officer in violation of section 708.3A(4), and second-degree theft in violation of sections 714.1 and 714.2(2). He contends there was insufficient evidence to convict him of second-degree theft and felony eluding. He also contends his trial counsel was ineffective in several respects and the trial court failed to apply the correct standard for a motion for new trial.

I. Background Facts and Proceedings. At approximately 12:30 p.m. on February 12, 2005, Deputy Sheriff Jerrod Henningsen saw Powell driving a white GMC pickup truck. He knew there was a warrant for Powell's arrest and activated his patrol lights to pull him over. Powell continued driving so the deputy radioed for assistance. Officer James Steinkuehler responded to the call and parked his patrol car in Powell's path in an attempt to stop him. Powell stopped, then accelerated rapidly, hit the patrol car, and sped off.

Deputy Henningsen continued his pursuit of Powell, who was exceeding speeds of sixty miles per hour in a twenty-five-miles-per-hour zone. Powell also ran stop signs while being pursued.

Sheriff Thomas Hogan was at home when he heard of the chase on his police scanner. Because the chase was heading his way, he decided to place spiked strips known as "stop sticks" on the road in an attempt to puncture and deflate the tires of Powell's vehicle. The sheriff parked his vehicle in the southbound lane of Ridge Road in Denison and put the strip across the

northbound lane. Sheriff Hogan activated the warning lights above the windshield and in the grill, and flashed the headlights of his unmarked patrol vehicle. He stood in a residential driveway approximately twelve to fifteen feet away from the passenger side of his vehicle.

The sheriff saw Powell's car approaching and estimated his speed in excess of sixty miles per hour. Before reaching the stop sticks, Powell applied his brakes, veered left, drove over the curb and onto the lawn, accelerated, and drove at Sheriff Hogan. When Powell's vehicle was a few feet away, the sheriff jumped out of the way. Powell came within twelve to eighteen inches of hitting him. He was driving approximately thirty-five miles per hour as he drove by the sheriff.

Powell was eventually arrested. The vehicle he was driving belonged to Roger Slechta. Slechta had not given Powell permission to drive the vehicle.

Following a jury trial, Powell was convicted of second-degree theft, first-degree eluding, assault on a peace officer, and attempted murder. He was sentenced to a twenty-five-year prison term on the attempted murder charge, five-year prison terms on the theft and eluding charges, and a one-year prison term on the charge of assaulting a peace officer. The sentences were ordered to be run concurrently.

II. Theft. Powell first contends there is insufficient evidence to support his conviction for second-degree theft because the State failed to prove he intended to permanently deprive Slechta of the vehicle. We review claims of insufficient evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.*

"Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.*

One of the elements of theft is the intent to 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. *State v. Venzke,* 576 N.W.2d 382, 384 (Iowa Ct. App. 1997). It may be inferred from outward acts and attending 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 his or her 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 Powell took the pickup without Slechta's consent does not give rise to an inference that he intended to permanently deprive Slechta of the vehicle. *See id.* at 791.

We turn then to the circumstantial evidence available to us to determine Powell's intent and find little to assist us. Although apprehension of the suspect within a short time of the taking of the vehicle does not defeat the possibility of proving there was an intent to permanently deprive the owner of the property at the time of the taking, it severely limits the circumstantial evidence from which that intent can be inferred. *State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004). Here, Deputy Henningsen attempted to stop Powell almost immediately after Powell took the vehicle.

Powell testified he did not intend to permanently deprive Slechta of the vehicle. He claims he was in severe pain from a medical problem and took the vehicle without Slechta's permission in order to seek medical assistance. Slechta testified Powell left him a note explaining that he borrowed the truck and his reason for doing so. However, Slechta did not keep the note. Powell argues he did not attempt to elude law enforcement because he intended to keep the truck, but rather because he wanted to get to the hospital and had previously had bad experiences receiving medical treatment in jail. Although the jury was free to reject the testimony of Powell and Slechta as self-serving and not credible, *State v. Leckington*, 713 N.W.2d 208, 214 (Iowa 2006), there is little other evidence by which to judge Powell's state of mind at the time he took the vehicle.

If this case involved any property other than a motor vehicle, this court would find theft occurred because Powell's actions after taking the vehicle deprived the owner of its value. *See State v. Berger,* 438 N.W.2d 29, 31 (Iowa Ct. App. 1989) (holding an intent to deprive the owner of the property does not require permanent deprivation; it is sufficient to show the defendant withheld for

so long, or under such circumstances, that its benefit or value was lost; or the property was disposed of so that it was unlikely the owner would recover it). However, here there is not sufficient evidence of Powell's state of mind to determine he intended to permanently deprive the owner of the vehicle. We question whether in similar situations, where a defendant is caught with the vehicle a short time after taking it, there could ever be adequate proof of theft; the only cases we find to support upholding a verdict of theft involve deprivation for a longer period of time, although even that is not determinative. *Compare State v. McCarty*, No. 03-1151 (Iowa Ct. App. April 28, 2004) (holding evidence showed defendant's intent to permanently deprive owner of the vehicle where the defendant drove it to a town two hours away and it was not found until three days later), *and State v. Bowerman*, No. 02-0465 (Iowa Ct. App. July 3, 2002) (holding intent to permanently deprive owner of the vehicle proven where the defendant drove the vehicle from Iowa to Texas), *with Morris*, 677 N.W.2d at 787-88 (holding evidence did not prove intent to permanently deprive owner of vehicle where the defendant stopped the vehicle and ran when pulled over by law enforcement one half hour after taking the vehicle), *and Shminkey*, 597 N.W.2d at 791 (holding evidence was insufficient to prove intent to permanently deprive owner of vehicle where the defendant had driven the vehicle seven or eight miles to a neighboring town and became involved in an accident a matter of hours after he had taken possession of the vehicle).

Because the evidence is insufficient to support a conviction for second-degree theft, we conclude the district court erred in denying Powell's motion for judgment of acquittal. We reverse Powell's conviction for second-degree theft.

We remand to the district court to enter an amended judgment of conviction for operating without owner's consent.

III. Felony Eluding. Powell next contends there is insufficient evidence to support his conviction for felony eluding. Iowa Code section 321.279(3) states in pertinent part:

> 3. The driver of a motor vehicle commits a class "D" felony if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle that is driven by a uniformed peace officer after being given a visual and audible signal as provided in this section, and in doing so exceeds the speed limit by twenty-five miles per hour or more, and if any of the following occurs:
> a. The driver is participating in a public offense, as defined in section 702.13, that is a felony.

Iowa Code section 702.13 states:

> A person is "participating in a public offense," during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be. A person is "participating in a public offense" during this period whether the person is successful or unsuccessful in committing the offense.

"Participating in a public offense" is defined as

> including the period of time beginning with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has eluded pursuers, if any there be

State v. Doggett, 687 N.W.2d 97, 100-01 (Iowa 2004). Powell argues there was insufficient evidence to prove he was exceeding the speed limit by twenty-five miles per hour or more while attempting to commit murder.

Sheriff Hogan testified that Powell was driving towards the stop sticks at an estimated speed of over sixty miles per hour. Powell then hit the brakes and

"slowed dramatically." He then veered off the road, heading toward the sheriff. He accelerated as he headed over the curb and onto the lawn. Sheriff Hogan had to jump out of the way to avoid being struck by Powell's vehicle. As the vehicle passed the sheriff, he estimated its speed at thirty-five miles per hour. The speed limit on Ridge Road is twenty-five miles per hour.

Powell was clearly exceeding the speed limit by more than twenty-five miles per hour during his pursuit and as he was heading toward the stop sticks. However, he was only exceeding the posted speed limit by ten miles per hour as he was driving directly toward Sheriff Hogan. Attempted murder requires a specific intent to cause the death of Sheriff Hogan. *See* Iowa Code § 707.11. Powell could not have formed that intent until he was aware of Sheriff Hogan's presence. At the time Powell saw Sheriff Hogan and committed the public offense of the attempted murder, Powell was not exceeding the speed limit by the requisite speed to be convicted of felony eluding.

Because the evidence is insufficient to support a conviction for first-degree eluding, we conclude the district court erred in denying Powell's motion for judgment of acquittal. We reverse Powell's conviction for first-degree eluding.

IV. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. McBride,* 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State,* 603 N.W.2d 243, 245 (Iowa 1999). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation

is impugned." *State v. Kirchner,* 600 N.W.2d 330, 335 (Iowa Ct. App. 1999) (citing *State v. Coil,* 264 N.W.2d 293, 296 (Iowa 1978)).

To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State,* 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must show counsel's performance fell below an objective standard of reasonableness so that counsel failed to fulfill the adversarial role that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark,* 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State,* 626 N.W.2d 134, 145 (Iowa 2001).

Additionally, our courts have ruled that trial strategy, miscalculated tactics, mistake or inexperience do not constitute ineffective assistance. *Id.* at 143. We may dispose of the defendant's ineffective assistance claims under either prong. *Id.* In order to prove the prejudice prong, the defendant must show a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Powell argues his trial attorney breached an essential duty in failing to move for judgment of acquittal on the attempted murder charge. By way of pro

se brief, Powell also argues his trial counsel was ineffective in failing to inform him of his right to a speedy trial, in failing to object to the prosecutor's question asking him to comment on whether another witness was correct or incorrect in his testimony, and in failing to move for a mistrial when the prosecutor violated the motion in limine. We preserve these claims for postconviction relief to allow the record to be fully developed.

V. Motion for New Trial. Finally, Powell contends the district court erred in applying the incorrect standard in denying his motion for new trial. Powell contends the district court applied the wrong standard because it failed to make its own determination that the verdict was contrary to the evidence, as distinguished from a finding that the evidence was legally sufficient. We review his claim for correction of errors at law. Iowa R. App. P. 6.4.

We conclude the district court used the proper standard in denying Powell's motion for new trial. In its ruling, the court referenced Iowa Rule of Criminal Procedure 2.24 and referred to the weight of the evidence in its ruling. Accordingly, we affirm the district court's denial of Powell's motion for new trial.

VI. Summary. We reverse the conviction for second-degree theft and remand for entry of judgment of guilty of operating without owner's consent. We reverse the conviction for first-degree eluding and remand for new trial. We affirm the convictions for assault on a peace officer and attempted murder. We preserve Powell's claims of ineffective assistance of counsel for post conviction consideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.