

**IN THE COURT OF APPEALS OF IOWA**

No. 7-059 / 06-0232  
Filed February 28, 2007

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

**vs.**

**MARK ALAN LATHROP,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, James E. Kelley,  
Judge.

The defendant appeals his conviction and sentence by the district court following a jury trial. **CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Patricia Reynolds, Acting State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Rob Cusack, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**VOGEL, P.J.**

Mark Lathrop appeals his conviction and sentence following a jury trial on a charge of theft in the first degree, in violation of Iowa Code sections 714.1(1) and 714.2(1) (2005). Following our review of the record for errors of law, *State v. Turner*, 630 N.W.2d 601, 610 (Iowa 2001), we conclude sufficient evidence supports Lathrop committed the crime in Iowa thereby subjecting him to prosecution in Iowa under Iowa Code section 803.1. The record reflects that while working for an armored car service Lathrop removed money from ATM cassettes in either Iowa or Illinois, serviced ATM's on several scheduled stops in Illinois, but then exited the armored car at the end of his shift in Iowa with the money in his possession. His conduct in Iowa evidenced his intent to permanently deprive rightful ownership of the money. See Iowa Code § 714.1(1); *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). We therefore affirm his conviction.

Lathrop claims his trial counsel was ineffective for failing to request a jury instruction on the issue of territorial jurisdiction. To establish ineffective assistance of trial counsel, the defendant has the burden of proving his attorney's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Prejudice is shown by a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). Because Iowa had jurisdiction to prosecute the charge, Lathrop cannot demonstrate that he was prejudiced by trial counsel's failure to request such an instruction. We affirm as to this issue.

The State concedes that the district court erred during sentencing when it erroneously believed that Lathrop was ineligible for a deferred sentence, thereby limiting its own available discretion. See *State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999) (stating that it is clear that when a sentencing court has discretion, it must exercise that discretion and a failure to exercise discretion amounts to a defective sentencing procedure). We vacate the sentence and remand for resentencing.<sup>1</sup>

**CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

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<sup>1</sup> This memorandum opinion is pursuant to Iowa Court Rules 21.29(1)(a), (b), (e).