

IN THE COURT OF APPEALS OF IOWA

No. 7-096 / 05-2065
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK A. DOYLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals his conviction for theft in the second degree.

AFFIRMED.

Mark C. Smith, State Appellate Defender, Dennis D. Hendrickson and Martha J. Lucey, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, Polk County Attorney, and Jim Ward, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

On January 27, 2005, Amber Malloy left her car unlocked and the engine running when she went into a QuikTrip to prepay for gasoline. Mark Doyle got in Malloy's car and drove away. After about forty-five minutes, Doyle was spotted by police officers, and he led them on a high-speed chase through parts of Des Moines and then to Ankeny. Doyle crashed the car and attempted to escape on foot, but was apprehended.

After a jury trial Doyle was convicted of theft in the second degree, in violation of Iowa Code sections 714.1(4) and 714.2(2) (2005), and eluding or attempting to elude a pursuing law enforcement vehicle, in violation of section 321.279(3). Doyle was sentenced to a term of imprisonment not to exceed five years on each count, to be served consecutively. Doyle appeals, claiming he received ineffective assistance of counsel.

II. Standard of Review

Our review of claims regarding ineffective assistance of counsel is de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). We presume that counsel is competent and that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Jury Instructions

Doyle claims he received ineffective assistance because defense counsel failed to object on the ground the jury was not instructed that it needed to find he had a specific intent to permanently deprive the owner of the automobile. He states that without a finding that he intended to permanently deprive Malloy of the automobile he was only guilty of operating a vehicle without the owner's consent. See Iowa Code § 714.7.

Doyle was charged with theft by exercising control over stolen property, knowing such property had been stolen, under section 714.1(4), not theft by taking possession or control of the property of another, under section 714.1(1). In order to obtain a conviction under section 714.1(1), the State must present evidence of intent to deprive. *Eggman v. Scurr*, 311 N.W.2d 77, 79 (Iowa 1981). On the other hand, for a conviction under section 714.1(4), the State must "establish that the accused actually did believe that the property was stolen." *State v. Hutt*, 330 N.W.2d 788, 790 (Iowa 1983).

The crime of theft by exercising control over stolen property does not include intent to deprive as an element. See *State v. McVey*, 376 N.W.2d 585, 586 (Iowa 1985) ("Thus the crime of theft based on exercising control over stolen property does not require proof of any intent beyond the voluntary act of exercising the prohibited control over property the accused knows is stolen."). We conclude defense counsel did not have a duty to object to the jury instructions because they did not include the element of intent to deprive.

IV. Sufficiency of the Evidence

Doyle contends he received ineffective assistance because defense counsel failed to raise in a motion for judgment of acquittal a claim that there was no evidence he intended to permanently deprive Malloy of the automobile. As noted above, there is no requirement for the State to show Doyle intended to permanently deprive the owner of the vehicle. Even if there is no evidence Doyle intended to deprive the owner of the vehicle, this is irrelevant to a conviction under section 714.1(4).

We conclude Doyle has failed to show he received ineffective assistance of counsel. We affirm his convictions.

AFFIRMED.