

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 26 1984

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

GEORGE DUMERAUF,)

Defendant-Appellant.)

Filed June 26, 1984 511

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Appeal from the Iowa District Court for Scott County—Max R. Werling
Judge.

Defendant appeals the judgment and habitual offender sentence imposed
upon his conviction for first degree theft in violation of Iowa Code sections
714.1(2) and 714.2(1). AFFIRMED.

Charles Harrington, Appellate Defender and Fern S. Shupeck, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney
General, for plaintiff-appellee.

Heard by Snell, P.J. and Hayden and Sackett, JJ.

Defendant, George Dumerauf, appeals the judgment and habitual offender sentence imposed upon his conviction for first degree theft in violation of Iowa Code sections 714.1(2) and 714.2(1). On appeal Dumerauf asserts that: (1) the evidence of general criminal intent was insufficient to support his conviction; and (2) he received ineffective assistance of trial counsel due to counsel's failure to file an adequate motion for judgment of acquittal to preserve error on the sufficiency of the evidence issue.

In February 1982, defendant was charged by information with first degree theft by misappropriating property in his trust in violation of Iowa Code sections 714.1 (2) and 714.2 (1). The information was subsequently amended to allege that defendant was an habitual offender under Iowa Code section 902.8. Defendant unsuccessfully moved to dismiss on grounds that no trust arrangement could be established under the facts of the case. Thereafter the matter was tried to a jury. At the close of the state's case and at the close of all evidence, defendant again unsuccessfully moved to dismiss on the trust arrangement ground. He did not move for a judgment of acquittal on other grounds. The jury subsequently found defendant guilty as charged. Following the denial of defendant's motion in arrest of judgment challenging application of the habitual offender statute, defendant was sentenced as an habitual offender to an indeterminate fifteen-year term of imprisonment.

On appeal both parties acknowledge that general criminal intent is an element of the offense of theft by misappropriation. The only dispute is whether the evidence is sufficient to prove such general criminal intent on the part of defendant.

Dumerauf asserts that the evidence as to his general criminal intent was

insufficient to support his conviction, and that he received ineffective assistance of counsel because trial counsel failed to preserve this issue for review.

We agree that the issue was not preserved for review on direct appeal. Because trial counsel's motion for a judgment of acquittal did not challenge the sufficiency of the evidence presented with regard to criminal intent, the defendant's right to challenge the sufficiency of the evidence is deemed waived for the purpose of appellate review. See State v. Dickerson, 313 N.W.2d 526, 529 (Iowa 1981)(party cannot effectively challenge sufficiency of evidence for first time on appeal). The defendant requests that we ignore this waiver and consider the substantive issue raised because "any waiver was the result of trial counsel's ineffective assistance."

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, 52 U.S.L.W. 4565 (No. 82-1554)(May 14, 1984). Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance. Id. at 4571. Even if a defendant shows that the particular errors of counsel were unreasonable, therefore, defendant must show that they actually had an adverse effect on the defense. Id. at 4572. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

The defendant was charged, under Iowa Code section 714.1(2)(1981), with the offense of theft by misappropriation. General criminal intent is an element of the offense. Eggman v. Scurr, 311 N.W.2d 77, 78-79 (Iowa 1981). General intent exists when from the circumstances the prohibited results may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result. Id. at 80.

In reviewing a claim of insufficiency of the evidence, we view the evidence in the light most favorable to the state. State v. Robinson, 288 N.W.2d 337,338 (Iowa 1980). All inferences which can be reasonably drawn from the evidence will be drawn in the state's favor. Id.

The state, at trial, presented evidence from which the jury could have inferred that the defendant voluntarily acted in such a way that his acts could have reasonably been expected to result in the misappropriation of funds. The defendant's actions were enough to allow the jury to infer his general criminal intent. Because a factual question as to the defendant's general criminal intent was established, the defendant was not prejudiced by trial counsel's failure to preserve the issue by way of motion for judgment of acquittal.

Because we find that Dumerauf failed to show that trial counsel's action actually prejudiced the defense, we need not determine whether trial counsel's failure to move for a judgment of acquittal on the general criminal intent issue amounted to "deficient performance."

The judgment of the district court is affirmed.

AFFIRMED.