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IN THE COURT OF APPEALS OF IOWA

No. 7-149 / 96-689

FILED
MAY 29 1997
CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

DAVID KYLE CRADY,
Appellant.

Appeal from the Iowa District Court for Jasper County, Michael J. Streit, Judge.

Defendant appeals judgment and sentence entered, following jury trial, for first-degree theft, in violation of Iowa Code sections 714.1 and 714.2(1) (1995).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and John M. Priester, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, R. Steven Johnson, County Attorney, and James W. Cleverley, Jr., Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Cady and Vogel, JJ.

VOGEL, J.

David Kyle Crady appeals judgment and sentence entered, following jury trial, for first-degree theft, in violation of Iowa Code sections 714.1 and 714.2(1) (1995). He argues the trial court erred in instructing the jury about the intent to deprive element. He also contends he received ineffective assistance of counsel because trial counsel failed to object to the erroneous jury instruction.

Scope of review. Trial court determinations regarding jury instructions are reviewed on appeal for errors of law. Iowa R. App. P. 4.; *State v. Kellogg*, 54 N.W.2d 514, 516 (Iowa 1996). The ineffective assistance of counsel claim implicates constitutional rights; accordingly our review on this claim is de novo. *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980).

Jury instruction. Crady was charged with operating a motor vehicle without the owner's consent, in violation of Iowa Code section 714.7 (1995), after allegedly taking a 1992 Buick Roadmaster from a McDonald's parking lot. After Crady was apprehended, law enforcement officers recovered the keys to the stolen car from his backpack. Crady allegedly told the officers he and his girlfriend intended to drive the car to Fort Dodge for Ragbrai because their bikes did not fit in his car. The State subsequently amended the charge to first-degree theft, in violation of Iowa Code sections 714.1 and 714.2(1).

The case proceeded to trial and after it was submitted, the jury sent a question to the court: "'Specific intent to deprive the owner of the automobile': is this

permanently deprive or temporarily deprive the owner?" Apparently the court did not instruct the jury regarding "intent to deprive" in the original jury instructions. The court gave the following supplemental instruction:

> The intent to "deprive the owner" of the property means to permanently withhold, or withhold 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.
>
> The deprivation intended needs to be more than a mere temporary dispossession but it is not necessary that it be permanent.

Defense counsel did not object to the submission of this instruction. The jury returned a verdict of guilty, and Crady was sentenced to an indeterminate ten-year term of imprisonment.

Crady contends that although the first paragraph of the instruction mirrors uniform jury instruction 1400.2, the second paragraph was apparently the court's attempt to supplement that uniform jury instruction with language from *State v. Berger*, 438 N.W.2d 29, 31 (Iowa App. 1989). The *Berger* court held that "the intent to deprive used in the theft statute 714.1(1) of the 1987 Iowa Code requires more than a temporary dispossessing of another's property, although a deprivation is not necessarily a permanent thing." *Id.* Crady argues the use of "deprivation intended" in the second paragraph negates the meaning and effect of uniform jury instruction 1400.2 and is an incorrect statement of the law.

We find the disputed portion of the instruction, the second paragraph, is an accurate statement of the law and the district court did not err in so instructing the

jury. Crady cites *State v. McCormack*, 293 N.W.2d 209, 210 (Iowa 1980), for the proposition that the confusion of the challenged instruction might have been the basis for the jury's finding defendant was guilty of a greater offense, constituting error warranting reversal. However, in *McCormack*, the court found "the bare form in which instruction 14 was given here leaves in *hopelessly confused conflict* with the earlier described elements of the greater offense" where there was no explanation that instruction 14 only addressed the lesser offense. *Id.* at 211. (Emphasis added.) In this case, paragraph two of the instruction does not conflict with paragraph one, nor does it engender confusion; it is a clear and correct statement of the law.

Notwithstanding the jury instructions, the jury was allowed to consider compelling evidence that Crady intended to permanently deprive Mr. Vonk of his vehicle. Defendant made an admission to the police that he stole the vehicle and was planning to drive it to Fort Dodge. At the time of apprehension, the keys were still in Crady's possession.

We affirm the district court's instruction to the jury.

Ineffective assistance of counsel. Crady further argues counsel was ineffective for failing to object to the jury instruction. Our principle concern in determining ineffective assistance of counsel claims is whether the defendant was denied fundamental fairness in a proceeding. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). The burden is on Crady to prove by a preponderance of

the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Id.* We find counsel did not breach an essential duty as he had no duty to object at trial to a jury instruction setting forth a correct statement of the law. Even if we assume counsel breached a duty, there is no evidence the outcome would have been different had he objected to the challenged instruction. We therefore reject Crady's claim of ineffective assistance of counsel.

Having considered the issues on appeal, we affirm the district court.

AFFIRMED.