IN THE COURT OF APPEALS OF IOWA

No. 1-256 / 00-0605
Filed July 31, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT ANTHONY JERDE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Defendant appeals from his conviction for second-degree theft and eluding by exceeding the speed limit by twenty-five miles or more and while participating in a felony. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

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

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SACKETT, C.J.

Defendant Robert Jerde was alleged to have stolen a car from a Des Moines dealer and driven it on a high-speed chase through the city. He was convicted of second-degree theft and eluding in violation of Iowa Code sections 714.1(4), 714.2(2) and 321.279(3) (1999). On appeal he contends (1) the district court should have instructed the jury on the element of intent to permanently deprive; (2) there was not sufficient evidence to support a finding beyond a reasonable doubt that he was guilty of eluding a pursuing law enforcement vehicle; (3) that the district court applied the incorrect standard in ruling on his motion for new trial; and (4) his trial counsel was ineffective. We affirm.

On Thursday November 4, 1999, the defendant went to Stivers Lincoln-Mercy and while looking at a 1993 silver Cadillac asked the sales person if he could take it for a test drive. The request was refused because defendant did not have a valid driver's license in his possession. Defendant continued looking at the car and the sales person came back just as defendant was getting out of it with the doors locking. Defendant said he had locked the ignition key in the car. The next morning the car was opened but keys that had been in the ignition were gone. Attempts to contact the defendant about the missing keys were not successful.

On Saturday, November 6, 1999, the Cadillac was discovered missing from the lot and it was reported stolen. On November 7, 1999, a Des Moines police officer was notified that the driver of a silver Cadillac bearing dealer plates traveling north on Fleur Drive might be drunk. The uniformed officer in a marked

patrol car waiting in the Iowa Lottery parking lot on Grand Ave saw the Cadillac pass by traveling west and the officer began following. The Cadillac cut through a parking lot at 2700 Grand. The officer followed and activated red lights on his car. With the car's lights and siren activated the officer followed the Cadillac as it turned west on Ingersoll Avenue. The Cadillac proceeded to 42nd Street, ran a red light, and turned north to Chamberlain Avenue north of Roosevelt High School. The chase continued on Polk Boulevard to Waterbury to Harwood back to Ingersoll Avenue, then west to 45th Street. On 45th Street the Cadillac turned north and ultimately ended up stopped in a yard. The officer testified he estimated the speed of the Cadillac during the chase to be in excess of sixty miles per hour.

Defendant first contends that the district court should have instructed the jury on the element of his intent to permanently deprive the owner of property, an element of theft by taking. The request was denied. The State concedes that error was preserved on this issue. We review claimed error in instructing the jury for errors of law. Iowa R. App. 4; *State v. Chang*, 587 N.W.2d 459, 460 (Iowa 1998). Reversal is warranted only if the error is prejudicial. *State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994).

The jury was instructed that in order to find the defendant guilty of theft by exercising control over stolen property the State was required to prove:

> 1. A 1993 Cadillac belonging to Stivers Mercury was stolen.
> 2. On or about the 7th day of November 1999, the defendant exercised control over the property.
> 3. At the time the defendant knew the property had been stolen.
> 4. The defendant did not intend to promptly return the car to the owner or to deliver it to an appropriate public officer.

The State argues the district court did not err in denying defendant's requested instruction because an intent to deprive the owner of its property is not an element of theft by exercising control over stolen property, the charge on which defendant was convicted.

Iowa Code section 714.1(4) makes it a theft for a person to "[exercise] control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen, unless the person's purpose is to promptly restore it to the owner or to deliver it to an appropriate public officer." *State v. McVey*, 376 N.W.2d 585, 586 (Iowa 1985) The mens rea of this offense requires proof that the accused actually believes the property is stolen. The offense does not require proof of specific intent. *Id.*; *State v. Hutt*, 330 N.W.2d 788, 790 (Iowa 1983).

An intent to permanently deprive the owner of his property is an essential element of theft under section 714.1(1). *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999). Although the defendant was originally charged with violation of section 714.1(1), the trial information was amended and he was not found guilty of that charge. There is no merit to the defendant's argument on this issue.

Defendant next contends there was not substantial evidence to find beyond a reasonable doubt that he was guilty of eluding a pursuing law enforcement vehicle. The State concedes that the defendant preserved error on this issue. In reviewing this challenge we view the evidence in the light most favorable to the State and consider all the evidence presented at trial and not just the evidence which supports the verdict. *See State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980).

For the defendant to be found guilty under Iowa Code section 321.279(3), eluding or attempting to elude a pursuing law enforcement vehicle, the State must prove among other things that in eluding the officer the defendant drove at speeds that exceeded " . . . the speed limit by twenty-five miles per hour or more, ..." Iowa Code § 321.279(3).

The defendant argues that the officer's estimates of speed where he did not use radar and did not pace the Cadillac were not sufficient to uphold the finding beyond a reasonable doubt.

The officer testified defendant was traveling at speeds in excess of sixty miles an hour on Ingersoll Avenue where the speed limit is thirty miles per hour; at fifty to sixty-plus miles per hour on 42nd Street where the speed limit is thirty miles per hour; fifty to sixty miles per hour on Chamberlain Avenue where the speed limit is twenty-five miles per hour; and in excess of sixty miles per hour on Polk Boulevard where the speed limit is thirty miles per hour. The officer testified that he had been a policeman for sixteen years and during that time worked with traffic and cars and speeds all the time. He said his estimate of the defendant's speed was based on that experience as well as the speed of his vehicle when following the Cadillac defendant was driving. The officer also testified that during the chase he was about a block behind the defendant. The officer's testimony as to defendant's speed provided sufficient evidence to support the conviction.

The defendant had also contended that the district court failed to consider his challenge that the verdict was against the weight of the evidence. The State contended this issue was not preserved for appellate review. We disagreed and

found it was raised both in defendant's written motion for a new trial and was verbally argued to the district court before the motion was ruled upon. In *State v. Ellis*, 578 N.W.2d 655, 658-659 (Iowa 1998) the Iowa court in overruling prior precedent, said on a motion for new trial the district court should weigh the evidence and consider the credibility of witnesses, and if the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. *See id.* The court noted that the motion for new trial is left to the discretion of the district court, and should be exercised with caution. *See id.*

The district court failed to address the defendant's motion for new trial to determine if it was against the weight of the evidence. We did a limited remand to the district court seeking a ruling on this issue. The district court made a subsequent ruling indicating that while it was not articulated, it had considered the "weight of the evidence" standard in ruling on the motion for new trial. The court indicated it had again reviewed the motion for new trial under the "weight of the evidence" standard and that the verdict was not against the weight of the evidence and again denied the defendant's request for new trial. Consequently we find no reason to reverse on this issue.

Defendant also contends that his trial attorney was not effective. He contends that this attorney should have objected to the State's improper use of prior crimes to impeach his testimony. The defendant had elected to testify. After consulting with his attorney and being advised by the court that prior offenses could be used for impeachment purposes he withdrew his election. He

contends his attorney was ineffective in failing to require the district court to make a determination that the probative value of the evidence outweighed the prejudicial effect.

The general standard used for reviewing ineffective-assistance-of-counsel claims is set forth in *Strickland v. Washington*, 466 U.S. 668, 691-96, 104 S. Ct. 2052, 2066-69, 80 L. Ed. 2d 674, 695-99 (1984). That standard requires a defendant to show that his counsel's performance fell below minimum professional standards and that his counsel's poor performance was so prejudicial that it probably changed the outcome of his trial. *Id.*; *State v. Thompson*, 597 N.W.2d 779, 782 (Iowa 1999).

Defendant did not testify and the convictions did not come into evidence. The defendant has failed to show how he was prejudiced by not testifying.

Defendant further contends that his attorney should have objected to the amendment of the trial information during the course of the trial. Defendant was originally charged with theft in the first degree in taking a vehicle worth more than $10,000, a class C felony, in violation of Iowa Code sections 714.1 and 712.2(1) (1999). The amendment charged defendant under 714.1(4) and 714.2(2) (1999) a class D felony. Defendant contends the elements of the two charges are different.

Iowa Rule of Criminal Procedure 4(8)(a) provides that an amendment to a trial information is allowed unless the substantial rights of the defendant are prejudiced by the amendment or if a wholly new and different offense is charged. Theft by taking and theft by exercising control over stolen property are alternative ways of committing the same offense. *See State v. Schmitz*, 610 N.W.2d 514,

516 (Iowa 2000) (section 714.1 defines theft and subsection 4 is an alternative under which a person may be charged). Defendant has failed to show his attorney was ineffective in this regard.

AFFIRMED.