IN THE COURT OF APPEALS OF IOWA

No. 9-078 / 97-2323
Filed March 31, 1999

STATE OF IOWA,

Appellee,

vs.

MARK DOYLE,

Appellant.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Defendant appeals the judgment and sentence entered upon his conviction of second-degree theft, in violation of Iowa Code sections 714.1(1) and 714.2(2) (1997).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Mark Doyle appeals his conviction and sentence, following a jury trial, for second-degree theft. We affirm.

Background facts. On April 22, 1997, Doyle's car broke down near the home of Michael and Anna Darr in Des Moines. The Darrs allowed Doyle and his girlfriend to stay with them for several days while Doyle and Michael Darr repaired the car. Approximately one month after Doyle and his girlfriend had left, Michael discovered that two of his tool boxes and the tools they contained were missing. Darr's neighbors told investigating police that they had observed Doyle and his girlfriend take the tool boxes.

Police charged Doyle with theft in the second degree. A jury convicted Doyle of the charge in November of 1997. Doyle appeals, claiming he was denied effective assistance of counsel because of his counsel's failure to request a "claim of right" instruction.

Scope of review. Our standard of review as to the constitutional issue of effective assistance of counsel is de novo. *See State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994).

I. Ineffective assistance. To prevail on a claim of ineffective assistance of counsel, the burden rests with the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *State v. Palmer*,

569 N.W.2d 614, 617 (Iowa App. 1997). It is not necessary for us to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996); *see also Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference is the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* We find the record in this case sufficient to allow us to address Doyle's claim on direct appeal.

At trial Doyle testified that he only borrowed the tools and did not intend to steal them. He claimed that Michael Darr had told him he could borrow the tools anytime he wanted as long as he returned them within one week. Doyle's girlfriend, Kimberly Meeley, gave similar testimony. Doyle also claimed that he had returned the tools to Darr, but the tools and tool boxes were not recovered. Darr denied ever giving Doyle permission to borrow the tools.

Doyle claims that his counsel's failure to request a jury instruction on the defense of claim of right[1] made his whole defense theory meaningless to the jury and

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[1] Iowa Uniform Jury Instruction 1400.19 (1988) provides:

> A person who [takes] [disposes of] [uses] [acquires] property is not guilty of Theft if [he] [she] reasonably believes [he] [she] has a right, privilege, or permission to do so, or if [he] [she] does in fact have such right, privilege or permission.

caused him significant prejudice. We agree that, based on the defense presented, the instruction should have been requested. However, we find Doyle suffered no prejudice from the omission. In finding Doyle guilty, the jury necessarily rejected his testimony that Darr had given him permission to borrow the tools. The jury could not find Doyle had the specific intent to deprive Darr of the tools if it had believed his version of events.[2] The intent to deprive is inconsistent with the intent to borrow and return the tools. Because Doyle cannot show he was prejudiced by counsel's failure to request a claim of right instruction, his claim of ineffective assistance must fail.

Having considered all issues properly before us on appeal, we hereby affirm Doyle's conviction and sentence.

AFFIRMED.

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[2] The jury was instructed that the State had to prove all of the following elements:

> 1. On or about the 22nd day of April, 1997, the defendant, Mark Doyle, took possession or control of tools and two (2) tool boxes.
>
> 2. The defendant, Mark Doyle, did so with the specific intent to deprive Michael Darr of the tools and too boxes.
>
> 3. The property, at the time of the taking, belonged to Michael Darr.

The jury was instructed as to the specific intent required as follows:

> The intent to "deprive the other" of the property means to permanently 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,