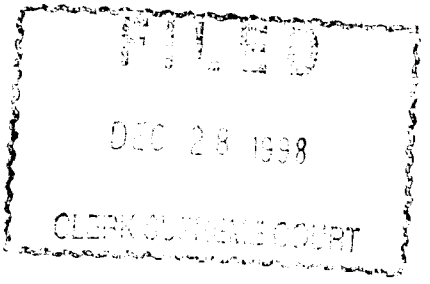
IN THE COURT OF APPEALS OF IOWA

No. 8-555 / 97-1969
Filed December 28, 1998



STATE OF IOWA,
Appellee,

vs.

MICHAEL ALLEN WOODY,
Appellant.

Appeal from the Iowa District Court for Jasper County, Peter A. Keller, Judge.

Michael Woody appeals from the judgment and sentence entered upon his conviction of second-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Steve Johnson, County Attorney, and James Cleverly, Jr., Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink, Streit, Vogel, and Mahan, JJ.

STREIT, J.

This is an appeal by defendant Michael Woody seeking to overturn his conviction for theft in the second degree, in violation of Iowa Code sections 714.1(3) and 714.2(2) (1995). Woody claims he received ineffective assistance of counsel. We affirm on appeal.

Woody advertised in a newspaper for the sale and installation of new convertible tops for vehicles. In the time period from March to May 1996, Woody received deposits of $100 from Henry Mouzakis, $300 from Curtis Ward, $507.24 from Jack Rorah, and $285 from Steve Brekunitch, for a total of $1192.25. In each instance, Woody failed to perform the work as promised and refused to provide a refund.

Woody was charged with one count of second-degree theft. A jury found him guilty of this charge. He was sentenced to a term of imprisonment not to exceed five years. Woody now appeals, claiming he received ineffective assistance of counsel at his criminal trial.

Our scope of review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). 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. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

Woody contends he received ineffective assistance because his counsel failed to request proper jury instructions on the issue of aggregation. Section 714.3 provides in part:

> If money or property is stolen from the same person or location by two or more acts, or from different persons by two or more acts which occur in approximately the same location or time period so that the thefts are attributable to a single scheme, plan or conspiracy, these acts may be considered a single theft and the value may be the total value of all the property stolen.

Where there are multiple incidents which constitute a single theft charge, the jury should consider each incident separately. *State v. Amsden,* 300 N.W.2d 882, 886 (Iowa 1981). On the incidents where the jury determines guilt has been established, then the jury should consider the amount of the theft and whether there was a single scheme, plan, or conspiracy, so as to allow aggregation of the amounts stolen. *Id.*

Woody claims he received ineffective assistance because his trial counsel did not request instructions to require the jury to separately consider the four incidents of alleged theft in this case. He also claims the jury was not instructed to find a common scheme, plan, or conspiracy.

Here, the jury was given an instruction which essentially follows the language of section 714.3. Thus, the jury was required to consider whether there had been a common scheme, plan or conspiracy. We conclude Woody has not shown counsel breached an essential duty by failing to request an instruction on this issue.

In addition, the jury instructions required the jury to find Woody guilty of second-degree theft or acquit him of all charges. In such a situation, where the verdict is all or nothing, defense counsel could reasonably decide defendant stood a better chance of acquittal than if the jury considered each incident of theft separately. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *State v. Kone,* 557 N.W.2d 97, 102 (Iowa App. 1996).

We determine Woody has failed to show he received ineffective assistance of counsel. We affirm his conviction for second-degree theft.

AFFIRMED.