

IN THE COURT OF APPEALS OF IOWA

No. 5-380 / 94-1043

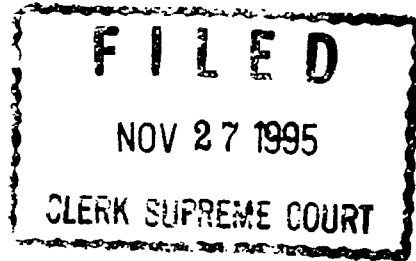
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DOUGLAS RICHARD WYNN,

Defendant-Appellant.



Appeal from the Iowa District Court for Buena Vista County, Charles H. Barlow, Judge.

Defendant appeals his conviction of and sentence for second-degree theft by deception. **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Phil Havens, County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Douglas Richard Wynn was convicted of the crime of second-degree theft by deception in violation of Iowa Code sections 714.1(3) and 714.2(2) (1993). He appeals his conviction contending (1) there was not substantial evidence supporting his conviction and (2) his trial counsel was not effective. We affirm.

In August 1993, defendant met Tami in Omaha, Nebraska. Defendant told her he was a professional baseball player with the Montreal Expos, but he was not currently playing baseball because of an injury and because he was sufficiently wealthy and did not need to work.

Tami and defendant had a romantic relationship. Defendant told Tami certain local businesses would not accept his out-of-state checks. Tami paid some bills for him. She also bought airplane tickets for him to take business trips. After one trip, defendant gave Tami \$5000 in cash. Tami was present when defendant applied for a bank mortgage and said he had \$7 million in assets, including \$500,000 in checking and savings in a Hawaiian bank.

At one point, defendant told Tami he had been in prison for three years because he was involved in the Charles Keating Savings and Loan scandal in Arizona. Defendant said he was on parole. Another time, defendant told her he had laundered money for the Mafia. Tami testified she believed defendant because she loved him.

On September 13, 1993, Tami deposited checks written to her by defendant in the amount of \$10,000. The checks were to reimburse Tami for money she had advanced defendant. Defendant's bank returned the checks as unpaid because defendant did not have sufficient funds in his account. Tami told defendant the checks were not honored. He said he would go to Hawaii to get the money to pay her. Tami purchased a round-trip ticket for defendant to Hawaii. Defendant did not use the ticket because he said the Mafia was after him.

Defendant drove Tami's jeep to Las Vegas. There he tried to win money to pay her back. Defendant then drove to California at the request of his parole officer. During this trip, Tami and her mother, Linda Groth, sent the six wire transfers that form the basis of this charge to defendant at his request. The transfers totaled \$2875. Tami and her mother testified defendant wanted the money to go to Hawaii to get the funds to reimburse Tami. Both testified defendant also promised to pay back these travel funds.

At trial, defendant admitted he was a con artist. He admitted most of what he said to Tami and her mother were lies. Defendant said he had never played professional baseball for the Montreal Expos or been involved with the Mafia or the Charles Keating Savings and Loan scandal. Defendant admitted he did not have \$7 million in assets and did not own any real estate or have other assets of value.

At the time defendant met Tami, he was on parole following a conviction in Arizona.

A jury found defendant guilty of the crime charged. The district court denied defendant's motion for judgment of acquittal and motion for new trial. Defendant was sentenced as a habitual offender. He now appeals.

Defendant contends there was not sufficient evidence to support the jury's verdict finding him guilty of theft by deception in the second degree. He claims he did not deceive Tami or her mother concerning what he did with the money they transferred. Defendant said he told them he needed money for gas, food, and lodging on his trip to Las Vegas and then to California and that is how he used the money.

In considering defendant's challenge, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). Evidence is substantial when it could convince a reasonable person defendant is guilty beyond a reasonable doubt. *State v. Knox*, 536 N.W.2d 735, 741 (Iowa 1995); *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *State v. Robinson*, 288 N.W.2d 337, 338 (Iowa 1980).

Under Iowa Code section 714.1(3), a person is guilty of theft if the person obtains possession of the property of another by deception. Deception is defined in Iowa Code section 702.9 as:

1. Creating or confirming another's belief or impression as to the existence or nonexistence of a fact or condition which is false and which the actor does not believe to be true.

2. Failing to correct a false belief or impression as to the existence or nonexistence of a fact or condition which the actor previously had created or confirmed.

Iowa Code §§ 702.9(1), 702.9(2).

There is sufficient evidence to support a finding beyond a reasonable doubt that defendant obtained money from Tami and her mother by deception. It was agreed at trial the money transfers were loans, not gifts. Defendant's representations he had substantial assets caused Tami and her mother to be under the impression defendant had the ability to pay back the loans when actually he had no ability to repay the loans.

There is substantial evidence in the record to support defendant's conviction for theft by deception.

Defendant next claims he was denied the effective assistance of trial counsel. Defendant charges his trial attorney failed to subject the State's case to meaningful adversarial testing. He contends there were no pretrial requests to produce exculpatory information and his trial counsel took no discovery depositions. Defendant contends his trial counsel did not adequately investigate evidence from four witnesses, namely, Mike Harrington, a counselor from the Arizona Department of Corrections; Keith Kiuchi, an attorney in Hawaii; Charlene Newborn, his probation officer from California; and his brother.

The testimony of Kiuchi and Newborn was presented at trial through a tape recording of their telephone depositions. There is no record as to what testimony the other two witnesses could supply. Defendant contends his brother was not available at trial because he needed a subpoena to get off work and his attorney failed to send him one.

The standard for measuring ineffective assistance of counsel claims is well established. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The record is not sufficient to allow us to examine these claims. Because we lack an adequate record on the ineffective assistance of counsel claim, we think the claim is more appropriate for postconviction relief consideration. *State v. Padavich*, 536 N.W.2d 743, 753 (Iowa 1995); *see also State v. Epps*, 322 N.W.2d 288, 292 (Iowa 1982).

We affirm defendant's conviction for the crime of theft in the second degree. Costs of this appeal are assessed to defendant.

AFFIRMED.