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APR 20 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, )

Plaintiff-Appellee, ) Filed April 20, 1988 208

vs. )

DONALD FITZGERALD, ) 8-54
87-904

Defendant-Appellant. )

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Appeal from the Iowa District Court for Buena Vista County (No. 6691), Richard F. Branco, Judge.

Defendant appeals his conviction of theft in the second degree, challenging the sufficiency of the evidence to prove the elements of the crime charged. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie Ann Halligan, Assistant Attorney General; and Corwin Ritchie, Buena Vista County Attorney, for plaintiff-appellee.

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

**HABHAB, J.** 299

This is an appeal by the defendant from a judgment and sentence following his conviction, after a jury trial, of second-degree theft, in violation of Iowa Code sections 714.1(3) and 714.2(2) (1987). The sole issue for our consideration is whether or not there was sufficient evidence to convince a rational jury beyond a reasonable doubt that the defendant obtained by deception the transfer of possession, control, or ownership or beneficial use of the property of Franklin Halverson. We find there is.

In reviewing the sufficiency of the evidence, the court considers the evidence in the light most favorable to the State, and it considers all the evidence presented at trial, not just the evidence which supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). This includes legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Substantial evidence means evidence which could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Schertz, 328 N.W.2d 320, 321 (Iowa 1982).

From the evidence presented at trial, the jury could have found the following facts. In January of 1985, ninety-five-year-old Franklin Halverson contacted Richard Altringer to express his concern over the growing expense of his Statesman Insurance policy. Altringer had sold Halverson this medicare supplement policy in 1980. Altringer discussed the situation with Halverson and suggested two new insurance policies.

On March 25, 1985, Altringer, according to his testimony, returned to Halverson's home accompanied by the defendant. The defendant supplied Halverson with brochures which explained the coverage available from two companies—United American and United Equitable. The defendant also supplied

the necessary application forms. Acting on the information supplied by the defendant, Mr. Halverson applied for a medicare supplement with United American and a nursing home policy with United Equitable. The defendant calculated the premium for the policies to be $1,450. Halverson signed a check for that amount and made it payable to the defendant's company. Altringer testified that $659 was needed for the United American policy and the balance was to go towards the nursing home policy. The two applications and the check for the premiums were given to the defendant for processing. The applications were to be handled by the defendant from that point on because Altringer was not licensed with the particular companies.

At this point we note that United Equitable's nursing home policy could only be sold to individuals between the ages of sixty-two and seventy-nine. Altringer testified that since the defendant was licensed with United Equitable, he would have known about the age restrictions. In addition, the defendant admitted that on March 25, 1985, he knew that Franklin Halverson was well over the age limitation.

Although Mr. Halverson had opted to buy insurance with United American and United Equitable, on April 10, 1985, the defendant sent in an application for Mr. Halverson to Lincoln Life Insurance, a completely different company, without consulting Mr. Halverson. Along with this application for a medicare supplement, the defendant sent Lincoln Life a bank draft for $764.13 and a medical release form. Altringer testified that a Lincoln Life medicare supplement policy was never discussed with Mr. Halverson.

Halverson testified that his signatures on the Lincoln Life application and the medical release had been forged. The defendant admitted that he had filled out the rest of the Lincoln Life application and had signed his own name to the application, but maintained that he thought Franklin Halverson had signed

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it. Lincoln Life rejected the application and sent the defendant a check for $764.13 made payable to Franklin Halverson as a refund for premiums submitted with the original application. Lincoln Life intended that defendant deliver the check to Mr. Halverson as soon as possible. Both Halverson and Altringer testified that Halverson's endorsement on the Lincoln Life check was forged. The check was then deposited in the defendant's own account.

On May 7, 1985, the defendant, on behalf of Mr. Halverson, sent in an application for insurance with United American. The defendant sent in $259.60 to United American, which represented a year's premium for the United American medicare supplement. Mr. Halverson testified that his signature on the application to United American had been forged. Altringer agreed that Halverson's name had been forged and that the application sent in to United American was not the same application which was originally filled out on March 25, 1985. Nonetheless, United American issued a medicare supplement policy based on this application.

By the end of May 1985, the defendant had collected $1,450 from Mr. Halverson, but Mr. Halverson only had $659 worth of coverage from United American. The refund from Lincoln Life had yet to be returned to Mr. Halverson. As mentioned above, it was deposited in defendant's own account.

After nine months of not hearing anything, Mr. Halverson, who was then living in the Sioux Care Center in Sioux Rapids, asked the administrator there, Sandy Tielbur, to look into the matter. Ms. Tielbur contacted Altringer, who eventually delivered a United American policy to Halverson on January 16, 1986.

Ms. Tielbur examined the policy and noted that Halverson's signature had been forged. She also noted that the application was dated September 3, 1985, and that the defendant had not been in contact with Mr. Halverson on

that date. Finally, she determined that the agent for the policy was the defendant. On January 31, 1986, Ms. Tielbur contacted the defendant and expressed her concerns. On February 6, 1986, she contacted the Buena Vista County Attorney and indicated that Halverson wanted an investigation. After the county attorney had been contacted, the defendant came to the nursing home to see Halverson. It was at this time that the defendant found out that an investigation was in progress. Shortly thereafter, Halverson received a check in the amount of $757 from the defendant.

The defendant's defense at trial was that he "thought he gave [Mr. Halverson's money] back in September." After speaking to Ms. Tielbur, who informed him of the investigation, the defendant then realized that Halverson's check had never been cashed. On cross-examination, the county attorney pointed out that the carbon of the check which was allegedly written to Halverson in September had "void" written in carbon. The suggestion was that when a check is given to a party and remains uncashed for a certain period of time, the person who issued the check will go back to his records and mark "void" on the carbon copy of the original uncashed check. The "void" written on the carbon copy will necessarily appear in original ink rather than in carbon. The defendant claimed that the markings were not carbon but were instead made by his blue pencil. A jury could reasonably believe that the markings on the exhibit were made by carbon rather than by a blue pencil.

In the defendant's February 11, 1986, letter, he made reference to the alleged earlier attempt to return Halverson's money. The defendant merely apologized for the delay in returning the refund. As indicated earlier, this letter was written and the refund was given only after the defendant was made aware of the ongoing investigation. The defendant's testimony further demonstrated deceptive behavior. He testified that it would have been improper to sell both

the Lincoln Life policy and the United American policy to Halverson, because both contained medicare supplements and would have resulted in "stacking." He then admitted to paying Altringer a commission on the United American policy and submitting an application to Lincoln Life. He further admitted that the Statesman Insurance which Halverson originally had provided better coverage than the new policies which were presented to Halverson. The defendant admitted to filling out all of the applications in evidence and admitted to providing false information to the insurance companies on several points. The Iowa Supreme Court has stated that a defendant's inconsistent statements are probative circumstantial evidence from which a fact finder may infer guilt. State v. Schrier, 300 N.W.2d 305, 309 (Iowa 1981).

Viewing the above evidence in the light most favorable to the State, it is clear that the defendant's deceptive behavior was calculated to obtain from Mr. Halverson a transfer of possession, control or ownership, or the beneficial use of property in excess of $500 but less than $5,000, in violation of Iowa Code sections 714.1(3) and 714.2(2). The record clearly demonstrates that the defendant wrongfully retained possession of Halverson's $757 and returned this money only after discovering that he was the subject of a criminal investigation. For these reasons we find that there is substantial evidence in the record to support the jury verdict.

**AFFIRMED.**