IN THE COURT OF APPEALS OF IOWA

No. 0-208 / 98-1655
Filed May 31, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DELORES CALKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Defendant appeals from the judgment and sentence entered on her conviction for first-degree theft. **AFFIRMED.**

Robert W. Thompson of Thompson Law Office, Reinbeck, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Zimmer and Hecht, JJ.

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HECHT, J.

On appeal from the judgment and sentence entered on her conviction for first-degree theft, Delores Calkins contends (1) the district court erred in concluding she had possession of property by way of a trust, (2) the court erroneously admitted her bankruptcy petition into evidence, and (3) she was provided ineffective assistance of counsel. We affirm.

I. Background Facts and Proceedings. At all times material to these proceedings, JoAnn and Paul Johnson were married and owned and operated Paulie's Place, a bar in Waterloo, Iowa. Delores Calkins ("Calkins") worked at Paulie's Place from 1985 until 1995. In the beginning of her employment, she tended bar and was a waitress. In 1989, Calkins became the manager of the bar and took care of most of the bar's financial dealings. She made deposits, collected cash, paid bills, and kept the bar's financial records.

When JoAnn moved to St. Paul, Minnesota, in 1989, Calkins and Paul Johnson began an intimate relationship. They lived together when Paul was in Waterloo and took vacations together. They liked to gamble together and Paul often gave Calkins money and expensive gifts or let her use his credit card for gambling purposes. During the time in question, Paul had a continuing problem with alcoholism and spent less and less time running the bar. The evidence also indicates Paul did not run the bar with exemplary accounting procedures. On one occasion, he misplaced a money bag containing $10,000. He often loaned money to patrons of the bar or cashed paychecks out of the register. Calkins

assumed an increasingly larger role in the bar's finances during the course of her employment at Paulie's Place.

Calkins gave the bar's financial records to a bookkeeper, Donna Thissen ("Thissen"), on a monthly basis. In 1993, Thissen noticed the bar's deposits were not getting to the bank, an excessive number of checks were being written for cash, and deposits were often "shorted." Thissen discussed the discrepancies with Calkins on several occasions and never received an adequate explanation. She also become aware that while Calkins was writing checks for sales and payroll taxes, the checks were not being deposited. She later discovered Calkins was writing the checks, but not mailing them. After further investigation, Thissen discovered more than $60,000 was missing. A criminal investigation began and Calkins admitted in a series of letters to JoAnn and Paul that she had "borrowed" the money. In the letters, she disclosed she used the money to buy a car, to give things to her children, and to go gambling. She frequently took the money bag with cash receipts in her purse at night and occasionally took the bag with her when she gambled. She also admitted to misappropriating money from football pools and fundraisers at the bar.

On December 4, 1996, the State charged Calkins with first-degree theft in violation of Iowa Code sections 714.1(2) and 714.2(1) and with forgery in violation of Iowa Code section 715A.2. On June 5, 1997, Calkins filed for bankruptcy. In her petition, she listed Paulie's Place and Paul as unsecured creditors for a $100,000 personal loan. Calkins waived jury trial and the matter was tried before the district court on March 10, 1998. The district court found her

guilty of theft in the first degree and not guilty of forgery. Calkins appeals her conviction on the theft charge.

II. Standard of Review. We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4; *State v. Thomas,* 561 N.W.2d 37, 39 (Iowa 1997). We review evidentiary issues for an abuse of discretion. *State v. Most,* 578 N.W.2d 250, 253 (Iowa App. 1998). We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998); *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996).

III. First-Degree Theft. Calkins contends the record contains insufficient evidence she had possession of the Johnson's property by reason of a trust. In reviewing challenges of the sufficiency of the evidence, we examine the evidence in the light most favorable to the State, and make all reasonable inferences that may fairly be drawn therefrom. *State v. McPhillips,* 580 N.W.2d 748, 753 (Iowa 1998). We consider all the facts, not just those which support the verdict, and will uphold a conviction if it is supported by substantial evidence. *State v. Kostman,* 585 N.W.2d 209, 211 (Iowa 1998). Evidence is substantial if a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *State v. Conroy,* 604 N.W.2d 636, 638 (Iowa 2000).

> A person commits theft when the person does any of the following:
>
> 2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such

> property to the person's own use, when the owner of such property is known to the person.

Iowa Code § 714.1(2). The district court concluded a trust relationship existed between Calkins and the Johnsons with regard to their property. We may affirm the district court's decision for any reason appearing in the record. *State v. O'Malley,* 593 N.W.2d 517, 519 (Iowa 1999). Even if, as Calkins argues, the evidence was insufficient to show Calkins misappropriated property she held by way of trust, substantial evidence in the record proves Calkins misappropriated property of another that was in her possession or control. Calkins acted as the manager of Paulie's Place from 1989 to 1995. She took care of all of the bar's financial dealings including making deposits, paying bills, paying taxes, and keeping records. The evidence also indicates she misappropriated the bar's property for her own personal gain by taking the bar's money bags with her when she gambled, giving money to her children from the cash register, and using the money for personal items such as credit cards and a car. We conclude there is substantial evidence in the record before us to support a conviction of first-degree theft pursuant to Iowa Code section 714.1(2).

IV. Bankruptcy Petition. Calkins also argues the district court erred by admitting her bankruptcy petition into evidence. She contends the petition's probative value is outweighed by its prejudicial nature. On appellate review of an evidentiary ruling, we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis,* 574 N.W.2d 15, 16 (Iowa 1998). Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 403; *State v. Shortridge,* 589 N.W.2d 76, 82 (Iowa App. 1998).

"[R]ule 403 does not provide protection against all evidence that is prejudicial or detrimental to one's case; it only provides protection against evidence that is unfairly prejudicial." *State v. Howell,* 557 N.W.2d 908, 912 (Iowa App. 1996) (quoting *State v. Plaster,* 424 N.W.2d 226, 231 (Iowa 1988)). We cannot conclude admission of Calkins's bankruptcy petition was unfairly prejudicial. The district court indicated on the record it would give the evidence "as much weight as it deserves." In addition, there is no suggestion in the record the evidence had "an undue tendency to suggest decisions by the fact finder based on an improper basis." *See State v. Alderman,* 578 N.W.2d 255, 258 (Iowa App. 1998). We therefore affirm the decision of the district court on this issue.

V. Ineffective Assistance of Counsel. Calkins claims her trial counsel was ineffective by (1) failing to file a motion in arrest of judgment and (2) misapplying and misunderstanding the law. Normally, "we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Query,* 594 N.W.2d 438, 444 (Iowa App. 1999). Claims of ineffective assistance of counsel may, however, be resolved on direct appeal "when the record is adequate to decide the issue." *Id.*

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Johnson,* 604 N.W.2d 669, 673 (Iowa App. 1999) (quoting *Strickland v. Washington,* 466 U.S. 668, 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Pace,* 602 N.W.2d 764, 774 (Iowa 1999). We affirm if either element is absent. *State v. Crone,* 545 N.W.2d 267, 270 (Iowa 1996). As to the first element, Calkins must prove her trial counsel's performance was not within the normal range of competence. *See id.* As to the second element, Calkins must prove her counsel's error resulted in an actual and substantial disadvantage, creating a reasonable probability that but for the error the outcome of the proceeding would have been different. *State v. Gant,* 597 N.W.2d 501, 504 (Iowa 1999).

Calkins first alleges trial counsel was ineffective for failing to file a motion in arrest of judgment and thereby limiting her ability on appeal to attack the verdict. We find no prejudice in the record to Calkins because the evidence of her guilt was overwhelming. *See Whitsel v. State,* 439 N.W.2d 871, 875 (Iowa App. 1989). We therefore cannot conclude trial counsel was ineffective for not filing a motion in arrest of judgment.

Calkins next contends trial counsel was ineffective by misunderstanding and misapplying the elements of the code section that formed the basis of the theft charge. Specifically, trial counsel argued the State failed to show Calkins had the intent to permanently deprive the Johnsons of their property, but such

intent is not an element of the crime charged. Even if trial counsel was mistaken in his arguments to the court, Calkins has failed to demonstrate trial counsel's actions prejudiced her. Calkins has failed to illustrate there is a reasonable probability that but for trial counsel's errors, the outcome of the trial would have been different. *See State v. Arndt,* 539 N.W.2d 489, 491 (Iowa App. 1995). Calkins's claims of ineffective assistance of counsel are denied.

AFFIRMED.