FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

469

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
WAYNE GLIECK,)
Defendant-Appellant.)

Filed August 29, 1985

5-368
84-1339

Appeal from the Iowa District Court for Buena Vista County - Cameron B. Arnold, Judge.

Defendant appeals from his conviction of third-degree theft in violation of Iowa Code sections 714.1(6) and 714.2(3). **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Defendant appeals from his conviction of third-degree theft in violation of Iowa Code sections 714.1(6) and 714.2(3). He asserts that his conviction was not supported by substantial evidence. Specifically, defendant argues that the State did not prove that he knew that certain bad checks would not be paid when presented. Defendant also asserts that the trial court impermissibly relied upon unproved allegations of other crimes in determining his sentence. We affirm.

In November 1983, defendant Wayne Glieck presented two $50 checks and one $100 check to a convenience store. On each occasion, part of the check was used to purchase gasoline and the balance was taken in cash. All three checks were drawn from the account of "Triple G Enterprises" and were signed by Glieck's wife as treasurer.

On December 10, 1983, defendant's wife was notified by certified mail that the two $50 checks were returned because of insufficient funds. On December 14, 1983, Glieck received certified notice that the $100 check had been returned due to insufficient funds. The notices provided that defendant had ten days in which to pay the amount due. As of the time of trial, the checks had not been paid and no one had approached the convenience store concerning payment.

Following a jury trial, Glieck was found guilty of third-degree theft. The defendant's motion for a new trial and motion for arrest of judgment were overruled by the trial court.

Glieck's first claim is that there was insufficient evidence to support a finding that he knew the checks were bad when they were presented.

In considering this claim, we view the evidence in a light most favorable to the State, including all legitimate inferences and presumptions which may

fairly and reasonably be deduced from the record. State v. Nunn, 356 N.W.2d 601, 603 (Iowa Ct. App. 1984). A verdict of guity is considered binding unless it is supported by substantial evidence. Id. Substantial evidence has been defined as "such evidence as could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt." State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980).

The defendant emphasizes that valid checks were presented before and after the bad checks were written. He also points out that substantial deposits were made shortly after the bad checks were issued. This evidence, however, would not necessarily preclude a finding of guilt. In fact, a juror could conclude that the deposits were made in an attempt to cover the bad checks and that Glieck knew there were insufficient funds at the time they were issued. Furthermore, it is evident from the record that after Glieck was notified that there were insufficient funds, he made no attempt to contact the convenience store and remedy the situation. This fact would support an inference that defendant knew the instruments would not be paid on presentation. See Iowa Code § 714.16 (1983).

Viewing the evidence in a light most favorable to the State, we conclude the conviction should be sustained. Substantial evidence exists to satisfy the knowledge requirement of third-degree theft.

Glieck argues, in the alternative, that his sentence should be vacated. He contends that the trial court impermissibly relied upon allegations of "other bad checks" in selecting the sentence ultimately imposed. We disagree.

Under Iowa law, a sentence will be vacated when the court relies upon unprosecuted charges which were not admitted to by the defendant or otherwise proved. State v. Black, 324 N.W.2d 313, 315 (Iowa 1982); State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981).

In the case before this court, the sentencing court relied in part on information contained in a presentence investigation report. The report reveals that Glieck had been convicted on several bad check charges. Additionally, the report contains the following statement:

> It is this agent's understanding that the Buena Vista County Attorney has an additional insufficient fund check written by Mr. Glieck. Charges have not been filed. The defendant stated that he is aware of additional bad checks in Marshall County, Sac County, and Carroll County relating to that his attorney is aware of these and has arranged payment.

At the sentencing hearing, the court made reference to "other bad checks floating around: Marshall County, apparently, Sac County, Carroll County." We would agree with the defendant that this statement concerns the unprosecuted charges mentioned in the report, rather than the convictions. We note, however, the defendant admitted these acts to the presentence investigator. Because of this, we believe it was proper for the court to consider the charges, even though they were unprosecuted.

Finding no error, we affirm the judgment and sentence.

AFFIRMED.