IN THE COURT OF APPEALS OF IOWA

No. 7-084 / 96-0476

STATE OF IOWA,

Plaintiff-Appellee,

vs.

KAREN S. HUSTON,

Defendant-Appellant.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Lee (South) County, D.B. Hendrickson, Judge.

Karen Huston appeals the judgment and sentence entered upon her conviction of forgery in violation of Iowa Code sections 715A.2(1)(b) and 715A.2(2)(a) (1995).

REVERSED AND DISMISSED.

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson and Sarah E. Hennesy, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Michael Short, County Attorney, and Bruce C. McDonald, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Vogel, JJ.

SACKETT, P.J.

Defendant-appellant Karen Sue Huston was convicted of forgery in violation of Iowa Code sections 715A.2(1)(b) and 715A.2(2)(a) (1995) after she endorsed and transferred to herself a $27.27 refund check from Continental Cablevision delivered to her address and made payable to Robin Dutcher. Dutcher lived with defendant and her daughter Mandy for a period, but had moved from the house at the time the check was received. Defendant was found guilty after a jury trial; and having two prior convictions for second-degree theft, she was sentenced to a term in prison not to exceed fifteen years.

Defendant appeals contending there was not substantial evidence to show beyond a reasonable doubt she intended to defraud Dutcher or sign her name with the knowledge this would facilitate a fraud. Defendant further contends the district court erred in sentencing her as an habitual offender. We reverse and dismiss.

Dutcher moved in with defendant and Mandy in May or June 1995 and stayed for about seven weeks. Dutcher was having personal and financial problems and paid defendant no rent. Dutcher's telephone service was transferred to defendant's home. Dutcher wanted cable television service installed at defendant's home and defendant agreed. Mandy accompanied Dutcher to sign for the service. The only evidence of who paid the deposit was Mandy paid it. The service from Continental Cablevision was installed in defendant's home but billed in Dutcher's name. When Dutcher moved

out, she canceled the service and was promised a refund of the deposit. It was not forthcoming and she learned the check had been mailed to defendant's address. Defendant admitted to an investigating officer she had endorsed the check by signing Dutcher's name and deposited it into her account claiming she did so because Dutcher owed her money. Defendant was charged with forgery.

At her jury trial, defendant and Mandy testified Dutcher told them they would receive a check from the cable company. They inferred from this that Dutcher intended for them to have the check. Mandy further testified Dutcher owed her $200 on a car Dutcher had purchased from Mandy and had not paid for. Dutcher denied speaking with defendant and Mandy about the cable refund check. Further, she testified she did not feel she owed defendant or Mandy any money because she had paid over $500 of their telephone bills.

When asked about the check, defendant told what had happened, contending she thought she had permission to endorse the check because she had signed cable documents before. Defendant does not deny she signed Dutcher's name to the check. She contends instead that allowing Dutcher to live with her without paying rent, driving her to and from work, letting Dutcher use her car, and Mandy loaning Dutcher money for the cable service show the improper signing of the refund check was a misunderstanding and there is not sufficient evidence to support a finding of fraud.

The jury found defendant guilty as charged. The court found defendant was an habitual offender, having had two prior convictions of second-degree theft. The court sentenced defendant to a term of imprisonment not to exceed fifteen years. In imposing sentence, the court stated, "The reasons for imposing this sentence are, basically, your prior record in this matter and inability to learn [from] your prior convictions."

Defendant advances the evidence was insufficient to show she intended to defraud Dutcher or knew that by signing Dutcher's name to the check she would facilitate a fraud. Defendant further argues the court erred in imposing sentence as it did. She asserts an habitual offender by definition has prior convictions, yet this was the only reason cited by the court for the sentence imposed. Defendant contends the sentence was illegal, procedurally defective, or void. Defendant claims she was not required to raise this issue before the trial court.

We review the evidence in the light most favorable to the State. *State v. Rojas-Cardona*, 503 N.W.2d 591, 594 (Iowa 1993). We draw all reasonable inferences from the evidence taking all evidence into consideration. *Id.* The district court's decision not to grant defendant's motion for judgment of acquittal will be affirmed if there is substantial evidence to convince a rational fact finder defendant is guilty as charged beyond a reasonable doubt. *Id.*

To convict defendant of forgery, the jury was instructed it must find:

> 1. On or about the 9th day of August, 1995, the defendant signed the name of Robin Dutcher as an endorsement on a check made payable to Robin Dutcher.
>
> 2. The defendant signed Robin Dutcher's name as an endorsement on the check without the authority or permission of Robin Dutcher.
>
> 3. The defendant signed Robin Dutcher's name
>
> (a) with the specific intent to defraud Robin Dutcher, or
>
> (b) with the knowledge that the act of signing Robin Dutcher's name as an endorsement on the check would facilitate a fraud.

There is not substantial evidence defendant intended to defraud Dutcher. The check was a refund for a deposit. The only evidence is Mandy made the deposit. Defendant signed Dutcher's name to the cable contract. The refund check was mailed to defendant's address. The refund came as a result of the financial operation of a joint household where defendant and Dutcher and Mandy shared expenses incident to the household operation, and there were continuing obligations. The evidence introduced is not sufficient to support a finding beyond a reasonable doubt of an intent to defraud.

We find it unnecessary to address the sentencing issues.

We reverse and dismiss.

REVERSED AND DISMISSED.

Vogel, J., concurs; Cady, J., dissents.

CADY, J. (dissenting)

I respectfully dissent. There was substantial evidence to support the finding by the jury that Huston intended to defraud Dutcher.