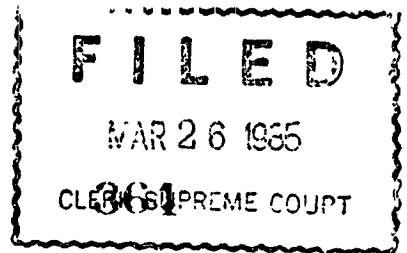


**IN THE COURT OF APPEALS OF IOWA**



**STATE OF IOWA,**

)

Plaintiff-Appellee,

)

Filed March 26, 1985

vs.

)

**MARY A. BERRY,**

)

5-08  
83-1406

Defendant-Appellant.

)

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Appeal from the Iowa District Court for Marion County - Van Wifvat, Judge.

The defendant appeals from conviction and sentence for second-degree theft. REVERSED.

Charles L. Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

**SNELL, J.**

The defendant, Mary Berry, was accused of obtaining merchandise and labor from various Knoxville businesses by deception. She was charged with first-degree theft on the theory that the transactions comprised a single scheme.

At the trial, the State presented the testimony of twenty-one business people from whom the defendant obtained services and goods on credit. The State argued that the defendant received all the various goods and services without intending to pay for them. At the close of the State's evidence, defense counsel requested that the State be ordered to restrict the charge to a single transaction. The motion was sustained and the State elected to prosecute the defendant for her failure to pay for carpeting installed in her home by Carpetsville, a business owned by Gary DeJoode.

The evidence showed that DeJoode installed carpeting in the defendant's home at a cost of \$1,901.19, based on the defendant's assurances that it would be paid for. The defendant informed DeJoode that the funds would come from her boyfriend, Ronald Oldham. Later, the defendant told DeJoode that she would be responsible for the debt and that she would rely on funds from her social security or from a bank loan that she was attempting to obtain. After the defendant failed to pay, DeJoode secured a mechanic's lien. There was evidence that the defendant had other debts and an overdrawn checking account at the time she arranged for the carpet installation.

The defendant testified that she purchased the carpet based on the assurances of Ronald Oldham that he would cover the cost. Oldham testified that he was at one time going to move in with the defendant and that he intended to contribute to the costs of remodeling the defendant's home if he moved in with her. However, around the time that the arrangements were being made to install the carpet, Oldham moved out of the defendant's home and attempted to reconcile with his wife.

Prior to the submission of the case, the jury was instructed that the evidence of the other transactions involving the defendant was to be considered only as it pertained to the defendant's intent or knowledge. The jury found the defendant guilty of second-degree theft.

On appeal, appellant argues that there was not sufficient evidence from which a rational jury could find that the defendant acted with the intent necessary to establish second-degree theft.

A person commits theft when he or she:

Obtains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, or the beneficial use of property of another, by deception. Where compensation for goods and services is ordinarily paid immediately upon the obtaining of such goods or the rendering of such services, the refusal to pay or leaving the premises without payment or offer to pay or without having obtained from the owner or operator the right to pay subsequent to leaving the premises gives rise to an inference that the goods or services were obtained by deception.

Iowa Code § 714.1(3) (1983).

Due process guarantees that no person shall "suffer the onus of criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560, 571 (1979).

When the assignment of error presents a federal constitutional issue, we make an independent evaluation of all the evidence from which the assertions of unconstitutionality arise. State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976).

After examining the record, we find that there is insufficient evidence from which a rational jury member could find that the defendant acted with intent to commit theft. At worst, the defendant is an incompetent financial manager, unable to balance her checkbook or live within a budget. The defendant has been married three times. Her first marriage was to Billy Cox and they had one child,

Nicolaus, who is 22 at present and is a mongoloid. After Mr. Cox was killed in an accident, she married Charles Berry and had one child, Carla, who is 17. She was married a third time to Jan Berry and one child, JoAnn, was born of that marriage. She is currently 12. In addition to her own children, defendant cared for other children.

Defendant's financial problems date back to prior to her move to Knoxville. Before coming to Knoxville, the defendant lived in Albia and later moved to Springfield, Missouri. During this time, one child, for whom she had been receiving social security, left her home. She was required to pay back that share which she had received that was attributable to this child. In addition, she had a number of overdrafts at her bank in Springfield. However, defendant, by working two jobs, was able to pay back the money to both the bank and the Social Security Administration.

The defendant returned to Iowa in July 1984. In August 1982, she met Ronald Oldham and they began dating. Oldham advanced money to defendant to help her buy a home on West Washington Street. The home was fairly run down and required a good deal of work.

In November 1982, the defendant went to one carpet company in Knoxville and received an estimate of the cost of installing new carpeting in the house. Oldham, who had agreed to help pay for the carpet, advised the defendant that the estimate was too high. Defendant went to Carpetsville and obtained an estimate of approximately \$1,800 for new carpet. Gary DeJoode of Carpetsville told the defendant that \$500 would have to be paid before they would lay the carpet. Defendant agreed, but said she did not have her checkbook with her. On November 8, the workers from Carpetsville went to the defendant's home to lay the carpet. Although the defendant was not there and had not paid the \$500, the workers proceeded to lay the carpet. The workers continued to lay carpet the following day even though the defendant was still not there. On the third day,

November 9, DeJoode stopped the carpet installation because no payment had been received. However, the defendant told him that she was waiting for Oldham, who was a subcontractor, to be paid and that once Oldham was paid she would pay him in full. DeJoode agreed to complete installation because he understood Oldham's situation.

After the carpet was installed, Oldham broke off his relationship with defendant and returned to his wife. Defendant contacted DeJoode and told him she intended to be solely responsible for the carpet payment and that she would pay him from her social security receipts and by a loan she hoped to obtain from the bank.

In January, defendant contacted the officers at a local bank to see if she could obtain a loan to pay off the remodeling contract. The bank officials visited the home and determined that there was not sufficient equity in the home to substantiate the loan at that time. There was, however, no indication on the loan form that defendant received notice of the denial and the defendant claims that she was never told the loan was denied. The bank official testified that he did tell the defendant that she would have to resubmit the loan application.

During this same period, defendant purchased several other items from local retailers on credit. Defendant told many of the retailers that she was waiting to receive the bank loan and would pay them when she received the money. Several of these creditors testified that the defendant had purchased goods on credit but they stated that they did not feel that the defendant tried to deceive them.

The State argues that the defendant misrepresented her financial position to Carpetsville throughout the entire course of dealings. Several factors are set forth to establish the intent to deceive, including the fact that the defendant's checking account was overdrawn shortly before she contacted Carpetsville, that she had insufficient funds to make the \$500 down payment at that time, and that

she told DeJoode of Carpetsville that she would pay for the carpet in full once Oldham was paid from his contracting job.

We find that these factors when considered in the context of the entire record fail to establish an intent to deceive. At the time the defendant contacted Carpetsville, she had just finished straightening out problems with her Missouri bank resulting from overdrafts and with the Social Security Administration for overpayment. She had reasonable cause to believe that Oldham would help her with the payments. Oldham testified, "I told her to get an estimate, we'd see what it was and then if we stayed together I'd help pay." It was not until after the carpet was installed that Oldham broke off his relationship with the defendant and returned to his wife. After the defendant learned that Oldham returned to his wife and that she could not rely on his financial support, she contacted DeJoode and told him that she would be solely responsible for the payments and that she would pay him from the social security she received and by a loan she hoped to receive from the bank.

After considering all these factors, we find insufficient evidence from which a rational jury could find that the defendant intended to deceive Carpetsville when she hired them to install the carpet. The record indicates that she reasonably believed that she could make the payments.

We find that the conviction should be reversed and the sentence vacated.

REVERSED.

All judges concur except Donielson, P.J., who dissents.

**DONIELSON, P.J.** (dissenting)

I respectfully dissent. Viewing the evidence in a light most favorable to the State, as we are required to do at this point, I believe that the conviction should be affirmed. Substantial evidence supports the finding that the defendant consistently gave unfounded promises to pay for the carpet and intentionally deceived Carpetsville.

A jury could reasonably find that the defendant knew that she did not have sufficient funds to make the \$500 down payment. Before she contacted Carpetsville, her checking account was overdrawn by almost \$600. On November 3, a deposit of \$720 was made to her account resulting in a balance of at most \$120. In spite of this, the defendant told Carpetsville that the only reason she could not pay was because she did not have her checkbook with her. It would be entirely reasonable for a juror to conclude that such a statement was deceptive. Later that same day, the defendant made a second statement which could be characterized as deceptive. She claimed that she was having trouble with her checking account and that Oldham would pay for the services. Yet the record would support a conclusion that Oldham never intended to assume full responsibility for payment and that the defendant knew this.

Carpetsville eventually stopped working on the job since they had not received the down payment. At that point, the defendant called Carpetsville and explained that she was having difficulty getting the money from Oldham because he had not been payed for a subcontracting job. A jury could find that this statement was also an intentional misrepresentation. Oldham had moved out of the defendant's home a few days earlier. It would be reasonable to conclude that the defendant knew that Oldham no longer intended to be responsible for any expenses at that time.

In light of these misrepresentations, I find it difficult to believe that the defendant was simply an incompetent financial manager. She consistently told

Carpetsville that she would be able to pay when she knew she was unable to do so. Furthermore, I cannot ignore the fact that this was not an isolated instance. The defendant was able to get others to work on her house based on a promise of payment with funds she planned to receive from a bank loan. She continued to promise payment even after the bank loan was denied. As the State points out, the frequency of the defendant's irresponsible credit transactions tends to negate an innocent intent.

Accordingly, I would conclude that a jury question, however difficult, was raised by the evidence and the conviction was supported by substantial evidence. As long as this is the case, we should avoid invading the province of the jury.

Certainly, one should not be found guilty of theft merely because a contract was breached. Yet when one consistently makes misrepresentations concerning ability to pay, a fraud is being perpetrated and a conviction under Iowa Code § 714.1(3) should be allowed to stand.