IN THE COURT OF APPEALS OF IOWA

No. 8-333 / 97-1050

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES EDWARD RIVERS,

Defendant-Appellant.

FILED
JUL 31 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Mahaska County, Richard J. Vogel, Judge.

Defendant appeals from his conviction for two counts of second-degree theft in violation of Iowa Code section 714.1(3) and 714.2(2) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

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MAHAN, J.

James Rivers appeals the trial court's denial of his motion for judgment of acquittal on the charges of theft by deception. Rivers also appeals the trial court's award of restitution. Rivers argues the district court erred when it: (1) concluded there was sufficient evidence to allow the charges to go to the jury; and (2) awarded excessive restitution. We affirm.

Rivers ran a contracting business. The contracting business apparently used the name Home Remodeling Company as well as Home Remodeling and Maintenance Company. On January 13 and March 6, 1995, Rivers filed bankruptcy petitions under Chapter 13. Both petitions were dismissed for noncompliance. On April 19, 1995, Rivers filed a Chapter 7 petition. Rivers received a discharge of debts under this petition on September 15, 1995.

After the discharge, Rivers took downpayments for six jobs. Some work was done on five of the jobs. In some instances, further installments were paid. However, no job was ever entirely completed. Each time, Rivers had a reason for failing to complete the work as contracted.

On February 2, 1996, Rivers filed another Chapter 13 bankruptcy petition.[1] That same day, his house burned down. Rivers had renter's insurance with Auto-Owner's Insurance Company (Auto-Owner's). A claims adjuster for Auto-

[1] Rivers could not receive another discharge due to the discharge in September 1995, and the case was dismissed.

Owner's met with Rivers the evening of the fire and provided him with a $5000 advance payment to be used for Rivers' family's immediate expenses. The advance was charged against the personal property portion of the coverage.

Rivers and his family checked into the Traveler Budget Inn (Budget) in Oskaloosa. Rivers later asked for a second advance, but Auto-Owner's refused. At the time, arson was suspected and this influenced Auto Owner's decision to refuse the request. Auto-Owner's told Rivers there would be no more advances, and any living expenses would have to be payed out of the initial $5000 advance.

Auto-Owner's received a call from Budget inquiring about payment. The manager informed Auto-Owner's the Rivers' bill was getting high and they wanted payment. Auto-Owner's told Budget it should contact Rivers. Auto-Owner's claims adjuster also told Rivers to pay the motel from the $5000. The bill at Budget came to $674.17. Rivers paid $416.77 and the Red Cross of Mahaska County paid the remaining $257.40. On February 13, Rivers moved his family to the Red Carpet Inn in Oskaloosa.

Red Carpet Inn agreed to rent two rooms to the Rivers for $25 per room and Rivers' wife wrote a check for the first few nights. Within a day or two, Rivers showed the innkeepers his insurance coverage and told them he had coverage for $5500 in living expenses. Rivers asked for the check back and told Red Carpet Inn it would be reimbursed by Auto-Owner's. Rivers also wrote the name and address of Auto-Owner's on the back of the registration card. Rivers told Red Carpet Inn it

could charge their regular rates since Auto-Owner's would be paying for the rooms. Instead of $50 per night, the rooms were charged out at $94 per night.

Rivers told Red Carpet Inn his family would need the rooms approximately one month. However, the innkeepers did not see Rivers or his family after March 1. Red Carpet Inn did not clean out the rooms because the Rivers left behind clothes and a refrigerator full of food, as well as boxes of food on the floor. Red Carpet Inn assumed the Rivers were still living in the rooms. Finally, on March 13, the Rivers returned to clean the rooms and remove the items they left behind. They never returned to pay the bill.

The State charged Rivers with second-degree arson, second-degree theft relating to the hotel charges, and first-degree theft relating to the unfinished construction jobs. A jury acquitted Rivers on the charges of arson, but found him guilty of two charges of second-degree theft. The trial court ordered Rivers to pay $13,559.56 as restitution to the defendants. After a restitution hearing, this amount was reduced to $11,520. Of this, $850 went to Red Carpet Inn, and the remaining $10,670 went to pay those people whose construction work was not completed. Rivers does not challenge the $850 award to Red Carpet Inn.

I. JUDGMENT OF ACQUITTAL. When the denial of a motion for judgment of acquittal is based on the alleged insufficiency of the evidence, we review for substantial evidence. *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997). Substantial evidence means evidence that could convince a rational jury that the

defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). We consider the evidence in the light most favorable to the State. *Coffman*, 562 N.W.2d at 768. We must consider all of the evidence, not merely the evidence which supports the verdict. *Id.* Provided the evidence raises a fair inference of guilt and does more than create speculation, suspicion or conjecture, direct and circumstantial evidence are equally probative. *Id.*

> Iowa Code section 714.1(3) provides that a person commits theft when that person "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." Iowa Code § 714.1(3).
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> Iowa Code section 702.9(5) defines deception as "[p]romising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows that the actor will not be able to perform." Iowa Code § 702.9(5). This same section goes on to say "[f]ailure to perform, standing alone, is not evidence that the actor did not intend to perform." Iowa Code § 702.9(5).

State v. Hogrefe, 557 N.W.2d 871, 877 (Iowa 1996).

The evidence presented by the State showed Rivers knew he was supposed to pay Red Carpet Inn with the $5000 Auto-Owner's had already given him. Auto-Owner's specifically told Rivers this when Rivers checked out of Budget. Rivers then went so far as to show the innkeepers the insurance forms. Rivers created a belief in Red Carpet Inn it would be paid by Auto-Owner's. After he created this belief, he convinced Red Carpet Inn to return the check his wife had written to them. Rivers further reassured Red Carpet Inn it would be paid by Auto-Owners when he told Red Carpet Inn it could charge the regular room rate.

We find the trial court correctly determined there was substantial evidence that could convince a rational jury Rivers is guilty of second-degree theft as the charge relates to Red Carpet Inn. The trial court correctly allowed the issue to go to the jury.

Rivers next contends the trial court should have granted his motion for judgment of acquittal as it related to the construction contracts. Rivers argues the State has failed to show at the time the downpayments were made on the contracts he had no intention of fulfilling those contracts, nor did the State prove Rivers knew he would be unable to fulfill those contracts.

The State presented evidence of nine different contracts in various stages of completion. One contract was never even started. In each instance, Rivers had some reason for being unable to finish the work. The reasons ranged from personal conflicts with the clients, to being cheated by a local businessman, to the flu and cut off fingers. When one client complained about the pace of the work, Rivers threatened to walk away from the job, telling her he did not need the business because he was a minister making over $100,000 per year and he intended to quit working on the job. The client then agreed to pay an additional $300. Still, the work was never fully completed. Thomas Beck, one of Rivers' employees, testified while he worked for Rivers no one on the crew came down with the flu, nor did anyone cut off any fingers. Whatever the reason, the result was always the same: Rivers ended up with his clients' money and he did not complete the scheduled work.

We find the trial court correctly determined there was substantial evidence that could convince a rational jury Rivers is guilty of theft as the charge relates to the construction contract. The trial court correctly allowed the issue to go to the jury.

II. RESTITUTION. Restitution is authorized only by statute, is a mandatory part of sentencing in Iowa, and is defined in fairly broad terms. *State v. Tutor*, 538 N.W.2d 894, 896 (Iowa App. 1995); Iowa Code § 910.1(3) (1997). A defendant who seeks to overturn or modify a restitution order must show a failure by the trial court to exercise its discretion or an abuse of discretion. *Tutor*, 538 N.W.2d at 896. A trial court abuses its discretion and exceeds its statutory authority when it orders restitution for losses not causally related to the offense committed. *Id.* at 896-97.

In each instance, a causal connection must exist between the criminal act and the injury to the victim. *Id.* at 896. The relationship between damage caused by the criminal conduct and the restitutionary order must be shown by a preponderance of the evidence. *State v. Wagner*, 484 N.W.2d 212, 216 (Iowa App. 1992). This causal connection is essentially the tort element of proximate cause. *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa App. 1995).

Once the causal connection is reached, the statute allows recovery of all damages the State can show by a preponderance of the evidence. *Id.* The amount that may be recovered as restitution includes:

> [A]ll damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same

> facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.

Iowa Code § 910.1(3).

In reviewing the amount of restitution fixed by a trial court, we must determine whether the trial court applied the correct law in fixing the damages and whether there is substantial evidence to support the damages award. *Ihde*, 532 N.W.2d at 829. A restitution order is not excessive if it bears a reasonable relationship to the damage caused. *State v. Mayberry*, 415 N.W.2d 644, 647 (Iowa 1987). The restitution amount must be in accord with the damages caused by the crime. *Ihde*, 532 N.W.2d at 830.

Rivers first contends the $10,670 awarded in restitution was excessive in light of the value placed on the crime by the jury when it determined Rivers was guilty of second-degree theft, having a limit of $10,000. This is specifically at odds with supreme court precedent. *See State v. Holmberg*, 449 N.W.2d 376, 377 (Iowa 1989) (supreme court denied defendants argument his restitution must be limited to $500 due to the limits of the offense to which he pled guilty).

Rivers next argues the individual amounts are inconsistent and excessive. The State argues it proved by a preponderance of the evidence the amounts sought were causally connected to Rivers' deception. Rivers does not challenge the amounts awarded to Dennis Givens and Michael Vos, whose restitution awards total $5100.

Rivers quoted Julie Reeves a price of $1200 to repair gutters at an apartment building. Reeves paid Rivers $900 to begin working. Rivers now argues he did sixty percent of the work and deserves an offset. However, Reeves testified Rivers simply removed some of the old gutters and then left them on the premises.

Pauline and Ruby Eveland paid Rivers $335 to do some home remodeling. However, when Rivers failed to finish the job, they hired another contractor. This contractor did some additional work and charged the Evelands a total of $3000. Pauline testified they figured the cost of completing Rivers' work was approximately $1500.

Betty and Barry Moore's contract to turn their garage into an embroidery shop was to cost $4800. The Moores paid Rivers a total of $4200. The Moores, at Rivers' request, made a list of things needing completion. The list of sixteen items included installing the floor, covering the floor, squaring up the doors, installing the air conditioner, rebuilding the breezeway roof, removing old wiring, new wiring, and building a ramp for the front door.

Rivers agrees Don Baldwin gave him $650 and no work was done. However, Rivers argues he returned $100 to Baldwin because Baldwin was having financial difficulties. Rivers points to nothing in the record other than his own testimony to prove he returned the $100.

We find the State proved by a preponderance of the evidence each of the claims was causally related to Rivers' acts. There was substantial evidence to support

the award of damages. The order was also not excessive, as it bore a reasonable relationship to the damages Rivers caused. For these reasons, we find the trial court did not abuse its discretion.

AFFIRMED.