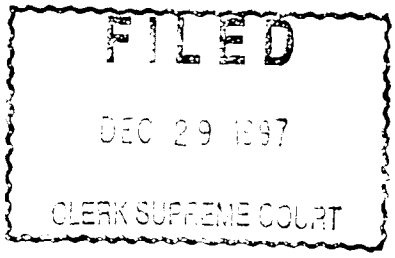
IN THE COURT OF APPEALS OF IOWA

No. 7-596 / 96-2104

000409



STATE OF IOWA,

Plaintiff-Appellee,

vs.

DANIEL TOVAR,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Defendant appeals from his convictions, following a bench trial, for two counts of theft by deception in violation of Iowa Code sections 714.1(3), 714.2(2) and 714.2(3) (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, Thomas J. Ferguson, County Attorney, and Linda Hall, Assistant County Attorney, for appellee.

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

SACKETT, J.

Defendant-appellant Daniel Tovar was found guilty, after trial to the district court, of theft by deception in violation of Iowa Code sections 714.1(3), 714.2(2), and 714.2(3) (1995). The charges were filed after defendant through his carpet business took down payments from two customers and was unable to deliver materials and services. Defendant contends there was not substantial evidence to support a finding of guilt. We affirm.

Substantial evidence is evidence that would convince a rational trier of fact defendant is guilty as charged beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). We view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

Defendant ran a retail carpet store known by several names, including Commercial and Home Improvement Center, CCT Incorporated, and C and H Floor Coverings. The State claimed between August 18, 1995 and November 17, 1995 defendant deceived Ann Russell and Margaret Hanson by promising to deliver goods or services when he knew he could not perform or deliver.

Russell signed a purchase order for carpet and installation totaling $1374.18. She paid $687.10 by a check. Defendant told Russell to leave the payee blank and he inserted his name. Defendant said he would install the carpet October 20, 1995. He failed to appear. Russell called and was told by defendant he could not get a

carpet layer. There was no further contact. In November, Russell was notified defendant had filed for bankruptcy.

Hanson ordered carpeting, wallpaper, and hardwood flooring from defendant on September 22, 1995, and gave him a check in the amount of $1161.65 for half of the carpet order. Defendant told Hanson to make the check payable to him. Defendant told Hanson the carpet would be installed October 17, 1995. The hardwood flooring and installation was $307.36. Hanson paid half of this amount, making her check payable to defendant who told her the flooring would be installed October 16 or October 17.

Neither the carpet nor the flooring were installed on the promised date. Calls to defendant were not answered until November 8, when defendant contacted Hanson's husband telling him the other half of the money was needed. It was not paid, but in the course of the conversation defendant told him eight other customers were similarly situated. Hanson, too, was advised defendant took bankruptcy.

The trial court found defendant in entering into the contracts with Russell and Hanson expressly or by express implication represented to them he would apply their down payments on the materials ordered. The trial court further found defendant's intention in entering the contract was not to apply the money to the merchandise ordered, but to pay other business expenses and complete other contracts. The court found defendant guilty as charged beyond a reasonable doubt.

Defendant contends the State has failed to show substantial evidence to support these findings. Taking the check as a down payment on the purchase was a promise defendant would deliver the carpet in the future. Where the alleged deception is a defendant's promise, we look to (1) whether defendant intended to perform, or (2) whether defendant knew he would not be able to perform. *State v. Hogrefe*, 557 N.W.2d 871, 878-79 (Iowa 1996). The allegations can be shown by circumstantial evidence. *Id.* at 879-80.

Defendant advances he was in the carpeting business and wanted to remain in the business. There was no evidence to contradict this argument. The State failed to show defendant did not intend to perform.

There is, however, substantial evidence defendant knew he would not be able to perform. A deception occurs when the actor knows he or she will not be able to perform. *See State v. West,* 252 N.W.2d 457, 461 (Iowa 1977). False promises are deception. *See State v. Galbreath,* 525 N.W.2d 424, 426 (Iowa 1994). The misrepresentation can be by word or action. *West*, 252 N.W.2d at 461-62.

We agree with defendant there must be evidence to show beyond a reasonable doubt he knew the carpet would not be delivered when the order was placed. *State v. McFadden,* 467 N.W.2d 578, 581 (Iowa 1991). We focus on defendant's intention and knowledge when he took the deposit and promised to order and install the carpet. *See Hogrefe,* 557 N.W.2d at 879.

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The trial court found defendant at the time he entered into the contracts admitted he was using the down payments of Russell and Hanson to pay accrued debts and to purchase merchandise to fill prior contracts. The court further found defendant was on a cash basis with suppliers and knew he could not order carpet without payment to suppliers. Defendant was delinquent in payments to employees. His business account had overdrafts. His personal account was under a tax levy. The court determined defendant never disclosed these facts to Russell or Hanson and created an impression he was solvent and doing business as usual when he was not. These findings are supported by substantial evidence and support a finding defendant knew he would not be able to perform. We affirm.

AFFIRMED.