IN THE COURT OF APPEALS OF IOWA

No. 0-311 / 99-0725
Filed July 12, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LINDA JOYCE GNEWUCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Robert J. Dull, District Associate Judge.

The defendant appeals from her conviction for fourth degree theft in violation of Iowa Code section 714.1(6) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Zimmer and Hecht, JJ.

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HECHT, J.

On appeal from her conviction for fourth-degree theft, Linda Gnewuch argues the district court erred in denying her motion for judgment of acquittal and contends her trial counsel was ineffective by failing to move for a mistrial. We affirm.

I. Factual Background and Proceedings. On February 19, 1998, Emily Dykstra gave Gnewuch $350 in cash in exchange for a personal check drawn on Gnewuch's account at the First National Bank in Sioux Falls, South Dakota. When Gnewuch gave the check to Dykstra, she postdated the check for March 3, 1998, and assured her it would be good on that date. Dykstra agreed to hold the check until March 3. Before March 3, however, Gnewuch contacted Dykstra and asked if she would be willing to hold the check until April 3, 1998. Dykstra again agreed and deposited the check on April 3, 1998. However, the check was ultimately returned to her and marked "account closed" dated April 7, 1998.

Dykstra spoke to Gnewuch who told her she had been having some difficulties with the account but she would correct the problems. However, Gnewuch did not contact Dykstra again and would not return her phone calls. Dykstra then personally confronted Gnewuch, and Gnewuch told her she would not pay the check. The next day, Gnewuch placed a handwritten letter in Dykstra's mailbox confirming she was not going to pay the money unless court action was taken.

Dykstra sought legal advice and, with the assistance of her attorney, sent Gnewuch a notice and demand for payment by certified mail. The notice was returned undelivered on May 3, 1998. Following the advice of her attorney,

Dykstra spoke to a Plymouth County law enforcement officer who filed a charge of theft in the fourth degree against Gnewuch.

The case was tried to the district court on January 29, 1999. The district court entered its order finding Gnewuch guilty of theft in the fourth degree on February 10, 1999, and sentenced her to a jail term of ninety days, restitution, and a $500 fine. Gnewuch appeals.

II. Standard of Review. We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4; *State v. Thomas,* 561 N.W.2d 37, 39 (Iowa 1997). We review ineffective assistance of counsel claims de novo. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996).

III. Sufficiency of the Evidence. Gnewuch contends the district court erred by denying her motion for judgment of acquittal asserting the evidence was insufficient to convict her of theft pursuant to Iowa Code section 714.1(6) because at the time of the exchange, she intended to pay the check and did not have the intent to deceive. When considering a challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the State. *State v. Crone,* 545 N.W.2d 267, 270 (Iowa 1996). We look for substantial evidence, including any inferences arising from the evidence, to support the verdict. *Id.* A verdict will be upheld where there is substantial evidence in the record tending to support the charge. *State v. Terry,* 544 N.W.2d 449, 451 (Iowa 1996). Substantial evidence means evidence that would convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Id.*

The district court convicted Gnewuch of theft in the fourth degree in violation of section 714.1(6). A person commits theft when the person:

> 6. Makes, utters, draws, delivers, or gives any check . . . on any bank, credit union, person, or corporation, and obtains property, the use of property, including rental property, or service in exchange for such instrument, if the person knows that such check . . . will not be paid when presented.

Iowa Code § 714.1(6) (1997). Gnewuch maintains pursuant to *State v. McFadden*, 467 N.W.2d 578 (Iowa 1991) and *State v. Rojas-Cardona*, 503 N.W.2d 591 (Iowa 1993), she did not have the requisite intent to deceive at the time she gave the postdated check to Dykstra. This line of cases held when there was an understanding between the parties a check is not payable at the time it is received, but will be made good at some time in the future, the representations made are only promises, and there is no deception and no criminal liability under section 714.1(6) if the check is not honored when subsequently presented for payment. *Rojas-Cardona*, 503 N.W.2d at 594 (quoting *McFadden*, 467 N.W.2d at 581). However, *McFadden* and *Rojas-Cardona* were explicitly overruled by *State v. Hogrefe*, 557 N.W.2d 871 (Iowa 1996). In *Hogrefe*, the Iowa Supreme Court stated:

> [A] postdated check can be evidence of deception even though both parties knew the check was not good at the time the defendant issued it. In these circumstances, criminal liability should attach if, at the time the defendant issued the check, the defendant (1) never had the intention to pay the check, or (2) knew he or she would not be able to pay it.

Hogrefe, 557 N.W.2d at 879.

In the present case, the evidence establishes Gnewuch and Dykstra both knew the check was not good when it was written. Gnewuch specifically asked Dykstra if it was acceptable to postdate the check to March 3, and Dykstra agreed to hold the check until that date. Therefore, we must consider whether

there is substantial evidence at the time Gnewuch issued the check to Dykstra, she either had no intention to pay it or knew she would not be able to pay it.

Although there is no direct evidence to support a finding Gnewuch had no intent to pay the check, the court may infer such intent pursuant to section 714.1(6), which states:

> Whenever the drawee of such instrument has refused payment because of insufficient funds, and the maker has not paid the holder of the instrument the amount due thereon within ten days of the maker's receipt of notice from the holder that payment has been refused by the drawee, the court or jury may infer from such facts that the maker knew that the instrument would not be paid on presentation.

Iowa Code 714.1(6). The record indicates the bank refused payment for the check on April 7, 1998. Dykstra then sent Gnewuch a notice and demand for payment on April 18, 1998. Gnewuch did not claim the notice and demand and it was returned to Dykstra on May 3, 1998. After a personal confrontation with Dykstra, Gnewuch indicated she did not intend to pay the check short of court action. The district court could infer from these facts Gnewuch knew at the time she presented the check to Dykstra it would not be paid on presentation to her bank

In addition:

> Whenever the drawee of such instrument has refused payment because the maker has no account with the drawee, the court or jury may infer from such fact that the maker knew that the instrument would not be paid on presentation.

Iowa Code § 714.1(6). Gnewuch's bank refused payment on the check because the account had been closed as of April 7, 1998. From this fact, the district court

could also infer Gnewuch did not intend the check to be paid upon presentation to the bank.

Gnewuch asserts certain evidence in the record indicates she intended to pay on the check. She and Dykstra had been friends for some time and had established a history of paying each other back when they borrowed money. As further evidence of their relationship, Gnewuch notes she paid Dykstra for some tools her son stole from Dykstra. Although this evidence shows in the past transactions had not been problematic between the parties, there is substantial evidence in the record to indicate in the present instance, she never intended the check to be paid. We therefore conclude there is sufficient evidence in the record to support the district court's finding of guilt in this case.

IV. Ineffective Assistance of Counsel. Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addressed the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). In this case, the record is adequate and we will address Gnewuch's claim on direct appeal.

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2071, 80 L. Ed. 2d 674, 688 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999). We affirm if either

element is absent. *Crone*, 545 N.W.2d at 270. As to the first element, Gnewuch must prove her trial counsel's performance was not within the normal range of competence. *See id.* As to the second element, Gnewuch must prove her counsel's error resulted in an actual and substantial disadvantage, creating a reasonable probability that but for the error the outcome of the proceeding would have been different. *See State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999).

Gnewuch claims her trial counsel was ineffective for failing to move for a mistrial due to the prosecutor's alleged misconduct. The alleged misconduct occurred as the result of what Gnewuch perceives to be a violation of Iowa Code of Professional Responsibility DR 7-106, which states, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Gnewuch maintains because the victim hired a private attorney who, after attempting collection on the check, referred the victim to the county attorney's office, and the information the victim supplied to the county attorney's office ultimately resulted in criminal charges, the prosecutor violated DR 7-106 by participating in presenting criminal charges solely to obtain a civil advantage. Gnewuch fails to point us to any evidence in the record tending to support her theory the prosecutor brought charges against her for the prosecutor's own advantage. She also fails to show any evidence in the record the prosecutor participated in presenting criminal charges *solely* for the victim's gain or that of the victim's attorney. The record contains substantial evidence to support the prosecutor's decision to bring a charge of theft in the fourth degree and, therefore, the prosecutor was merely fulfilling her duty to prosecute criminal conduct. Because Gnewuch has failed to show any misconduct on the part of

the prosecutor, we cannot say her trial counsel failed in an essential duty by not moving for mistrial. Consequently, we conclude her claim of ineffectiveness is without merit.

AFFIRMED.