FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

322

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	Filed December 29, 1982
DONALD E. CRAFT,	)	2-339
Defendant-Appellant.	)	67561

Appeal from Linn District Court, Robert Osmundson, Judge.

Defendants appeals from his convictions of theft in the second degree in violation of Iowa Code sections 714.1(3) and 714.2(2) and theft in the third degree in violation of Iowa Code sections 714.1(2) and 714.2(3). AFFIRMED.

Mark Rettig of Hines, Pence, Day & Powers, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant appeals from his convictions of theft in the second degree in violation of Iowa Code sections 714.1(3) and 714.2(2) and theft in the third degree in violation of Iowa Code sections 714.1(2) and 714.2(3). The defendant claims that the trial court erred (1) by admitting evidence with regard to contracts and business activities involving the defendant with individuals other than the victims of the crimes of which he was convicted; (2) by admitting evidence with regard to a letter from defendant's attorney to the county attorney which indicated that the defendant was aware of potential criminal liability in his series of home improvement contract transactions; (3) by failing to grant defendant's motions for judgment of acquittal based on insufficiency of the evidence; and (4) in its findings of fact and conclusions of law with regard to the charges for which he was convicted. He also claims (5) that the trial court abused its discretion in sentencing the defendant. We affirm.

Defendant Donald E. Craft was charged with four counts of theft by deception in violation of section 714.1(3) of the Iowa criminal code. Count I alleged theft in the first degree, counts II and III alleged theft in the second degree, and count IV alleged theft in the third degree. Prior to trial, count IV had been amended to allege a violation of theft by misappropriation in violation of section 714.1(2). Trial by jury was waived. A motion for acquittal on count I was granted, and after trial to the court, Craft was found not guilty on count II and guilty of counts III and IV. Following review of a presentence report and a sentencing hearing, the court entered judgment and imposed sentences requiring Craft to serve a period of two years on count IV and five years on count III, with the sentences running consecutively.

Count III charged Craft with theft by deception in the second degree by obtaining from George Hill the sum of $1100, which was tendered to him as a

deposit with which Craft was supposed to purchase materials and furnish work in order to complete certain repairs on Hill's house. The court found that no materials were furnished and no work was done by Craft on the contract. The court found further that at least six months earlier, Craft was aware of the fact that some of his customers had been dissatisfied over his failure to complete the contract and were considering pressing criminal charges. The court found that his knowledge of his own financial situation and capabilities and reasonable inferences and deductions that could be drawn from the facts and circumstances proved by the evidence led to the conclusion that he was guilty of theft by deception, since he knowingly promised delivery of the goods and services but did not intend to perform or knew that he was unable to perform that which he had promised to do in the contract.

Count IV concerned a deposit of $500 which Drew Eckert had paid to Craft to enable Craft to obtain materials for remodeling work that Craft had agreed to perform on Eckert's home. Craft had indicated to Eckert that he would start within two days and that he would finish the project promptly. However, the materials that were to have been purchased with the deposit money were never delivered and the services promised under the contract were never performed. The court found that although Craft had come into possession of the money in a lawful manner and had a right to the money when he received it, "he later disposed of it in a manner inconsistent with or a denial of the trust under which it was paid to him and to the purpose for which it was delivered in denial of the owner's rights in the property." He was therefore found guilty of misappropriation under count IV.

I. Admission of Evidence Concerning Contracts other than those of Hill and Eckert.

In a motion to suppress/motion in limine, Craft attempted to have the court exclude from consideration testimony of his business activities other than those

for which he was being charged in the instant case. These motions were overruled, and during trial, similar motions concerning the same matter were urged, on the ground that they were irrelevant and immaterial. These two were overruled.

Admission of evidence is within the discretion of the trial court. If the trial court's ruling may be sustained "on any gound," no reversible error exists. State v. Nowlin, 244 N.W.2d 596, 600 (Iowa 1976). See also State v. Wright, 203 N.W.2d 247, 251 (Iowa 1972). Proof of prior criminal conduct may be offered:

> when it tends to prove (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other or (5) identity of the person charged with commission of the crime.

State v. McDaniel, 265 N.W.2d 917, 921 (1978), citing State v. Wright at 639-40. More particularly, "where the prosecution contends the existence of a scheme or system of fraud, evidence of other instances of the same kind is proper in order to negative the suggestion of mistake or in order to show the existence of a planned course of fraud." State v. Hatridge, 252 Iowa 1116, 1120, 109 N.W.2d 705, 708 (1961).

The other witnesses who were permitted to testify had all entered into home improvement contracts with Craft, made down payments which they understood were to be used to purchase materials, had difficulty contacting Craft to find out why work was not being done, and were given a variety of excuses as to his reasons for not doing the jobs he had contracted to do. This pattern was in all material respects identical with that which was experienced by Hill and Eckert. We therefore find that the trial court did not abuse its discretion in admitting this evidence.

II. Admission of Exhibit 31.

A letter written by Craft's counsel to the county attorney on February 19, 1980, was admitted into evidence as Exhibit 31. Craft argued that this exhibit was hearsay, irrelevant, immaterial, and beyond the proper scope of cross-

examination, and was therefore not admissible. His motion to suppress was overruled.

"The admission of hearsay evidence is presumed to be prejudicial error unless the contrary is affirmatively established." State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979).

In the letter, Craft's attorney says that Craft "believes that some of the people with whom he has had some difficulties may have made overtures to you regarding criminal charges." He goes on to give assurances that Craft wants to "make good on every contract which he currently has" and to ask that filing any criminal charges against him be delayed.

The exhibit was offered to show that Craft knew that some of his customers were considering pressing criminal charges because of his failure to complete his contract with them. The letter would therefore seem to fall under the hearsay rule.

However, "admissions of an attorney, whether written or oral, if relevant and material and within the scope of his employment are admissible against his client." Suntken v. Suntken, 223 Iowa 347, 356, 272 N.W. 132, 137 (1937). However, such statements must be "shown to have been made within the actual or ostensible scope of authority" of the attorney and such authority must be affirmatively established by evidence other than the attorney's own declarations. In this case, the attorney's authority was established by Craft's own testimony that his attorney had written the letter after Craft had contacted him. The letter was relevant and material, for it tended to show his state of mind when he entered into the transactions at issue. In particular, it shows that Craft was aware of potential criminal liability resulting from failure to fulfill his contractual agreements. We therefore conclude that it was admissible under the rule enunciated in Suntken.

III. Sufficiency of the Evidence. 327

Craft argues, with regard to count III, that there is insufficient evidence to show the requisite intention to deceive at the time he was negotiating the contract for making improvements to Hill's property. As for count IV, he argues that he was not required to put the funds deposited with him by Eckert in a trust or otherwise to hold them in safekeeping, and that he had a claim of right to utilize the funds as he saw fit. Citing Iowa code section 714.4, which provides that "if the person reasonably believes that he or she has a right, privilege, or license to take, obtain, dispose of, or otherwise use or acquire property, then he is not guilty of theft," Craft claims that the State's burden of proof has not been met.

On review, we look at all of the evidence in the light most favorable to the State. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). It is for the factfinder and not for the reviewing court to determine the credibility of witnesses and the weight of evidence. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Bearing these constraints in mind, we find that there was ample evidence from which the court could conclude that Craft did intend to deceive his customers at the time he entered into contracts with them, and that he knew or should have known that he had no right to utilize the funds placed on deposit with him by Eckert for any purpose other than to purchase labor and materials for the projects he had contracted to complete. There is also ample evidence he deceived them as to the true purposes for the down payment, and that he knew or should have known that he was not in a position to complete the job he had contracted to do when he promised to do it. There is also evidence showing that when he told his potential customers that he needed their deposits in order to purchase parts and materials for their project, he intended to use the funds thus entrusted to him for his own personal expenses. We therefore find that there was sufficient

evidence to justify the court's overruling Craft's motion for a directed verdict.

IV. Findings of Fact and Conclusions of Law.

Craft's contentions in this division are substantially the same as those discussed in division III of this opinion, and our conclusion is the same.

V. The Sentence.

Craft asks this court to rule that the trial court abused its discretion in sentencing him to consecutive sentences when the recommendation in the presentence report was for concurrent sentences and his criminal record was such that "he has had few convictions on charges for some time prior to the instant events, although criminal charges were pending in related cases."

"[S] o long as the sentence is within the statutory maximum we will not reverse absent an abuse of discretion." State v. Grgurich, 253 N.W.2d 605, 606 (Iowa 1977). Before we reach the conclusion that a court has abused its discretion, we would have to find "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 255 (Iowa 1982), citing State v. Buck, 1275 N.W.2d 194, 195 (Iowa 1979).

The facts of this case lead us to conclude that there was no such abuse on the part of the trial court. Craft had a long history of financial irresponsibility, and of uncompleted home improvement contracts on which he had accepted down payments. His record is replete with home improvement frauds and unsatisfied civil judgments in Iowa and elsewhere. His PSI revealed that following his conviction in the instant case, he placed newspaper advertisements under a false name soliciting home repair work.

The trial court is not obliged to follow the recommendation of the PSI. We find that the court did not abuse its discretion, and therefore affirm both the convictions and the sentences imposed for them.

AFFIRMED.