IN THE COURT OF APPEALS OF IOWA

No. 6-528 / 05-0837
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL BRADLEY THORNTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Patrick J. Madden and Mark J. Smith, Judges.

Michael Bradley Thornton appeals his conviction for second-degree theft by deception. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Considered by Sackett, C.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Michael Bradley Thornton was at the scene of an accident in Davenport, Iowa. He received medical attention at the scene and at a hospital, after claiming to have been a passenger in one of the vehicles. Police officers later learned that Thornton was not involved in the accident.

The State charged Thornton with second-degree theft by deception based on his receipt of $1200 in medical services. Iowa Code §§ 714.1, 714.2(2) (2003). Thornton waived a jury trial and agreed to submission of the charge on the minutes of testimony. The district court found him guilty.

On appeal, Thornton challenges the sufficiency of the evidence to support the conviction. He also raises an ineffective assistance of counsel claim.

I. Sufficiency of the Evidence

Thornton appears to concede he obtained medical services by misrepresenting that he was involved in the accident. He contends, however, that "the issue is not whether he lied about why he needed services, but whether he attempted to get services from the hospital without being required to pay for the services." The State counters that the type of theft with which Thornton was charged does not require proof of a promise to pay. We agree with the State.

Thornton was charged with obtaining "the labor [or] services of another . . . by deception." Iowa Code § 714.1(3). "Deception" is defined in several ways, including knowingly doing either of the following:

> 1. Creating or confirming another's belief or impression as to the existence or nonexistence of a fact or condition which is false and which the actor does not believe to be true.

> 2. Failing to correct a false belief or impression as to the existence or nonexistence of a fact or condition which the actor previously has created or confirmed.

Id. at § 702.9. While "deception" also is defined as "promising payment," this definition was not at issue here. *See id.* at § 702.9(5).

The record contains substantial evidence to support the district court's findings of deception under Iowa Code sections 702.9(1) and (2). *State v. Dible,* 538 N.W.2d 267, 270 (Iowa 1995) (setting forth standard of review). Thornton informed medical personnel he was injured in an automobile accident and he sought medical treatment for his alleged injuries. This "fact" and the "condition" were created by Thornton, were false, and were known by Thornton to be false. *Id.* at § 702.9(1). Thornton did not confess the truth until an officer confronted him with witness statements contradicting his version of events. *Id.* at § 702.9(2).

There is also substantial evidence, in the form of an incident report attached to the minutes of testimony, which establishes a theft of property "exceeding one thousand dollars but not exceeding ten thousand dollars in value." *Id.* at § 714.2 (2). Therefore, the State proved a "loss of some value."

II. Ineffective-Assistance-of-Counsel Claim

Thornton argues defense counsel was ineffective in failing to present evidence that he agreed to pay the hospital bill within thirty days from the date of billing. We preserve this claim for postconviction relief "to allow full development of the facts surrounding counsel's conduct." *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa Ct. App. 2004).

AFFIRMED.

Hecht, J. concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

Defendant was convicted of theft, in violation of Iowa Code section 714.1[1] and 714.2(2).[2] I agree with the majority that defendant was deceptive. What he did is wrong, but the facts must fit the crime. In my opinion they do not. Defendant lied about the reason for seeking medical services which arguably could prove a violation of section 714.1(3). However, our inquiry does not end there because the State has the burden of not only showing defendant obtained labor or services of another but also showing that what defendant received exceeded $1000 in value but not more than $10,000 in value. That is, did defendant attempt to get services from the hospital without being required to pay for the services? There is not substantial evidence to prove this element beyond a reasonable doubt. At trial, the State must prove every element of the crime

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[1] Iowa Code section 714.1 defines Theft as follows:

> A person commits theft when the person does any of the following:
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> . . .
>
> 3. *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.

(emphasis supplied)

[2] Iowa Code section 714.2 sets out degrees of theft

> 2. The theft of property exceeding one thousand dollars but not exceeding ten thousand dollars in value or theft of a motor vehicle as defined in chapter 321 not exceeding ten thousand dollars in value, is theft in the second degree. Theft in the second degree is a class "D" felony. However, for purposes of this subsection, "motor vehicle" does not include a motorized bicycle as defined in section 321.1, subsection 40, paragraph "b".

charged beyond a reasonable doubt. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976). The State's evidence must "raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

To prove the value of the theft the State needed to prove that defendant deceived and, as a result of his deception he took from the hospital services that exceeded $1000 in value. To do so the State had to also prove defendant did not intend to pay or was representing payment from a source that had no responsibility to be considered for payment.[3]

While the State appears to argue defendant intended to have a third party or a third-party insurer pay for his medical care, there is nothing in the minutes of testimony to support such a finding. Consequently, I would reverse the conviction.

That said, I concur with the majority that at the very least the defendant's claim of ineffective assistance should be preserved. While the State appears to recognize that the agreement to pay exists, it argues we should dismiss the issue for several reasons, including the fact that defendant could not demonstrate prejudice, and had the agreement been introduced defendant would still have been convicted. The State argues that the presentence investigation report shows defendant was unemployed and only receiving a modest disability

[3] In *State v. Williams*, 674 N.W.2d 69, 70-71 (Iowa 2004) the court considered in affirming a conviction for theft of a car by deception the fact that defendant used a bogus letter indicating he was to receive a substantial sum of money from which he would pay for the car. However, care must be exercised in applying *Williams* to a hospital situation where a party represents that his or her medical or other insurance may be responsible for the bill. The confusion that frequently exists as to the nature and extent of one's coverage would appear to raise the bar to show deception higher than *Williams*.

payment so counsel could have known defendant would not have paid the bill within thirty days. I believe that had the agreement been introduced it would have demanded a dismissal.

Additionally I have problems applying the deception statute to cases where persons are seeking medical treatment. The reason the person is seeking treatment should, without a release of medical information, remain between the patient and the medical provider. Secondly, incorrect representations as to third party payments by persons seeking emergency care should generally not support a finding of deception and the fact that a person seeking medical care represents he or she can pay the bill personally in a period of time should not either.

I do not deny that defendant was guilty of some criminal conduct, only that the State has failed to provide substantial evidence to prove beyond a reasonable doubt that he is guilty of the crime of which he was convicted. I would reverse and dismiss the charge.