

**FILED: October 19, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

and

CITY OF LAKE OSWEGO,  
Plaintiff,

v.

BARBARA JAY REYNOLDS,  
Defendant-Appellant.

Lake Oswego Municipal Court  
08M94496

A142686

William Bruce Shepley, Judge.

Argued and submitted on June 28, 2011.

Erik Blumenthal, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Erika L. Hadlock, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reversed.

1                    NAKAMOTO, J.

2                    Defendant appeals a judgment of conviction for second-degree theft, ORS  
3 164.045. She assigns error to the trial court's denial of her motion for a judgment of  
4 acquittal, arguing that the state failed to prove the necessary element that she intended to  
5 defraud her landlord when she failed to pay rent. Because we agree with defendant, we  
6 reverse.

7                    We review challenges to the sufficiency of evidence to determine whether,  
8 viewing the evidence in the light most favorable to the state, any rational trier of fact  
9 could have found the essential elements of the crime proved beyond a reasonable doubt.  
10 *State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995).  
11 We begin with a recitation, in chronological order, of each month's rental accounting.

12                    On May 7, 2007, defendant and her husband entered into a one-year  
13 residential lease with Arant, to rent his condominium in Lake Oswego. The lease  
14 provided that monthly rent was \$1,095 and required a \$1,595 total deposit that included a  
15 \$500 security deposit and \$1,095 for the last month's rent. Because defendant lacked  
16 sufficient funds to pay the \$1,595 deposit, the lease provided that defendant would pay an  
17 additional \$400 in June, July, and August and \$395 in September to account for the total  
18 deposit. The lease also provided that rent would be due on the first of the month and the  
19 landlord would charge a \$10 per day late fee for any amount overdue after the fifth of the  
20 month.

21                    On July 6, 2007, defendant first became late on her rent. Arant notified  
22 defendant's husband of the late rent and imposed a late fee. On July 12, 2007, defendant

1 paid Arant for July rent, but did not pay the deposit amount or late fee.

2           On August 18, 2007, Arant sent defendant's husband an e-mail notifying  
3 him that the August rent was late and Arant would assess a \$75 late fee. A few days  
4 later, defendant paid the August rent but not the late fee or the deposit.

5           On September 14, 2007, Arant sent defendant's husband an e-mail  
6 informing him that September rent was late and defendant still owed late fees for July  
7 and August as well as the \$1,595 deposit.

8           On October 18, 2007, Arant informed defendant's husband that defendant's  
9 October rent check had been returned for insufficient funds. Also around this time,  
10 defendant's husband lost his job and began to collect unemployment benefits.

11           On November 6, 2007, Arant received a money order for \$1,095 for the  
12 October rent, but did not receive any money for the deposit or late fee. On November 7,  
13 2007, Arant sent defendant's husband an e-mail notifying defendant that November rent  
14 was now due. On November 15, 2007, Arant received defendant's November rent, but no  
15 late fees or deposit amount.

16           On December 1, 2007, Arant sent an e-mail listing the outstanding late fees,  
17 bank fee for the dishonored check, and deposit. Defendant's husband told Arant that he  
18 would start paying the late fees off and sent a \$200 check for the late payments and a  
19 \$1,095 check for December rent. The \$200 check cleared but the \$1,095 December rent  
20 check was returned for insufficient funds.<sup>1</sup>

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<sup>1</sup> The December rent check was drawn from defendant's husband's account, not defendant's checking account.

1           On January 9, 2008, Arant notified defendant's husband that his December  
2 rent check had been returned for insufficient funds. Arant also told defendant that  
3 December and January rent was now late and that he would take action to evict if  
4 defendant did not come current on her account. On January 15, 2007, defendant and her  
5 husband paid Arant \$450 cash and said they "would do [their] best to get on track as  
6 quickly as possible." Around this time, the relationship between defendant and Arant  
7 became combative. Arant sent requests that defendant work out a plan to pay past due  
8 debts, but defendant's husband refused.

9           Defendant made further rent payments and some payments toward the  
10 balance owed. On February 1, 2008, defendant paid Arant \$1,095 for February rent. On  
11 February 29, 2008, defendant paid Arant \$800. On March 17, 2008, defendant paid  
12 Arant \$1,450. On April 5, 2008, defendant paid Arant \$1,095. In early April, Arant  
13 posted an eviction notice. Defendant responded by informing Arant that she and her  
14 husband were giving their 30-day notice and would vacate the premises on May 11, 2008.

15           When defendant moved out, the condominium was not clean. Arant told  
16 defendant that she owed him \$6,418 for past rent, late fees, and the cost to clean up the  
17 condominium. Arant offered to waive all remaining late fees if defendant paid him  
18 immediately what defendant owed him, approximately \$4,500. Arant later changed his  
19 estimate to \$1,806 without the late fees. Defendant believed she owed somewhere  
20 between \$400 and \$1,100, based on whatever time she had been in the residence during  
21 May and for any remaining late fees. When Arant confronted defendant about the  
22 amount owed, defendant disagreed with the amount and told Arant not to contact her

1 again. Arant and defendant exchanged e-mails where Arant acknowledged an obvious  
2 disagreement in the amount owed and asked defendant to provide him with an accounting  
3 of what defendant believed she owed. The last contact Arant had with defendant was  
4 through e-mail, where defendant wrote:

5 "We have contacted a lawyer on the subject, since there WAS A MOLD  
6 PROBLEM (which we have documented) & your illegal attempts at taking  
7 money for rent and applying it elsewhere as well as illegal 72 hour notice.  
8 You have more than enough money to cover the cleaning, as we cleaned  
9 tremendously when moving in (also documented) so I believe we are even.  
10 From now on it will be handled through the lawyer."

11 (Emphasis in original.)

12 A few months after defendant moved out, Arant could no longer reach  
13 defendant through e-mail or phone calls. Arant filed a police report, and defendant and  
14 her husband were subsequently charged with negotiating a bad check, ORS 165.065, and  
15 second-degree theft, ORS 164.045.<sup>2</sup> The state elected a theory of theft by deception,  
16 ORS 164.085.

17 A bench trial was held. Defendant testified that during the term of the  
18 lease, defendant had health problems that prevented her from going to work. She also  
19 testified that her husband had lost his job and the couple had difficulty paying other bills.  
20 Her car was repossessed and her utilities were shut off. At the close of the state's case,  
21 defendant moved for a judgment of acquittal based on the state's failure to provide  
22 evidence showing intent to defraud. The trial court denied the motion. The trial court  
23 found defendant not guilty as to Count 1, negotiating a bad check, but found her guilty of

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<sup>2</sup> Defendant and her husband were tried separately.

1 second-degree theft by deception. The court concluded that defendant formed the intent  
2 to deceive at the very end of the lease agreement when she told Arant that she did not  
3 owe him anything and he should not contact her again for whatever reason. The trial  
4 court explained:

5 "The defense's argument is that she intended--she always intended to  
6 pay what she intended to pay and was going to sit back and wait for some  
7 lawsuit to come along.

8 "However, [Arant] has testified to the following; that is, [defendant]  
9 said to him: We don't owe you anything; and then don't communicate with  
10 us again under any fashion. And I find his testimony on that matter to be  
11 more credible than hers.

12 "I find that intent to deceive accrued at the very end of this lease  
13 agreement at the point in time, which she was leaving. I believe by her  
14 testimony, it was sufficient value. I find that the City has met its burden on  
15 Count 2 beyond a reasonable doubt. I, therefore, enter a finding of guilty  
16 on the charge of Theft in the Second Degree."

17 On appeal, defendant argues that the trial court erred by denying her motion  
18 for a judgment of acquittal because there was insufficient evidence for the court to infer  
19 that defendant intended to defraud Arant under ORS 164.085(1). According to  
20 defendant, ORS 164.085(3) prevents the factfinder from inferring defendant's intent not  
21 to perform her promise from lack of performance alone. Instead, defendant contends that  
22 the state must prove that, at the time of defendant's promise to Arant, she consciously  
23 tried to trick or deceive Arant. The state first argues that defendant failed to preserve her  
24 argument on appeal that the state's evidence was insufficient because it consisted only of  
25 evidence of nonperformance. The state next contends that, even if the issue was  
26 preserved, the trial court properly denied the motion for a judgment of acquittal because

1 there was sufficient evidence from defendant's repeated promises to pay rent--and then  
2 failing to pay--to infer intent.

3 We begin with an explanation of the relevant statute. In interpreting  
4 statutes, this court's task is to ascertain the legislature's intent. *PGE v. Bureau of Labor  
5 and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). We first look at the text and  
6 context of the statute, and will consider legislative history if it appears useful to the  
7 court's analysis. [\*State v. Gaines\*](#), 346 Or 160, 172, 206 P3d 1042 (2009).

8 In part, ORS 164.085 provides:

9 "(1) A person, who obtains property of another thereby, commits  
10 theft by deception when, with intent to defraud, the person:

11 " \* \* \* \* \*

12 "(e) Promises performance that the person does not intend to  
13 perform or knows will not be performed.

14 " \* \* \* \* \*

15 "(3) In a prosecution for theft by deception, the defendant's intention  
16 or belief that a promise would not be performed may not be established by  
17 or inferred from the fact alone that such promise was not performed."

18 Thus, theft by deception requires (1) a person to obtain property from  
19 another, (2) by promising performance that the person intends or knows will not be  
20 performed, (3) with the intent to defraud. The parties do not dispute that defendant  
21 obtained property from Arant in the form of possession of the condominium. Both  
22 parties also agree that defendant made promises to Arant to pay rent during the tenancy.  
23 The only remaining issues are whether there was sufficient proof that defendant did not  
24 intend to perform as promised, or knew that she would not do so, and whether defendant

1 had the intent to defraud. Although defendant appears to conflate the intent to defraud  
2 with the intent not to perform, which are two distinct elements for theft by deception, we  
3 agree with defendant that the evidence was insufficient to establish the requisite intent to  
4 defraud.<sup>3</sup>

5 "Intent," when used with respect to conduct describing an offense, means  
6 "that a person acts with a conscious objective to cause the result or to engage in the  
7 conduct so described." ORS 161.085(7). The legislature did not define "defraud." When  
8 no statutory definition exists, we presume that the legislature intended terms to have their  
9 plain, natural, and ordinary meaning. *PGE*, 317 Or at 611. The plain meaning of  
10 "defraud" suggests an act of misrepresentation. Common definitions of "defraud" are "to  
11 take or withhold from (one) some possession, right, or interest by calculated misstatement  
12 or perversion of truth, trickery, or other deception," *Webster's Third New Int'l Dictionary*  
13 593 (unabridged ed 2002), or "[t]o cause injury or loss to (a person) by deceit." *Black's*  
14 *Law Dictionary* 488 (9th ed 2009). Both definitions require misrepresentation or  
15 deception by the person taking the property or causing injury. Thus, we conclude that, as  
16 used in ORS 164.085, "intent to defraud" means that a person acts with a conscious  
17 objective to take property from another person by deception.<sup>4</sup>

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<sup>3</sup> Because we find insufficient evidence for a reasonable factfinder to infer an intent to defraud, we do not reach the state's contention that defendant failed to preserve her argument that, contrary to ORS 164.085(3), the trial court inferred defendant's intent not to perform from lack of performance alone.

<sup>4</sup> In the context of identity theft, ORS 165.800(1), we have concluded that "intent to defraud" includes "an intent to cause injury to another's legal rights or interests." [\*State v. Alvarez-Amador\*](#), 235 Or App 402, 407, 232 P3d 989 (2010) (footnote omitted). In the



1                   Our case law supports that statutory construction. In *State v. Van De*  
2 *Vorren*, 94 Or App 694, 767 P2d 96 (1989), the defendant entered into a lease with the  
3 victims by promising to pay the rent with proceeds from assets that he sold in Belgium.  
4 He also induced the victims to loan him money by representing that he expected to inherit  
5 money from his father's estate. On appeal, the defendant argued that there was  
6 insufficient evidence for a rational jury to conclude that the defendant committed theft by  
7 deception. *Id.* at 697. We disagreed, concluding that conviction for theft by deception  
8 was supported by the defendant's repeatedly deceiving the victims about his intention to  
9 repay them with his Belgian assets and expected inheritance. *Id.* at 697 n 4. The  
10 defendant's intent to defraud could be inferred by his deceptive statements that he would  
11 pay the victims from assets and money that he did not have.

12                   In this case, the trial court inferred that defendant formed the intent to  
13 defraud at the end of the lease. At that time, defendant and Arant disagreed about the  
14 amount due. Arant believed that defendant owed anywhere from \$1,400 to \$6,400, while  
15 defendant believed she owed an amount between \$400 and \$1,100. The trial court  
16 appears to have inferred defendant's intent to defraud from defendant's statement that she  
17 and her husband did not owe anything to Arant and that he should never contact her  
18 again. That statement was insufficient as a matter of law to support the conviction.

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context of theft by deception, ORS 164.085(1) limits the type of intended injury; it applies when a person acts with the intent to defraud and "obtains property of another thereby."

1           First, even if defendant's statement was deceptive,<sup>5</sup> it did not establish an  
2 intent to defraud coupled with a promise. Theft by deception requires a person to obtain  
3 property from another by promising performance with the intent to defraud. ORS  
4 164.085. Declaring her refusal to pay what Arant believed he was owed was not  
5 promising performance, and certainly was not a promise that would induce Arant to give  
6 up property. Without the promise element, defendant did not have an intent to defraud  
7 and did not commit theft by deception at the end of the tenancy.

8           Second, defendant's statement does not prove that she had an intent to  
9 defraud for previous promises she made during the term of the lease. Defendant's intent  
10 to defraud must be formed at the time defendant made her promise. The record does not  
11 indicate that, at the time she made her past promises, she had the requisite intent to  
12 defraud. Telling Arant, at the time the lease ended, that she did not owe him more in the

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<sup>5</sup> The scant evidence of deception appears to be that defendant acknowledged at the time of trial that, in her estimation, she still owed Arant between \$400 and \$1,100. The record otherwise contradicted the trial court's finding. Both Arant's and defendant's testimony and the documentary evidence indicated that defendant and Arant were in a dispute regarding the amount owed and that she was refusing to pay the amount Arant demanded. One of the state's exhibits, an e-mail that defendant sent to Arant, detailed defendant's belief that Arant had unlawfully credited her monthly rent payments to late fees first, thereby continually increasing the late fees that Arant charged her and her husband due to resulting shortfalls in rent. Defendant also asserted in the e-mail that the cleaning expense should have been reduced because of the condition of the unit when she moved in and the mold problem she had while living there. Finally, defendant told Arant in the e-mail, "[f]rom now on [this dispute] will be handled through the lawyer." Those statements in the e-mail, sent well before the criminal action began, do not suggest an intent to defraud, but instead a good faith dispute over the amount defendant and her husband actually owed.

1 context of a rent dispute is substantially different from having the intent not to pay at the  
2 time the promise is first made. Here, defendant explained to Arant that she disagreed  
3 with the amount due and would not pay on that basis. There was no indication that her  
4 statement meant she never intended to pay when she first signed the lease, which is  
5 consistent with the trial court's finding that defendant formed an intent to deceive at the  
6 end of the lease, when she was leaving. Therefore, defendant's statement was not proof  
7 of an intent to defraud at the time she made her past promises to pay rent.

8           In the alternative, the state argues that defendant's intent to defraud can be  
9 inferred by her repeated promises to pay her rent and her failure to do so. Based on the  
10 record, however, defendant made two explicit promises. First, she promised to pay rents  
11 for all months when she signed the lease in May 2007. Second, she promised in January  
12 that she "would do [her] best to get on track as quickly as possible." However, unlike in  
13 *Van De Vorren*, defendant engaged in no deceit, and she made no assertions about her  
14 *ability* to pay. In fact, she made the opposite assertion. When defendant signed the lease,  
15 she told Arant that she did not have enough money for the security deposit, so she and  
16 Arant agreed to pay the security deposit in installment payments from June through  
17 September. In the fall, she told Arant that her husband had lost his job and she had  
18 become ill, preventing her from working. If anything, defendant represented to Arant  
19 that she might not be able to perform her promise to pay rent. And unlike the defendant  
20 in *Van De Vorren*, defendant in this case made regular, albeit late, rental payments. From  
21 January 2007, when she promised to do her best to get back on track, defendant appears  
22 to have performed as promised for the three months following her promise: She paid her

1 February rent on time and paid an additional \$800 at the end of February; she paid her  
2 March rent late but included an additional \$345; and she paid her April rent on time. The  
3 only remaining rent definitively not accounted for is the partial May 2008 rent.<sup>6</sup> At the  
4 times when defendant made her promises--when she signed the lease in May and when  
5 she promised to get back on track in January--there was no evidence that she was  
6 engaging in deception. Although she ultimately failed to fully perform and a dispute  
7 ensued as to how much she owed Arant at the time she and her husband moved out, there  
8 was no evidence that would allow a reasonable factfinder to infer that she had a  
9 conscious objective to take Arant's property by deception at the time of her promises to  
10 him. Thus, viewing the facts most favorably to the state, there were insufficient facts to  
11 infer intent to defraud. The trial court erred in denying defendant's motion for judgment  
12 of acquittal.

13                   Reversed.

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<sup>6</sup> Arant did not provide a clear accounting of what he is owed.