IN THE COURT OF APPEALS OF IOWA

No. 1-993 / 11-0430
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BYRON C. HARRISON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

Byron Harrison challenges his conviction for theft in the second degree. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelley Cunningham, Assistant County Attorney, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

We are asked today to decide whether obtaining goods by the unauthorized use of a credit card may also constitute theft by taking or exercising control over stolen property. Byron Harrison challenges his conviction for theft in the second degree, alleging the State failed to offer substantial evidence and his trial counsel was ineffective for not alleging deficient theft alternatives in his motion for judgment of acquittal and for not objecting to the marshalling instruction.

Because the defendant's fraudulent use of the victim's credit card did not satisfy the statutory elements of either theft alternative charged, his trial counsel failed to provide effective assistance in challenging the prosecution's case. We reverse his conviction for theft in the second degree and remand for entry of judgment on the lesser offense of theft in the fifth degree.

I. Background Facts and Proceedings

Jennifer West ate lunch with her daughter at a Panera Bread restaurant in Davenport on June 8, 2010. She placed her designer-brand purse[1] on an extra chair and slid it under the table. West forgot to pick up her purse when she left the restaurant. She carried her car keys in a jacket pocket and drove home without realizing she left her purse behind. It was not until she needed to pick up her son later that afternoon that West realized she left her purse at the restaurant. She called Panera and talked to manager Brian Krantz, who told her that no one had turned in the purse. West's purse contained a Coach-brand

[1] West testified her purse was a "B. Makowsky" brand valued at approximately $280.

wallet, which she valued at $175. Also inside the purse were several gift cards, her checkbook, driver's license, and credit or debit cards.

Concerned that her purse and its contents had been stolen, West checked her bank account on line. She learned that several transactions had been posted to her account without her approval, including charges at Hibbett Sports, Foot Locker, Kwik Shop, Amoco, and All Cell World. West called Quad Cities Bank and Trust to cancel her charge card.

West also contacted Hibbett Sports to ask who had used her credit or debit card. Manager Aaron Oates recalled waiting on two customers who used her card, including a woman, who was wearing a tan polo shirt emblazoned with the Panera Bread logo. An investigation revealed that Panera employee Cherece Armstrong matched the description of the customer who used West's credit card at the sporting goods store. Armstrong had been working at the restaurant on June 8, 2010, while West was dining there. Armstrong clocked out that day at 1:44 p.m.

Police executed a search warrant at Armstrong's residence, discovering a Coach-brand wallet that West identified as hers. Officers also found goods they believed to have been purchased with West's credit or debit card. When officers returned to Armstrong's residence to place her under arrest, her boyfriend Byron Harrison was present. Harrison shared the apartment with Armstrong. A detective recognized Harrison from surveillance videos obtained from two stores where West's credit or debit card had been used without her permission.

West's Visa card was used at Hibbett Sports to charge two purchases, one for $156.21 and another for $94.16. Charges appeared on that same card from Kwik Shop in the amount of $39.52, from Amoco for $98.31, and from All Cell World for $107.00. West's Discover card incurred a charge of $194.73 from Foot Locker and $151.10 from Hy-Vee.

On August 6, 2010, the State filed a trial information, charging Armstrong and Harrison with theft in the second degree in violation of Iowa Code sections 714.1(1) or (4), 714.2(2), and 703.1 (2009), and credit card fraud in violation of Iowa Code section 715A.6.[2]

The State tried Harrison and Armstrong together, starting on February 7, 2011. At trial, Harrison admitted using West's Visa card without authorization, but denied using the Discover card or taking possession of West's purse and the items contained in it. In his deposition, read into the record at trial, Harrison testified that he found the credit cards in the Panera parking lot when he went to meet Armstrong on her lunch break.

On February 11, 2011, the jury returned verdicts finding Harrison guilty of credit card fraud and theft, pegging the value of the property taken by the defendant at more than $1000 but less than $10,000. On March 10, 2011, the court sentenced Harrison to concurrent terms of incarceration, not to exceed five years on the theft conviction and not to exceed two years for the credit card fraud. He now appeals from his theft conviction only.

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[2] The trial information also charged Harrison and Armstrong with two additional offenses involving another victim, but the State dismissed those counts before trial.

II. Scope and Standards of Review

Our review is at law when considering Harrison's sufficiency-of-the-evidence claim. *See State v. Armstrong*, 787 N.W.2d 472, 475 (Iowa Ct. App. 2010). We will uphold a jury verdict if it is supported by substantial evidence. *Id.* Substantial evidence is proof upon which a rational finder of fact could determine the defendant's guilt beyond a reasonable doubt. *Id.* We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. *Id.*

We review Harrison's ineffective-assistance-of-counsel claims de novo. *See State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). "Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate." *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999).

III. Analysis

A. Sufficiency of the Evidence

1. Preservation of Error

At trial, the State pursued the theory that Harrison's theft embraced the personal property taken from West, as well as the charges placed on her two credit or debit cards. On appeal, Harrison argues that the card transactions, while not authorized, do not constitute theft by taking in violation of Iowa Code section 714.1(1) or exercising control over stolen property in violation of section

714.1(4). The State disputes that Harrison raised that claim in his motion for judgment of acquittal.

In our review of counsel's motion, we do not find Harrison raised the same deficiencies before the trial court as he advances on appeal. In moving for judgment of acquittal, counsel challenged the State's argument that Harrison was an accomplice to the theft. Counsel claimed his client did not have anything to do with the purchases at Hy-Vee or Footlocker, "and there is absolutely no evidence regarding any of the items taken." He also argued the State did not show the Coach wallet found at Armstrong's residence was the same one taken from West. He did not assert the credit card transactions could not constitute theft by taking or exercising control over stolen property. Accordingly, Harrison's sufficiency claim involving the card transactions is not preserved for our review. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (recognizing that counsel's general motion for judgment of acquittal did not preserve error where it failed to identify specific elements of charge not supported by the evidence). In light of Harrison's alternative argument on appeal, we will consider his sufficiency claim involving the property obtained by use of West's credit or debit card under the ineffective-assistance-of-counsel rubric.

2. Did the State Prove Harrison Aided and Abetted in the Theft of West's Wallet or Exercise Control Over It Knowing It Was Stolen?

Harrison argues the prosecution presented insufficient evidence he took West's purse and its contents. He reasons that West left her purse on the chair

at Panera after having lunch there on June 8, 2010, but the State did not offer any evidence that Harrison was in the restaurant that day.

The prosecution advanced an aiding and abetting theory at trial. To prove Harrison aided and abetted the theft of West's purse and its contents, the State was required to prove that he assented to his girlfriend's act of taking the purse or lent countenance or approval either by actively participating in the theft or by encouraging the theft in some manner. *See State v. Kittelson,* 164 N.W.2d 157, 161-162 (Iowa 1969). The prosecution alternatively alleged that Harrison committed theft by exercising control over West's property, knowing that it was stolen.

The State connected Harrison to the purse theft by circumstantial evidence. Harrison lived with Cherese Armstrong, who was working at Panera on the day of the crime. Harrison admitted using West's credit cards at Hibbet Sports in a Davenport mall about eighty minutes after Armstrong clocked out at the restaurant. Police found the items purchased with the card at the couple's apartment. Harrison claimed he found the credit cards on the ground outside the restaurant when he was picking up Armstrong. The jury was free to reject Harrison's claim, especially given the fact that the police found a Coach wallet—identified by the victim as the one that held her credit cards—at the apartment he shared with Armstrong. *See State v. Millbrook,* 788 N.W.2d 647, 653 (Iowa 2010) (stating the jury is free to disbelieve a defendant's self-serving testimony). The timing of the couple's joint shopping spree also supported a finding that Harrison constructively possessed the stolen wallet and credit cards. *Cf*. *State v.*

Reeves, 209 N.W.2d 18, 23 (Iowa 1973) (describing test for constructive possession of controlled substances). The police did not recover West's purse or any of its other contents.

We find the State presented substantial evidence supporting the jury's verdict finding Harrison guilty of aiding and abetting the taking of West's Coach wallet or alternatively of exercising control over the wallet, knowing that it was stolen. But the State did not offer evidence that the wallet or the credit card used by Harrison had a value exceeding $200.

B. Ineffective Assistance of Counsel

Harrison alleges trial counsel was ineffective in not raising the correct argument in his motion for judgment of acquittal and in not objecting to the marshalling instruction for theft. To prove an ineffective assistance claim, a defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty and (2) prejudiced resulted from that failure. *Ondayog*, 722 N.W.2d at 784 (citing *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

A defendant asserting an ineffective-assistance-of-counsel claim on direct appeal must establish "an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). "[I]t is for the court to determine whether the record is adequate and, if so, to resolve the claim." *Id*.; *see also* Iowa Code § 814.7.

Harrison's claim trial counsel was ineffective for failing to challenge the State's theory of theft in connection with the charged retail goods is the kind of

matter that normally can be decided on direct appeal. *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) ("A claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal."). If the record does not reveal substantial evidence to support the second-degree theft conviction, counsel was ineffective for failing to properly raise the issue and prejudice resulted. *Id*. Conversely, if the State offered substantial evidence, counsel's failure to raise the claim could not be prejudicial. *Id*. Consequently, we will address Harrison's ineffective assistance of counsel claim on direct appeal.

1. Adequacy of Motion for Judgment of Acquittal

We first consider whether trial counsel breached an essential duty by failing to allege in his motion for judgment of acquittal that the credit card transactions did not constitute theft by taking or exercising control over stolen property. The following two theft provisions are at issue:

> A person commits theft when the person does any of the following:
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> 1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
> . . . .
> 4. Exercises control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen . . . .

Iowa Code § 714.1(1), (4).

Neither Harrison nor the State identify case law accepting or rejecting the notion that unauthorized use of a credit card can also be considered theft by

taking or exercising control over stolen property. Both parties rely on general theories underlying our theft statutes.

Harrison proposes that theft by taking is Iowa's modern equivalent of larceny, which required the wrongful "carrying away" of another's property without the consent of the owner. He claims he did not take possession of the merchants' property without their consent, but rather that the stores voluntarily gave him their merchandise in exchange for a credit card transfer. He contends his criminal conduct arose only from the lack of authorization for that transfer from the account holder. In sum, he argues: "This is not the type of factual situation § 714.1(1) prohibits." Harrison alleges that his unauthorized use of West's credit cards violated Iowa Code section 715A.6,[3] but was not theft.

The State counters that Iowa's theft statute largely follows the Model Penal Code. *See State v. Donaldson*, 663 N.W.2d 882, 885 (Iowa 2003) (noting that Iowa's theft statute abandons the common law asportation requirement). Under the Model Penal Code's explanation of theft, taking possession or control of an object includes the offender using it "in a manner beyond his authority." *Id*. at 886. From this premise, the State reasons: "The fact that [Harrison] unlawfully possessed the card and used it without West's authority thereby obtaining

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[3] That section states:

> A person commits a public offense by using a credit card for the purpose of obtaining property or services with knowledge of any of the following:
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> a. The credit card is stolen or forged.
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> b. The credit card has been revoked or canceled.
>
> c. For any other reason the use of the credit card is unauthorized.

Iowa Code § 715A.6.

property including shoes, alcohol, cell phone minutes and cigarettes is, under the Model Penal Code definition, a theft."

While it is true Harrison used West's credit or debit card in a manner beyond his authority, that does not fully answer the question whether he took possession or control of the property he purchased with the intent to deprive its rightful owner thereof. We find it difficult to shoehorn Harrison's conduct into the language of section 714.1(1) or (4). For instance, when Harrison used West's Visa card to charge shoes at Hibbett Sports, he took possession of the shoes from the store. He did not deprive the store of the property because the store received payment in the form of a credit or debit transaction. He did not deprive West of the property because she never owned or possessed the shoes and may not ultimately be indebted for their cost.[4] Likewise, the property was not stolen, because it was purchased—albeit by unauthorized means.

Harrison was found guilty of fraudulent use of a credit card in violation of section 715A.6 but he did not engage in theft by taking or exercising control over stolen property. The wording of those two theft provisions does not extend to the kind of illegal charging activity undertaken by Harrison in this case. Trial counsel breached a duty in not urging the proper basis for his motion for judgment of acquittal.

In asserting the lack of *Strickland* prejudice in relation to the marshalling instruction for theft, the State suggests that the correct charging alternative in this

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[4] Underlying policy of the federal Truth in Lending Act, 15 U.S.C.A. § 1643(a), is to protect credit card holders against losses due to theft or fraudulent use of a credit card on the theory that the card issuer is in a better position to prevent such losses. *Minskoff v. American Express*, 98 F.3d 703, 708-09 (2nd Cir. 1996).

case may have been theft by deception under Iowa Code section 714.1(3).[5] Our supreme court has categorized "theft by deception" as a "catch-all crime to encompass the full and ever changing varieties of deception." *State v. Hogrefe*, 557 N.W.2d 871, 878 (Iowa 1996). But it is not clear to us that theft by deception would apply to Harrison's unauthorized use of West's credit or debit cards. At least one commentator had questioned the ability to prosecute for theft by deception in a three-party credit card situation.

> The usual three-party arrangement is that the creditor collects from the credit-card issuer, who assumes the risk of misuse of credit cards so as to encourage creditors to honor cards promptly. Under these circumstances it is difficult to convict the misuser of a credit card of the crime of false pretenses, for the person deceived (the creditor) loses nothing, and the person who loses something (the issuer) is not the one deceived.

Wayne R. LaFave, 3 Substantive Criminal Law § 19.7 (2nd ed. 2011).

But even if Harrison's fraudulent use of a credit or debit card could fall within the elements of theft by deception, we don't believe that—had trial counsel advanced the proper argument for judgment of acquittal—the State could have belatedly amended the trial information to allege a new alternative of theft without prejudicing Harrison's substantial rights. *See State v. Williams*, 328 N.W.2d 504, 505-06 (Iowa 1983). Harrison's counsel may have pursued an entirely different defense strategy had the State originally charged theft by deception instead of, or

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[5] That section states:

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

Iowa Code § 714.1(3).

in addition to, the other theft alternatives. With adequate notice of the charges against him, he would have had the opportunity to engage in additional discovery or to challenge the State's decision to file two different criminal counts addressing the same acts.

Harrison suffered prejudice as a result of his counsel's omission in moving for judgment of acquittal. Had counsel urged the proper argument, the district court would have allowed the jury to consider only the offense of theft in the fifth degree. Accordingly, we reverse Harrison's second-degree theft conviction, and remand for the court to enter judgment on the lesser offense. *See Truesdell*, 679 N.W.2d at 619-20 (remanding for dismissal of charge not supported by the evidence).

2. Objection to Theft Instruction

Having determined counsel was ineffective in his handling of the motion for judgment of acquittal, we do not need to address the additional claim that counsel breached an essential duty by not objecting to the marshalling instruction for the theft count.

C. Reimbursement of Attorney Fees

As part of the remand, we direct the court to reduce the restitution order for Harrison's attorney fees to the statutory limit for causes of this type. *See State v. Dudley,* 766 N.W.2d 606, 626 (Iowa 2009).

REVERSED AND REMANDED.