IN THE COURT OF APPEALS OF IOWA

No. 9-636 / 08-1738
Filed September 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MITZI E. FENZLOFF,
Defendant-Appellant.

Appeal from the Iowa District Court for Franklin County, John S. Mackey, Judge.

Mitzi Fenzloff appeals from her convictions for fraudulent practices and first-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Brent Symens, County Attorney, and Denise Timmins and Chantelle Smith, Special Prosecutors, for appellee.

Considered by Eisenhauer, P.J., Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ZIMMER, S.J.

Mitzi Fenzloff appeals after being convicted of fraudulent practices and first-degree theft following a bench trial. She contends there was insufficient evidence to support her conviction for first-degree theft by misappropriation. She also contends her counsel was ineffective. We affirm her conviction and preserve her claim of ineffective assistance for possible postconviction proceedings.

I. Background Facts and Proceedings. Mitzi Fenzloff and her husband, Albert Fenzloff, owned Sunnyside Memory Gardens, a perpetual care cemetery. They applied for the permits necessary to sell pre-need funeral services and merchandise but were denied due to Mitzi's criminal history and concerns about the insolvency of their business. Despite the fact that they did not have the appropriate permits, the Fenzloffs sold pre-need funeral services and merchandise from November 2003 through December 2004.

After receiving a complaint about Sunnyside Memory Gardens, the Iowa Insurance Division's Director of Regulated Industries conducted an investigation. On March 20, 2006, the State charged Mitzi and Albert with ongoing criminal conduct, fraudulent practice in the first degree, and theft in the first degree by misappropriation. The three-count trial information was later amended. The State dismissed the ongoing criminal conduct charge and reduced the first-degree fraudulent practice charge to second-degree fraudulent practice. The

first-degree theft charge was not affected by the amendment. The defendant waived her right to a jury trial and opted for a trial on the minutes of testimony.[1]

Following a trial on the minutes, the district court found the defendant guilty of second-degree fraudulent practices and first-degree theft. The court sentenced her to a term of not more than five years for second-degree fraudulent practices (Count I) and ten years for first-degree theft (Count II). The sentences were ordered to run concurrently. In this appeal, Fenzloff contends the district court erred in convicting her of first-degree theft.

II. Sufficiency of the Evidence. Fenzloff contends the evidence is not sufficient to support her conviction for theft by misappropriation. We review challenges to the sufficiency of the evidence to support a conviction for errors at law. *State v. Dalton*, 674 N.W.2d 111, 116 (Iowa 2004).

> The district court's finding of guilt is binding upon us unless we find there was not substantial evidence in the record to support such a finding. In determining whether there was substantial evidence, we review the record evidence in the light most favorable to the State. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.

Id. (quoting *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001)). We consider all the record evidence, not just the evidence supporting guilt. *Id.*

The State alleged that the defendant misappropriated the funds she collected from various customers for pre-need funeral services while operating Sunnyside Memory Gardens. Under Iowa Code section 714.1 (2005), a person commits theft by misappropriation if he or she

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[1] This appeal concerns only Mitzi Fenzloff. All references to the "defendant" or to "Fenzloff" refer to Mitzi Fenzloff.

> [m]isappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

The theft of property exceeding $10,000 is a class "C" felony. Iowa Code § 714.1(2).

Fenzloff argues the record fails to demonstrate that she used or disposed of the property of another in a manner inconsistent with the owner's rights. She also argues there is no evidence any misappropriated money was in excess of $10,000 in value as required in section 714.1(2).

In its ruling, the district court made the following findings:

> The defendant sold pre-need funeral services to several citizens not only without the required permits, but also without depositing 80% of the customer's funds into trust accounts as required under Iowa Code section 523A.201. The minutes of testimony further disclose that all funds received by the defendant pursuant to the pre-need funeral service contracts were either deposited in the Sunnyside Gardens business account or defendant's personal account. The minutes, therefore, make clear by circumstantial evidence that no funds required to be held in trust were placed in any trusting alternative allowed under subchapter part IV of chapter 523A. The minutes of testimony further reflect that only $980.70 of over $51,000 received by defendant were placed into trust and of those funds, the pre-need contracts were entered into prior to defendant taking over the operations of Sunnyside Memorial Gardens. Due to its insolvency, Sunnyside Memorial Gardens was eventually placed into full receivership with the State. The minutes of testimony further reflect that the defendant was in dire financial straits personally and professionally during the time she operated the business. According to State's Exhibit 3, $56,132.25 paid to defendant and her husband pursuant to the pre-need funeral services contracts were withdrawn by defendant and her husband without holding the same in trust for the benefit of the contract holder.

Substantial evidence supports these findings.

The district court concluded Mitzi misappropriated over $10,000 in pre-need funeral services funds she was entrusted with. Upon our review of the record, we find no reason to disagree with this conclusion. The minutes of testimony show that more than $50,000 in the pre-need funeral service funds Fenzloff collected were deposited into either her personal account or the business account. The funds deposited into the business account were withdrawn immediately. None of the funds were placed in trust as required by law, which was in derogation of the owners' rights.[2]

We believe the evidence is sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that Fenzloff misappropriated money paid by citizens for pre-need funeral services in an amount in excess of $10,000. When viewed in the light most favorable to the State, the record supports the conclusion that Fenzloff converted the funds she received to her own use instead of using them for their intended purpose. Fenzloff acted in a manner that was plainly inconsistent with the owners' rights in such property. Because substantial evidence supports Fenzloff's conviction for first-degree theft by misappropriation, we reject her challenge to the sufficiency of the evidence.

III. Ineffective Assistance of Counsel. Fenzloff next contends her counsel was ineffective in failing to object to the admission of State's Exhibit 3. She argues the exhibit in question—a list of customers, the amount of money they paid for the pre-need funeral services, and the amount of money she placed

[2] Defendant and her husband had two trust accounts at a bank in Charles City. After 2003, no funds were deposited into either account except by the previous owner of Sunnyside, and that amount totaled $980.70.

in trust—was inadmissible because she was not given proper notice of the exhibit.[3] She also contends the exhibit was inadmissible hearsay.

We review this claim de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). A successful ineffective-assistance-of-counsel claim requires proof by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id*. at 214-15. In analyzing the first prong of the test, we presume counsel acted competently. *Id*. at 215. Counsel cannot fail to perform an essential duty by merely failing to make a meritless objection. *Id.* In regard to the second prong of the test, Fenzloff must show a reasonable probability the result of the proceeding would have been different had counsel objected. *State v. Cromer*, 765 N.W.2d 1, 11 (Iowa 2009).

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to enable full development of the record and to afford trial counsel an opportunity to respond to the claims that have been made. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). We may resolve the claim of ineffective assistance of counsel on direct appeal if we find the record is sufficient to do so. *State v. Hildebrant*, 405 N.W.2d 839, 840-41 (Iowa 1987). Upon review of the record here, we conclude the defendant's claim should be preserved.

In this case, defense counsel may well have had tactical reasons for electing not to object to Exhibit 3. For example, the record reveals that the parties engaged in negotiations prior to trial resulting in the dismissal of one

[3] Defense counsel became aware of Exhibit 3 on the morning of trial. He objected to editorial comments contained in the title of the exhibit and in one of the columns. The trial court redacted the comments and the exhibit was received without further objection.

felony charge, the reduction of another, and a bench trial on the minutes of testimony. It is possible that counsel chose not to object to Exhibit 3 in order preserve an agreement which benefited his client. The State may not have been obligated to fulfill this agreement if defense counsel objected to Exhibit 3 in its entirety. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) (holding that because counsel may "have had a good reason for each step he took or failed to take," the issue of ineffective counsel should be raised in an application for postconviction relief where a hearing may be had and counsel given the opportunity to respond to defendant's charges). We preserve the defendant's claim for possible postconviction relief proceedings.

Because substantial evidence supports the district court's findings, we affirm the defendant's conviction and sentence. We preserve Fenzloff's claim of ineffective assistance of counsel for possible postconviction relief proceedings.

AFFIRMED.