STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0397

State of Minnesota,
Respondent,

vs.

Nadia Martynyuk,
Appellant.

Filed December 3, 2018
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19HA-CR-16-3743

Lori Swanson, Attorney General, Kristi Nielsen, Assistant Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges her conviction of aiding and abetting theft by swindle, arguing that the evidence was insufficient to sustain the conviction. We affirm.

FACTS

Respondent State of Minnesota charged appellant Nadia Martynyuk with one count of theft by swindle and one count of theft by false representation, based on allegations that Martynyuk and her stepson, V.N., fraudulently obtained payments for personal-care-assistant (PCA) services related to V.N.'s care of Martynyuk's father, S.M. The state also charged V.N. with theft by swindle and theft by false representation. The state later amended the complaint against Martynyuk to substitute one count of aiding and abetting theft by swindle for the original charges of theft by swindle and theft by false representation.

Martynyuk's trial was originally scheduled for June 19, 2017. The state had previously reached a plea agreement with V.N. and attempted to subpoena him for trial as a witness against Martynyuk. V.N. did not appear for Martynyuk's trial, and a warrant was issued for his arrest.[1]

Martynyuk's trial was continued to December 11, 2017, and the charge was tried to the district court the next day. The evidence at trial indicated that V.N. served as the PCA

[1] Public records regarding V.N.'s case indicate that he has not been adjudicated guilty on any of the charges related to this case. The state indicates that, two days before Martynyuk's trial was scheduled to begin, V.N. flew from New York City to Amsterdam with a plane ticket paid for by a company that Martynyuk managed.

for S.M. and M.M., Martynyuk's parents. V.N. was employed in this capacity by Integra Home Health Care (Integra). As a PCA, V.N.'s duties included dressing, bathing, and feeding S.M. and M.M., as well as light housework. V.N. was required to fill out timesheets documenting the hours that he worked and the tasks he performed. V.N. and care recipient were required to sign the timesheets. Because V.N. does not speak or read English, Martynyuk filled out the timesheets for V.N., and V.N. signed and dated them. Martynyuk then sent the timesheets to Integra for processing. Both Martynyuk and V.N. received training on how to properly fill out the timesheets, and V.N. received compensation from Integra based on the timesheets.

From May 13 through June 10, 2015, S.M. was vacationing in Russia. Martynyuk and V.N. knew that S.M. was in Russia and that he was not receiving PCA services from V.N. while he was in Russia. Nonetheless, Martynyuk submitted timesheets to Integra claiming that V.N. provided PCA services for S.M. during the time that S.M. was in Russia. Martynyuk filled out those timesheets, and V.N. signed and dated them.[2] The timesheets indicated that on certain days while S.M. was in Russia, V.N. arrived at S.M.'s home at 9:00 a.m., left at 11:30 a.m., and assisted S.M. with dressing, grooming, and toileting during that time. Integra paid V.N. $827.95 for those services. The payments were disbursed on June 9 and July 7, 2015.

At trial, Martynyuk testified that the false statements on the timesheets indicating that V.N. provided PCA services to S.M. while S.M. was in Russia were an oversight.

[2] S.M. had pre-signed timesheets before he left for Russia.

Martynyuk described her actions as a "mistake" that was due to filling out the timesheets "automatically."

The district court found Martynyuk guilty of aiding and abetting theft by swindle. Specifically, the district court found that V.N. was not fluent in English and needed Martynyuk's help to fill out his timesheets, that S.M. was out of the country from May 13 to June 10, 2015, and that Martynyuk and V.N. knew that S.M. was out of the country. The district court also found that Martynyuk's testimony that "the fraudulent timesheets were an oversight lack[ed] credibility." Lastly, the district court found that "[b]ecause of this fraud, [Martynyuk] received $827.95 in unearned monies from Integra." The district court concluded that Martynyuk had committed a "swindle accomplished by false representation as to either past or future facts."

Martynyuk appeals, challenging the sufficiency of the evidence to support her conviction of aiding and abetting theft by swindle.

D E C I S I O N

An appellate court will not disturb a guilty verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). An appellate court "review[s] criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). An appellate court carefully analyzes the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the fact-finder

to reach the verdict that it did, *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989), assuming that the fact-finder "believed the state's witnesses and disbelieved contrary evidence," *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). However, if the state relied on circumstantial evidence to prove an element of the offense, an appellate court applies a heightened standard of review. *See State v. Al-Naseer*, 788 N.W.2d 469, 475 (Minn. 2010) (applying the circumstantial-evidence standard to individual element of a criminal offense that was proved by circumstantial evidence).

Minnesota's aiding-and-abetting statute provides, "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2014). "[T]he element of 'intentionally aiding' embodies two important and necessary principles: (1) that the defendant knew that [her] alleged accomplices were going to commit a crime, and (2) that the defendant intended [her] presence or actions to further the commission of that crime." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted). Because Martynyuk's intent is an element of aiding and abetting, and because intent is generally proven circumstantially, *State v. Davis*, 656 N.W.2d 900, 905 (Minn. App. 2003), *review denied* (Minn. May 20, 2003), we apply the heightened circumstantial-evidence standard of review.

A conviction based on circumstantial evidence will be affirmed if the circumstances proved are consistent with the hypothesis that the defendant is guilty and inconsistent with any rational hypothesis except that of guilt. *Al-Naseer*, 788 N.W.2d at 473. When reviewing a conviction based on circumstantial evidence, an appellate court first

determines the circumstances proved. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). When identifying the circumstances proved, an appellate court "disregard[s] evidence that is inconsistent with the . . . verdict." *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). An appellate court next determines if the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt, reversing the conviction only if there is a reasonable inference other than guilt. *Loving*, 891 N.W.2d at 643.

Martynyuk's main argument is that the evidence was insufficient to prove that she aided V.N. to commit a theft by swindle because the state did not prove that V.N. committed a theft by swindle. Martynyuk argues, "The state failed to prove [V.N.] committed a theft by swindle because it failed to prove that [V.N.] knew that Martynyuk was submitting incorrect time sheets or that he was going to be paid for services he did not provide at the time he signed the time card." Martynyuk concludes, "If [V.N.] did not commit a theft by swindle, then [she] could not have aided him in doing so."

It is true that a person may not be convicted of aiding and abetting a crime if no crime was committed. *See State v. Gruber*, 133 N.W. 571, 573 (Minn. 1911) ("It is quite impossible to see how a person can be guilty of aiding or abetting in the commission of a crime when no crime is committed."). However, Martynyuk's argument presumes that a person cannot be convicted of aiding another to commit a crime unless the state proves that the other person is guilty of the crime. That premise is false. Minnesota's aiding-and-abetting statute establishes that a person may be convicted of aiding and abetting an offense even though no other person is convicted of the offense, providing:

> A person liable [for aiding and abetting] may be charged with and convicted of the crime although the person who directly committed it has not been convicted, or has been convicted of some other degree of the crime or of some other crime based on the same act, or if the person is a juvenile who has not been found delinquent for the act.

Minn. Stat. § 609.05, subd. 4 (2014).

Minnesota caselaw similarly establishes that a person may be convicted of aiding and abetting an offense even though the person who she allegedly aided was not convicted. *See State v. Caldwell*, 803 N.W.2d 373, 382 (Minn. 2011) ("[T]he acquittal of a principal does not bar conviction of a defendant for aiding and abetting . . . ."). Indeed, in *State v. Dominguez-Ramirez*, the supreme court affirmed a defendant's conviction of aiding and abetting first-degree murder even though the person he allegedly aided had fled the country and had not been tried. 563 N.W.2d 245, 249 & n.1, 260 (Minn. 1997). Minnesota's jurisprudence in this area reflects the principle that "the fact that the principal has been acquitted has no bearing on the guilt of an aider and abettor provided that the evidence is sufficient *to establish the commission of a crime and the aider and abettor's complicity in its commission*." 9 A.L.R. 4th 972, 977 (1981) (emphasis added).

Because a person may be convicted of aiding and abetting a crime even though the person who she allegedly aided has not been convicted, we reject Martynyuk's argument that the evidence was insufficient to prove her guilty of aiding and abetting theft by swindle unless it also proved that V.N. was guilty of theft by swindle. The evidence was sufficient to sustain Martynyuk's conviction if it established that a theft by swindle was committed and that Martynyuk aided and abetted its commission.

A theft by swindle occurs when a person "by artifice, trick, device, or any other means, obtains property or services from another person." Minn. Stat. § 609.52, subd. 2(4) (2014). "[T]he [theft-by-swindle] statute punishes any fraudulent scheme, trick, or device whereby the wrongdoer deprives the victim of [its] money or property by deceit or betrayal of confidence." *State v. Ruffin*, 158 N.W.2d 202, 205 (Minn. 1968). Under the statutory definition, as explained in *Ruffin*, a theft by swindle occurred in this case if Integra was deprived of its money by deceit or betrayal of confidence.

The following circumstances were proved at trial. Martynyuk filled out timesheets indicating that V.N. provided PCA services for S.M. at a time when S.M. was out of the country. Martynyuk knew S.M. was out of the country and therefore knew that V.N. could not have provided those PCA services. The district court rejected Martynyuk's claim that her misrepresentations on the timesheets regarding V.N.'s provision of PCA services were due to an oversight. This court defers to that credibility determination. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) ("[A]ppellate courts defer to [district] court credibility determinations."). Thus, the state proved that Martynyuk intentionally put false information on V.N.'s timesheets.

The state also proved that Martynyuk had V.N. sign the timesheets knowing they contained false statements regarding V.N.'s provision of PCA services. Martynyuk submitted the false timesheets expecting that Integra would pay V.N. for the PCA services described on the timesheets, as it had done in the past, and V.N. was paid based on those timesheets. These proven circumstances establish, beyond a reasonable doubt, that Integra

was deprived of its money by deceit. Thus, the evidence shows that a theft by swindle was committed.

We next consider whether Martynyuk aided and abetted the commission of that theft by swindle. The circumstances proved establish that Martynyuk knew that Integra was going to be deprived of its money by deceit and that she intended her actions to further the commission of that crime. Thus, the circumstances proved are consistent with the hypothesis that Martynyuk is guilty of aiding and abetting theft by swindle. There is no other rational hypothesis except that of guilt. Indeed, Martynyuk does not offer a rational hypothesis of innocence, relying instead on her erroneous assertion that the evidence cannot be sufficient to sustain her conviction unless it also proves that V.N. is guilty of theft by swindle.[3]

We acknowledge that the circumstances proved tend to establish Martynyuk's guilt without relying on aiding-and-abetting liability. However, the supreme court has "long held that aiding and abetting is not a separate substantive offense." *State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999); *see also State v. Ostrem*, 535 N.W.2d 916, 922 (Minn. 1995) ("It is undisputed that aiding and abetting is not a separate substantive offense."); *State v. Britt*, 156 N.W.2d 261, 263 (Minn. 1968) ("[T]here is no separate crime of criminal liability for a crime committed by another person.").

The supreme court has also held that a jury can convict a defendant of aiding and abetting a crime despite the absence of any aiding-and-abetting language in the complaint.

[3] Because V.N. has not been tried, it remains to be seen whether the state can establish his guilt.

See State v. Lucas, 372 N.W.2d 731, 740 (Minn. 1985) ("[E]ven if the indictment had not used 'aiding and abetting' language, the jury would have been free to base the murder conviction on a determination that [the] defendant was liable as an aider or abettor."); *State v. DeFoe*, 280 N.W.2d 38, 40, 42 (Minn. 1979) (affirming conviction for aiding and abetting even though the defendant was not charged with aiding and abetting).

Because aiding and abetting is not a separate substantive offense, and because a conviction can be sustained based on aiding-and-abetting liability even though the defendant was not charged with aiding and abetting, we do not see why an aiding-and-abetting conviction cannot be sustained in a case in which the state chose to rely on an aiding-and-abetting theory but established, beyond a reasonable doubt, the defendant's commission of the underlying substantive offense.

Martynyuk's brief implicitly recognizes that possibility, arguing that the state could not prove that she was the "principal because she did not receive the proceeds from the PCA services that were not completed."[4] That argument is unavailing. Under the statutory definition of theft by swindle, as explained in *Ruffin*, a crime occurs if a wrongdoer deprives the victim of its money by deceit or betrayal of confidence. *Ruffin*, 158 N.W.2d at 205. Martynyuk deprived Integra of its money by deceit; whether Martynyuk herself received that money is irrelevant.

[4] Martynyuk argues against "principal" liability even though she recognizes that the state "originally charged [her] as a principal" and "later amended the charges to aiding and abetting."

We hold that the evidence was sufficient to sustain Martynyuk's conviction of aiding and abetting theft by swindle.

Affirmed.