IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27481-1-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
THEODORE B. BURTON,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Theodore Burton was convicted of two counts of first degree theft in Douglas County Superior Court after he accepted down payments from customers but did not erect buildings for them. He argues that the evidence did not support the verdicts and that his counsel was ineffective by not requesting an instruction on good faith claim of title. We affirm.

FACTS

Although unrelated, both counts reflected similar facts. Joe and Cendie Dietrich signed a contract on June 25, 2007, with Cook's Steel Buildings, which was represented

by salesman Larry Anderson. Mr. Burton was the owner of that company. The Dietrichs made a down payment of $7,677.35. Mr. Anderson told the Dietrichs that the purpose of the down payment was to get materials ordered and shipped to the work site.

By September, the Dietrichs began calling Cook's because no work had started on the building. Phone messages were left twice a week from September through November. No one called back. Eventually, the company and personal phones were disconnected. Mr. Dietrich subsequently located Mr. Burton at a work site in Chelan in November 2007. Mr. Burton stated that he was a "little behind" but would be out by Thanksgiving to dig and set poles. I Report of Proceedings (RP) 99. Mr. Burton did make the trip and put markings on the ground. He promised the Dietrichs that he would "get this thing up for you." They never saw him again. The Dietrichs sent a certified letter requesting a refund of their down payment. They never received a refund.

Clint Wall signed a contract with Cook's on July 25, 2007, and made a down payment of $4,589.46 to Mr. Burton on August 5. Mr. Burton told him that the down payment was for "materials to get the job started, posts and the initial framing, and to get the process started of putting a building up." I RP 175. Mr. Wall testified that Mr. Burton promised to help him prepare drawings for the building permit, but never did so. Mr. Burton never returned to the property, nor were any materials delivered there.

Mr. Wall later saw Mr. Burton in Mansfield. Burton told Wall that he was behind schedule, but would "get the building up." I RP 185. Mr. Wall later left Mr. Burton 40 or 50 messages, but never heard back from him. The down payment was never refunded.

Mr. Anderson testified for the prosecution. He testified that the contracts called for payments of one-third down, one-third on delivery of materials, and the final one-third upon completion of the job. The down payment was used to order trusses and have metal and lumber cut. If the property owner did not obtain a building permit, the down payment would be refunded.

The contracts signed by the parties had a different payment schedule. After the initial down payment, additional payments were due when the materials were delivered, the building was framed, the building was sided, and the final payment when the overhead door was installed. Exhibit 1, 2.

Mr. Burton testified that he got behind on the work as his crews were downsized. He took the projects in contract order and was getting around to the Dietrich and Wall contracts. Customer down payments went into the business account and were used for business expenses rather than being applied solely to the customer's order.

Defense counsel argued to the jury in closing that Mr. Burton was simply following standard business practices in using the down payments for business overhead

expenses. Mr. Burton intended to complete the contracts, but his business failed first.

The jury convicted Mr. Burton as charged. The court sentenced him to standard range concurrent sentences. He then timely appealed to this court.

ANALYSIS

Mr. Burton raises two claims in this appeal.[1] First, he argues that the evidence was sufficient because he was free to use the down payments as he saw fit. Second, he contends his trial counsel was ineffective by failing to request a good faith claim of title instruction. These two contentions, which are both governed by well-settled law, will be addressed in the order presented.

Sufficiency of the Evidence. The appellant's initial argument is that he did not convert the down payments because he was entitled to use the money as he saw fit. He focuses his argument on the fact that the contracts did not expressly limit his use of the money and industry practices.

The sufficiency of the evidence to support a verdict is reviewed according to long-settled principles. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond

[1] A third challenge to the amount of restitution was withdrawn. Reply Br. at 9.

a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

The State was required, as charged here, to show that Mr. Burton, acting with the intent to deprive the victims of their money, exercised unlawful control of those funds (in excess of $1,500) sometime between the date of their down payments and February 5, 2008. Clerk's Papers (CP) 36, 37. A person exercises unlawful control over the property of another in his possession when he puts that property to his own use. CP 40; RCW 9A.56.010(19).

The leading case in this context, argued by both parties, is *State v. Joy*, 121 Wn.2d 333, 851 P.2d 654 (1993). There, a building contractor was convicted of five counts of first degree theft for taking money for remodeling projects that he never performed work on and never refunded the money. *Id.* at 335-338. Division One of the Court of Appeals had reversed all of the convictions, reasoning that the funds became the contractor's when paid to him and it was impossible to steal one's own money. *Id.* at 338. The Washington Supreme Court reinstated three of the five convictions. *Id.* at 335-337. The Court determined that the term "property of another" used in the theft statutes did not require

that "title must strictly be in the other person." *Id.* at 340. Instead, the "property of another" was property in which another person had some interest. *Id.* at 341.

Applying that view to the facts of the case, the Court concluded that in the three counts where the victims testified that they were told their payments were to be used to obtain building materials, the victims retained an interest in the money. *Id.* When the "defendant used that money for other purposes, he appropriated the funds to his own use and committed theft by embezzlement." *Id.* As to the other two counts, the Court found that there was no testimony about what the payments were to be used for and no restriction in the written contract concerning the use of the advance payments. *Id.* at 343.

The parties here each argue that the case fits within the *Joy* fact pattern, with the prosecutor stressing the testimony of the purchasers and Mr. Burton contending that the contracts did not restrict his use of the payments and did not allow for oral modification. We agree that the facts here are consistent with the convictions affirmed in *Joy*.

The purchasers and Mr. Anderson testified that the down payments would be used to purchase materials for their particular construction projects. This testimony of a restriction on the use of the payments is what occurred in *Joy*. Under the reasoning of that case, the evidence was sufficient to establish that the purchasers retained an interest in the down payments. It did constitute the "property of another" under our theft statutes.

Joy, 121 Wn.2d at 341-342.

In response, Mr. Burton argues that the contracts each had integration clauses limiting the contracts to their written terms and forbidding oral modifications. For several reasons, we do not agree with that argument. First, each of the victims in *Joy* also signed a contract, and we have a hard time believing those documents did not contain integration clauses. We doubt that the existence of an integration clause permits someone to make express representations and then deny making them. By its term, the clause prohibited oral modifications; it did not prohibit testimony about the representations and understandings of the parties. There also was no express term proclaiming that the funds were the sole property of the construction company, so the testimony explaining the meaning of the parties was not an oral modification of the contract.

Second, and more importantly, the contract itself suggests that the funds were restricted. The contracts tied each payment to an event, with initial money down and then the second payment due when the materials arrived. The contracts also provided that "materials will not be delivered without payment." Exhibit 1, 2. We think these clauses suggest that the down payments would be used to purchase materials and that the parties understood that to be the purpose. When coupled with the right of refund also guaranteed in the contracts, the contracts strongly suggest that the down payments were

restricted.

The evidence was sufficient to establish the "property of another" element and that the money was not put to its expected use. Valuation is not in issue. The remaining element is whether Mr. Burton intended to deprive the purchasers of the funds.

Mr. Burton argued that he was taking the jobs in order and that he would have eventually built the Dietrich and Wall buildings. In other words, he did not intend to steal anyone's money. There was contradictory testimony, however, that he refused to refund the purchasers their down payments and would not communicate with them at all. Far from simply being a businessman behind in his obligations, he was a businessman who was shunning his obligations to his clients and had no intention (and perhaps no ability) to perform the contracts.

The jury was free to choose between competing views of the evidence. There was evidence to support each element of the prosecution's case. It was, therefore, sufficient to support the verdicts. *State v. Green*, *supra.*

Ineffective Assistance of Counsel. Mr. Burton next argues that his counsel failed him by not seeking an instruction on good faith claim of title. There was no factual basis for giving the instruction. Counsel did not err.

The Sixth Amendment guarantees the right to counsel. More than the mere

presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

A defendant is entitled to an instruction on good faith claim of title under RCW 9A.56.020(2)(a)[2] when he presents evidence that (1) the taking was open and avowed, and (2) has shown circumstances which permit an inference that the defendant has some legal or factual basis for a good faith belief that he has title to the property. *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995). There is no entitlement to the instruction if there is no evidence supporting one of these elements. *Id.* at 93.

In *Ager*, officers of an insurance company contended they had a good faith claim of title defense to embezzlement when they took advances from the company. The advances were recorded in the company's books. The insurance code permitted insurance companies to give advances to its officers. *Id.* at 96. However, there was no

[2] The statute states: "In any prosecution for theft, it shall be a sufficient defense that: (a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable."

evidence that the company had authorized advances to its officers. *Id.* Therefore, while there was evidence to support the open taking requirement, there was no legal or factual basis for believing there was a basis for a good faith claim of title in the advances. *Id.* at 96-97. The defendants were not entitled to the defense. *Id.* at 97.

In *State v. Moreau*, 35 Wn. App. 688, 669 P.2d 483 (1983), *review denied*, 102 Wn.2d 1019 (1984), this court upheld the embezzlement conviction of a bookkeeper who had used company funds to make loans to herself. She had the authority to write checks and claimed that she had the ability to make loans to herself. This court found there was no authorization by the company to make loans. She therefore had no right to a good faith claim of title instruction. *Id.* at 694-695.

We do not believe the evidence supports either prong of the good faith title defense. There is no evidence that Mr. Burton openly converted the funds to his own use or claimed them as his own; he certainly did not tell the purchasers that he considered the funds his own property and nothing in the contracts suggested that. At whatever time he changed the funds to his own purposes, he did not tell the purchasers or otherwise suggest openly that he was doing so. This case is thus unlike the officers in *Ager* and the bookkeeper in *Moreau* who at least had records of the payments made to them in the company books.

There also is no basis for believing the funds belonged solely to Mr. Burton so that he could have a good faith claim of title to the money. The contracts did not speak to that issue and he never told the purchasers that the funds were his to do with as he pleased whenever he wanted. While he may have believed that he could use the funds as he saw fit, the evidence, as in *Ager*, did not show that he was authorized to do so.

For both reasons, there was no evidentiary basis for instructing on a good faith claim of title defense. Mr. Burton's counsel did not err in failing to ask for the instruction.[3] Accordingly, Mr. Burton has not shown that his counsel performed ineffectively.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

_____
Kulik, C.J.

[3] We need not address the other aspects of an ineffective assistance claim.

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Brown, J.