

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0081

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KAMIE JO SCHIEBOUT,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SIOUX COUNTY
THE HONORABLE PATRICK H. TOTT (TRIAL & SENTENCE),
AND THE HONORABLE JEFFREY A. NEARY (REIMBURSEMENT),
JUDGES

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Sufficient Evidence Supported the Verdict.

Authorities

State v. Theodore, 150 N.W.2d 612 (Iowa 1967)
Millam v. State, 745 N.W.2d 719 (Iowa 2008)
State v. Donaldson, 663 N.W.2d 882 (Iowa 2003)
State v. Hogrefe, 557 N.W.2d 871 (Iowa 1996)
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State v. Stevens, 719 N.W.2d 547 (Iowa 2006)
State v. Thomas, 847 N.W.2d 438 (Iowa 2014)
Iowa Code § 714.1(6)(b)
Model Penal Code § 224.5

II. Counsel Had No Duty to Object to the Jury Instructions.

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
Millam v. State, 745 N.W.2d 719 (Iowa 2008)
State v. Hill, 449 N.W.2d 626 (Iowa 1989)
State v. Tate, 710 N.W.2d 237 (Iowa 2006)

III. The State Concedes That the District Court Erred in Ordering Reimbursement Without Determining Schiebout's Reasonable Ability to Pay.

Authorities

State v. Alspach, 554 N.W.2d 882 (Iowa 1996)
State v. Blank, 570 N.W.2d 924 (Iowa 1997)
State v. Jenkins, 788 N.W.2d 640 (Iowa 2010)
Iowa Code § 910.2
Iowa Code § 356.7

ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal from a guilty verdict for second degree theft. Kamie Jo Schiebout argues that the State's evidence was insufficient, that her trial counsel was ineffective for failing to object to the jury instructions, and that the district court erred when it ordered reimbursement to the Sioux County Sheriff.

Course of Proceedings

The State accepts the course of proceedings as set forth in Schiebout's brief as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Schiebout stole a book of checks associated with a Sandy Hollow Ducks Unlimited account from her estranged husband at some point prior to November of 2015. Trial Tr. Vol. I P.40 L.16 – P.41 L.25. She was not authorized to write checks from the account. Trial Tr. Vol. I P.39 Ls.19-25. Nevertheless, Shiebout wrote several

checks to Wal-Mart, Casey's, Hy-Vee, and others in November and December of 2015. State's Exhibit 1; Conf. App. 4-8. The aggregate value of the seven checks submitted to the jury was \$1,256.93. State's Exhibit 1; Conf. App. 4-8; Jury Inst. Questions Nos. 4-10; App. 32-33.

ARGUMENT

I. Sufficient Evidence Supported the Verdict.

Preservation of Error

At the close of the State's evidence, Schiebout moved for a judgment of acquittal on the ground that the State failed to prove that she knew the checks would not be paid by the bank. Trial Tr. P.31 Ls.12-21. Error is preserved for that claim. Schiebout admits that she did not preserve her claim that the State failed to prove that she received property, services, or money for the checks. She claims that her counsel was ineffective for failing to preserve that claim.

Standard of Review

The Iowa Supreme Court summarized the standard of review for sufficiency challenges as follows:

Sufficiency of evidence claims are reviewed for correction of errors at law. In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider all of the record evidence viewed in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the

evidence. We will uphold a verdict if substantial record evidence supports it. We will consider all the evidence presented, not just the inculpatory evidence. Evidence is considered substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt. Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury is free to reject certain evidence, and credit other evidence.

State v. Thomas, 847 N.W.2d 438, 442 (Iowa 2014) (quoting *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012)). Ineffective assistance of counsel claims are reviewed *de novo*. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008).

Merits

Schiebout was charged with theft by check. That theft alternative requires the State to prove that the defendant (1) wrote checks, (2) that were drawn on a bank, (3) received property, services, or money in exchange, (4) and knew at the time the checks were presented that they would not be paid by the bank because the defendant was not an authorized signer on the account. Jury Inst. No. 14; App. 28. Schiebout challenges the sufficiency of the evidence for elements three and four.

A. The evidence was sufficient to prove that Schiebout knew at the time she presented the checks that they would not be paid by the bank.

Schiebout stole a book of checks associated with a Sandy Hollow Ducks Unlimited account for which she was not an authorized signer. Trial Tr. Vol. I P.39 Ls.19-25, P.40 L.16 – P.41 L.25.

Nevertheless, Schiebout wrote several checks to retailers using the stolen checks. State's Exhibit 1; Conf. App. 4-8. A reasonable juror could conclude that because Schiebout knew she was not authorized to sign the checks, she knew the bank would not pay them.

Schiebout argues that the State's evidence was insufficient because the bank inadvertently paid the checks. But the evidence does not, as Schiebout argues, show that she knew the checks were being paid. Tooker testified that the checks that Schiebout wrote to Wal-Mart were converted to ACH network transfers, but she did not testify that the money was paid from the account "immediately."

Trial Tr. Vol. I P.31 L.13 – P.32 L.3. Schiebout also relies on testimony that she did not write any checks after a bank employee told her to stop. Trial Tr. Vol. II P.37 L.16 – P.38 L.13. But a reasonable jury could have concluded that Schiebout knew that the

bank would not pay the checks when she wrote them and planned to continue until she was caught.

The Iowa theft statute is “modeled after the Model Penal Code, with slight variation.” *State v. Donaldson*, 663 N.W.2d 882, 885 (Iowa 2003). Model Penal Code section 224.5 covers “bad checks.” It provides that a person commits theft by issuing or passing “a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.” Model Penal Code § 224.5. It also provides for a presumption that the defendant knew the check would not be paid if “the issuer had no account with the drawee at the time the check or order was issued.” Model Penal Code § 224.5(1). The Iowa statute words the presumption slightly different:

Whenever the drawee of such instrument has refused payment because the maker has no account with the drawee, the court or jury may infer from such fact that the maker knew that the instrument would not be paid on presentation.

Iowa Code § 714.1(6)(b). It is unclear from the evidence at trial whether Schiebout had an account with American State Bank, but it is undisputed that she did not have a Sandy Hollow Ducks Unlimited account.

Even if the State did not benefit from Iowa’s statutory presumption because the bank did not refuse payment, the logic of the presumption applies to this sufficiency challenge. As the Model Penal Code comment puts it:

Consider the position of the hotel keeper or merchant who finds that a check is drawn on a fictitious or inadequate account. *In a fictitious account situation, it is highly improbable that the transaction was innocent.*

Model Penal Code § 224.5 cmt.2 (emphasis added). In *Hogrefe*, this Court summarized an earlier decision on Iowa’s theft by check law by saying that “the gist of the theft by check offense is obtaining something of value through deception.” *State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996). Schiebout knew she had no authority to write checks from that account. She led the retailers to whom she wrote the checks to believe she did. The district court did not err when it submitted the question to the jury.

B. The evidence was sufficient to prove that Schiebout received property, services, or money for the checks.

Schiebout argues that her counsel was ineffective for failing to preserve error on a sufficiency challenge to the State’s evidence supporting element three. That element required the State to prove

that Schiebout received property, services, or money in exchange for the checks. Jury Inst. No. 14; App. 28. The State submitted to the jury seven different checks that Schiebout wrote on the Sandy Hollow Ducks Unlimited account. Check number 1383 was written to South Ridge for \$87.37. Number 1384 was to Shell for \$105.21. Number 1386 was to Wal-Mart for \$374.24. The payee is unreadable on number 1387, but the amount was \$224.46. Check number 1388 was to Nearly New Town for \$59.82. Number 1391 was to Wal-Mart for \$355.33. Number 1392 was to Kum & Go for \$50.50. State's Exhibit 1; Conf. App. 4-8; Jury Inst. Questions Nos. 4-10; App. 32-33.

Schiebout concedes that the State presented sufficient evidence to prove that she received property in exchange for the two checks written to Wal-Mart, because the jury saw receipts showing items she purchased. The State did not offer testimony about property or services she purchased with the other five checks. She argues on appeal that her counsel should have challenged the sufficiency of the evidence on those five checks for that reason.

To survive a motion for a judgment of acquittal on this element, the evidence needed to be sufficient to convince a rational trier of fact that Schiebout received property or services in exchange for the

checks. But the State was not required to introduce specific evidence identifying the property that Schiebout received. Jurors can rely on common knowledge to support a conviction. *See State v. Stevens*, 719 N.W.2d 547, 552 (Iowa 2006). In *State v. Theodore*, this Court held that jurors could find from common knowledge and experience that ninety-one boxes of loins, five boxes of cooked hams, three boxes of smoked hams, and one box of shankless hams, which allegedly were subject of conspiracy to commit felony larceny or embezzlement, were worth more than \$20, even though no evidence had been presented on the value of the meat. 150 N.W.2d 612, 616 (Iowa 1967).

The five checks that Schiebout challenges were written to local retailers in amounts that suggest Schiebout was paying a price for goods, not giving a donation. Jurors can call on their common knowledge to tell them that Schiebout was not donating money to Kum & Go, nor was she donating exactly \$59.82 to Nearly New Town. The State concedes that the payee is illegible on the exhibit copy for check number 1387, but a rational jury could have concluded that it was written to a Sioux County business in exchange for property or services. The check appears with six others, all of which were written to Sioux County businesses in amounts between \$50 and \$375 dollars

and the investigating officer testified that he visited all the businesses that accepted the stolen checks. Trial Tr. Vol. II P.19 L.8 – P.20 L.13. But even if this Court has concerns about check number 1387, the aggregate amount of the other six checks is \$1,032.49; it exceeds the amount necessary to prove second degree theft. Counsel had no duty to seek a judgment of acquittal on this ground.

II. Counsel Had No Duty to Object to the Jury Instructions.

Preservation of Error

The State does not contest error preservation.

Standard of Review

Ineffective assistance of counsel claims are reviewed *de novo*.

Millam, 745 N.W.2d at 721.

Merits

Schiebout argues that her counsel should have asked the district court to instruct the jurors that they could only consider the seven checks listed on the verdict form in determining her guilt. While her counsel certainly could have requested such an instruction, he did not have a duty to do so. The jury was adequately informed by the instructions and the verdict form that it was deciding Schiebout's guilt based on the seven checks listed on the form.

In any event, Schiebout was not prejudiced by any alleged error in failing to preserve a challenge to the jury instructions. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed”); *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (“In analyzing this claim, we need not determine whether his counsel’s performance was deficient before examining the prejudice component of his ineffective-assistance claim”). Prejudice in this context requires Schiebout to prove that had the district court instructed the jury that it was allowed to consider only the seven checks on the verdict form, there is a reasonable probability that it would have reached a different verdict. *See State v. Hill*, 449 N.W.2d 626, 629 (Iowa 1989).

The district court instructed the jury that they were required to answer a question on the verdict form to determine the degree of theft. Jury Inst. No. 16; App. 30. The verdict form asks the jury first whether Schiebout wrote checks from the account. Jury Inst. Question No. 1; App. 31. The second asks whether “the 7 checks at issue herein” were a part of a single scheme or plan. Jury Inst. Question No. 2; App. 31. They are then told to either answer question

three or proceed to questions four through ten. Jury Inst. Question No. 2; App. 31. Questions four through ten ask for individual verdicts on each of the seven checks for which the State submitted substantial evidence. Jury Inst. Question Nos. 4-10; App. 32-33.

During closing argument, the State and Schiebout's counsel specifically identified each of the seven checks that appear on the verdict form and no others. Trial Tr. Vol. II P.68 Ls.7-16, P.76 L.1 – P.78 L.19. The State told the jury to “look at the seven checks.” Trial Tr. Vol. II P.74 L.2. The seven checks on the verdict form have an aggregate value of more than \$1,000. Schiebout concedes that any error would be harmless if the jury found Schiebout guilty on enough of the seven submitted checks to reach \$1,000 in aggregate value. Thus, for the alleged error to have prejudiced Schiebout, jurors would have to have concluded that she was not guilty of several of the checks listed on the verdict form, but that she was guilty of some other check that was not listed on the verdict form. She does not give any plausible reason why a juror would so conclude. She has not met her burden to prove that she was prejudiced by the alleged error.

III. The State Concedes That the District Court Erred in Ordering Reimbursement Without Determining Schiebout's Reasonable Ability to Pay.

Preservation of Error

The State does not contest error preservation.

Standard of Review

Review of restitution orders is for correction of errors at law.

State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010).

Merits

The district court set a hearing following an application for reimbursement of correctional fees pursuant to section 356.7. The application included \$735 for room and board and \$28,136.31 in reimbursement for medical aid and requested that the amount be included in restitution. Application for Reimbursement 02/20/18; Conf. App. 21. After the hearing, the district court denied the \$735 room and board fee but concluded that expenses for medical aid do not constitute “correctional fees pursuant to section 356.7” for purposes of the required reasonable ability to pay determination under section 910.2. Ruling on Reimbursement 05/07/18. The State concedes that the district court’s conclusion was error. Remand is necessary for a hearing on Schiebout’s reasonable ability to pay the medical aid expenses. The State also concedes that Schiebout was

entitled to counsel at the hearing under *State v. Alspach*, 554 N.W.2d 882 (Iowa 1996), and *State v. Blank*, 570 N.W.2d 924 (Iowa 1997).

CONCLUSION

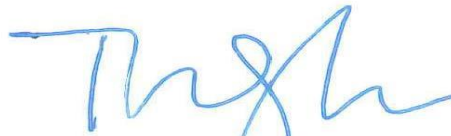
For the foregoing reasons, Schiebout's conviction should be affirmed. Her sentence should be vacated in part and this Court should remand for a determination of her reasonable ability to pay the \$28,136.31 in medical aid expenses.

REQUEST FOR NONORAL SUBMISSION

The State agrees that nonoral submission is appropriate for this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,532** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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