

IN THE COURT OF APPEALS OF IOWA

No. 6-444 / 05-0287
Filed October 11, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY GLEN FREY,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

Defendant appeals his convictions for ongoing criminal conduct, money
laundering, and second-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Martha E. Boesen and Denise
Timmins, Assistant Attorneys General, for appellee.

Heard by Miller, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.**I. Background Facts & Proceedings**

Terry Frey was an insurance agent and financial consultant. One of his clients was an elderly widow, Ann Hromatko. Hromatko had a stroke in June 2002, and her niece, Cheryl Lange, took over her finances. Lange became concerned about the way Frey was handling her aunt's finances. This eventually led to an investigation by Lee Sellmeyer of the Iowa Insurance Division and Steven Ponsetto of the Division of Criminal Investigation. The investigation revealed Frey had misappropriated client funds.

Hromatko had an annuity with Jackson National Life. In September 1998, Hromatko withdrew \$50,000 from the annuity. The check from the annuity was deposited in an account for Old Nevada Financial, Inc. at Hills Bank & Trust. Frey was sole signatory on that account. Frey wrote checks to himself from the Old Nevada account and deposited the money in his checking account at Guaranty Bank & Trust. From there, \$25,000 was placed in Frey's futures trading account at MAN Financial, Inc., and the remaining \$25,000 was spent on Frey's business and personal expenses.

Also, in September 1998, Hromatko made out a check to Frey for \$27,309 from her checking account at Commercial Federal Bank. Frey deposited the check into his checking account at Guaranty Bank. This money was also apparently spent on Frey's business and personal expenses.

In March 2000, Frey sent a fax to Jackson National Life stating Hromatko wanted to close out the annuity and asked that the check be sent to his office. A

check for \$117,462 made out to Hromatko was sent to Frey. Frey deposited the check in his Guaranty Bank checking account. He placed \$100,000 of that amount in his futures account at MAN Financial. Each month thereafter he withdrew \$10,000 from the futures account and deposited the money in his checking account until the futures account was nearly depleted. The \$17,462 not placed in the futures account, plus the amounts withdrawn from the futures account were spent on Frey's business and personal expenses.

In April 2001, Frey entered into an agreement with Connie Burgardt, another client, to invest \$50,000 in a futures account on Burgardt's behalf. Frey deposited the check from Burgardt into his checking account. He then transferred \$45,000 to his MAN Financial futures account. Frey spent the remaining \$5000 on his business and personal expenses.

Frey was charged with ongoing criminal conduct, in violation of Iowa Code sections 706A.2(4) (2003), 706A.1(5), and 706A.4; money laundering, in violation of sections 706B.2(1)(a) and 706B.2(2)(a); and theft in the second degree, in violation of sections 714.1(2) and 714.2(2).¹ The ongoing criminal conduct charge related to his activities with Hromatko and Burgardt. The money laundering charge related only to his financial dealings with Hromatko. The theft charge related to the \$5000 which Frey failed to invest on behalf of Burgardt.

At the criminal trial the State presented the evidence as outlined above. Frey testified Hromatko had agreed to pay him the amounts he withdrew from her accounts for his financial advice. Due to her stroke Hromatko was unable to

¹ Frey was additionally charged with securities fraud and being an unregistered broker-dealer or agent. These charges were later dismissed by the State.

testify and did not remember the transactions. Frey stated he had \$5000 in his futures trading account when he deposited \$45,000 of Burgardt's money into the account, and felt this was sufficient to honor his agreement with Burgardt to invest \$50,000 on his behalf. The district court denied Frey's motions for judgment of acquittal.

A jury found Frey guilty on all three counts. The court denied his motion for a new trial. Frey was sentenced to a term of imprisonment not to exceed twenty-five years on the charge of ongoing criminal conduct, a term not to exceed ten years on the charge of money laundering, and a term not to exceed five years on the theft charge, all to run concurrently. Frey now appeals.

II. Sufficiency of the Evidence

Frey contends the State did not present sufficient evidence to support his convictions. We review issues regarding the sufficiency of the evidence for the correction of errors of law. *State v. Corsi*, 686 N.W.2d 215, 218 (Iowa 2004). Evidence is substantial if it could convince a rational jury of the defendant's guilt beyond a reasonable doubt. *Id.* "In assessing the sufficiency of the evidence, we consider all of the evidence in the record, but we view the evidence in the light most favorable to the State." *Id.*

A. Ongoing Criminal Conduct. Frey was charged with violating section 706A.2(4), which provides, "It is unlawful for a person to commit specified unlawful activity as defined in section 706A.1." "Specified unlawful activity" is defined as follows:

[A]ny act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is

punishable as an indictable offense under the laws of the state in which it occurred and under the laws of this state.

Iowa Code § 706A.1(5). In this case the State alleged Frey misappropriated money of Hromatko and Burgardt, which was held in his possession or control and he used it or disposed of it in a manner which was inconsistent with, or a denial of, the trust of Hromatko and Burgardt, and his acts were performed on a continuing basis and for financial gain.²

The purpose of the statute is “to defend legitimate commerce from organized criminal activity and remedy the economic effects of crime.” *State v. Olsen*, 618 N.W.2d 346, 348 (Iowa 2000). The term “preparatory” extends the reach of the statute beyond core offenses, such as drug trafficking and theft, to support services, such as corruption, obstruction of justice, and money laundering. *State v. Reed*, 618 N.W.2d 327, 334 (Iowa 2000). The term “continuing basis” means there must be continuity plus a relationship between the acts. *Id.* The predicate acts should “have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events.” *Id.* (citations omitted).

We find substantial evidence in the record to show Frey misappropriated funds from Hromatko and Burgardt on a continuing basis. There was continuity in the acts because they occurred over a span of time from September 1998 until April 2001. The acts were related because they had the same or similar purpose and methods of commission, and were not isolated events. Frey’s actions were

² The underlying allegations of the State follow the definition of theft in section 714.1(2).

also made for his financial gain. The evidence showed Frey used the money taken from Hromatko and Burgardt for his business and personal expenses. The jury was free to reject Frey's claims that his victims willingly gave him the sums in question. See *State v. Garr*, 461 N.W.2d 171, 174 (Iowa 1990) (noting a jury may accept or reject a defendant's version of events). We conclude there is sufficient evidence in the record to support Frey's conviction for ongoing criminal conduct.

B. Money Laundering. Frey was charged with money laundering under section 706B.2(1)(a), which provides:

It is unlawful for a person to commit money laundering by doing any of the following:

a. To knowingly transport, receive, or acquire property or to conduct a transaction involving property, knowing that the property involved is the proceeds of some form of unlawful activity, when, in fact, the property is the proceeds of specified unlawful activity.

"Specified unlawful activity" is defined in this statute as "any act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is punishable by confinement of one year or more" Iowa Code § 706B.1(3). The allegations regarding money laundering were confined to Frey's transactions with Hromatko's funds.

In regard to a similar case, the supreme court stated, "Each time the defendant improperly took funds from his client he committed a theft. When he used cashier's checks and money orders to conceal the source of his funds he committed money laundering." *State v. Jacobs*, 607 N.W.2d 679, 688 (Iowa 2000). In this case, Frey misappropriated Hromatko's money and then moved it from the Hills Bank to the Guaranty Bank to MAN Financial, and then back to

Guaranty Bank, where he used the money for his own benefit. We conclude there is substantial evidence in the record to show Frey engaged in money laundering.

C. Second-Degree Theft. Frey was charged with second-degree theft under the definition found in section 714.1(2). This section applies when a person:

Misappropriates 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.

Iowa Code § 714.1(2). The allegation of theft arises only from Frey's transactions with Burgardt.

The evidence shows Burgardt gave Frey a check for \$50,000 which Frey was supposed to invest in a futures account for Burgardt. Instead, Frey deposited the check in his checking account and transferred only \$45,000 to the futures account. Frey claimed he already had \$5000 in the futures account, and so only put in \$45,000 to bring the amount up to \$50,000. Burgardt testified he expected Frey to invest the entire \$50,000 on his behalf. Frey used the \$5000 in a manner which was inconsistent with the owner's rights to the money. Furthermore, as noted above, the jury could have disregarded Frey's testimony. See *Garr*, 461 N.W.2d at 174 (noting a jury may accept or reject a defendant's version of events). We find there is substantial evidence to support Frey's conviction for second-degree theft.

III. Merger of Sentences

Frey contends the district court should have merged his sentences for ongoing criminal conduct and money laundering. Frey relies upon section 701.9, which provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

We review claims regarding the merger of sentences under section 701.9 for the correction of errors of law. *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999).

Our supreme court has previously considered whether sentences for ongoing criminal conduct and delivery of cocaine should be merged under section 701.9. See *Reed*, 618 N.W.2d at 337. Based on its finding there was no double jeopardy violation in multiple punishments for these crimes, the court found no violation of section 701.9. *Id.* The court stated:

We need not resort to the same-elements test here because, for reasons that follow, we think the legislature intended cumulative punishment. In Iowa Code section 706A.5(1), the legislature has made clear its intent to punish as a class “B” felony both preparatory and completed offenses that are committed on an ongoing basis for profit and are indictable offenses. Had the legislature intended to prohibit cumulative punishments for indictable-offense convictions as part of the specified unlawful activity, we think it would have done so directly as it did for conspiracies in Iowa Code section 706.4. . . .

. . . We likewise see nothing in our ongoing-criminal-conduct statute that suggests our legislature intended to preclude separate convictions for the ongoing criminal conduct and underlying crimes used to establish such conduct.

Id. at 336-37.

Based on the supreme court's holding in *Reed*, we find section 701.9 does not require that Frey's sentences for ongoing criminal conduct and money laundering be merged. See *id.* at 337. The legislature did not intend to preclude separate sentences for ongoing criminal conduct and the underlying crime used to establish the specified unlawful activity. *Id.*

IV. Ineffective Assistance

Frey asserts he received ineffective assistance of counsel because his trial counsel failed to assert that the money, once given to him, no longer constituted property of another or property held in trust. We determine this claim should be reserved for possible postconviction proceedings. See *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) ("Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim.").

We affirm Frey's convictions and sentences.

AFFIRMED.