IN THE COURT OF APPEALS OF IOWA

No. 6-826 / 05-1922
Filed January 18, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRUCE RUBEN DUQUE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary Howes, District Associate Judge.

Bruce Ruben Duque appeals from his conviction of fourth-degree theft. **REVERSED AND REMANDED.**

Jack Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Martha Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Mark Gellerman, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Bruce Ruben Duque appeals from his conviction of fourth-degree theft in violation of Iowa Code sections 714.1(2) and 714.2(4) (2005). He contends the facts do not support his conviction for theft, the court erred in failing to submit a "claim of right" jury instruction, and the court erred in refusing to allow him to use a peremptory challenge to strike an African-American juror. He also makes a cumulative error claim. We reverse.

I. Background Facts and Proceedings

On June 14, 2005, Michelle Morgan was interested in buying a car. She and a friend went to the Motorhaus dealership in Davenport. Morgan found a Honda van she liked and returned the next day and spoke with a salesman named "Aaron."[1] Aaron informed Morgan the van cost $3500. Morgan did not have money to pay for the van at that time. According to Morgan, she agreed to put money on the car to hold it until she could obtain financing. Morgan left the dealership and returned with $500. When Morgan returned, she learned Aaron had left the dealership to attend to a personal matter. Morgan spoke with another dealership employee, Amanda Liedtke.

Liedtke prepared a Motor Vehicle Purchase Agreement for Morgan's signature. Before Morgan signed the document, she asked Liedtke if her money would be returned if she could not secure financing. Liedtke said, "I don't see why not." Morgan signed a paper, believing it acknowledged her deposit for the van. The second page of the document contained the following provision: "If you

[1] Although Morgan identifies the salesman as "Aaron," Evan Fry testified he assisted Morgan at the dealership on June 15, 2005. To be consistent with Morgan's testimony, we will refer to the salesman as Aaron.

refuse or fail to accept delivery of the purchased vehicle, we may keep your cash deposit as liquidated damages."

Morgan returned to the dealership the next day. She informed Liedtke she was unable to secure financing, and she asked for the return of her deposit. Liedtke made a call regarding the deposit. When she hung up the telephone, she told Morgan the dealership would not return her deposit. When Morgan questioned Liedtke, a male dealership employee told Morgan she could not have her money back because she had "signed the contract."[2]

Morgan called the police, and Davenport Police Officer Craig Stone responded. Morgan told Officer Stone the dealership refused to return her deposit. Officer Stone asked to speak to the person in charge of the dealership. The officer then spoke to Bruce Duque by phone. When the officer asked Duque if Morgan's money would be returned, Duque said, "No" and began to yell at the officer. The officer asked the dealership to provide him with a photocopy of the agreement Morgan had signed, and he was given a photocopy of the front page of the document.[3]

Officer Stone subsequently turned the matter over to Officer Eric Court, who was in charge of the Davenport Police Detective Bureau. Officer Court thought he could resolve the problem with a phone call to the dealership. However, when he questioned Duque about the matter, Duque became angry, told the officer it was a civil matter, and used profanities.

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[2] The record does not make clear if the person was Duque or another employee of the dealership.

[3] The document Morgan signed was two-sided. Morgan was not provided with a copy of the back of the document, which contained a liquidated damages provision.

On June 29, 2005, the State filed a trial information charging Duque with fourth-degree theft in violation of Iowa Code sections 714.1(2) and 714.2(4). The trial information is confusing. The State alleged the defendant committed the offense of fourth-degree theft by "tak[ing] possession or control over the property of another with the intent to deprive the other thereof." However, section 714.1(2), the Code section referred to in the trial information, defines theft by misappropriation rather than theft by taking.[4] The record on appeal contains no indication the discrepancy in the trial information was ever addressed at the trial court level.[5]

Jury trial commenced October 24, 2005. Duque elected to represent himself at trial. During the jury selection process, the district court refused to allow the defendant to use a peremptory challenge to strike an African-American juror. After the State presented its evidence, Duque moved for a directed verdict, which the district court denied. The trial was completed the same day it began. The trial court instructed the jury on theft by taking as defined in section 714.1(1)

[4] A person commits theft by misappropriation pursuant to Iowa Code section 714.1(2) when the 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.

[5] A police incident report which is part of the record on appeal indicates the defendant was to be charged with misappropriation of property held in trust as defined in section 714.1(2). In its brief on appeal, the State recognizes the discrepancy in the trial information. Because the jury was instructed regarding the offense of theft by taking as defined in section 714.1(1), the State assumes the Code section referred to in the trial information is a scrivener's error.

rather than theft by misappropriation. The jury found Duque guilty of fourth-degree theft.

Following trial, Duque retained an attorney who filed a variety of post-trial motions and represented the defendant at sentencing. On November 23, 2005, the court denied the defendant's motions and sentenced Duque to one year in jail with all but sixty days suspended and a $1000 fine.

Duque raises five issues on appeal. First, he claims his conduct does not constitute a crime and should be treated as a civil matter under *State v. Galbreath*, 525 N.W.2d 424, 427 (Iowa 1994) (holding there was no factual basis for a contractor's guilty plea to theft by misappropriation because "in the context of an ordinary construction contract, cash advanced as a down payment will not qualify as 'property of another' because title and possession are transferred from the owner to the contractor—not in trust—but outright.") Second, he contends the specific elements of theft by taking did not exist in the record, and the evidence was insufficient to support his conviction. Third, Duque claims the court erred in failing to submit a "claim of right" jury instruction. Fourth, he claims the district court erred in refusing to allow him to use a peremptory challenge to strike an African-American juror. Finally, Duque contends the cumulative effect of errors in this case deprived him of his right to a fair trial.

II. Discussion

The State contends the defendant did not preserve error on his claim that the trial information did not charge an offense in light of *State v. Galbreath*. The record reveals Duque never moved to dismiss the trial information. *See* Iowa R. Crim. P. 2.11(2). In addition, he did not bring the issue he presents on appeal

regarding *Galbreath* to the district court's attention in any other manner either before or during his trial. In order to preserve error, issues must be presented to and decided by the district court before they may be raised on appeal. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997). We find Duque failed to preserve error on his claim that his conduct did not constitute a crime under the holding in the *Galbreath* case.

We next address Duque's claim that the State should have granted his motion for a directed verdict because the evidence presented at trial was insufficient to support his conviction for theft. In order to convict Duque of theft by taking, the State was required to prove beyond a reasonable doubt that the defendant took possession or control of money belonging to Morgan with the intent to deprive Morgan of the property. Iowa Code § 714.1(1).

We review sufficiency of the evidence claims for the correction of errors at law, and we will uphold the verdict if substantial evidence supports it. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). Evidence is substantial if it would convince a rational fact-finder to "find guilt beyond a reasonable doubt." *State v. Robinson*, 288 N.W.2d 337, 341 (Iowa 1980). When we determine the sufficiency of the evidence supporting a conviction, we consider all the evidence in the record, not just the evidence supporting the defendant's guilt. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). However, when we make this determination, we consider the evidence in the light most favorable to the State, and we include legitimate inferences and presumptions that may be reasonably deduced from the evidence in the record. *Id*.

The State presented evidence from which a jury could conclude Duque was the manager of Motorhaus. The defendant was not present during any negotiations between Morgan and Aaron. In addition, he was not present when Morgan made a $500 deposit or down payment and signed a Purchase Agreement in the presence of Liedtke. The State offered evidence Duque assisted Liedtke by phone in answering some questions; however, no evidence was offered that he was involved in any discussions regarding whether Morgan's initial payment would be refundable. The payment at issue was made to Motorhaus, not Duque. The State clearly proved Duque made the decision not to refund the $500 payment made to Morgan. However, the defendant consistently argued that the decision not to refund was based on the contract signed by Morgan. The facts of this case reasonably call into question the defendant's ultimate right to keep Morgan's deposit. However, we do not believe the record provides sufficient evidence to support a criminal conviction of theft by taking. Because we conclude the defendant's conviction is not supported by substantial evidence, we reverse and remand for dismissal of Duque's judgment and sentence. Our decision renders the defendant's remaining appellate claims moot.

REVERSED AND REMANDED.