

IN THE COURT OF APPEALS OF IOWA

No. 09-1038 / 09-0111
Filed March 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHANE ALAN HABBEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Clay County, Don E. Courtney,
Judge.

A defendant appeals his judgment and sentence on one count of second-degree theft and two counts of forgery. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

John Sandy, Spirit Lake, and Dennis Hart and James Butera, Washington,
D.C., for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney
General, and Michael J. Houchins, County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

Shane Habben appeals his judgment and sentence on one count of second-degree theft and two counts of forgery. He challenges the sufficiency of the evidence supporting the findings of guilt and raises several additional arguments.

I. Background Facts and Proceedings

Habben was a loan officer at State Bank in Spencer. He was involved with three transactions that precipitated these criminal proceedings.

The first transaction began with an auto loan to purchase an Oldsmobile Bravada. When the borrower fell behind on his loan payments, the bank repossessed the vehicle. Habben advertised the vehicle in the local newspaper and accepted four bids. According to the bid sheets, Chad Trierweiler, the person who repossessed the vehicle for the bank, had the winning bid of \$2500. Trierweiler, however, did not purchase the vehicle. Instead, Habben paid the bank \$2500 on October 12, 2006. He took possession of the vehicle¹ and subsequently sold it to a third-party at a \$500 profit. Habben's boss, Wayne Johnson, was told of this transaction and terminated Habben for violating the bank's protocol.

The second transaction involved a loan taken out by the son of customer Kenneth Manwarren. When Manwarren paid off the loan on behalf of his son, a bank employee asked him when he was going to make a payment on another \$2500 outstanding loan. Manwarren denied knowledge of another loan. He was

¹ Habben testified that he parked the car in his driveway beginning in late September or early October, 2006. He said he and the president of the bank, Wayne Johnson, sometimes stored bank vehicles on their residential properties.

shown a document purportedly signed by him and he denied the signature was his. Manwarren asked Habben about the document and suggested that if Habben paid the \$2500 loan off the situation would “go away.” Habben agreed to pay the \$2500 and delivered the money to Manwarren.

The third transaction involved a loan taken out by Max Cory. The file contained two loan extensions that Cory denied signing.

Based on these transactions, the State charged Habben with one count of second-degree theft and three counts of forgery, one of which was dismissed. Prior to trial, Habben filed a motion to have the State produce Suspicious Activity Reports (SARs) prepared by the bank pursuant to federal regulations. The district court denied the motion. Habben moved to dismiss the charges based on the State’s non-production of these documents. He also filed a motion to sever the forgery counts from the theft count. The court denied both motions.

The case proceeded to trial and a jury found Habben guilty on all three counts. This appeal followed.

II. Sufficiency of the Evidence

Habben asserts that the record lacks sufficient evidence to support the jury’s findings of guilt on each of the counts. The State counters that Habben did not properly preserve error. We will address the State’s argument first.

“To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal.” *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004); accord *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). Habben presently asserts that the bank did not own the Oldsmobile

Bravada, a key element of the theft charge, and that he lacked the specific intent to commit forgery, a key element of the forgery counts.

At trial, Habben's attorney made the following motion for judgment of acquittal:

At this time, the defendant moves for judgment of acquittal, I would submit, on Counts II and III. Count I, I would like to address specifically. That's a theft misappropriation count. The State has to prove that in the alternative the Defendant either had the property in trust or that he had possession of the property of another and disposed of it in a manner inconsistent with the owner's rights of such property. The property in this case, the Oldsmobile Bravada, was not held in trust by Mr. Habben. Any trust that was there was released with the affidavit of foreclosure. It was not the property of State Bank on November 17 because it had been sold. Everyone agreed it had been sold to Mr. Habben. Now, whether that sale was by bank policy is a question which is still open. But in either case, it was not the property of the State Bank when it was disposed of. Mr. Habben didn't have the property in trust with State Bank when it was disposed of. Thus, that element of the offense can't be met under any circumstances.

At the close of the State's case, defense counsel argued the following:

Your Honor, if it please the court, the Defendant would move for directed verdicts on all three counts. The first count is the Oldsmobile Bravada. We'd argue that the State has not met its burden of demonstrating that he disposed—he disposed of this in a manner inconsistent with its true owner; that in regard to the second and third counts, we'd argue that the State did not meet its burden to produce sufficient evidence to establish the elements that he had specific intent to defraud.

This motion was sufficient to preserve Habben's challenge to the sufficiency of the evidence as to the ownership element of the theft count. The motion was also sufficient to preserve error on Habben's challenge to the specific intent to defraud element of the forgery counts.

We will uphold a finding of guilt if there is substantial evidence to support it. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

A. Theft. The jury was instructed that the following elements had to be proven to find Habben guilty of theft:

The Defendant had possession or control of a 1997 Oldsmobile Bravada, which was owned by the State Bank.

On or between the 12th day of October, 2006, and the 17th day of November, 2006, the Defendant intentionally misappropriated the Oldsmobile Bravada by disposing of it in a manner which was inconsistent with the State Bank's rights.

That the Oldsmobile Bravada is a motor vehicle.

The jury was further instructed that "misappropriate" means

that a person, knowing he had no right or permission to do so, exercises control over property or aids a third person in exercising control, so that the benefit or value of the property is lost to the owner. Misappropriation may also occur when a person knowingly disposes of the property for his own benefit or for the benefit of a third person.

See Iowa Code § 714.1(2) (2005) (stating that one way to commit theft is when a person "[m]isappropriates 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"). Under this theft alternative, the State had to prove that the bank had an ownership interest in the vehicle. See *State v. Burgess*, 639 N.W.2d 564, 570 (Iowa 2001) ("Under Iowa Code section 714.1(2), the State must prove the owner retained some interest in the property misappropriated by the defendant."); *State v. Galbreath*, 525 N.W.2d 424, 427 (Iowa 1994) ("'[P]roperty of another' as

it is used in Iowa Code section 714.1(2) means property in which the owner retains an interest, whether by trust or some other legal relationship.”).

At trial, the State argued that the misappropriation occurred when Habben resold the vehicle at a \$500 profit. The resale took place on November 17, 2006. More than a month earlier, the bank had accepted payment for the repossessed vehicle in the form of a \$2500 payment from Habben. Additionally, Habben did not secrete the car but had it in his driveway in plain view. Finally, even if we were to assume that the bank’s acceptance of the \$2500 payment was insufficient to divest the bank of an ownership interest, the bank formally relinquished its ownership interest on November 16, 2006, when it executed an affidavit of foreclosure.² The affidavit specifically stated that the bank “sold, or caused to be sold, said vehicle at foreclosure sale pursuant to the laws of the State of Iowa, and conveyed all right, title, and interest to the following named person(s) for the sale price of \$2500.” Although the purchaser was not identified, the sale price indicates it had to be Habben.

We recognize that the affidavit was executed by Habben as a representative of the bank. However, at trial, the State did not attempt to discredit the affidavit on this basis. To the contrary, the State used the affidavit to establish that the bank owned the vehicle as of November 16, 2006. Accepting the State’s proof, therefore, the bank owned the vehicle up to and including November 16, 2006, but did not own it on November 17, 2006, the date of the claimed misappropriation of \$500 through Habben’s resale of the vehicle.

² Habben signed the affidavit on November 14, 2006, and had it notarized on November 17, 2006.

As the State failed to prove this “ownership” element, the jury’s finding of guilt on the theft charge must be reversed.

B. Forgery. The jury was instructed that the State would have to prove the following elements of forgery on the count related to the Manwarren signature:

1. On or about the 3rd day of October, 2006, the defendant, Shane Alan Habben, without Kenneth E. Manwarren’s authority, made the signature of Kenneth E. Manwarren appear to be the act of Kenneth E. Manwarren.
2. a. The defendant specifically intended to defraud or injure Kenneth E. Manwarren or The State Bank or
b. The defendant knew the act would facilitate a fraud or injury.

The jury was further instructed that it would have to find the following on the forgery count related to the Max Cory signatures:

1. On or about the 30th day of November, 2005, and July 5, 2006, the defendant, Shane Alan Habben, without Max Cory’s authority, made the signature of Max Cory appear to be the act of Max Cory.
2. a. The defendant specifically intended to defraud or injure Max Cory or The State Bank or
b. The defendant knew the act would facilitate a fraud or injury.

Additionally, the jury was instructed that “[s]pecific intent’ means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.” The jurors were told they could, “but are not required to, conclude a person intends the natural results of his acts.”

With respect to the Manwarren loan, the State’s handwriting expert could not confirm that Habben forged the signature on the pertinent document. However, this fact is not dispositive, as Habben’s acts in response to Manwarren’s discovery of the document can be used to infer guilt. See *State v. Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003); *State v. Cox*, 500 N.W.2d 23, 25

(Iowa 1993). Specifically, Habben paid Manwarren \$2500 to make the situation “go away.” We conclude this evidence, together with Manwarren’s denial of his signature amount to substantial evidence in support of a finding that Habben specifically intended to defraud Manwarren or the bank.

With respect to the Cory transactions, the State introduced evidence that (1) Habben sent a letter to Cory in July 2006 informing him that he still owed over \$7600 on the loan, (2) two loan extensions were granted, one made a month after the letter was sent, (3) the second loan extension indicated an interest payment was made, and (4) Cory did not sign the extension documents and did not make the interest payment.³ As the State points out, a reasonable juror could infer from this evidence that Habben “created the loan extensions to make it appear that the loans were viable and payments were current when they were not.” The evidence amounts to substantial evidence of Habben’s specific intent to defraud Cory or the bank. See *State v. Acevedo*, 705 N.W.2d 1, 5 (Iowa 2005) (defining fraudulent intent as “[t]o deliberately make false statements or give false information in order to gain some advantage”).

III. SAR Reports

Habben next challenges the district court’s refusal to require production of the SARs and its refusal to dismiss the charges in light of the non-production. The State responds that production is prohibited by federal law even if the State

³ We decline to consider the equivocal testimony of the handwriting expert that Habben “may have” signed the extension documents, as this testimony is only relevant to the unchallenged element that Habben signed the document. See *State v. Barnholtz*, 613 N.W.2d 218, 224 (Iowa 2000) (finding evidence that signature was “probably made” by defendant insufficient to support finding of guilt on forgery count).

had SARs in its possession, which it did not. See 31 U.S.C. § 5318(g)(2)(A)(ii).⁴ The State also points out that the State attempted to obtain the SARs for Habben but was unsuccessful. Habben concedes that the case law he found concerning production of SARS does not support disclosure. See *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 683 (S.D. Tex 2004); see also *United States v. Holihan*, 248 F. Supp. 2d 179, 186–87 (W.D.N.Y. 2003); *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 813–15 (N.D. Ill. 2002); *Gregory v. Bank One Corp.*, 200 F. Supp. 2d 1000, 1003 (S.D. Ind. 2002); *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001). He nonetheless argues that

If the state desires to use a witness who has authored and filed with a government authority an official report of the underlying facts of the offense, then the state must either produce those documents or forego the use of that witness.

Based on the absence of supporting authority for this proposition and the fact that the State did not have SARs in its possession and had made efforts to obtain it which were rebuffed, we conclude the district court did not err in not requiring the State to produce these documents. For the same reason, the district court did not err in refusing to dismiss the charges based on the claimed discovery failure. We find it unnecessary to address the remaining arguments raised by the parties on this issue.

⁴ The provision states:

no officer or employee of the Federal Government or of any State, local, tribal, or territorial government within the United States, who has any knowledge that such report was made may disclose to any person involved in the transaction that the transaction has been reported, other than as necessary to fulfill the official duties of such officer or employee.

31 U.S.C. § 5318(g)(2)(A)(ii).

IV. Failure to Sever the Theft and Forgery Counts

Habben next challenges the district court's denial of his motion to sever the theft and forgery charges. Our review of the court's ruling is for an abuse of discretion. *State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007).

The district court concluded the motion was not timely filed. See Iowa R. Crim. P. 2.11(4) (requiring motion to "be filed when the grounds therefor reasonably appear but no later than 40 days after arraignment"). The record supports this conclusion. As Habben did not assert good cause for the delay, his untimely filing constitutes a waiver of the issue. Iowa R. Crim. P. 2.11(3); see *State v. Glessner*, 572 N.W.2d 562, 565 (Iowa 1997).

V. Limitation of Cross-Examination

Habben finally argues that the district court abused its discretion in disallowing inquiry into sexual offenses committed by Kenneth Manwarren's son. He asserts that "it is the motive to lie induced by the witness' self interest in deflecting liability from himself that is the central question in this case." The issue as presently framed was not preserved for review. Therefore, we decline to consider it. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

VI. Disposition

We affirm Habben's judgment and sentences on the forgery counts. We also affirm the district court's denial of Habben's discovery request, motion to dismiss, motion to sever, and limitation of cross-examination. We reverse the jury's finding of guilt on the theft charge and remand for dismissal of that charge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.