

**IN THE COURT OF APPEALS OF IOWA**

No. 9-1042 / 09-0215  
Filed March 24, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**EDDIE DONOVAN DELONG,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Osceola County, Patrick M. Carr,  
Judge.

Defendant appeals his conviction for theft in the second degree as a  
habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant  
Attorney General, and Robert Hansen, County Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.\*

\*Senior Judge assigned pursuant to Iowa Code section 602.9206 (2009).

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

Eddie DeLong operated DeLong Construction, LLC, in Iowa. In 2007, Ronald Koser approached DeLong about having the shingles replaced on a rental home owned by Koser. DeLong's estimate included labor and materials. Koser agreed to have DeLong perform the job, and paid one-half of the estimate, \$2803.40. Koser asked to have the materials purchased from Schnepf Lumber in Sibley, Iowa.

Before the job was completed, Koser and his wife were contacted by Julie Weppler of Neal Chase Lumber Company in Sheldon, Iowa. DeLong had opened an account at Neal Chase Lumber and the company had put a hold on the account. Some of DeLong's workers came in and attempted to get nails. Weppler refused to give DeLong's workers any materials on account, and followed them to Sibley in an attempt to see where they were working. Weppler informed the Kosers that DeLong had not been paying his bills. She asked that if material from Neal Chase Lumber was used on the Kosers' roof that the company be paid directly, instead of the Kosers paying DeLong. It was later determined that no material from Neal Chase Lumber was used on the Kosers' roof. DeLong told the Kosers there was just a misunderstanding with Neal Chase Lumber.

When the job for the Kosers was completed, the Kosers at first stated they intended to pay the materials bill themselves. However, extra material owned by DeLong and plywood owned by the Kosers was used on the roof. Also, some

extra material could be returned to Schnepf Lumber. DeLong stated it was getting kind of complicated, and he suggested the Kosers pay him. DeLong stated he would pay Schnepf Lumber before he left town. The Kosers paid DeLong \$2221.37. At the Kosers' request, the parties signed a separate document stating DeLong had been paid in full for "all my labor and all the materials that were ordered from Schnepf Lumber Co."

Despite his statements to the Kosers, DeLong did not pay the bill for materials at Schnepf Lumber. The Kosers ended up paying the Schnepf Lumber bill of \$1504.15, plus interest for the materials used on the roof. DeLong was charged with theft in the second decree, as a habitual offender, in violation of Iowa Code sections 714.1 and 714.2(2) (2007). DeLong waived his right to a trial by jury.

Prior to trial DeLong filed a motion in limine seeking to exclude evidence that he had failed to pay for materials at other area lumber yards, despite being paid for these materials by homeowners. The district court ruled:

[A]ll the mentioned evidence is relevant to the Defendant's intent, motive and possible common scheme, that the evidence bears on what may be the most critical issue before the Court at trial, and that its probative value outweighs the potential for prejudice.

During the trial evidence was presented that DeLong had obtained building materials from Hartley Farm and Home Center for three different job sites and owed \$3598, which had not been paid. DeLong also owed money to Neal Chase Lumber for materials purchased on account there.

DeLong testified he had not been successful in his construction business and had consistently been losing money. He admitted he had been in a financial

bind and testified, "I was robbing Peter to pay Paul to get out of the hole." He testified he had not declared bankruptcy because he wanted to pay his bills, but he did not have the financial ability to do so.

The district court concluded DeLong was guilty of theft by deception in the second degree, in violation of sections 714.1(3) and 714.2(2). The court found DeLong had specifically promised to pay the bill at Schnepf Lumber, but at the time he obtained the check from the Kosers he did not intend to pay the materials bill. The court found DeLong deceived the Kosers in order to obtain the check from them. The court denied DeLong's post-trial motion to enlarge or amend.

A separate hearing was held on the issue of whether DeLong was a habitual offender. The State presented evidence that an Eddie Donovan DeLong, born on August 20, 1973, had been convicted of larceny from a motor vehicle in 1991 and larceny in a building in 1992 in Michigan. This was the same name and birthday as the defendant. Also, at a bond reduction hearing DeLong had admitted he had two prior felony convictions in Michigan. The district court found beyond a reasonable doubt that DeLong was a habitual offender.

DeLong was sentenced to a term of imprisonment not to exceed fifteen years. This sentence was suspended and he was placed on probation for three years. DeLong was ordered to pay restitution to Ronald Koser. DeLong now appeals his conviction and sentence.

## **II. Prior Bad Acts**

DeLong contends the district court abused its discretion by admitting evidence of prior bad acts, in violation of Iowa Rules of Evidence 5.403 and

5.404(b). He claims the district court should have granted his motion in limine to exclude evidence that he failed to pay for materials at lumber yards in other instances. DeLong asserts the evidence was not relevant, and was only introduced to show he was a bad person. In the alternative, he claims the evidence was more prejudicial than probative.

In considering evidence of prior bad acts, the court must first determine whether the evidence is relevant. *State v. Reynolds*, 765 N.W.2d 283, 289 (Iowa 2009). The evidence must be probative of some issue other than the defendant's propensity to commit wrongful acts. *State v. Mitchell*, 633 N.W.2d 295, 298 (Iowa 2001). Evidence of other acts may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 5.404(b).

If the evidence is found to be relevant, the court must then determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403; *Reynolds*, 765 N.W.2d at 290. "Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party." *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). We review a district court's decision admitting prior bad acts evidence for an abuse of discretion. *Id.*

DeLong was charged with theft by deception, in violation of section 714.1(3). Theft by deception involves the specific intent to deceive. *State v. Williams*, 674 N.W.2d 69, 72 (Iowa 2004). Evidence of prior bad acts may be

admissible to show intent. Iowa R. Evid. 5.404(b). We conclude the evidence of whether DeLong had a pattern of not paying lumber yards for materials received is relevant to the issue of intent. See *State v. Rivers*, 588 N.W.2d 408, 412 (Iowa 1998) (finding evidence of intent may be based on a “similar pattern of conduct”).

We determine the district court did not abuse its discretion in finding the probative value of the evidence was not outweighed by the danger of unfair prejudice. There was less danger of prejudice because the matter was tried to the court, and not a jury. See *State v. Jacobs*, 607 N.W.2d 679, 689 (Iowa 2000). The court specifically ruled the evidence would be received on the issue of defendant’s motive, and not to show bad character or thievery.

### **III. Substantial Evidence**

DeLong asserts there is insufficient evidence in the record to support his conviction for theft by deception. He claims the State did not present sufficient evidence to show he did not intend to pay the bill at Schnepf Lumber for the Kosers’ roof project, or that he knew he would be unable to pay. He points out that his failure to pay, standing alone, is not sufficient to show he did not have the intent to pay. He also claims there was some uncertainty about the amount he needed to pay Schnepf Lumber.

We review challenges to the sufficiency of the evidence in a criminal case for the correction of errors at law. *State v. Heuser*, 661 N.W.2d 157, 165 (Iowa 2003). The fact-finder’s verdict will be upheld if it is supported by substantial evidence. *Id.* at 165-66. Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable

doubt. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). We view the evidence in the light most favorable to the State. *State v. Padavich*, 536 N.W.2d 743, 751 (Iowa 1995).

DeLong was found guilty of theft by deception. The term “deception” is defined in section 702.9(5), as follows:

Promising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows the actor will not be able to perform. Failure to perform, standing alone, is not evidence that the actor did not intend to perform.

The mere fact of nonpayment is not sufficient; something more must be shown to prove criminal intent. *State v. Hogrefe*, 557 N.W.2d 871, 878 (Iowa 1996). The intent not to perform “must exist at the time the defendant makes the promise of payment, delivery, or performance.” *Rivers*, 588 N.W.2d at 410. A defendant’s intent to deceive may be shown by circumstantial evidence. *Id.*

We determine there is substantial evidence in the record to support the district court’s conclusion that DeLong was guilty of second-degree theft by deception. The evidence supports the district court’s finding that DeLong and the Kosers accurately calculated DeLong’s bill at the time he was paid. DeLong knew he was in dire financial straits at the time he suggested that the Kosers pay him instead of paying Schnepf Lumber directly. The evidence that DeLong had a pattern of performing work, getting paid, but not paying for his materials shows he did not intend to pay Schnepf Lumber when he promised the Kosers he would pay the company. The Kosers would not have paid DeLong \$2221.37 if they had known he was not going to pay the bill owed to Schnepf Lumber of \$1504.15 from that amount. We affirm the district court.

#### IV. Habitual Offender

DeLong claims the district court erred in finding he was a habitual offender. Under section 902.8, a habitual offender is a person who has twice before been convicted of felony, either in Iowa or another state. DeLong contends there was not sufficient evidence he was the same person who had been convicted two times previously in Michigan. He states that the name and birth date are not sufficient to show he is the same person.

In order to show a defendant is a habitual offender, the State must prove the defendant's prior convictions beyond a reasonable doubt. *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005). "Generally, the State must prove the prior convictions at the second trial by introducing certified records of the convictions, along with evidence that the defendant is the same person named in the convictions." *Id.* The identity of names alone is not sufficient to establish that a defendant is the same person named in a prior conviction. *State v. Sanborn*, 564 N.W.2d 813, 815 (Iowa 1997).

The district court's decision is not based on DeLong's name alone. The Michigan convictions were for a person with the same birth date as DeLong. Furthermore, DeLong admitted during a bond reduction hearing that he had two prior felony convictions in Michigan, further reinforcing the district court's conclusion that the Michigan convictions for Eddie Donovan DeLong were for the same Eddie Donovan DeLong in this case. See *id.* (noting the relative uniqueness of a person's name is a factor to be considered). We conclude there



is sufficient evidence to support the district court's conclusion that defendant was the same person who had two prior felony convictions in Michigan.

Also, DeLong asserts the State should have presented official copies of the Michigan statutes to show the prior convictions were felonies. The district court took judicial notice of the Michigan statutes. DeLong did not object to this before the district court. Where an issue has not been raised before the district court, we do not consider it for the first time on appeal. *Id.*

We affirm DeLong's conviction for second-degree theft by deception, as a habitual offender.

**AFFIRMED.**