

2018 IL App (1st) 160890-U

No. 1-16-0890

Order filed June 15, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 16508
)	
PAULETTE SOLOMON,)	Honorable
)	Alfredo Maldonado,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's convictions for theft affirmed over her contention that the State did not prove beyond a reasonable doubt that she intended to permanently deprive the owner of the property at issue. We vacate the restitution order and remand to the trial court.

¶ 2 Following a bench trial, defendant Paulette Solomon was convicted of theft by deception (720 ILCS 5/16-1(a)(2)(A) (West 2010)) and theft by exerting unauthorized control over property of the owner (720 ILCS 5/16-1(a)(1)(A) (West 2010)). The court subsequently

sentenced defendant to two years of felony probation and ordered her to pay restitution. On appeal, defendant contends the State failed to prove she intended to permanently deprive the owner, the State of Illinois, of the funds at issue. Defendant also contends we should vacate the restitution order and remand for a restitution hearing. We affirm in part, vacate in part and remand for a restitution hearing.

¶ 3 The charges in this case arose out of a vendor fraud investigation by the Illinois Department of Human Services (DHS). The evidence at trial showed that, as part of the Home Services Program (HSP) of DHS, Rosemary Hayes worked as a personal assistant (PA) for Mary Solomon until around April 2010.¹ Defendant engaged in a check transaction scheme where she created a customer profile account at Azteca Currency Exchange (Azteca) in Hayes' name and, from September 2010 to October 2011, used that profile to cash checks from the State of Illinois made payable to Hayes for PA services allegedly provided to Mary. The trial court ultimately concluded that defendant's identity could not be sufficiently established in 7 of the photographs associated with the 22 transactions at Azteca but found defendant guilty of theft for the remaining transactions.

¶ 4 At trial, Terri Norment, a rehabilitation counselor for HSP during the relevant time period, testified that HSP provides in home services for Medicaid recipients. "Customers" with HSP may select their own PA to come into their home to provide the services. To receive payment, a PA must complete and turn in time sheets, which are signed by both the PA and customer.

¹ Mary Solomon and defendant, Paulette Solomon, share the same last name. We will therefore refer to Mary Solomon by her first name.

¶ 5 Norment testified that Mary was a customer with HSP and she was familiar with Mary because her district with HSP covered the zip code where Mary lived. The DHS records showed that Hayes was Mary's PA from September 24, 2010, to October, 5, 2011. Hayes was paid for her PA services by completing time sheets showing the hours she worked. Norment identified approximately 23 time sheets between October 1, 2010, and October 15, 2011, showing Mary as the customer and Hayes as the PA. Norment testified that Hayes and Mary's signatures appeared to be on all of the time sheets.

¶ 6 At some point, Norment received notice that she needed to assess whether Hayes was still working for Mary because Hayes had informed HSP that she was no longer working for Mary and someone had been fraudulently signing Hayes' name to time sheets. After having been informed of this information, in April 2012, Norment conducted an assessment on Mary. Mary told Norment that Hayes was still working for Mary and, when Norment asked her when Hayes would perform her eight hours that day, Mary responded, "Well, she does it. She will stay here until she does it, but she will be here during the evening hours." Norment testified that, at some point, DHS stopped processing the time sheets that were being sent in for Mary's services. Mary never complained to Norment that the services were not being provided to her.

¶ 7 The parties stipulated that Robert H. Keller, the manager and owner of Azteca, would testify that, before any customer checks are cashed at Azteca, a customer profile is created, which includes the customer's name, date of birth, address, social security number, and photograph. When a customer requests Azteca to cash a check, the customer must complete a signature card, provide identification, and take a transaction photograph. The Azteca clerk

compares the transaction information to the customer profile to make sure they match. Before the clerk cashes the customer's check, the customer endorses the check.

¶ 8 Keller would identify the customer profile at Azteca created for the person purported to be Rosemary Hayes. The profile consisted of 22 checks endorsed in the name of Rosemary Hayes and cashed by Azteca between September 24, 2010, and October 5, 2011, including one transaction that occurred on February 5, 2011. Keller would testify about the date and amount for each check transaction. Keller would also identify the customer profile at Azteca created for the person purported to be defendant, which showed that one check in that profile was cashed on February 5, 2011.

¶ 9 Rosemary Hayes testified that she knew defendant because defendant was her son's great aunt. In 2009, Hayes lived with Mary and worked as her PA. In 2010, after an argument with Mary, Hayes moved to Indiana. After Hayes moved, she continued to work as a PA for Mary but stopped providing services for Mary around April 2010. From around May 2010 to December 2010, Hayes received payments from HSP even though she had not performed services for Mary. To obtain these payments, Mary informed Hayes when the checks arrived, Hayes signed the checks, and then went to a currency exchange with Mary and Shaundrika Dickerson, her son's cousin, to cash the checks. Mary gave Hayes around \$200 to \$400 for each transaction. Hayes never went to Azteca to cash the checks. As a result, Hayes pled guilty to vendor fraud in exchange for two years of probation and restitution.

¶ 10 At some point, when Hayes was completing her annual report for subsidized housing ("Section 8 report"), she learned that time sheets were being submitted in her name even though she no longer served as Mary's PA. Hayes informed DHS that she no longer worked for Mary.

Hayes identified time sheets showing Hayes had been working as Mary's PA and testified her signature was not on any of the time sheets and she did not receive any money for the services represented on them.

¶ 11 Hayes testified about the customer profile at Azteca that the parties had stipulated was created for a person purportedly named Rosemary Hayes. She testified that all of the checks contained in the exhibit were from the State of Illinois and made payable to Rosemary Hayes. Hayes identified defendant as the individual in the customer's photograph identification as well as in the transaction photographs appearing next to the checks. Hayes testified that her name, Rosemary Hayes, appeared on the back of each check but she did not sign the checks. The address provided with each check was not her address and she never received any money from any of the checks.

¶ 12 Hayes testified about the customer profile at Azteca that the parties had stipulated was created in defendant's name. She identified defendant as the individual in the customer's photograph identification as well as in the transaction photograph dated February 5, 2011, which was the same individual appearing in the photographs contained in the customer profile at Azteca that was created in Hayes' name.

¶ 13 On cross-examination, Hayes testified that she did not disclose the payments she received from DHS between April 2010 and December 2010 on her Section 8 report. She also did not disclose the payments to DHS or the Illinois State Police when she was first confronted about the unearned payments. Hayes acknowledged she signed approximately seven or eight falsely obtained checks. Hayes never saw defendant present any of the checks at Azteca and did not know if defendant was working for Mary.

¶ 14 The parties stipulated that Virm Rodriquez, an auditor for the Illinois State Police, would testify that 22 checks from the State of Illinois made out to Rosemary Hayes were cashed at Azteca between August 31, 2010, and September 15, 2011, for services rendered to Mary. The total amount of the 22 checks was \$26,281.68.

¶ 15 The court found defendant not guilty of vendor fraud (Count I), noting that the State did not prove she was the individual who submitted the time sheets to DHS. The court found defendant guilty of theft by deception (Count II) and theft by exerting unauthorized control over property of the State of Illinois (Count III). In doing so, the court noted that “I do believe [Hayes] when she said that wasn’t her, that she wasn’t the individual who cashed those checks. I believe her, notwithstanding the fact that she is a convicted felon.” The court concluded it would not consider seven of the check transactions contained in Azteca’s customer profile created in Hayes’ name because it could not find beyond a reasonable doubt that defendant was the individual in those transaction photographs, as the photographs were either blurry, a side profile, or the individual was wearing a baseball cap. The court subsequently denied defendant’s motion for new trial, merged Count III into Count II, sentenced defendant to two years felony probation, and ordered her to pay \$14,496.19 to DHS in restitution.

¶ 16 Defendant first contends on appeal that the State did not prove beyond a reasonable doubt that she intended to permanently deprive the State of Illinois of the funds at issue. Defendant claims that, at most, the evidence shows she cashed the checks and delivered the money under the direction of Mary and Hayes as their courier. Defendant asserts that the evidence does not show she intended to abscond with the funds, conceal them, or deposit them into her own bank account. Defendant claims there was no evidence that she retained the funds seeking

compensation for their return or that she sought to sell, give, pledge, or transfer any interest in the checks to a third party.

¶ 17 On appeal, when we review the sufficiency of the evidence, we must determine whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). “We will not substitute our judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness’s testimony, or the reasonable inferences to be drawn from the evidence.” *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 159. We will only reverse a conviction if the evidence is “so improbable or unsatisfactory as to give rise to a reasonable doubt of guilt.” *Taylor*, 344 Ill. App. 3d at 937.

¶ 18 To prove defendant guilty of the two types of theft as charged, the State had to prove that defendant knowingly obtained “by deception control over property of the owner” (Count II) and obtained or exerted “unauthorized control over property of the owner” (Count III). 720 ILCS 5/16-1(a)(1)(A) (West 2010); 720 ILCS 5/16-1(a)(2)(A) (West 2010). For both types of theft, the State also had to prove that defendant “[i]ntend[ed] to deprive the owner permanently of the use or benefit of the property.” *Id.* See *Oglesby*, 2016 IL App (1st) 141477, ¶ 163. Here, defendant does not dispute that the evidence showed that she knowingly obtained or exerted unauthorized control of the funds or that she obtained control over the funds by deception. Rather, defendant argues that the State did not prove that she intended to permanently deprive the owner, the State of Illinois, of the use or benefit of the funds.

¶ 19 The State may prove defendant’s intent to deprive the owner of the property by circumstantial evidence (*People v. Robinson*, 147 Ill. App. 3d 131, 133 (1986)) and “from the

facts and circumstances surrounding the alleged theft, including the act of the theft itself” (*Oglesby*, 2016 IL App (1st) 141477, ¶ 166). Whether defendant had the requisite felonious intent is a question for the trier of fact. *People v. Martin-Trigona*, 111 Ill. App. 3d 718, 722 (1982); see also *People v. Campbell*, 28 Ill. App. 3d 480, 484 (1975).

¶ 20 Viewing the evidence as a whole and in the light most favorable to the State, the evidence was sufficient for the court to conclude that defendant intended to permanently deprive the State of Illinois of the funds.

¶ 21 The evidence showed that defendant created a customer profile account at Azteca in the name of Rosemary Hayes and, from September 24, 2010, to October 5, 2011, she endorsed and cashed at least 15 checks from the State of Illinois made payable to Hayes using that account. Given defendant’s conduct of creating the account in Hayes’ name and then repeatedly endorsing and cashing the checks made payable to Hayes over a period that lasted about one year, a rational trier of fact could conclude that defendant engaged in such conduct with the intent to permanently deprive the State of Illinois of the use of the funds. *People v. Koter*, 2012 IL App (1st) 100951, ¶ 31 (“intent may be inferred from fraudulent or deceptive acts that facilitated the theft”).

¶ 22 We disagree with defendant’s assertion that she did not have the requisite intent to deprive the State of Illinois of the funds because she “merely acted as a courier” who was “recruited” by Mary and Hayes. There was no direct evidence and virtually no circumstantial evidence to support the inference that Mary and Hayes recruited defendant to act as a courier. The trial court here, as the fact finder, was not “required to disregard the inferences that normally flow from the evidence or to seek out all possible explanations consistent with a defendant’s

innocence and elevate them to reasonable doubt.” See *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 11. Rather, the trial court could reasonably infer from the circumstances surrounding defendant’s repeated fraudulent conduct in the check transactions that she had the requisite intent to permanently deprive the owner of the funds. See *People v. Veasey*, 251 Ill. App. 3d 589, 592 (1993) (“it has been generally recognized that an intent to permanently deprive the owner of his property may ordinarily be inferred when a person takes the property of another”).

¶ 23 Defendant asserts that the State did not prove she intended to permanently deprive the owner because there was no evidence that she retained the money seeking compensation, kept the money, deposited it into her own bank account, or sought to sell or transfer any interest in the checks. However, defendant has not cited any authority to support the proposition that, to prove that a defendant had intent to permanently deprive the owner of the property, the State must establish what a defendant did with the property after it was obtained.

¶ 24 Further, even when there has been evidence that the funds the defendant exerted control over were still available and the defendant attempted to return the money one year later, the reviewing court has found that the circumstances of defendant’s conduct were sufficient to establish intent to deprive the owner of the funds. *People v. Campbell*, 28 Ill. App. 3d 480, 483-84 (1975) (where the defendant cashed two checks made payable to him but which were intended to be used for a village’s rental payment, put the money in a drawer with the alleged intent to return it, and did not attempt to return the funds until one year later, the reviewing court found that the circumstances of the conduct justified finding that he possessed the intent to deprive the owner of the funds). Thus, we are unpersuaded by defendant’s argument that the State did not prove she had intent to deprive the owner of the funds because there was no

evidence of what she did with the money after she cashed each of the checks. The evidence here surrounding defendant's conduct was not so improbable as to give rise to a reasonable doubt of defendant's guilt and intent to permanently deprive the State of Illinois over the funds.

¶ 25 Defendant's second contention is that we should vacate the \$14,496.19 restitution order and remand for a restitution hearing because the trial court failed to comply with the restitution statute when it did not set a payment schedule or consider her ability to pay. The State agrees that the trial court did not set a payment schedule and asserts we should remand for resentencing with instructions for the trial court to set a payment schedule, considering defendant's ability to pay.

¶ 26 A trial court may order restitution as part of a defendant's sentence. *People v. Adame*, 2018 IL App (2d) 150769, ¶ 13. When a trial court orders restitution, it "must determine a reasonable time and manner for the payment of restitution to insure that restitution can be paid." *People v. Fontana*, 251 Ill. App. 3d 694, 708 (1993). When setting the restitution amount, the trial court "is not required to consider a defendant's financial circumstances." *People v. Day*, 2011 IL App (2d) 091358, ¶ 56. Rather, "[i]t must consider defendant's ability to pay only when setting the time and manner of payment." *People v. Bouyer*, 329 Ill. App. 3d 156, 165 (2002). Specifically, section 5-5-6(f) of the Unified Code of Corrections (Code) sets forth the time frame and method of payment of restitution and, in relevant part, states:

"(f) Taking into consideration the ability of the defendant to pay, *** the court shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years, ***If *** the court orders that restitution is to be paid over a period greater than 6 months, the court shall order that the

defendant make monthly payments; the court may waive this requirement of monthly payments only if there is a specific finding of good cause for waiver.” 730 ILCS 5/5-5-6(f) (West 2016).

“If the court does not specify a particular time, the restitution order is fatally incomplete.” *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1067 (2008). “A trial court’s order concerning the time and manner of payment of restitution is reviewed for an abuse of discretion.” *People v. Day*, 2011 IL App (2d) 091358, ¶ 56.

¶ 27 Here, the trial court sentenced defendant to two years of probation and ordered her to pay restitution before “termination of probation date.” However, the trial court did not comply with the requirements of section 5-5-6(f), as it did not specify the manner of payment, *i.e.* whether defendant had to pay the restitution in a single payment or in installments. Further, the court ordered restitution to be paid over a period greater than six months, *i.e.* before the termination of her two-year probation period, but did not order her to make monthly payments or make a “specific finding of good cause for waiver,” as required by section 5-5-6(f). 730 ILCS 5/5-5-6(f) (West 2016). We therefore vacate the restitution order and remand this matter to allow the trial court to comply with section 5-5-6(f) of the Code, which includes determining the method and manner of payment while taking into account her financial circumstances. 730 ILCS 5/5-5-6(f) (West 2016); see *People v. Fontana*, 251 Ill. App. 3d 694, 708 (1993) (where the trial court ordered the defendant to pay restitution within five years but “failed to specify whether the payment would be in installments or a lump sum,” the reviewing court “remanded to the trial court for a determination of the method and manner of payment, taking into account defendant’s financial circumstances”).

¶ 28 Finally, we note that defendant concedes that “ability to pay, in theory at least, is not a factor when setting the restitution amount.” As previously noted, we agree that the court need not consider defendant’s financial circumstances when setting the restitution amount. See *Day*, 2011 IL App (2d) 091358, ¶ 56. However, given that we are remanding for the trial court to comply with section 5-5-6(f) of the Code, which includes taking into consideration defendant’s ability to pay when determining the time and manner of payment, we need not determine at this point whether the restitution order and method and manner of payment is appropriate or, as defendant asserts, imposes “an impossible financial burden.”

¶ 29 Accordingly, we affirm defendant’s convictions and sentence of probation but vacate the trial court’s restitution order because it failed to set forth the time and manner in which defendant would pay restitution. We remand this case to the trial court for further proceedings in compliance with section 5-5-6(f) of the Code. 730 ILCS 5/5-5-6(f) (West 2016).

¶ 30 Affirmed in part; vacated in part; and remanded with instructions.