2019 IL App (1st) 161588-U

No. 1-16-1588

Order filed May 10, 2019

Fifth Division

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 2068
	)	
PETER RUIZ,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for theft over his contention that the evidence failed to prove his intent. Restitution order amended.

¶ 2 Following a bench trial, defendant Peter Ruiz was convicted of theft, sentenced to two years' probation, and ordered to pay restitution totaling $5750. On appeal, defendant argues that (1) he was not proven guilty beyond a reasonable doubt because he thought he was entitled to the

money at issue, and (2) the trial court miscalculated restitution and did not conduct a proper hearing. We affirm defendant's conviction and amend the restitution order.

¶ 3 Defendant was charged by indictment with one count of theft for allegedly depriving his employer, R. Eck & Sons, Inc. (R. Eck) of more than $500 and less than $10,000 in violation of section 16-1(a)(1)(A) of the Criminal Code of 2012 (720 ILCS 5/16-1(a)(1)(A) (West 2012)). The case proceeded to trial on April 27, 2016.

¶ 4 Charles Flowers, who acknowledged having a prior conviction for misappropriation of funds, testified that he contacted R. Eck regarding roof repairs. On January 31, 2013, defendant went to Flowers's house and they signed a document stating that R. Eck would repair the roof for two installments totaling $560. On February 1, 2013, Flowers gave defendant the first check for $200, with a memorandum stating "Down payment/Roof Repairs/R. Eck & Sons, Inc." On February 9, 2013, after repairs were completed, Flowers gave defendant the second check for $350, with a memorandum reading "Partial Roof Repair." Per defendant's instructions, Flowers made both checks payable to defendant.[1]

¶ 5 After accepting the second check on February 9, 2013, defendant informed Flowers that shingles were missing from his roof and offered to perform the work "on the side." Flowers agreed, and gave him a check for $225 on February 18, 2013. On November 26, 2013, Flowers met with a detective who informed him that R. Eck had not received payment for the repairs. During the meeting, Flowers identified defendant in a photo array. On cross-examination, he

[1] Although the agreement stated that Flowers would pay $560 to R. Eck, his checks totaled $550. Neither party addresses the discrepancy in their briefs on appeal.

agreed the document he signed on January 31, 2013, was an "estimate" and did not state it was a "contract."[2]

¶ 6 Laura Caifa testified that she contacted R. Eck regarding home repairs and met with defendant at her house on June 3, 2013. That day, they signed a document stating that Caifa would pay R. Eck a deposit of $1755, followed by another payment of $5000. On July 3, 2013, after repairs were completed, defendant instructed Caifa to make the $5000 check payable to him. In August 2013, R. Eck informed Caifa that her repair work "wasn't paid in full." She gave Frank Pedi, an R. Eck employee, a copy of the check she had given defendant. Later, a detective called Caifa regarding that transaction.

¶ 7 Frank Pedi, R. Eck's general manager, testified that he operated the company with the president, his brother Steve Pedi.[3] R. Eck hired defendant in 2005, fired him "for stealing" in 2007 or 2008, and rehired him as a salesperson in 2012. Defendant was responsible for the contracts with Caifa and Flowers, but lacked authority to receive checks under his name and was not an authorized signer on the company's accounts.

¶ 8 According to Frank, R. Eck received Caifa's initial payment of $1755, but not an additional $5000 owed by Caifa or $550 owed by Flowers. Frank met with Caifa and Flowers, who produced copies of the checks they paid defendant. Defendant did not return to R. Eck after work was completed on Caifa's house. After trying to reach defendant by phone and at his house, Frank contacted the Forest Park Police Department. On cross-examination, he acknowledged that

[2] The document signed by Flowers and defendant appears in the record, and, near their signatures, states that "[t]his contract shall not become effective until accepted by the owner at its home office at Forest Park, Il[linois]."

[3] Because Frank Pedi and Steve Pedi have the same last name, we refer to them by their first names for the remainder of this order.

he did not contact the police or sue defendant for stealing during his first period of employment with R. Eck.

¶ 9 Forest Park police detective Jarlath Heveran testified that he met with Frank and then interviewed Flowers and Caifa. On January 7, 2014, Heveran went to a currency exchange and showed an employee, Maribel Ortega, copies of the checks that Caifa and Flowers gave defendant. Ortega stated that defendant cashed the checks. Both Ortega and Flowers identified defendant in photo arrays, and the parties stipulated that Ortega told Heveran that defendant "was a regular customer." On January 13, 2014, Heveran arrested defendant, took him to the police station, and administered *Miranda* warnings. Defendant signed a form stating that he understood his rights and agreed to provide a written statement, which Heveran typed based on their conversation.

¶ 10 Defendant's typed statement, which the State entered into evidence, began with the *Miranda* warnings and concluded with his acknowledgment that he gave the statement voluntarily, without threats, promises, or the influence of drugs or alcohol. The statement reflects that defendant read the first page aloud and was permitted to make changes or corrections. Heveran testified that defendant made handwritten revisions that were initialed by defendant, Heveran, and another officer. The statement was not video recorded.

¶ 11 According to the statement, defendant worked for R. Eck from 2002 to 2005, but resigned because the company owed him commissions totaling $18,000. Two years later, he accepted $3000 from R. Eck, forgave the remainder, and returned to work. After six months, he resigned due to illness. In July 2011, he requested work from Steve, who accused him of stealing. Eventually, they "resolv[ed] their issues" and defendant resumed work. Around that

time, Steve sold defendant a van for $1800 and recovered the cost by deducting it from his commissions. In the summer of 2013, defendant "junked" the van for $300 after the engine failed.

¶ 12 Defendant stated that he secured more than $100,000 in work for R. Eck, but Frank "would always find an excuse not [to] pay him" and only issued him two checks, for $600 and $100, between January 2013 and March 2013. Frank asked defendant to tell customers to pay in cash, and did not care if they wrote checks to defendant and he gave the proceeds to the company, as the Village of Maywood "had a freeze" on R. Eck's bank account for unpaid taxes and fines.

¶ 13 In February 2013, defendant issued Flowers an estimate for a home repair costing $560 and instructed Flowers to make the checks payable to him. Defendant cashed Flowers's checks and gave the proceeds to R. Eck, but retained a separate $225 payment for a "side job." In June 2013, defendant gave Caifa an estimate for home repairs. When the work was completed, he asked for a $5000 check payable to him because "he felt like he had been cheated by R. Eck long enough and he needed *** his commission so he could pay some of his bills." He "cashed [the check], kept the money, and did not return to R. Eck after that time."

¶ 14 According to the statement, defendant denied stealing from R. Eck and described himself as a "loyal employee," but claimed the company "treated him poorly by not paying *** his salary." He regretted not "hir[ing] a lawyer earlier on to recover his losses from R. Eck," but explained that, "after taking and keeping the $5000.00 check *** for work done by R. Eck, he felt that he would cut his losses and not return to R. Eck again."

¶ 15 The State rested and defendant's motion for directed finding was denied. The defense rested without presenting evidence.

¶ 16 Following argument, the trial court found defendant guilty of theft. The court stated it was "clear" from defendant's statement that he "felt that he was owed commission and he chose to take money intended to be paid to [R. Eck] as his commissions." The court noted that defendant "intend[ed] *** to take that money as his commissions, whether he was owed them or not," and should have resolved the issue in a civil proceeding instead of "helping himself to monies that the homeowners believed that they were paying to an authorized representative of the company." The trial court revoked defendant's bond and ordered him taken into custody over his objection that he would lose his job.

¶ 17 On June 1, 2016, defendant's motion for new trial was denied and the case proceeded to sentencing. The court received defendant's presentence investigation (PSI) report which revealed, in relevant part, that he earned $40,000 per year working for R. Eck from August 2011 through August 2014. From August 2014 through August 2015, he was self-employed and earned $25,000 per year. Since September 2015, defendant earned $19 per hour as a maintenance worker and had a monthly income of $2400. Defendant was married with four children, and had monthly expenses of $800 for rent, $600 for food, and $150 for utilities.

¶ 18 The trial court sentenced defendant to two years' probation and ordered him to pay R. Eck restitution totaling $5750. The court also assessed fees and costs, but advised defendant that the "priority" is "for you to pay restitution to the victim." Defendant responded that he understood. The following colloquy then occurred:

"THE COURT: I can always waive the probation fees, but you need to bring documentation to the probation officer that you have to seek a reduction in that because you are supporting a family, because you are possibly a seasonal worker, it is going to be tough maybe for you to get a job.

So you can always get them to reduce the fees initially, but I can always waive them in the end. I want this restitution to be paid.

***

THE DEFENDANT: Do I just make payments to them or to the—

THE COURT: No, you make the payments to the probation department, and they will in turn send the payments to them.

THE DEFENDANT: Okay. I will obviously do the best I can. *** I will have two years to do it, correct, ma'am?

THE COURT: Don't wait two years.

THE DEFENDANT: No, no, no.

THE COURT: You should make monthly payments.

THE DEFENDANT: Absolutely, absolutely."

¶ 19 Defendant did not file a postsentencing motion.

¶ 20 On appeal, defendant first argues the evidence did not establish his intent to deprive R. Eck of its property because the trial court "specifically held" that he thought he was entitled to the money he took. The State, in response, maintains that defendant's belief that R. Eck owed him money constituted his motive to commit theft, but did not negate the mental state for the offense.

¶ 21 The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Newton*, 2018 IL 122958, ¶ 24. The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving conflicts in the testimony, the credibility of witnesses, or the weight of the evidence. *People v. Gray*, 2017 IL 120958, ¶ 35. Moreover, "the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." (Internal quotation marks omitted.) *People v. Hardman*, 2017 IL 121453, ¶ 37. Rather, "it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the accused's guilt." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. A defendant's conviction will not be reversed unless "the evidence is so improbable or unsatisfactory" that a reasonable doubt of his guilt persists. *People v. Harris*, 2018 IL 121932, ¶ 26.

¶ 22 As charged, a person commits theft when he knowingly "[o]btains or exerts unauthorized control over property of the owner" and "[i]ntends to deprive the owner permanently of the use or benefit of the property." 720 ILCS 5/16-1(a)(1)(A) (West 2012). Here, defendant only challenges the element of intent. Although direct evidence of intent "is rarely available," the intent to commit theft "may be inferred from the facts and circumstances surrounding the alleged theft, including the act of the theft itself." *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 166. Whether intent existed is a question for the trier of fact, and "reviewing courts will not disturb

that finding unless it clearly appears there is reasonable doubt." *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 52.

¶ 23 The trial evidence showed that defendant, a salesperson for R. Eck, executed agreements with Flowers and Caifa on behalf of the company. Flowers paid $560 for roof repairs, which he tendered in two checks payable to defendant per his instructions. Caifa paid $1755 for home repairs, followed by an additional $5000, which defendant told her to pay with a check in his name. Detective Heveran testified that a currency exchange employee confirmed defendant cashed all three checks. Frank explained that R. Eck never obtained the $550 owed by Flowers or the $5000 owed by Caifa, and that defendant lacked authority to receive checks under his name. In a statement to police, defendant claimed Frank allowed him to accept checks in his name and maintained he gave the $550 to R. Eck. But, he acknowledged "taking and keeping the $5000 check *** for work done by R. Eck" because the company owed him money.

¶ 24 Viewing this evidence in the light most favorable to the State, a rational trier of fact could find that defendant, without authorization, directed Flowers and Caifa to write checks in his name for work performed by R. Eck and cashed the checks with the intent to permanently deprive the company of the money. See *People v. Kotero*, 2012 IL App (1st) 100951, ¶ 31 ("intent may be inferred from fraudulent or deceptive acts that facilitated the theft"). While defendant claimed that he kept the payments because R. Eck owed him commissions, no evidence substantiated that allegation or suggested that he was otherwise entitled to the funds he took. Defendant's intent in taking those funds was a question for the trier of fact, which was not obligated to credit his testimony over other circumstances showing his culpability. *People v.*

Barney, 176 Ill. 2d 69, 74 (1997) (a defendant's testimony is "entitled to no greater deference than the testimony of any other witness"); *Viramontes*, 2017 IL App (1st) 142085, ¶ 52.

¶ 25 Defendant relies on *People v. Falkner*, 61 Ill. App. 3d 84 (1978) and *People v. Baddeley*, 106 Ill. App. 2d 154 (1969), where we reversed convictions for theft based on the probability the defendants took or retained property by mistake. *Falkner*, 61 Ill. App. 3d at 89-90 (the defendant demanded money from a bartender whom he believed shortchanged him); *Baddeley*, 106 Ill. App. 2d at 156, 159 (the defendant thought he had a lien on a vehicle he repaired). *Falkner* and *Baddeley*, however, were decided before our supreme court rejected the reasonable-hypothesis-of-innocence standard of review. *People v. Pintos*, 133 Ill. 2d 286, 291 (1989). Further, unlike those cases, the evidence here did not show that defendant mistakenly believed he was entitled to the money paid by Flowers and Caifa for work performed by R. Eck, but only that he thought R. Eck had underpaid him in the past. We therefore reject defendant's theory that the trial court's "specifically held" he "thought he was entitled to the money he took." To the contrary, the trial court stated that defendant "chose to take money intended to be paid to [R. Eck] as his commissions," and "intend[ed] *** to take that money as his commissions whether he was owed them or not." The trial court thus determined that defendant acted with the requisite mental state to commit theft, and the evidence at trial supported that finding beyond a reasonable doubt. Consequently, defendant's challenge to the sufficiency of the evidence is without merit, and his conviction for theft is affirmed.

¶ 26 Next, defendant contends this court should vacate the restitution order and remand for a new hearing because the trial court did not consider his ability to pay, determine whether payment should be made in installments or a lump sum, or fix a time for completion of the

payments. Alternatively, he maintains the $5750 restitution ordered by the trial court must be reduced by $200 because the evidence only showed that he stole $5550. The State concedes the restitution order should be corrected, but maintains that defendant received an adequate hearing.

¶ 27 Defendant did not challenge the restitution order or hearing in the trial court, and therefore, forfeited the issue. See *People v. Staake*, 2017 IL 121755, ¶ 30 (to preserve an error for review, a defendant must object at trial and raise the issue again in a posttrial motion). He asks this court to excuse the forfeiture, address the issue under the plain error doctrine, or, as we elect here, to consider his claim as a matter of ineffective assistance for counsel's failure to object in the trial court.

¶ 28 To establish a claim for ineffective assistance, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness, and (2) he was prejudiced by counsel's deficient performance. *People v. Brown*, 2017 IL 121681, ¶ 25 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Under the first prong, an attorney's performance "must be evaluated from counsel's perspective at the time the contested action was taken and will be considered constitutionally deficient only if it is objectively unreasonable under prevailing professional norms." *People v. Bailey*, 232 Ill. 2d 285, 289 (2009). As to the second prong, a defendant is prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *People v. Hale*, 2013 IL 113140, ¶ 18.

¶ 29 The 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). In setting the amount of restitution, the trial court "is not required to consider a defendant's financial circumstances." *People v. Day*, 2011 IL App (2d) 091358, ¶ 56. Rather, "the trial court is required to consider the ability to pay only when determining the *time and manner of payment* or when considering a petition to revoke restitution." (Emphasis in original). *Id.*

¶ 30 Section 5-5-6(f) of the Unified Code of Corrections (730 ILCS 5/5-5-6(f) (West 2012)) provides:

> "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, *** within which payment of restitution is to be paid in full. Complete restitution shall be paid in as short a time period as possible. *** If the defendant is ordered to pay restitution and 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."

A restitution order is "fatally incomplete" when the trial court "does not specify a particular time" for payment. *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1067 (2008). Orders "concerning the time and manner of payment of restitution [are] reviewed for an abuse of discretion." *Day*, 2011 IL App (2d) 091358, ¶ 56.

¶ 31 Turning to the present case, the record shows the trial court received defendant's PSI report, which revealed that he earned $40,000 per year from August 2011 through August 2014, $25,000 per year from August 2014 through August 2015, and $19 per hour as a maintenance

worker since September 2015. The report specified that defendant was married and had four children, with monthly expenses totaling $1550. At sentencing, the trial court noted that defendant might have difficulty finding a job because he was "possibly a seasonal worker," and that his fees could be reduced or waived but the restitution had to be paid. The court explained that restitution payments were to be made to the probation department, and that defendant should make "monthly payments" and not "wait two years."

¶ 32 The trial court thus specified the time for making restitution payments, the monthly schedule for payments, and the manner of payment, and was also aware that defendant was incarcerated between his trial and sentencing hearing and not working during that time. Given the foregoing, the proceedings were not inadequate and no remand is necessary. As such, trial counsel was not ineffective for failing to object to the proceedings, and defendant's claim of ineffective assistance as to this issue fails. See *People v. Holmes*, 397 Ill. App 3d 737, 745 (2010) ("It is axiomatic that a defense counsel will not be deemed ineffective for failing to make a futile objection.").

¶ 33 Defendant further contends that counsel was ineffective for failing to object to the $5750 restitution order because the evidence only showed that he stole $5550. Here, defendant was convicted of theft based on evidence that he retained $5550 in customer payments for R. Eck's services, specifically, checks for $200 and $350 from Flowers and a check for $5000 from Caifa. The trial court ordered that defendant pay restitution totaling $5750. While Flowers paid defendant an additional $225 for repairs "on the side," R. Eck did not claim it as lost proceeds and the trial court did not mention the payment in its findings. Trial counsel's failure to object to the erroneous calculation constituted deficient performance, and prejudiced defendant because it

resulted in an improper restitution order. Consequently, we amend the restitution order to reflect that defendant is only required to pay $5500. See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967) (the reviewing court may "modify the judgment or order from which the appeal is taken").

¶ 34 In summary, we affirm defendant's conviction for theft, amend the restitution order to reflect a total of $5500, and affirm the judgment of the trial court in all other respects.

¶ 35 Affirmed; restitution order modified.