STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2403

State of Minnesota,
Respondent,

vs.

Kim M. Jeanes,
Appellant.

Filed April 14, 2009
Affirmed as modified
Lansing, Judge

Rice County District Court
File No. CR-06-895

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

G. Paul Beaumaster, Rice County Attorney, Rice County Courthouse, 218 Northwest Third Street, Faribault, MN 55021 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

In this appeal from conviction of theft by swindle, Kim Jeanes challenges the sufficiency of the evidence to support her conviction and the restitution imposed as part of her sentence. Because the record contains sufficient evidence on the elements of the offense, we affirm the conviction. And because the district court acted within its discretion by ordering restitution for legal fees incurred to attach the wrongfully obtained funds, we affirm as modified the restitution amount of $6,209.23.

F A C T S

Kim Jeanes and Manuel Henning met in 1994 and lived together from 1995 until April 2005. Henning retained a lawyer in 2000 to prepare a will and revocable trust that designated Jeanes as the personal representative of his estate and the successor trustee and beneficiary of the trust. He signed both documents in August 2000, and the drafting attorney retained a valid duplicate original of the trust instrument.

In 2003, Henning removed Jeanes as his personal representative, successor trustee, and beneficiary by crossing out her name on the will and the trust instrument and circling and underscoring, instead, the name of his grandson, who had been listed as the alternative personal representative and the alternative successor trustee and beneficiary. The changes were accompanied by a hand-written note in which Henning stated that he was leaving nothing to Jeanes. Jeanes saw the changes to the will but did not know that the trust instrument had also been altered until her attorney received a copy in November or December 2005, after Henning's death.

Henning died November 17, 2005. His grandson, who lived in Texas, learned of Henning's death when legal documents arrived in the mail in January 2006. Henning's family retained a Minnesota attorney to represent them in the probate proceeding.

The district court conducted a hearing in March 2006 on the petition to admit the will to probate and appoint a personal representative. Jeanes and her attorney both attended the hearing, and Jeanes's attorney informed her of the district court's written decision appointing Henning's grandson as personal representative for the estate. Jeanes requested that the district court make additional findings on whether the partially revoked will was valid. After Jeanes received the additional findings affirming the will's validity with the 2003 changes, she contacted the attorney who had drafted the trust instrument and obtained from him the duplicate original trust instrument that had designated her as trustee.

In early June—either June 1 or June 2—Jeanes went to the State Bank of Faribault to close Henning's checking account. She met with a personal banking manager and provided her driver's license; Henning's death certificate; and the unaltered, duplicate trust instrument. The manager asked Jeanes whether the estate had a personal representative. Jeanes said she did not know but that her attorneys told her that she had a right to the funds. The manager accepted Jeanes's assurances and, at her request, gave her a cashier's check for $6,712.84 and a $5,000 certificate of deposit.

After Jeanes left the bank, the manager realized that Jeanes had not signed the collection-of-personal-property affidavit and that the certificate of deposit did not have the correct payee. The manager contacted Jeanes and she returned to the bank on June 5

to sign the affidavit, which the manager notarized. The one-page affidavit states, "No application or petition for the appointment [of] a personal representative is pending or has been granted in any jurisdiction."

When Jeanes signed the affidavit, the manager again asked her if she had the personal-representative papers or if there were family members who might be appointed. Jeanes said that there could be a grandson. The manager told Jeanes that if a personal representative was appointed, that person would be entitled to collect the funds, not Jeanes. Because the manager was uneasy about the transaction, she put a hold on the certificate of deposit. Jeanes had already deposited the cashier's check in her personal account at another bank. She later transferred the money to a third bank.

When Henning's family attempted to close his State Bank of Faribault accounts, they learned that the funds had already been withdrawn. They contacted the police, who discovered Jeanes's involvement. The family's attorney obtained a writ of attachment for the funds in Jeanes's checking account.

Following an investigation, the state charged Jeanes with aggravated forgery and theft of more than $500 by swindle. At trial, the district court dismissed the aggravated forgery charge, and the jury found Jeanes guilty of theft by swindle.

The district court imposed a fine, stayed a 365-day sentence, and ordered Jeanes to pay Henning's family restitution for legal fees incurred by their attorney in connection with the writ of attachment. Jeanes contended that the claimed fees were attributable to the probate proceeding, not the writ of attachment. The family's attorney presented an

affidavit that separated his charges for the probate fees from the fees related to the writ of attachment.

After submitting the affidavit, the family's attorney acknowledged that he had failed to deduct a $500 payment received from Jeanes. The district court denied Jeanes's request for an accounting and ordered that Jeanes pay Henning's grandson restitution of $7,049.23. Jeanes appeals, challenging both the sufficiency of the evidence to support her conviction and the propriety and amount of restitution.

D E C I S I O N

I

In a challenge to the sufficiency of the evidence to support a conviction, we ascertain "whether the jury could reasonably find the defendant guilty given the facts in evidence and the legitimate inferences which could be drawn from those facts." *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998). We view the evidence in the light most favorable to the verdict and assume the jury believed the state's witnesses and disbelieved the contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The jury is in the best position to determine the credibility of the witnesses and resolve any conflicts in the testimony. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988).

Theft by swindle occurs when someone "by artifice, trick, device, or any other means, obtains" another person's property or services. Minn. Stat. § 609.52, subd. 2(4) (2004). To prove theft by swindle, the state must show that someone gave up property due to the defendant's swindle, that the defendant intended to obtain the property, that the

defendant's act was a swindle, and that the offense occurred at a specific place and time. 10 *Minnesota Practice*, CRIMJIG 16.10 (2006).

In her challenge to the sufficiency of the evidence, Jeanes raises three claims of deficiency: (1) that the state failed to prove that she intended to swindle or defraud the bank, (2) that her acts did not meet the legal definition of swindle, and (3) that the State Bank of Faribault did not give up the money because of the swindle. We address each of these elements separately.

First, a swindler must have an affirmative intent to defraud. *State v. Pirsig*, 670 N.W.2d 610, 615 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). Intent, however, is generally proved through circumstantial evidence, which can be shown by the defendant's words and actions in the surrounding circumstances. *State v. Hardimon*, 310 N.W.2d 564, 566 (Minn. 1981). Circumstantial evidence is entitled to the same consideration and weight as direct evidence. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Juries can best evaluate the circumstantial evidence and determine "the credibility and weight" to give to witnesses' testimony. *Bias*, 419 N.W.2d at 484.

The evidence sufficiently supports the element of intent. Jeanes saw Henning's alterations to his will and later learned that he had altered the trust instrument. After the court appointed Henning's grandson as the personal representative, Jeanes obtained the unaltered, duplicate original of the trust, which listed her as the trustee. Jeanes then deliberately used this duplicate original at the bank despite her knowledge that Henning had altered his trust. In addition, she signed an affidavit that stated, "No application or petition for the appointment [of] a personal representative is pending or has been granted

in any jurisdiction." Jeanes, however, knew that a petition had been granted because she had been present at the contested hearing, and her attorney informed her of the court's order. Jeanes attempts to characterize her conduct as bad judgment rather than intentional deceit, and to analogize her behavior to the utility-account holders who were exonerated from indictments of swindling in *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). But her affirmative conduct distinguishes her circumstances from the passive conduct of *Flicek* defendants who only failed to disclose that their accounts were delinquent. *Id.*

Second, the conduct satisfies the requirement that the theft was done by swindle. Theft by swindle can occur by using false representations of past or future facts or solely using words and actions. *10 Minnesota Practice*, CRIMJIG 16.10; *see also State v. Lone*, 361 N.W.2d 854, 858 (Minn. 1985) (noting that "statute punishes any fraudulent scheme, trick, or device whereby the wrongdoer deprives the victim of his money by deceit or betrayal of confidence" (citing *State v. Ruffin*, 280 Minn. 126, 130, 158 N.W.2d 202, 205 (1968))).

Third, Jeanes's argument that the bank was not induced to give up the money as a result of the swindle is not persuasive. The manager testified that she would not have released the funds if she had known that Henning's grandson was the personal representative and that she would have inquired further about Henning's estate if Jeanes had presented the altered trust instrument. Without the unaltered, duplicate original of the trust and the nondisclosure of the personal-representative status, the manager would not have released the funds.

Jeanes's actions provide a basis for the jury to infer intent and her conduct fits the definition of theft by swindle. *See* Minn. Stat. § 609.52, subd. 2(4) (providing that theft by swindle occurs when someone "by artifice, trick, device, or any other means, obtains" another person's property or services).

II

We review a district court's order for restitution under an abuse-of-discretion standard. *State v. Tenerelli*, 598 N.W.2d 668, 672 (Minn. 1999). To support a restitution amount, the record must contain a factual basis that indicates the loss's nature and amount with reasonable specificity. *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000). Determining whether an item meets the definition of restitution is a question of law, which is "fully reviewable by the appellate court." *Id.*

Jeanes essentially raises two challenges to the district court's restitution order: (1) the family's attorney may not receive restitution because he was not a victim and suffered no economic loss, and (2) his fees resulted from the probate proceeding not Jeanes's conduct.

The court-ordered restitution is well within the legal definition. In Minnesota, a victim has a right to request restitution for a specific loss if the defendant is convicted of a crime. Minn. Stat. § 611A.04, subd. 1(a) (2004). The restitution request "may include, but is not limited to, any out-of-pocket losses resulting from the crime." *Id.* Only losses "directly caused by the conduct for which the defendant was convicted" merit restitution. *State v. Latimer*, 604 N.W.2d 103, 105 (Minn. App. 1999) (quotation marks omitted).

Disputes about restitution amounts "must be resolved by the court by the preponderance of the evidence." Minn. Stat. § 611A.045, subd. 3(a) (2004).

The district court did not abuse its discretion in ordering restitution. First, the district court ordered restitution to be paid to the personal representative, Henning's grandson, not the family's attorney. As the personal representative, the grandson had the first right to access the funds and was a victim of Jeanes's wrongful conduct. Henning's grandson suffered a loss because he incurred legal fees in his attempt to recover the funds. *See* Minn. Stat. § 611A.04, subd. 1(a) (allowing restitution for "out-of-pocket losses resulting from the crime"); *State v. Olson*, 381 N.W.2d 899, 901 (Minn. App. 1986) (affirming restitution order because losses were directly caused by defendant's burglary).

Second, although Jeanes contends that the fees were from the probate proceeding and that some fees were not accurately assessed, she presents no evidence to prove her contentions. In response to the district court's inquiries, the family's attorney stated that he established an "entirely different file number" for the fees to recover the wrongfully withdrawn funds. The family's attorney provided detailed client billing worksheets, consistent with his continuing obligation to be candid with the district court. *See* Minn. R. Prof. Conduct 3.3(a)(1) (stating that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"). The record supports the district court's determination that the fees were incurred in the effort to recover the funds from Jeanes's theft by swindle, and the district court properly ordered restitution.

The record, however, discloses arithmetic errors in the restitution amount. *See Thole*, 614 N.W.2d at 234 (noting that factual basis must exist in record to support restitution amount). The court ordered restitution of $7,049.23. The family's attorney, however, informed the district court at the restitution hearing that he did not deduct Jeanes's $500 payment from the affidavit amount. Additionally, the attorney failed to submit a copy of his July 2007 bill and a charge of $340 apparently accrued in that month. Without the July 2007 bill, we cannot assume that these fees were incurred in the recovery efforts. We conclude that the district court's restitution order should be modified to reflect the $500 credit and to omit the $340 incurred in July 2007. Thus, the personal representative should receive restitution of $6,209.23 for out-of-pocket losses resulting from the theft by swindle.

Affirmed as modified.