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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2011**

State of Minnesota,
Respondent,

vs.

Dawn Marie Dircks,
Appellant.

**Filed December 10, 2012
Affirmed
Kalitowski, Judge**

Ramsey County District Court
File No. 62-CR-10-3568

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant
Public Defender, St. Paul, Minnesota; and

Mariah L. Reynolds, Special Assistant Public Defender, Dorsey & Whitney LLP,
Minneapolis, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Dawn Marie Dircks challenges her conviction of theft by swindle of property valued at more than \$1,000 in violation of Minn. Stat. § 609.52, subds. 2(4), 3(3)(a) (2008). Dircks argues that the district court’s jury instructions (1) denied her a jury determination on all of the elements of her offense beyond a reasonable doubt; (2) violated her right to a unanimous verdict; and (3) constructively amended the complaint, which prejudiced her substantial rights. We affirm.

DECISION

I.

Dircks worked as a dispatcher for a towing company, where she processed tows, accepted towing fees, and provided receipts. The owners of the company began to suspect that Dircks was stealing from the company by (1) collecting about \$285 per tow in cash from the vehicle owner; (2) recording the transaction as a \$60 “drop fee” without authorization; (3) placing \$60 in the company safe; and (4) keeping the difference of \$225 for herself. She later confessed to the thefts in a recorded conversation with the owners and was charged by complaint with one count of theft by swindle in violation of Minn. Stat. § 609.52 subds. 2(4), 3(3)(a).

At the jury trial, the state highlighted eight separate instances in which it alleged Dircks stole between \$225 and \$335. The district court submitted jury instructions on the elements of felony theft by swindle. But it did not include an aggregation instruction, and neither party requested one. After a period of time deliberating, the jury submitted a

question: “The total dollar amount of the theft was almost \$2,000 during eight separate instances over a five-week period. Why are we deciding this as a single act rather than eight separate acts?” In response, the district court provided the following aggregation instruction based on CRIMJIG 16.83:

Ladies and gentlemen, the statutes of Minnesota provide for aggregation of value for a charge. In order to aid you and in response to your question, I’ve developed a special verdict form for you to take back to the jury room. It reads: If you find the defendant guilty of one or more acts of theft within a period of six months, you have an additional issue to determine. One. Was the total value of the money taken in all acts more than one thousand dollars but not more than five thousand dollars[?] Two. Was the total value of the money taken in all acts more than five hundred dollars but not more than one thousand dollars[?] Three. Was the total value of the money taken in all acts 500 dollars or less[?]

. . . If you have a reasonable doubt as to the value of the money taken in all acts, you should answer “yes” to the lesser of the values you believe it had.

See 10 Minnesota Practice, CRIMJIG 16.83 (2006) (providing jury instruction for aggregation of values). The jury resumed deliberations, and returned with a guilty verdict.

Dircks argues that the district court’s reasonable-doubt instructions constituted either structural error or plain error. We disagree.

1. Structural Error

Structural errors are defects in the trial mechanism. *State v. Kuhlmann*, 806 N.W.2d 844, 851 (2011). They defy harmless-error analysis, and require reversal whether or not a timely objection was made. *Id.* Although structural errors are scarce,

constitutionally deficient reasonable-doubt jury instructions are structural error. *See id.* (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 2083 (1993) for this rule).

Dircks argues that the district court's jury instructions were structural error because they denied her a jury determination of all the elements of her offense beyond a reasonable doubt. We disagree.

We conclude that these instructions are not constitutionally deficient, and therefore do not fall within the limited class of structural errors. Dircks argues that the instructions unconstitutionally instruct the jury to resolve any reasonable doubt against her by telling the jury to answer "yes" even if it has a reasonable doubt as to the value. But this ignores the part of the instruction stating that if the jury has "a reasonable doubt as to the value of the money taken in all acts," it "should answer 'yes' to the *lesser* of the values you believe it had." Thus, the instruction tells the jury to resolve any reasonable doubt in Dircks's favor.

Dircks also argues that the use of the word "believe" dilutes the reasonable-doubt standard. The instructions tell the jury to answer "yes" to the lesser of the values it *believed* Dircks stole. But the instructions first instruct the jury that, "[i]f you find the defendant guilty of one or more acts of theft within a period of six months, you have an additional issue to determine." Thus, the jury, which had previously been properly instructed on the reasonable-doubt standard, had to find Dircks guilty beyond a reasonable doubt before it addressed the value questions. This is not structural error. And the use of the word "believe" in this context does not make the instruction

constitutionally deficient. We agree with appellant that the wording of the jury instruction guide could be improved. For example, the jury could be instructed to answer “yes” to the value of the money the state proved that a defendant had stolen beyond a reasonable doubt. Nevertheless, we conclude that the instructions are not constitutionally deficient, and therefore are not structural error.

2. Plain Error

Although Dircks’s trial counsel generally objected to the instruction being given in its entirety, counsel did not object to the language that Dircks now challenges on appeal. We review unobjected-to instructions under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under that standard, Dircks must show that that there was (1) error, (2) that is plain, and (3) that the error affected her substantial rights. *See id.* (stating plain-error standard). “An error is ‘plain’ if it is clear or obvious.” *Kuhlmann*, 806 N.W.2d at 853. And “[a]n error affects substantial rights if the error was prejudicial and affected the outcome of the case.” *Id.* If each prong is met, we assess “whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings.” *Griller*, 583 N.W.2d at 740.

We conclude that the plain-error standard is not met because the claimed error did not affect the outcome of the case, and therefore, it did not affect Dircks’s substantial rights. The evidence against Dircks was overwhelming. First, Dircks was the only person who had access to the cash between the time that customers paid and the time that Dircks dropped the cash into the safe. Second, surveillance video footage—viewed by the jury at trial—showed several customers paying \$285 or more. But the receipts for

those purchases were modified to indicate that the customers only paid a \$60 “drop fee.” Third, the testimony at trial showed that Dircks was the last person to make any modifications to payment information on those receipts. Dircks argues that another employee made notations on some of the receipts. But the other employee’s notations were unrelated to payment. Finally, and most importantly, Dircks confessed to stealing from the towing company. In a recorded conversation with the owners, Dircks admitted to stealing for “[a] couple weeks.” She said that because she kept copies of the invoices, she was “pretty sure” that she owed \$1,210, apologized, and said that she intended to refund the money. Considering this evidence against Dircks, a different aggregation instruction, or no aggregation instruction at all, would not have changed the outcome of the case.

Because we conclude that the jury instruction did not affect Dircks’s substantial rights, we need not consider whether the claimed error was plain. *See Kuhlman*, 806 N.W.2d at 853 (holding that if a defendant does not establish that the claimed error affected her substantial rights, we need not consider the other prongs of the plain-error standard).

II.

Dircks argues that the district court’s jury instructions violated her right to a unanimous verdict by allowing for disagreement regarding which alleged thefts she committed. Because Dircks failed to raise this objection at trial, we review for plain error. *See Griller*, 583 N.W.2d at 740 (stating unobjected-to jury instructions are reviewed for plain error). Dircks must show (1) error, (2) that is plain, and (3) that the

error affected her substantial rights. *See State v. Ihle*, 640 N.W.2d 910, 916-17 (Minn. 2002) (reviewing unobjected-to jury instructions for plain error).

“The jury’s verdict must be unanimous in all cases.” Minn. R. Crim. P. 26.01, subd. 1(5). “But unanimity is not required with respect to the alternative means or ways in which the crime can be committed.” *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001) (quotation omitted). “[I]f each act itself constitutes an element of the crime,” “the jury must unanimously agree on which acts the defendant committed.” *Id.* at 355. “Where jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant’s right to a unanimous verdict.” *Id.* at 354.

The district court did not instruct the jury that each misdemeanor offense was a separate and distinct element of felony theft by swindle. Rather, it submitted the following instructions:

The elements of theft by swindle are, first, Rapid Recovery, Incorporated gave up possession of money to [Dircks] because of the swindle.

Second, [Dircks] acted with the intention of obtaining for herself the possession of the money.

Third, that [Dircks’s] act was a swindle. . . .

Fourth, the amount taken was over \$1,000.

Fifth, [Dircks’s] act took place on or about October 16, 2009 to November 27, 2009, in Ramsey County.

If you find that each of these elements has been proven beyond a reasonable doubt, [Dircks] is guilty.

If you find that any element has not been proven beyond a reasonable doubt, [Dircks] is not guilty.

Dircks argues that each alleged misdemeanor theft is an element of the offense; and therefore, the district court plainly erred by failing to instruct the jury that it needed to unanimously agree on which misdemeanor thefts Dircks committed. But we conclude that the plain-error standard was not met because the claimed error did not affect the outcome of the case.

Dircks's defense was a general denial: She asserted that she did not commit any of the alleged thefts on the surveillance video without differentiating the thefts. The jury's verdict demonstrates that it did not believe Dircks, and the evidence against Dircks was overwhelming. Thus, even if the district court had sua sponte instructed the jury that it must unanimously agree on which misdemeanor thefts Dircks committed, the outcome would not have differed.

Because the claimed error did not affect the outcome of the case, we conclude that it did not affect Dircks's substantial rights and we need not consider the other prongs of the plain-error analysis.

III.

Dircks argues that the district court's aggregation instruction constructively amended the complaint in violation of Minn. R. Crim. P. 17.05. The district court may permit the state to amend the complaint before verdict if it does not charge a different offense or prejudice the defendant's substantial rights. Minn. R. Crim. P. 17.05. "A 'different offense' is charged if an amendment affects an 'essential element' of the

charged offense.” *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. 1997). The purpose of rule 17.05 is to prevent jury confusion and to ensure that the defendant is provided timely notice and an opportunity to prepare a defense. *Id.* at 13-14 (“The principle underlying Rule 17.05 is a concern for prejudicial effect, not procedural regularity.”).

Dircks argues that the district court’s aggregation instruction constructively amended the complaint because the state neither charged her under the aggregation portion of section 609.52, nor identified the individual misdemeanor thefts in the complaint.

We conclude that the jury instructions did not constructively amend the complaint. The complaint states that “[o]n or about the 17th day of October, 2009 to the 27th day of November, 2009 . . . DIRCKS, did unlawfully obtain possession of property” This language indicates that the state’s charge involved Dircks committing multiple offenses over several weeks. The complaint’s statement of probable cause states that video surveillance depicted Dircks stealing \$225 on at least five different occasions, and that the owners of the towing company could document that Dircks stole \$2,185 over a two-month period. In its opening statement at trial, the state told the jury that it would present evidence about how Dircks stole around \$225 per tow from October 17, 2009, to November 27, 2009. Thus, although the state charged her by complaint with one count of felony theft by swindle, it was clear that the state would be aggregating multiple misdemeanor offenses. The jury instructions were consistent with this. Moreover, because Dircks had timely notice of the charges against her, she was not burdened in preparing her defense. *See State v. Bias*, 419 N.W.2d 480, 486 (Minn. 1988) (stating that

the test is whether the complaint misled the defendant as to the charges and made it impossible for the defendant to prepare a defense).

Affirmed.