STATE OF MINNESOTA
IN COURT OF APPEALS
A11-316

State of Minnesota,
Respondent,

vs.

Diamond Lee Jamal Griffin,
a/k/a Diamond Ali-Jamal Griffin,
Appellant.

Filed January 23, 2012
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CR-10-45684

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assis0tant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

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

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

WRIGHT, Judge

Appellant challenges his conviction of theft, arguing that the evidence presented at trial is insufficient to support a guilty verdict and that the admission of the out-of-court statements of a witness violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. We affirm.

FACTS

At approximately 10:30 a.m. on September 28, 2010, I.C. was sitting on the front steps outside of her rental property, a four-plex, in Minneapolis. Her husband and son-in-law were two blocks away, driving back to the property after running an errand. I.C. had her cell phone in one hand and her purse on her other arm. A man, later identified as appellant Diamond Lee Jamal Griffin, approached I.C. and grabbed her purse. The force of the altercation almost caused I.C. to fall. Griffin fled, and I.C. ran after him screaming. As she followed Griffin to the alley, I.C. saw her husband and son-in-law driving in the alley. She entered the car and, after telling her husband and son-in-law that a black man took her purse, the trio followed the man. As they drove, I.C.'s husband saw Griffin running with I.C.'s purse. Their son-in-law observed Griffin carrying something covered by his jacket. I.C., her husband, and her son-in-law followed Griffin until he entered an apartment building. Griffin approached the back of the apartment building, and a man opened the door for him. While still carrying the purse, Griffin looked back briefly before entering the apartment building.

I.C. and her family parked behind the apartment building. Her son-in-law went to the front of the apartment building because he had seen the man who opened the door run in that direction and he believed the man may run out the front door. I.C. and her husband approached the back door, which was locked. A girl who was vacuuming the hallway let them in. The girl told I.C. that the man had thrown I.C.'s purse in the hallway. I.C. recovered her purse. Several of her belongings were still inside, but a small black purse containing between $300 and $400 and her identification/keycard for work were missing. When I.C.'s husband asked the girl in the hallway where the man who came running in had gone, the girl directed them to apartment 102. I.C.'s husband stood outside apartment 102 and called the police. The police arrived after approximately 20 minutes. During this period, I.C.'s husband watched the door of apartment 102, which he observed opening and then shutting.

After I.C.'s husband directed the police to apartment 102, she and her family waited outside the apartment building. Three officers entered the building, knocked on the door of apartment 102, and spoke with the man who answered. After permitting him, a woman, and a child to exit the apartment, the officers entered. They found Griffin in the kitchen, with his hands over his head. He was sweating "quite a bit" and his demeanor was compliant. The officers took Griffin into custody. An officer brought Griffin out of the building and asked I.C. to look at Griffin. I.C. nodded, telling the police, "[T]hat's him. All he did was take off his jacket and his hat because that's him."

Griffin was charged with theft of property from the person of another, in violation of Minn. Stat. § 609.52, subds. 2(1), 3(3)(d)(i) (2010). A jury trial followed. The jury

found Griffin guilty of the charged offense. Griffin waived the presentence investigation and moved for sentencing. After granting the motion, the district court imposed the presumptive sentence of 24 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Griffin argues that the evidence is insufficient to support his conviction of theft. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Griffin challenges the jury's determination that he is the person who took I.C.'s purse, contending that the post-arrest identifications by I.C., her husband, and her son-in-law are not reliable. It is the exclusive function of the jury to determine witness credibility. *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). The jury had the opportunity to evaluate the credibility of each witness after listening to the testimony of

each. In support of its verdict, the jury heard I.C. testify that, after the police took Griffin into custody, she recognized Griffin as the person who took her purse. I.C.'s husband and son-in-law also testified that they recognized Griffin as the man they pursued as he fled with the purse or a "covered" object. Each witness had an unobstructed opportunity to observe Griffin in daylight as Griffin fled the scene of the offense. And each followed him to the apartment building where he was arrested. I.C. recovered her purse from the hallway of the apartment building, and a police officer who responded to the 911 call testified that Griffin was sweating when the officers arrested him. When viewed in the light most favorable to the verdict, the evidence is more than sufficient to support the jury's determination that Griffin is the person who stole I.C.'s purse.

II.

Griffin next argues that, because the value of the stolen property is an essential element of the charged offense, the district court's failure to submit this issue to the jury warrants reversal of his conviction.

Before the district court gave its final jury instructions, counsel for each party indicated that there were no objections to the jury instructions. Griffin's counsel added, "They're fine." A party's failure to object to jury instructions at trial generally waives consideration of the issue on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Nevertheless, under Minn. R. Crim. P. 31.02, we may review an unobjected-to jury instruction for plain error. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). In doing so, we consider whether there is an error, whether such error is plain, and whether it affects the defendant's substantial rights.

Griller, 583 N.W.2d at 740. An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted), or if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects substantial rights "if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Griller*, 583 N.W.2d at 741 (quotation omitted). If the three plain-error factors are established, we then consider whether to remedy the error to ensure fairness and the integrity of the judicial proceedings. *Ihle*, 640 N.W.2d at 916; *Griller*, 583 N.W.2d at 740.

Under Minnesota law, a person commits theft if the person intentionally, without claim of right or the owner's consent, takes, uses, transfers, conceals, or retains possession of another's movable property with the intent to permanently deprive the owner of possession. Minn. Stat. § 609.52, subd. 2(1). Whoever commits theft may be sentenced "to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both, if . . . the value of the property or services stolen is not more than $1,000, and . . . the property is taken from the person of another." *Id.*, subd. 3(3)(d)(i). Although the value of the stolen property is not an element required to establish guilt of theft, value is an element necessary to determine the severity of the sentence. *Id.*, subds. 2, 3(3)(d)(i) (2010). A defendant has the right "to have all the elements of the offense with which he is charged submitted even if the evidence relating to these elements is uncontradicted." *State v. Carlson*, 268 N.W.2d 553, 560 (Minn. 1978). And it is the prosecution's burden to prove every element of the offense beyond a

reasonable doubt. *State v. Winston*, 412 N.W.2d 432, 433 (Minn. App. 1987). Accordingly, Griffin was entitled to have the value element submitted to the jury, and the district court's omission of that element was plain error. Therefore, this aspect of the *Griller* test is satisfied.

Griffin also must establish that the error affected his substantial rights. An error affects a defendant's substantial rights if there is a reasonable likelihood that a more accurate instruction would have had a significant effect on the jury verdict. *State v. Vance*, 734 N.W.2d 650, 656, 660-61 (Minn. 2007). The Minnesota Supreme Court has acknowledged, with respect to this third plain-error factor, that "the law is unclear regarding whether the omission of an element from jury instructions is necessarily prejudicial or may instead be subject to a harmless error analysis." *Vance*, 734 N.W.2d at 661. But the *Vance* court declined to resolve this issue, concluding that it "need not address the lack of clarity in the law" because the facts were distinguishable from cases in which a court "deemed harmless the failure to submit an element of the offense to the jury." *Id.* In *Neder v. United States*, the United States Supreme Court applied a harmless-error analysis to the district court's failure, over the defendant's objection, to instruct the jury on an element of the charged offense. 527 U.S. 1, 6, 19-20, 119 S. Ct. 1827, 1832, 1839 (1999). The *Neder* Court concluded that this analysis "serves a very useful purpose insofar as it blocks setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Id.* at 19, 119 S. Ct. at 1839 (quotation omitted). Although *Neder* applies a harmless-error analysis, as the defendant objected to the error, *Neder*'s rationale is analogous and persuasive for the

purpose of evaluating the third prong of our plain-error analysis here. *See also Ihle*, 640 N.W.2d at 917 (declining to grant relief for plain error when there is no "reasonable likelihood that a more accurate instruction would have changed the outcome").

The state charged Griffin with theft from I.C. of property with a value that is not greater than $1,000. *See* Minn. Stat. § 609.52, subd. 3(3)(d)(i). The record establishes that Griffin stole I.C.'s purse, which she was holding, and its contents, which included several unidentified items and between $300 and $400 in cash. There is no evidence establishing the value of the purse and any contents other than the cash. And the jury verdict form did not require the jury to state the value of the stolen property. Griffin argues that his conviction must be reversed because the state failed to prove beyond a reasonable doubt that the value of the property stolen is *not* greater than $1,000.

The district court sentenced Griffin in accordance with Minn. Stat. § 609.52, subd. 3(3), which authorizes imprisonment for not greater than five years, payment of a fine of not greater than $10,000, or both. This provision applies either when property with a value of not greater than $1,000 is stolen from the person of another or when property with a value of greater than $1,000, but not greater than $5,000, is stolen. *Id.*, subd. 3(3)(a), (d)(i) (2010).[1] The authorized sentence increases in severity based on the value of the property stolen only if the value of the property stolen is greater than $5,000. *See id.*, subd. 3(2) (2010). Thus, because the jury found that Griffin took the property

[1] The Minnesota Supreme Court has observed that "[t]he offense of theft from a person is serious enough to warrant felony treatment regardless of the amount taken because it is conduct that ordinarily is only one element [the use, or threat of imminent use, of force] short of constituting simple robbery." *State v. Nash*, 339 N.W.2d 554, 557 (Minn. 1983).

from the person of another, the district court would have imposed the *same* sentence regardless of whether the value of the property that Griffin stole was not more than $1,000 or greater than $1,000 but not greater than $5,000. The district court would have imposed a more severe sentence only if the value of the stolen property exceeded $5,000.

Indeed, Griffin was entitled to have the value element submitted to the jury. But in light of the jury's determination that Griffin committed the theft of property from I.C., the only alternative jury finding would have resulted in his conviction of a more serious offense than the charged offense. Under these circumstances, Griffin fails to establish that the district court's error affects his substantial rights.[2] Therefore, Griffin is not entitled to relief on this ground.

III.

In his pro se supplemental brief, Griffin argues that his Confrontation Clause rights were violated when I.C.'s husband testified regarding the statements of the girl who was vacuuming the apartment building's hallway. When a witness is not available to testify at trial in a criminal case, the Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the state from offering that witness's testimonial, out-of-court statement if it was not subject to the defendant's cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54, 59, 124 S. Ct. 1354, 1365, 1369 (2004). A testimonial statement is any statement "made under circumstances which would lead an

[2] Because Griffin fails to establish the third element of the plain-error test, we do not reach the question of whether granting the remedy which he seeks is necessary to ensure fairness and the integrity of the judicial proceedings. *See Ihle*, 640 N.W.2d at 916; *Griller*, 583 N.W.2d at 740 (stating that remedy to ensure fairness and integrity of judicial proceedings considered only after three plain-error factors are established).

objective witness reasonably to believe that the statement would be available for use at a later trial." *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (quotation omitted). The *Crawford* court distinguished formal statements to law enforcement officials from casual statements such as the one at issue here, explaining that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. If a statement is not testimonial, then the Confrontation Clause is not violated. *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010).

Here, the statements that Griffin challenges were made to I.C. and her husband to assist in recovering I.C.'s purse and locating the person who took it. These statements were not made to government officers in anticipation of trial. Indeed, they were made before the police were called. Because the statements at issue are not testimonial and the Confrontation Clause is not implicated, Griffin's challenge to his conviction on this ground fails.

Affirmed.