STATE OF MINNESOTA
IN COURT OF APPEALS
A10-227

State of Minnesota,
Respondent,

vs.

Thomas Albert Wagar,
Appellant.

Filed January 25, 2011
Affirmed
Schellhas, Judge

Kandiyohi County District Court
File No. 34-CR-09-133

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

Boyd Beccue, Kandiyohi County Attorney, Dain L. Olson, Assistant County Attorney, Willmar, Minnesota (for respondent)

Douglas D. Kluver, Nelson Oyen Torvik, Montevideo, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of receiving stolen property, arguing that (1) the district court violated his rights under the Confrontation Clause by admitting testimonial hearsay evidence, (2) the admissible evidence was insufficient to support his

conviction, and (3) he received ineffective assistance of counsel because his trial attorney failed to object to the hearsay evidence. We affirm.

FACTS

In the fall of 2005, while serving as a corporal in the United States Marine Corps and stationed in Camp Fallujah, Iraq, appellant Thomas Wagar found a set of night-vision goggles on top of a barrier. Appellant kept his eye on the goggles to see if anyone would return for them but, after about 45 minutes, he picked up the goggles and brought them to the dispatch shack at the gate of the compound. Service personnel often reported and retrieved missing property at the dispatch shack. Lance Corporal J.C., an assistant dispatcher with the motor pool, was on duty in the dispatch shack when appellant arrived with the night-vision goggles. Although appellant and Lance Corporal J.C. were in the same platoon, they were in different chains of command.

Lance Corporal J.C. told appellant that no one had reported the night-vision goggles missing and, due to limited space in the shack, suggested that appellant retain possession of the goggles until somebody claimed them. Lance Corporal J.C. told appellant that he would tell his superior N.C.O. about the night-vision goggles, and that if anyone came looking for them, he would direct that person to appellant. Appellant brought the goggles back to his room and kept them with his gear.

Lance Corporal J.C. testified that he told his superior N.C.O., Corporal B., about the night-vision goggles and that Corporal B. said, "good to go," and that if anyone came looking for the goggles, appellant could bring the goggles back to the dispatch shack. Lance Corporal J.C. did not make a written report or log entry regarding the goggles. He

testified that corporals, as N.C.O.s, were instructed to handle what they could at their own level because they are supposed to be "the problem solvers." If something as simple as this were brought higher up the chain of command, the staff N.C.O. would tell the corporal to take care of it himself. Lance Corporal J.C. testified that he was never given any formal training on lost equipment, and that "[t]hey always just told us gear adrift is a marine's gift or gear adrift is the enemy's gift."

But Lance Corporal J.C. also testified that the base armory signs out night-vision goggles to individual marines using a receipt-based procedure. Under that procedure, when a marine checks out a set of goggles, the armory keeps one half of a perforated card and the marine keeps the other half. When the marine returns the goggles to the armory, the armory returns the half card to the marine. Lance Corporal J.C. testified that if a marine brought a misplaced set of night-vision goggles to the armory, the armory would be able to check the particular set of goggles against its equipment list.

Appellant knew that marines signed out night-vision goggles from the base armory, and that the goggles he found were not signed out to him. But he did not report finding the goggles up his own chain of command and did not check with the armory to find out to whom the goggles were signed out even though the armory was not far from the dispatch shack. Appellant testified that he did not believe that bringing the goggles to the armory was necessary because he knew that people would go to the dispatch shack first to check for missing gear.

A few months later, appellant brought the night-vision goggles with him when he flew to a base in Kuwait. There he went through military customs prior to reentering the

United States. According to appellant and Lance Corporal J.C., military customs looks for gear, maps, ammunition, explosive ordnance, and anything else that marines are not supposed to have or that seems out of place, and confiscates those items immediately. At military customs in Kuwait, appellant laid out all of his belongings and gear, as well as the night-vision goggles, and the military-customs inspector picked up the goggles and looked at them but did not confiscate them. After completion of the customs inspection, appellant packed up his gear, including the goggles, and flew to the United States. Appellant was later honorably discharged from active military duty.

In September 2008, while investigating an unrelated incident involving appellant's father, a Kandiyohi County sheriff's deputy learned that appellant had given the night-vision goggles to his father as a gift. The deputy suspected that the goggles might be military property, so he sent photographs of the goggles to the United States Department of Defense, which confirmed that the goggles were "consistent with the equipment that was purchased for military use." When the deputy confronted appellant's father about the goggles in December, the father said that he had returned the goggles to appellant.

In January 2009, two agents from the Defense Criminal Investigative Service (D.C.I.S.) visited appellant's Minneapolis home to ask him about the night-vision goggles. Appellant initially said that he bought the goggles on Craigslist for $100, but after the agents "admonished him about being truthful," he apologized and stated that he had compromised his integrity and wanted to tell the truth. He then admitted that he found the goggles on the barrier in Camp Fallujah, gave them to his father, and received them back from his father in Willmar over the 2008 Thanksgiving holiday.

The D.C.I.S. agents took the night-vision goggles from appellant and attempted to trace their origin and ownership. The data plate on the goggles that was supposed to list their serial number was missing. But one of the D.C.I.S. agents opened the goggles and removed an internal component called the image-intensifier tube, which was marked with a serial number of its own, a contract number, and the letters U.S.M.C., which typically stand for United States Marine Corps. The D.C.I.S. agent testified that he gave this information to an "item manager," who contacted the manufacturer, which was able to determine that the image-intensifier tube was originally installed into a set of goggles with serial number 19962. The item manager then provided the D.C.I.S. agent with a copy of a 2004 material-inspection-and-receiving report which stated that ITT Night Vision in Roanoke, Virginia, shipped 642 units of night-vision goggles to Charleston Air Force Base, South Carolina, and that the units were marked for USMC TMO-East, A[l] Taqqadum Air Base, Habbaniyah, Iraq. The report contains a government representative's signature acknowledging receipt of the units that included serial numbers 19610 – 20251. The report shows that the cost of each unit was $2,850. A[l] Taqqadum Air Base is "a receiving area" in Iraq.

The state charged appellant with one count of receiving stolen property in violation of Minn. Stat. § 609.53, subd. 1 (2008). At trial, appellant testified that no one from the Marine Corps ever asked him to return the night-vision goggles, that he did not intend to deprive the goggles' true owner of possession, and that if a marine to whom the goggles were issued had asked him for the goggles, he would have returned them to that marine. A jury found appellant guilty. This appeal follows.

D E C I S I O N

Appellant primarily argues that the district court erroneously admitted testimonial hearsay statements in violation of his constitutional rights, and that without these statements, the evidence was insufficient to sustain his conviction.

A defendant is guilty of the crime of receiving stolen property if, among other things, the defendant received or possessed stolen property that the defendant knew or had reason to know was stolen. Minn. Stat. § 609.53, subd. 1. "Stolen property" means "[g]oods acquired by larceny, robbery, or theft." *Black's Law Dictionary* 1555 (9th ed. 2009). A person acquires property by theft if, among other things, the person "finds lost property and, knowing or having reasonable means of ascertaining the true owner, appropriates it to the finder's own use or to that of another not entitled thereto without first having made reasonable effort to find the owner and offer and surrender the property to the owner." Minn. Stat. § 609.52, subd. 2(6) (2008).

Confrontation Clause

Appellant first argues that the district court erred by allowing the D.C.I.S. agent to testify to information he received from the item manager. Although appellant did not object to this testimony at trial, he argues on appeal that the testimony violated his Confrontation Clause rights under the Sixth Amendment to the United States Constitution, which provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Generally, whether the admission of evidence violates a defendant's rights under the Confrontation Clause is a question of law, which we review de novo. *State v.*

Caulfield, 722 N.W.2d 304, 308 (Minn. 2006). But where the defendant failed to object to the disputed testimony at trial, our review is limited to plain error. Minn. R. Crim. P. 31.02; *State v. Bobo*, 770 N.W.2d 129, 143 (Minn. 2009). Plain-error analysis "involves four steps." *State v. Jenkins*, 782 N.W.2d 211, 229 (Minn. 2010). "First, we ask (1) whether there was error, (2) whether the error was plain, and (3) whether the error affected the defendant's substantial rights . . . ." *Id.* at 230. Only after these first three steps have been met do we assess whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

Was there error?

The Confrontation Clause provides that out-of-court, testimonial statements are inadmissible in a criminal trial unless the declarant is unavailable and the accused had a prior opportunity to cross-examine the declarant. *Bobo*, 770 N.W.2d at 143 (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354 (2004)). In *Crawford*, the Supreme Court set forth three general categories of testimonial statements: (1) ex parte in-court testimony; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits; and (3) statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. 541 U.S. at 51–52, 124 S. Ct. at 1364. "[T]he critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation." *Caulfield*, 722 N.W.2d at 309.

Here, a D.C.I.S. agent testified at trial that an "item manager" informed him that the image-intensifier tube inside the goggles in appellant's possession was originally

installed into a set of goggles with serial number 19962, which was purchased for the Marine Corps in 2004. The item manager made these statements to the D.C.I.S. agent in the context of the investigation that led to the charges in this case; i.e., the item manager's statements were for the purposes of litigation. And while there is no record of the agent and item manager's exact conversation, a reasonable person in the item manager's position would have understood that his or her statements could be used in an eventual trial. The item manager's statements were therefore testimonial. Because the district court did not make a determination that the item manager was unavailable to testify and because appellant was not given a prior opportunity to cross-examine the item manager, these testimonial statements should not have been admitted.

Was the error plain?

"An error is plain if it is clear and obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010). Here, admission of the statements was in violation of well-established case law from *Crawford* and *Caulfield* that statements prepared for litigation are testimonial, and that testimonial statements are inadmissible in a criminal trial absent unavailability and the opportunity for cross-examination. We therefore conclude that the error was plain.

Was the plain error prejudicial and did it affect the outcome of the case?

The third prong of the plain-error test "is satisfied if the defendant meets his 'heavy burden' to show that the error was prejudicial and affected the outcome of the case." *State v. Tscheu*, 758 N.W.2d 849, 864 (Minn. 2008) (quoting *State v. Griller*, 583

N.W.2d 736, 741 (Minn. 1998)). "An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Pearson*, 775 N.W.2d 155, 162 (Minn. 2009) (quotation omitted). Where testimony admitted in violation of the Confrontation Clause does not go to prove a contested element of the offense, the defendant's substantial rights are not affected. *See Bobo*, 770 N.W.2d at 144 (holding that even if doctor's testimony based on autopsy report of autopsy he did not personally perform violated Confrontation Clause, defendant's substantial rights were not affected where testimony was only necessary to demonstrate that victim was dead and that homicide had occurred, which was not disputed).

Appellant argues that the admission of this evidence prejudiced his defense because "it was the only evidence offered to prove ownership of the goggles" and because the agent's "status as a Department of Defense Special Investigator, no doubt, afforded [the agent's] baseless conclusion that the 'goggles were military property' an unwarranted level of credibility." But contrary to appellant's unsupported assertions in his brief that the state was required to prove that the military owned the goggles, the plain language of the theft-of-lost-property statute, under which the district court instructed the jury in this case, contains no such requirement. Instead, it requires proof only that *the finder knew or had reasonable means of ascertaining* the true owner. Minn. Stat. § 609.52, subd. 2(6). The item manager's statements had no bearing on this point—they instead related only to whether the military owned the goggles. Because the inadmissible statements did not relate to proof of any contested element of the offense, their admission was not prejudicial and did not affect the outcome of appellant's case.

Even if the state *were* required to prove that the military owned the goggles, given other circumstantial evidence in the record, appellant has failed to establish a reasonable likelihood that the item manager's statements had a significant effect on the jury's verdict. When reviewing the sufficiency of circumstantial evidence, we first "identify the circumstances proved, giving deference to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *State v. Anderson*, 789 N.W.2d 227, 241–42 (Minn. 2010) (quotation omitted). We next "independently examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt." *Id.* at 242 (quotation omitted). Mere conjecture is insufficient to overturn a conviction based on circumstantial evidence. *Id.*

Testimony at trial, exclusive of the item manager's statements, established that: the night-vision goggles were "consistent with the equipment that was purchased for military use"; a component inside the goggles was stamped "U.S.M.C.," which typically stands for United States Marine Corps; appellant found the goggles on a United States Marine Corps base; and the base armory signs out night-vision goggles to individual marines, keeps track of which goggles are signed out to which marine, and expects the goggles to be returned. The only reasonable inference that can be drawn from these circumstances is that the goggles belong to the Marine Corps. Appellant offers the far-fetched argument that notwithstanding the evidence, it is possible that an individual purchased this particular pair of goggles on the Internet and abandoned them on a barrier in Camp Fallujah. But this theory is not an inference that can be drawn from any of the

circumstances proved at trial. No fact in the record suggests that appellant's theory is what actually happened. On the contrary, the evidence as a whole unwaveringly suggests that the goggles belonged to the Marine Corps. We therefore conclude that, even if ownership of the goggles were an element of the offense in this case, the item manager's statements were not reasonably likely to have affected the jury's verdict.

Because appellant has failed to meet his "heavy burden" on the third prong of the plain-error test, the admission of the item manager's statements is not reversible error.

Sufficiency of the Evidence

Appellant argues that the evidence introduced at trial was insufficient for a jury to reasonably find that the night-vision goggles were stolen. The state can prove that property is stolen by establishing that (1) the property was lost, (2) someone found it, (3) the finder knew or had reasonable means of ascertaining the true owner, (4) the finder appropriated the property to the finder's own use or that of another not entitled to it, and (5) without first making a reasonable effort to find the owner and return the property to the owner. Minn. Stat. § 609.52, subd. 2(6).

"When reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the verdict and assume that the fact finder rejected any evidence inconsistent with the verdict." *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). "We will not disturb a verdict if the jury could reasonably conclude, given the presumption of innocence and the requirement of proof beyond a reasonable doubt, that the defendant was guilty of the charged offense." *Id.* "Assessing witness credibility and the weight given to witness testimony is exclusively the province of the jury." *Id.* "We

may assume that the jury credited the state's witnesses and rejected any contrary evidence." *Id.*

Appellant first argues that the evidence was insufficient for a reasonable jury to find that the goggles were lost, pointing out that no victim has come forward to assert that he or she lost a set of goggles. But there is sufficient evidence that the property was lost without having to positively identify the true owner: appellant found the goggles sitting on a barrier in Camp Fallujah; no one returned for them over the course of 45 minutes; and normally night-vision goggles were signed out to individual marines from the armory. Because the only reasonable inference that can be drawn from this set of facts is that the goggles were lost, there was sufficient circumstantial evidence to prove this element. *See Anderson*, 789 N.W.2d at 242.

The evidence also sufficiently establishes that appellant had reasonable means of ascertaining the goggles' true owner. Appellant found the night-vision goggles on a Marine base, and goggles normally come from the base armory, which keeps a property list that it can check against a particular pair of goggles. These facts are sufficient to support a finding that appellant could reasonably have found out whether the goggles belonged to the Corps, their most likely owner, by inquiring at the armory. And appellant does not dispute that he appropriated the goggles for his own use or that of his father, and that the goggles did not belong to them.

Appellant next argues that there is insufficient evidence that he failed to make a reasonable effort to find the true owner. Appellant points to testimony suggesting that the normal procedure for lost property at Camp Fallujah was to notify the dispatch shack

of property found. But the record also contains evidence that there was an armory on the base, that the armory was not far from the dispatch shack, that appellant knew night-vision goggles are normally checked out from the armory, and that appellant did not check with the armory about the goggles. Viewing the evidence in the light most favorable to the verdict, these facts are sufficient to support a finding that appellant failed to make a reasonable effort to find the true owner of the goggles.

We conclude that the state presented sufficient evidence to sustain the jury's verdict in all respects.

Ineffective-Assistance-of-Counsel Claim

In his reply brief, appellant argues that his counsel's failure to object to the admission of the item manager's testimonial out-of-court statements was due to ineffective assistance of counsel. Issues raised for the first time by an appellant in the reply brief that were not raised in the respondent's brief are "not proper subject matter for [the] reply brief," and an appellate court may strike them as waived. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (citing what is now Minn. R. Civ. App. P. 128.02, subd. 4). Appellant did not raise his ineffective-assistance claim until his reply brief, and the state did not raise the issue in its brief. We therefore conclude that appellant waived this issue, and strike it.

Affirmed.