STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1727

State of Minnesota,
Respondent,

vs.

Jennifer Susan Kline,
Appellant.

Filed December 3, 2018
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CR-16-8100

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

William J. Mauzy, Casey T. Rundquist, Kaitlin M. Ek, Mauzy Law Office PA, Minneapolis, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Jesson, Judge.

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

JESSON, Judge

After obtaining refunds from Macy's by returning designer clothing with tickets that had been switched, appellant Jennifer Kline was convicted of theft-by-swindle. She

challenges that conviction, arguing that (1) the evidence is insufficient to sustain her conviction; (2) the district court abused its discretion by not allowing her to call an expert witness to testify on clothing valuation; (3) she was entitled to a new trial based on the state's suppression of material exculpatory evidence; (4) the district court erred by denying her request for a *Franks* hearing; and (5) the district court erred by submitting the question of valuation to the jury as a special interrogatory rather than requiring this finding as an element of the offense. We affirm.

FACTS

A sales associate at the Macy's Mall of America store (MOA Macy's) working on November 11, 2015, notified the store's asset-protection manager about a high-dollar return of designer clothing items. The asset-protection manager watched a videotape of the return with the district director of asset protection, and he identified appellant Jennifer Kline as the person making the returns. The manager went to the sales floor, observed Kline and the returned items, and retrieved the clothing. He also personally saw Kline make a second return in the store eleven minutes later on a different floor.

The return of expensive clothing did not end on November 11. The manager later learned that on November 30, Kline made additional returns at MOA Macy's in two different departments. That clothing was likewise collected after the returns. Some of those brands were not carried at MOA Macy's, and the manager was able to verify that some of the tickets did not match the items to which they were attached.

Macy's became concerned that theft was occurring. The returned items were mostly designer clothing, and MOA Macy's does not generally carry designer items. Because the

items had been purchased at Southdale, Macy's designer hub, the lead asset-protection detective at Macy's Southdale store assisted in the internal investigation. She testified that while in 2015, Macy's had no time limit for returning merchandise, a returned item was required to be in saleable condition.

The asset-protection detective accessed security video and identified Kline as making purchases at Southdale in early November. She then photographed the returned items and took their tickets to the sales floor, where she located the items that actually belonged with the tickets. Each ticket also had a customer return label, which she used to access information on Macy's computer system and determine when each item had been purchased and each ticket returned. If the detective could not find the correct item on the floor, she found it in Macy's product-information tool, another system where search criteria can be used to locate a transaction. She found that 36 items had tickets attached that did not match the merchandise returned and that Macy's had given credit for those items in the amount of $5,501.36. She reported this information to police.

An Edina police detective reviewed the information provided by Macy's and obtained a search warrant for Kline's home. He swore in the affidavit supporting the warrant that Kline "made returns using low-end clothing items," but he testified at trial that he had only a suspicion that this was the case and that he was not a clothing expert.

When the detective executed the warrant, he brought along the Macy's district and regional directors of asset protection. He used the Macy's paperwork for the missing clothing items to locate some of the clothing in Kline's home. He also recovered a supply of plastic clothing fasteners and a map with the locations of Southdale Mall and the MOA

marked on it. He then arrested Kline. He obtained a search warrant for Kline's American Express credit card history, which showed credit obtained from MOA Macy's in the amount of $1,937.61 on November 11 and $666.92 on November 30. On those days, Kline also obtained additional credit from Macy's on an EZ Exchange card.

The state charged Kline with one count of theft-by-swindle in excess of $5,000. *See* Minn. Stat. § 609.52, subds. 2(a)(4), 3(2) (2014). Before trial, defense counsel argued that Macy's had not fully complied with discovery requests and had not responded to subpoenas seeking documents, including a copy of Macy's 2015 return policy and Macy's product-information tool. The defense requested a hearing to determine whether Macy's was a state actor for purposes of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and whether the state had violated Minn. R. Crim. P. 9.01. Macy's counsel asserted that Macy's had fully complied with the most recent subpoena, and there were no further documents to be found. The defense also requested a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), arguing that the affidavit supporting the search-warrant application had inaccurately alleged that designer clothing was switched for low-end clothing. The district court denied the defense's motions for *Brady* and *Franks* hearings and ultimately determined that the state had complied with all discovery requirements.

The defense additionally challenged the state's objection to a proposed defense expert witness, Paul Walsh, a forensic accountant who had calculated a discounted rate for the items returned by Kline and was prepared to testify that they were worth less than the total amount Kline was refunded. The district court granted the state's motion to exclude

testimony from Walsh as an expert witness in part on the basis that he was not an expert on clothing valuation, but also because his testimony would not be helpful to the jury since the value of the returned clothing was irrelevant under *State v. Ulvestad*, 414 N.W.2d 737 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988), and *State v. Lone*, 361 N.W.2d 854 (Minn. 1985).

Kline testified at trial. She explained that she worked as a fashion, beauty, and style expert on a home shopping network and was required to bring in a large number of clothing items for on-air presentations. She testified that she had the habit of purchasing items at Macy's and returning items that she did not wear on the show. Kline stated that because she was instructed that she could not go on the air with any tags on clothing, she would remove the tags at home and place them in a bag. When the show ended, she would put all the clothes in her car trunk and return them to Macy's. She admitted that she removed the original tickets from clothing and then reattached tickets with plastic fasteners that she had bought for a garage sale, selecting tickets that "seemed like a reasonable match" for the items.

Kline testified that she did not buy high-end clothes and return low-end clothes or sew different labels into the clothes, and that she thought she was helping Macy's by reticketing the items. She stated that she did not intend to defraud Macy's or cause Macy's any loss. Finally, Kline indicated that in November 2015, she had a high level of personal stress because of family issues, and she returned items at the Mall of America because it was convenient for trips she had to make to the airport.

The jury found Kline guilty of theft-by-swindle. The jury also found by special interrogatory that the value of the property was more than $1,000 but not more than $5,000. The district court convicted Kline and stayed imposition of a sentence for two years, with ten days in jail served on sentence-to-service.

This appeal follows.

D E C I S I O N

At the outset, we note that Kline's challenge to her conviction rests largely on her arguments regarding the value of the returned items. She contends that the state failed to prove her receipt of refunds greater than the actual value of the property returned, which is relevant to the issue of intent, and that the value of the property she received did not exceed $1,000. We address these arguments and related expert and discovery issues and conclude that the evidence is sufficient to support her conviction, that any error in excluding expert testimony or addressing discovery violations was not prejudicial, and that the district court did not err by declining to conduct a *Franks* hearing or submitting the issue of value to the jury by special interrogatory. Central to our analysis is the principle that under Minnesota law, a conviction of theft-by-swindle does not require proof that the value of the property given up by swindle is greater than that received by the victim. *See Lone*, 361 N.W.2d at 860; *Ulvestad,* 414 N.W.2d at 739.

I. The evidence sufficiently sustains Kline's conviction of theft-by-swindle of over $1,000.

Kline challenges the sufficiency of the evidence to support her conviction of theft-by-swindle. A person may be convicted of theft-by-swindle if he or she "obtains

property or services from another person" by an act of swindling, whether by artifice, trick, device, or any other means. Minn. Stat. § 609.52, subd. 2(a)(4). In essence, the swindling statute punishes any fraudulent trick, scheme, or device by which a wrongdoer deprives the victim of property or money by deceit or betrayal of confidence. *State v. Hanson*, 285 N.W.2d 483, 486 (Minn. 1979).

When reviewing the sufficiency of the evidence to support a conviction, an appellate court's review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must determine whether legitimate inferences drawn from the record would allow a fact-finder to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). We will uphold the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

In reviewing a conviction based on circumstantial evidence, we apply a two-step analysis. *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015). We first identify the circumstances proved, deferring to the jury's acceptance of proof of those circumstances and its rejection of contrary evidence. *Id*. We then independently examine the reasonable inferences that could be drawn from the circumstances proved. *Id*. In order to sustain a conviction based on circumstantial evidence, the reasonable inferences that may be drawn

from the circumstances proved as a whole must be consistent with a hypothesis of guilt and inconsistent with any rational hypothesis other than guilt. *Id*.

Here, the state proved circumstances that Kline returned 36 items of designer clothing to Macy's, that the tickets on the returned items were incorrect, and that she received credit back for the merchandise. Kline did not dispute she removed the original tickets herself and attached the incorrect tickets. But she argues that the state failed to prove that the value of the items returned was less than their actual value or that the property's valuation met statutory limits. She also argues that the circumstantial evidence is insufficient to show that she intended to deprive Macy's of any property or that Macy's relied on her representations of the property when issuing the refunds. We address each issue in turn.

Difference in value between property taken and property received by victim

Kline argues that Macy's was not deprived of property by swindle because there is insufficient evidence that by attaching the wrong tickets to the clothing items, she received a greater refund than she would have if the tickets had been correct. But under Minnesota law, a swindle focuses on the taking of a victim's property by deceit or betrayal of confidence, *Hanson*, 285 N.W.2d at 486, and there is no requirement that the value of the property received by the victim must be less than the value of the property given up to the swindler. *See Ulvestad*, 414 N.W.2d at 739. Thus, "[i]n theft by swindle, value becomes irrelevant." *Lone*, 361 N.W.2d at 860. As the Minnesota Supreme Court quoted Judge Learned Hand,

> "[a] man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed."

Id. (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)).

Following this reasoning, in *Lone*, the supreme court held that a defendant's conduct in selling basement waterproofing supported a conviction of theft-by-swindle, even though the victims received something of value for their money. *Id*. In *Ulvestad*, we similarly held that in a prosecution for theft-by-swindle by alteration of odometer readings of used cars, the actual value of the cars was irrelevant, expressly rejecting a balancing test by which the jury would '"consider what the victims gave up in relation to what it was they received."' *Ulvestad*, 414 N.W.2d at 739 (quoting *Lone*, 361 N.W.2d at 860). Therefore, because it is possible to have a conviction for theft-by-swindle even if there is no net loss to the victim, *see id.*, the state was not required to show that Macy's suffered a net loss resulting from Kline's actions.

Value of property taken

For sentencing on Kline's conviction of theft-by-swindle, the state was required to establish the value of the property or services obtained from Macy's within statutory limits. *See* Minn. Stat. § 609.52, subd. 3 (2014) (listing statutory maximum penalties for different categories of theft). By special interrogatory, the jury found that the value of the property

stolen was "more than $1,000 but not more than $5,000." *See* Minn. Stat. § 609.52, subd. 3(3)(a).[1]

Kline argues, however, that because the state did not prove that Macy's relinquished *any* property in reliance on the swindle or that Macy's provided a greater refund than it would have without the incorrect tickets, the state failed to establish that the value of the property exceeded $1,000. We reject these theories. The district director of asset protection testified that Kline returned 36 misticketed items and was credited $5,501.36 in exchange for those items, which the director characterized as a "very large loss to the company." The record thus contains evidence by which the jury could have found that the value of the property obtained from Macy's exceeded the $1,000 statutory threshold. *See id*. Kline's American Express card alone reflected that she received combined credit from Macy's of $2,604.53 dating from November 11 and November 30. The evidence supports the jury's finding that value of the property swindled was between $1,000 and $5,000.

Intent

"[T]he essence of a swindle is defrauding another person by an intentional misrepresentation or scheme." *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). Intent is generally proved by circumstantial evidence, and juries may infer intent by

[1] We note that we do not review an element of the crime under the circumstantial-evidence standard when the jury is presented with direct evidence of that element. *See State v. Horst*, 880 N.W.2d 24, 39-40 (Minn. 2016). Here, the state presented direct evidence of the value of the clothing. Therefore, we review that element under the traditional standard. *See id*.

considering a defendant's actions or words in light of all surrounding circumstances. *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996).

Here, the jury rejected Kline's direct testimony that she did not intend to deprive Macy's of any property. To the extent that proof of this element also rests on circumstantial evidence, we examine the circumstances proved, deferring to the jury's acceptance of proof of those circumstances. *Fox*, 868 N.W.2d at 223. We then independently review the reasonable inferences that may be drawn from those circumstances and examine whether they are consistent with a hypothesis of guilt and inconsistent with any rational hypothesis other than guilt. *Id*.

Kline argues that the circumstantial evidence is insufficient to prove that she intended to defraud Macy's. The circumstances proved with respect to her intent include: her admission that she attached some incorrect tickets to clothing; her possession of a large supply of plastic fasteners that she used to attach those tickets; her purchase of designer clothing at one Macy's store, but returning that clothing to a store across town that did not carry those lines; and her possession of a map showing the locations of both stores. Kline testified that she was only attaching tickets to the returned clothing to help out the associates, and she did not intend to deceive Macy's. But these circumstances proved support a reasonable inference that Kline had an intent to deceive Macy's and obtain property by "an intentional misrepresentation or scheme." *Flicek*, 657 N.W.2d at 598; *See Minn*. Stat. § 609.52, subd. 2(a)(4). In light of the circumstances proved, Kline's alternative hypothesis on the issue of intent, that she made a mistake, is not reasonable.

No reliance

Kline argues that the state did not prove beyond a reasonable doubt that Macy's issued refunds to her based on her submission of incorrectly ticketed items for return. The state must prove that the victim surrendered money or property due to the swindle. *Pratt*, 813 N.W.2d at 873. In other words, it must be shown that the victim relied on the acts of the defendant to surrender property. *Id*. It is not necessary that the victim place special confidence in the accused; rather, it is sufficient that, in obtaining the victim's property or services, a method is "used to dispel the victim's normal suspicion or caution." *State v. Cunningham*, 99 N.W.2d 908, 914 (Minn. 1959).

Here, the circumstances proved include that Macy's sales associates accepted the items for return when those items had the wrong tickets attached. Kline maintains that in light of Macy's liberal return policy at that time, a reasonable hypothesis exists that Macy's would have accepted the returns and issued refunds, even without *any* tickets, unless the merchandise was not from Macy's or it was not saleable. But we cannot conclude that such a hypothesis is reasonable in light of Kline's large returns of designer clothing. Rather, the only reasonable hypothesis, which is consistent with Kline's guilt, is that the associates who processed the returns of relatively high end, designer clothing, relied on the tickets that Kline had attached to the clothing in order to accept it and give Kline a corresponding amount of credit. This is supported by Macy's return policy, which gave discretion to associates to deny items for return. *See Pratt*, 813 N.W.2d at 875 (concluding that in conviction for swindle by falsifying mortgage loan documents, the only reasonable inference to be drawn from uncontradicted evidence was that the lenders

relied on that false information to decide on making loans). Therefore, we reject Kline's argument on this point.

Because the record contains sufficient evidence from which the jury could have found that Kline committed a swindle and that the value of the property taken from Macy's was over $1,000, and the circumstantial evidence sufficiently supports the elements of reliance and intent, the evidence is sufficient to support Kline's conviction of theft-by-swindle.

II. Any error in excluding expert testimony from a forensic accountant on behalf of the defense did not prejudice Kline.

Kline argues that the district court abused its discretion by excluding testimony from her proffered expert, Paul Walsh, a forensic accountant. This court reviews a district court's evidentiary rulings, including the admissibility of expert testimony, for an abuse of discretion. *State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987). A party challenging an evidentiary ruling "has the burden of establishing that the [district] court abused its discretion and that [that party] was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Expert testimony may be admitted if it assists the trier of fact to determine a fact in issue or to understand the evidence. Minn. R. Evid. 702. A person may be qualified as an expert by knowledge, education, skill, or experience. *Id*. "The basic requirement of Rule 702 is the helpfulness requirement," and proposed expert testimony meets this test if it explains a fact or conclusion that is outside the jury's common knowledge or experience. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980).

The defense proposed to have its expert, Walsh, testify as to the value of the items returned, applying a discount from the manufacturer's suggested retail price, which would show that the actual value of the clothing items was only slightly less than the total refund that Kline received. And Kline argues that this would tend to negate an inference of intent. The district court, however, noted that in a case of theft-by-swindle, valuation is irrelevant, citing *Ulvestad*, 414 N.W.2d at 740. And the district court ruled that Walsh could not testify as an expert because he was not an expert on clothing valuation or clothing itself, and his testimony would be based only on internet research.

The district court is correct. The difference in value between the property returned and the amount Kline was refunded is immaterial in a case of theft-by-swindle. *See Ulvestad*, 414 N.W.2d AT 740. But even if we were to agree with Kline that Walsh's proposed testimony had foundational reliability and relevance, any error in failing to admit Walsh's testimony was harmless. *See State v. Bird*, 734 N.W.2d 664, 672 (Minn. 2007). "Reversal is warranted only when the error substantially influences the jury's decision." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). Based on the records from Kline's American Express account, the jury could have reasonably inferred, even without expert testimony, that the value of the returned items was at least $1,000.

Kline further contends that because the district court admitted testimony from Macy's loss prevention personnel, she should have been allowed to present similar testimony to support her defense. She maintains that because Walsh's proposed testimony was highly relevant and no other evidence would serve the same purpose, its exclusion violated her right to present a complete defense. *See State v. Beecroft*, 813 N.W.2d 814,

839 (Minn. 2012) (stating that if fact-finders are exposed to opinions of the state's expert witnesses, a defendant must be provided with an equal opportunity to present the opposing views of the defendant's expert). But as discussed above, the jury had ample additional evidence by which to evaluate the value of the property returned. Thus, any error in denying Walsh's testimony as an expert was harmless beyond a reasonable doubt. *See State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (stating that standard for constitutional error).

III. The district court did not abuse its discretion by failing to order discovery of Macy's product-information tool.

Kline argues that she is entitled to a new trial because the state suppressed material exculpatory information by failing to disclose Macy's product-information tool to the defense. If the state possesses material evidence favorable to the defense in a criminal case, failure to disclose that information to the defense is a violation of due process. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. And under the Minnesota Rules of Criminal Procedure, prosecutors must disclose "[m]aterial or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt." Minn. R. Crim. P. 9.01, subd. 1(6). This court examines whether the district court erred by failing to order a hearing to consider Kline's arguments under *Brady* and rule 9.01. *Cf. State v. Burrell*, 697 N.W.2d 579, 605) (Minn. 2005) (concluding that the district court erred by failing to perform in camera review when the defendant requested discovery surrounding plea negotiations plausibly implicating *Brady*). The district court has "wide discretion to issue discovery orders," and an order will generally not be overturned absent

an abuse of discretion. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009) (quotation omitted).

"There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . ." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977). Here, where there was no evidence of deliberate misrepresentation, we cannot conclude that the state's failure to disclose Macy's product-information tool warranted a hearing under *Brady* as a constitutional issue. *See id*. at 559-60, 97 S. Ct. at 846.

The Minnesota rules of discovery, however, are broader than the federal rules relating to discovery issues and require "open-file discovery" in criminal cases. *State v. Kaiser*, 486 N.W.2d 384, 386-87 (Minn. 1992); *See* Minn. R. Crim. P. 9.01-.02. "The[se] rules are intended to give the parties complete discovery subject to constitutional limitations." Minn. R. Crim. P. 9, cmt. The Minnesota rules provide for discovery of all written or recorded statements, as well as written summaries of oral statements, which are known to the prosecutor. Minn. R. Crim. P. 9.01, subd. 1(2)(a), (b). The prosecutor must also disclose material in the possession of "others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to the prosecutor's office." *Id*., subd. 1a(1). And on a defense motion, the district court may at its discretion order disclosure of other relevant material that may relate to the guilt or innocence of the defendant. *Id*., subd. 2(3).

Here, the district court ruled that Kline was not entitled to a discovery hearing because Macy's was not a state actor. *See Beecroft*, 813 N.W.2d at 837 (noting that alleged violations of a criminal defendant's right to due process may be implicated by "private

conduct [only] if the conduct is sufficiently entwined with governmental character" (quotation omitted)). The district court directed the state to disclose the names of witnesses and other persons with information relating to the case, as well as any written statements and written summaries of oral statements, but did not address the disclosure of Macy's product-information tool.

We agree that in determining whether to order discovery, the district court should have analyzed whether the product-information tool was relevant and exculpatory to Kline's defense. *See* Minn. R. Crim. P. 9.01, subd. 2(3). However, we cannot conclude that under these circumstances, the district court abused its discretion by declining to order discovery of the product-information tool. Kline argues that the tool was relevant and related to her guilt because it would have shown that the returned items came from Macy's and the value of the property returned. But she admitted that she purchased the items from Macy's, and their value was established by the amount of the refund she received. And although the Southdale asset-protection detective testified that she sometimes used the product-information tool to locate the correct clothing item matching the tickets that Kline had attached to the wrong items, Kline acknowledged that she had switched tickets on the items. Therefore, Kline has failed to show how the product-information tool would have assisted her in challenging these elements of the state's case. *See, e.g.*, *State v. Underdahl*, 767 N.W.2d 677, 687 (Minn. 2009) (concluding that, when a defendant challenged the validity of an Intoxilyzer machine, the district court abused its discretion in finding that source-code information from the machine was relevant where the defendant made no showing that the information would assist him in disputing the charges against him).

IV. The district court did not err by denying a *Franks* hearing on the validity of the search warrant.

Kline challenges the denial of her motion for a hearing to challenge the search warrant under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). If a search-warrant application contains intentional or reckless misrepresentations of fact that are material to probable cause, the search warrant is void, and evidence resulting from the search must be suppressed. *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). The U.S. Supreme Court in *Franks* sets forth a two-pronged test for invalidating a warrant: the defendant must show both that the person submitting the supporting affidavit (1) deliberately made a false statement or one in reckless disregard of the truth, and (2) that the statement was material to the determination of probable cause. *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (citing *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85). A misrepresentation is material if, when it is set aside, probable cause no longer exists to issue the warrant. *Moore*, 438 N.W.2d at 105. And "[t]o mandate an evidentiary hearing, the challengers attack must [contain] allegations of deliberate falsehood or of reckless disregard for the truth, and [they] must be accompanied by an offer of proof . . . . Allegations of negligence or innocent mistake are insufficient." *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684.

Here, the search warrant affidavit contained information from the Edina police report that (1) Kline purchased over 36 designer clothing items from Macy's in early November 2015; (2) on two later dates in November, she "made returns using other low end clothing items with Macy's receipts" and received credit back; (3) Macy's verified

"that 36 returned items were not the designer items purchased," resulting in a loss to Macy's; (4) Kline used different stores for her purchases and returns, including purchasing designer items at the Southdale Macy's and returning them to other stores that did not carry the designer brands; and (5) Kline "would place the tags of the higher end items she had purchased on lower quality items before returning them."

Kline argues that the district court erred by denying a *Franks* hearing because the evidence shows that she returned only designer items for other designer items, and the officer was deliberately misrepresenting that she was returning lower-end items to Macy's. Therefore, she argues, there was insufficient probable cause to issue the warrant. In its order denying a *Franks* hearing, the district court found that, although the affidavit describes "low end" clothing items being returned in place of "designer" items purchased, the affidavit was not clear whether "the affiant officer meant switching tags to different brands or switching tags to lower-priced items." We agree that this language is ambiguous. But in view of the other facts in the affidavit, this assertion was not material to the issuance of the warrant. Further, based on the confusing language in the warrant, we cannot conclude that the district court erred by determining that any misrepresentations in the affidavit were only negligent, and a *Franks* hearing was not required. *See id*.

V. The district court did not err by submitting the issue of the value of the swindled property to the jury by special interrogatory.

Kline maintains that the district court erred by instructing the jury to make its finding on the value of the property by special interrogatory, rather than requiring the jury to determine value separately as an element of the crime charged. "[T]his court applies an

abuse-of-discretion standard of review to a district court's jury instructions." *State v. Bowen*, 910 N.W.2d 39, 49 (Minn. App. 2018). In so doing, we review the instructions as a whole and determine whether they accurately state the law in a manner that the jury can understand. *Id*. If the instructions fairly and adequately explain the law of the case and do not materially misstate the law, no error has occurred. *Id*.

At the end of trial, the defense requested bifurcated deliberation under the court's inherent power, asking the court to instruct the jury to determine first whether Kline was guilty, and then to determine the value of the property as a sentencing issue. The defense noted that a finding of a value of over $5,000 increases the statutory maximum penalty for the offense. *See* Minn. Stat. § 609.52, subd. 3(2). The district court denied the request, stating that its instruction would "make very clear that th[e] question [of value] is only to be considered if she's found guilty."

The district court then instructed the jury:

> If you find Ms. Kline is guilty, you have an additional issue to determine, and it will be put to you in the form of a question that will appear on a special verdict form. Was the value of the money or property more than $5,000? Was the value of the money or property more than $1,000 but not more than $5,000? Was the value of the money or property more than $500 but not more than $1,000? Was the value of the money or property not more than $500?
>
> If you find Ms. Kline guilty, you will answer one of the questions "yes." If you should have a reasonable doubt as to the value of the money or property, you should answer "yes" to [the] lesser of the values you believe it had. The value of the money or property is the retail market value at the time of the taking. So you must answer the questions regarding value either "yes" or "no." If you have reasonable doubt as to your answer, then you should answer the question "no."

It then submitted to the jury a verdict form on which the jury could indicate a verdict of guilty or not guilty and then circle "yes" or "no" on additional special verdict questions on the value of the property.

Kline argues that the district court's instruction did not allow the jury to find no value for the property and therefore, to acquit Kline. But the district court made it clear that the jury was to address the property's value separately and only if it had first found Kline guilty of theft-by-swindle, and it directed the jury to determine separately whether reasonable doubt existed as to the value of the property. The district court did not err by submitting the issue of property valuation to the jury by special interrogatory.[2]

VI. Reversal is not required based on cumulative error.

Kline argues that the cumulative effect of the district court's errors denied her a fair trial. In rare cases, an appellant may be entitled to a new trial when "errors, when taken cumulatively, have the effect of denying [the defendant] a fair trial." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted). When addressing a claim of cumulative error, we examine the egregiousness of the errors and the strength of the state's case. *Id*. Kline reiterates her previous assertions of error and maintains that, taken together, they denied her a fair trial. We disagree. Reversals that are based on cumulative error generally involve serious errors, where there is weak evidence of the defendant's guilt. *State v. Cermak*, 350 N.W.2d 328, 333-34 (Minn. 1984). The evidence against Kline was

[2] We also reject Kline's additional argument, made in passing, that the jury's special verdict was akin to a compromise verdict in a civil case.

strong, and none of the errors she has alleged, either separately or together, affected the jury's verdict in this case. *See Fraga*, 898 N.W.2d at 278 (concluding that errors when viewed either individually or together did not affect the verdict).

Affirmed.