STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0104

State of Minnesota,
Respondent,

vs.

Jessica Jo Huntington,
Appellant.

Filed March 9, 2020
Affirmed
Rodenberg, Judge

Stearns County District Court
File No. 73-CR-18-2527

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Renee N. Courtney, St. Cloud City Attorney, Stacy M. Lundeen, Assistant City Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

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

RODENBERG, Judge

Appellant Jessica Huntington appeals from the district court's final judgment of conviction, arguing that her conviction of misdemeanor theft by swindle under Minn. Stat.

§ 609.52, subd. 2(a)(4) (2016), must be reversed. Appellant argues (1) that the evidence is insufficient to support her conviction and (2) that her right to a fair trial was violated because of trial errors. We affirm.

FACTS

Greg Stelten (Stelten) owns St. Cloud Sprinkler Company (St. Cloud Sprinkler) located in Waite Park. In March 2016, Stelten hired appellant as his office manager. Appellant's duties included paying bills, invoicing, and payroll. Stelten gave appellant access to St. Cloud Sprinkler's business checking account. Only appellant and Stelten could access that account. In November 2016, appellant stopped working for St. Cloud Sprinkler.

While going through St. Cloud Sprinkler's books after appellant had ceased working for the company, Stelten noticed what he believed to be "mischievous transactions," including two payments to Montgomery Ward in December 2016 for $150 and $100. Neither St. Cloud Sprinkler nor Stelten in his individual capacity has a Montgomery Ward account. Stelten contacted Montgomery Ward and the Waite Park Police about the concerning transactions.

Waite Park Police Officer Gangle investigated Stelten's report. During the course of his investigation, Officer Gangle attempted to meet with appellant. Appellant did not show up for a scheduled appointment with Officer Gangle and later declined to speak to him. Officer Gangle nevertheless deemed his investigation complete.

Appellant was charged with two counts of misdemeanor theft by swindle under Minn. Stat. § 609.52, subd. 2(a)(4).

At trial, Stelten testified that appellant was the only person other than himself who had access to St. Cloud Sprinkler's business account. Stelten explained that appellant had permission to use the business account but was only to make payments related to St. Cloud Sprinkler. Stelten denied that any of his accounts have ever been "hacked."

Officer Gangle testified, over appellant's objection, that after meeting with Stelten to discuss the possibly fraudulent charges, he contacted Plaza Park Bank and Montgomery Ward to confirm that the two "mischievous transactions" were on St. Cloud Sprinkler's business account. Officer Gangle testified, without objection, that a Montgomery Ward employee told him that appellant tried to make payments on her Montgomery Ward account using her own checking account but that those payments were denied because of insufficient funds.

Officer Gangle also testified, without objection, about his unsuccessful attempts to meet or speak with appellant. Officer Gangle testified that, after completing his investigation, he felt "it was pretty clear and obvious" that appellant had used St. Cloud Sprinkler's business account to make payments on her Montgomery Ward account. He concluded that appellant later tried to cover up the payments made with the business account by using her own checking account to pay back the money that she used.

A credit compliance specialist for the company that provides credit collection services to Montgomery Ward's parent company testified about three trial exhibits which, taken together, show that (1) on December 2, 2016, an automated clearing house (ACH)[1]

[1] An ACH payment is an electronic payment or e-check.

payment was made from an account ending in 8901 for $150 on appellant's Montgomery Ward account and (2) on December 18, 2016, another ACH payment was made from an account ending in 8901 for $100 on appellant's Montgomery Ward account. Appellant's Montgomery Ward account was eventually sent to collections.

At the close of the state's case, appellant moved for a judgment of acquittal. The district court denied the motion.

Appellant testified at trial that she used the computer at St. Cloud Sprinkler for work, but that she also used it for personal matters such as online shopping. Appellant explained that, although she was never provided any direct instruction regarding the use of the St. Cloud Sprinkler's business checking account, she "know[s] better than to make payments on a personal account from a business account." Appellant testified that Stelten never asked her to make payments to any Montgomery Ward account from St. Cloud Sprinkler's business checking account.

Appellant confirmed that she had a Montgomery Ward account, that the account was past due, and that the account was sent to a collection agency with a balance of $483.83. Appellant explained that the only payment that she ever made on her Montgomery Ward account was the initial $15 payment required to open the account. Appellant testified that she was never notified of a $150 or $100 payment being made on her account, but she also conceded that she rarely opened the monthly statements that Montgomery Ward sent to her.

Appellant explained that Officer Gangle contacted her about this case and that she twice talked to him by phone. Appellant defended her decision not to provide a statement, explaining that "[t]alking to him on the phone should have been sufficient."

Appellant testified that a 2016 Yahoo data breach occurred which she believes impacted Stelten's business and personal accounts. Appellant explained that she provided Stelten information concerning the data breach which advised Stelten to change his passwords. Appellant testified that Stelten did not do so. Appellant argued to the jury that this "hacking" accounts for the "mischievous transactions."

The jury found appellant guilty of both counts of theft by swindle. The district court sentenced appellant to a stayed sentence of 90 days in jail and ordered restitution.

This appeal followed.

D E C I S I O N

I. There is sufficient evidence to support appellant's conviction for misdemeanor theft by swindle.

Appellant argues that the circumstantial evidence presented by the state is insufficient to prove either that a swindle occurred or that St. Cloud Sprinkler gave up any property that appellant received by way of a swindle.

"When evaluating the sufficiency of the evidence, we carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation and alteration omitted). Reviewing courts view the evidence "in

the light most favorable to the verdict [and assume] that the fact-finder disbelieved any evidence that conflicted with the verdict." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (citation omitted). "The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the State's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *Id.*

An offense may be proved using direct or circumstantial evidence. Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted).

When the state presents solely circumstantial evidence on one or more elements of an offense, we apply a circumstantial-evidence standard of review. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). The circumstantial-evidence standard requires a "review [of] the sufficiency of the evidence using a two-step analysis." *State v. Barshaw*, 879 N.W.2d 356, 363 (Minn. 2016) (citation omitted). The first step is to "identify the circumstances proved, deferring to the factfinder's acceptance of proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* (quotation omitted). The second step is to "independently examine the reasonableness of all inferences that might be drawn from the circumstances proved to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis of guilt." *Id.* (quotation and alteration omitted). "Circumstantial evidence must form a complete chain that, in view of the evidence as a

whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

At trial, the state needed to prove beyond a reasonable doubt that (1) St. Cloud Sprinkler gave up possession of funds to appellant because of the swindle; (2) appellant intended to obtain for herself the possession of St. Cloud Sprinkler's funds; (3) appellant's act was a swindle; and (4) appellant's acts took place on or around December 6, 2016, and December 20, 2016, in Waite Park. 10 *Minnesota Practice*, CRIMJIG 16.10 (2016).

A swindle is defined as "the cheating of another person by a deliberate artifice or scheme" and "may include a trick or a scheme consisting of mere words and actions, and it does not require the use of some mechanical or other device." *Id.* It is not necessary that St. Cloud Sprinkler have a "special confidence" in appellant. *Id.* A swindle "requires a showing of affirmative fraudulent or deceitful behavior." *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). The concept of a swindle covers a range of criminal actions. *See State v. Ruffin*, 158 N.W.2d 202, 205 (Minn. 1968) (explaining the "range of possibilities" for offenses that constitute a swindle).

The first step of the circumstantial-evidence test requires us to identify the circumstances proved, giving deference to the fact-finder's determinations. *Barshaw*, 879 N.W.2d at 363.

Deferring to the jury's guilty verdict, the circumstances proved at trial are that appellant was employed as an office manager by St. Cloud Sprinkler from March 2016 through November 2016. Only appellant and Stelten had access to St. Cloud Sprinkler's

business checking account. On December 2, 2016, a $150 payment was made to appellant's Montgomery Ward account from a checking account ending in 8901. On December 18, 2016, a $100 payment was made to appellant's Montgomery Ward account from a checking account ending in 8901. St. Cloud Sprinkler's business checking account showed two payments made to Montgomery Ward in December 2016. St. Cloud Sprinkler has never had a Montgomery Ward account, and it was never reimbursed for the payments to Montgomery Ward. Appellant's Montgomery Ward statement shows an ACH payment on December 2, 2016, for $150 and another on December 18, 2016, for $100. Appellant had a Montgomery Ward account while working at St. Cloud Sprinkler and at the time that both the $150 and $100 payments were made. St. Cloud Sprinkler did not authorize any payment to Montgomery Ward.

The second step of the circumstantial-evidence test requires us to "independently examine the reasonableness" of the inferences that may be drawn from the circumstances proved. *Id.*

We first observe that appellant makes no argument that the jury instructions for theft by swindle were incorrect. The definition of swindle is very broad and covers a wide range of actions. *Ruffin*, 158 N.W.2d at 205. We cannot say, as a matter of law, that appellant's actions did not constitute a swindle. The jury found the elements to have been proved, and the record supports that finding.

It is reasonably inferable from the evidence that appellant engaged in deceitful behavior by using St. Cloud Sprinkler's business checking account to make payments on her personal Montgomery Ward account. It appears that appellant continued to use

St. Cloud Sprinkler's account even after her employment had ended. Stelten testified that the St. Cloud Sprinkler business checking account records showed a $150 payment to Montgomery Ward on December 6, 2016, and a $100 payment to Montgomery Ward on December 20, 2016. Appellant's account showed an ACH payment of $150 on December 2, 2016, and another ACH payment of $100 on December 18, 2016. Appellant is the only person involved with a Montgomery Ward account. Appellant was the only employee of St. Cloud Sprinkler other than Stelten who had access to St. Cloud Sprinkler's business checking account information. On this record, the only rational inference from the circumstances proved is that appellant used a deliberate scheme to cheat St. Cloud Sprinkler by unauthorized use of the business checking account and thereby obtain its money for her personal use. We cannot say that the jury's verdict is unsupported on the question of whether there was a swindle.

Concerning appellant's second argument, it is reasonably inferable from the evidence that appellant obtained St. Cloud Sprinkler's funds by way of the swindle. Stelten and the credit compliance specialist testified concerning the two payments made to Montgomery Ward using what the jury reasonably inferred to be St. Cloud Sprinkler's business checking account. Stelten explained that the St. Cloud Sprinkler business account records showed two payments made for $150 and $100 to Montgomery Ward. Stelten testified that St. Cloud Sprinkler was never reimbursed for those amounts.[2] Appellant's

[2] The $100 ACH payment was reversed as an invalid payment. However, no testimony was presented that the money was ever returned to St. Cloud Sprinkler's bank account and Stelten's testimony indicates that the money was never returned.

Montgomery Ward account showed two payments for $150 and $100 respectively within days of the payments shown on St. Cloud Sprinkler's business checking account.

At trial, appellant argued to the jury that St. Cloud Sprinkler's accounts were "hacked." The jury's guilty verdict reflects the jury's rejection of appellant's hacking theory, and that theory is not a circumstance proved. What was proved is that St. Cloud Sprinkler had two specific amounts of money missing from its business checking account in December 2016 and appellant's Montgomery Ward account shows two payments credited to it for the same two specific amounts of money around the same time in December 2016.

The only rational inference from these circumstances is that appellant used St. Cloud Sprinkler's business checking account to make payments on her own Montgomery Ward account. The evidence, even though it is circumstantial, is sufficient to support the jury's verdict.

II. Appellant was not denied a fair trial because of trial errors.

Appellant argues that her right to a fair trial was violated because the state repeatedly elicited improper testimony which the state then emphasized during its closing argument. Appellant concedes that most of the testimony that she now argues was improperly received was not objected to at trial.

The evidentiary issues that appellant argues compromised her right to a fair trial are: (1) hearsay testimony from Officer Gangle about his conversations with Plaza Park Bank and Montgomery Ward employees, (2) testimony concerning appellant's refusal to meet with Officer Gangle, and (3) Officer Gangle's testimony opining that appellant is guilty.

"Evidentiary rulings are committed to the [district] court's discretion and will not be reversed absent a clear abuse of discretion." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002) (citation omitted). "As a general rule, whe[n] a defendant fails to object to a particular error at trial, the defendant is deemed to have forfeited his right to have the alleged error reviewed on appeal . . . ." *Id.*

Appellate courts will consider an issue not raised before the district court if it amounts to plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "Under [a] plain-error analysis, [appellant] is required to establish (1) an error, (2) that is plain, and (3) that affects her substantial rights." *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). "If these three prongs are met, the appellate court then assess whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted).

A. Hearsay testimony about Officer Gangle's conversations with Plaza Park Bank and Montgomery Ward employees

Appellant argues that Officer Gangle's testimony about conversations that he had with unidentified Plaza Park Bank and Montgomery Ward employees was improperly admitted hearsay. Appellant objected at trial to the officer's testimony that he contacted Plaza Park Bank and Montgomery Ward about the "mischievous transactions." Appellant did not object to the question of what the Montgomery Ward employee told him.

Officer Gangle testified that Plaza Park Bank and Montgomery Ward employees told him that St. Cloud Sprinkler's business checking account had charges on it from Montgomery Ward. Officer Gangle further testified that he was put in contact with Montgomery Ward's loss prevention company and "was told that [appellant] was trying to make payments on that bill with her own checking account now, but they were denied" for insufficient funds.

Plain error has limited application when hearsay testimony is admitted at trial. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). There are a multitude of exceptions to the rule against hearsay. *See* Minn. R. Evid. 802, 803, 804. "In the absence of an objection, the state [is] not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule." *Manthey*, 711 N.W.2d at 504.

Because Officer Gangle's testimony went largely unobjected to, it is unknown whether an exception to the rule against hearsay may have applied here. It is "particularly important that a full discussion of admissibility be conducted at trial[]," *id.*, and without such a discussion taking place, we are unable to say that Officer Gangle's hearsay testimony was error that is plain. We cannot discern from this record whether the state had other evidence on those topics that it opted not to produce because appellant did not object to Officer Gangle's hearsay testimony. And, as to the one hearsay objection the district court overruled, we cannot say on this limited record that the district court abused its discretion.

Moreover, and even if it could be said that there was error that is plain, the admission of the arguably hearsay testimony was harmless (regarding Officer Gangle's testimony that he spoke with Plaza Park Bank and Montgomery Ward employees) and did not affect appellant's substantial rights.

B. Testimony concerning appellant's refusal to meet with Officer Gangle

Appellant argues that Officer Gangle's testimony about appellant's choice to remain silent instead of giving "her side of the story" was improper and prejudicial.

Officer Gangle testified about appellant's refusal to meet with him:

> STATE: Did you attempt to contact [appellant]?
> OFFICER GANGLE: I did. I called her and I explained to her what was going on. I wanted to get her side of the story. She said she would come into the police department and speak with me the following day. She never showed up. I called her a couple times. She said that—I told her I would like to do a phone interview with her since she couldn't come in. Every time I contacted her, she was sick, or her kids were sick. She couldn't come in and wouldn't talk to me.
> STATE: Were you ever able to meet with [appellant]?
> OFFICER GANGLE: No.
> STATE: Did you make any attempts to go to [appellant]'s home?
> OFFICER GANGLE: Yes. I went there two or three times. I don't remember the exact number. No one answered the door. I did speak with someone that lives there, a caretaker, and they said she does live at that residence.
> STATE: So fair to say you were never able to obtain a statement from [appellant]?
> OFFICER GANGLE: Correct.
> . . . .
>
> STATE: Based upon the results of your investigation, what did you do next?
> OFFICER GANGLE: After doing my investigation, I couldn't speak with [appellant] and get her side of the story. . . .

In *Jenkins v. Anderson*, the Supreme Court held that impeachment with prearrest silence does not violate either the Fifth or Fourteenth Amendments. 447 U.S. 231, 238-40, 100 S. Ct. 2124, 2129-30 (1980). However, Justice Stevens, concurring in the judgment, explained his belief that "in determining whether the [Fifth Amendment] privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent." *Id.* at 243-44, 100 S. Ct. at 2132 (Stevens, J., concurring). The Minnesota Supreme Court has agreed with Justice Steven's analysis, holding "that if a defendant's silence is not in response to a choice compelled by the government to speak or remain silent, then testimony about the defendant's silence presents 'a routine evidentiary question that turns on the probative significance of that evidence.'" *State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011) (quoting *Jenkins*, 447 at 244, 100 S. Ct. at 2132 (Stevens, J., concurring)).

As the supreme court has noted, when and how a prosecutor may elicit testimony of prearrest silence is unsettled. *State v. Jones*, 753 N.W.2d 677, 688 (Minn. 2008). And *Borg* did not definitively resolve this issue.[3] Where the law is unsettled, any error cannot be plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Although the state's repeated emphasis of appellant's having opted not to talk to police—without some justification for that emphasis—appears troubling, we cannot say on this record that there was error that is plain.

[3] In *Borg*, there was one letter from law enforcement seeking an "interview appointment." 806 N.W.2d at 543. Here, the evidence of compulsion exceeds that one letter.

C. Officer Gangle's testimony opining that appellant was guilty

Appellant argues that Officer Gangle gave improper opinion testimony about the conclusions of his investigation. The state ended its direct examination of Officer Gangle with the following:

> STATE: And what conclusion did you make in regard to the nature of the crime that [appellant] committed, or that you believe she committed?
> OFFICER GANGLE: That she used Mr. Stelten's business account to pay for the items that she bought. And then later she tried to cover it up by using her personal checking account to pay back the charges so they were gone.

In its closing argument, the state referenced Officer Gangle's opinion testimony, explaining that, "[b]ased upon the investigation, [Officer Gangle] was able to determine that funds were used from Mr. Stelten's business checking account, taken from there, and applied to [appellant]'s Montgomery Ward account." The state further argued that, "[b]ased upon [Officer Gangle's] investigation, [Officer Gangle] determined that a crime had been committed." The first of those comments is proper argument from the evidence. The second comment is emphasis of improperly admitted opinion testimony on the ultimate issue for the jury.

The admission of Officer Gangle's testimony opining that appellant was guilty is troubling. But even if we were to conclude that this testimony amounts to error that is plain, appellant's substantial rights were not impacted. First, the evidence against appellant is very strong. Second, in the overall trial setting, where the jury had heard about Officer Gangle's investigation upon which the state had charged appellant with a crime, the jury likely knew without being told that the officer had formed an opinion about whether

appellant had committed a crime. Third, neither appellant's silence nor Officer Gangle's opinion testimony had any bearing on appellant's defense at trial that the "mischievous transactions" had resulted from St. Cloud Sprinkler's accounts being "hacked." The jury rejected that far-fetched defense and surely would have regardless of Officer Gangle's testimony about appellant's silence and his own opinions concerning the case.

Appellant has not shown any trial error that is plain and that affected her substantial rights. We therefore affirm appellant's conviction.

Affirmed.