STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0539

State of Minnesota,
Respondent,

vs.

Gerhard Arthur Ziemann,
Appellant.

Filed March 11, 2024
Affirmed
Reilly, Judge*

McLeod County District Court
File No. 43-CR-19-1521

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

Marc Sebora, Hutchinson City Attorney, Kenneth G. Janssen, Assistant City Attorney, Gavin, Janssen & Stabenow, Ltd., Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Greg Scanlan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Schmidt, Judge; and Reilly, Judge.

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

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant Gerhard Arthur Ziemann challenges his conviction for theft by swindle, arguing insufficient evidence establishes that he acted with the requisite intent at the time of the offense. Appellant alternatively argues that he is entitled to a new trial because the prosecutor committed misconduct by eliciting hearsay statements, and because the district court erred by denying his judgment of acquittal. We affirm.

FACTS

The jury heard the following testimony during trial. In 2019, the Hutchinson Police Department had a private company, Cars on Patrol (COP), tow appellant's vehicle for violating a city ordinance prohibiting vehicles from parking on city streets for more than 24 hours. Appellant, realizing his vehicle was missing, contacted law enforcement and learned that his vehicle had been towed. Appellant gave COP a $350 check to release his vehicle a few days later. Two days after tendering the check and retrieving the vehicle, appellant contacted the city about the parking ordinance. That same day, appellant canceled the check used to release his vehicle from COP's possession.

Respondent State of Minnesota charged appellant with misdemeanor theft by swindle, violating Minn. Stat. § 609.52, subd. 2(a)(4) (2018). The district court held a jury trial, at which the jury heard testimony from the officers involved with the tow, the owner of COP, and appellant. The jury found appellant guilty of theft by swindle. After trial, appellant moved for judgment of acquittal, arguing that he was never identified as the

defendant during trial. The district court denied appellant's motion, determining that there was enough identification evidence to present the question to the jury.

This appeal follows.

DECISION

I. Sufficient evidence supports appellant's conviction.

Appellant argues that the evidence is insufficient to support his conviction, claiming the state failed to prove that he intended on canceling the check when he retrieved the vehicle from COP. When evaluating the sufficiency of the evidence, we review the record to determine "whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict." *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). We assume the jury believed the evidence that supported the verdict and disbelieved any evidence that conflicted with the verdict. *Id.* "We will not disturb the verdict if the jury, while acting with proper regard for the presumption of innocence and regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Id.* at 25-26.

The parties agree that the nature of the evidence presented to prove intent is circumstantial. Circumstantial evidence is "evidence from which the [fact-finder] 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). A defendant's state of mind is generally proven by circumstantial evidence and can be inferred from their words or actions. *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000).

We apply a two-step test to evaluate the sufficiency of circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved, assuming the jury resolved all factual disputes in a manner "consistent with the verdict." *Id.* at 599. We assume the jury believed the state's witnesses and disbelieved defense witnesses. *Id.* Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We independently examine, with no deference to the jury, "the reasonableness of all inferences that might be drawn from the circumstances proved." *Id.* We will not reverse a conviction based on circumstantial evidence unless there is a reasonable inference other than guilt. *Id.*

A person commits theft by swindle when they, "whether by artifice, trick, device, or any other means, obtain[] property or services from another person." Minn. Stat. § 609.52, subd. 2(a)(4). "The elements of theft by swindle are: (i) the owner of the property gave up possession of the property due to the swindle; (ii) the defendant intended to obtain for himself or someone else possession of the property; and (iii) the defendant's act was a swindle." *State v. Pratt*, 813 N.W.2d 868, 873 (Minn. 2012). To "swindle" "requires a showing of affirmative fraudulent or deceitful behavior." *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). And a "swindler" is "[a] person who willfully defrauds or cheats another." *Id.* (quoting *Black's Law Dictionary* 1010 (7th ed. 1991)). Thus, "[t]heft by swindle requires the intent to defraud," and "[i]nherent in the intent requirement is that the swindler must act affirmatively to defraud another." *Id.* Appellant, citing *State v. Belfry*, 353 N.W.2d 224 (Minn. App. 1984), notes that the intent to defraud must be

contemporaneous with the act of taking, and he argues that he did not form the intent to cancel the check until after retrieving his vehicle from COP's impound lot, claiming that he decided to cancel the check after speaking with the city.

The circumstances proved demonstrate that appellant: (1) gave COP a $350 check to release his vehicle from their impound lot; (2) spoke to the city about the parking ordinance but did not formally challenge the tow; and (3) canceled the check used to release his vehicle from COP's impound lot. Appellant maintains that the circumstances proved fail to show that he acted with the requisite intent. We disagree and, as evidenced by its verdict, so did the jury. *See Harris*, 895 N.W.2d at 600-01 (noting that under the first prong of the circumstantial-evidence standard, we defer to the jury's credibility determinations, do not reweigh conflicting evidence, and "resolv[e] all questions of fact in favor of the jury's verdict").

While appellant testified that he did not intend on canceling the check when he retrieved his vehicle, this court defers to the jury's credibility determinations and does not reweigh conflicting evidence. *Id.* at 600-01. Construing "conflicting evidence in the light most favorable to the verdict," *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008), suggests that, by canceling the check used to get the vehicle out of COP's impound lot, appellant intended on getting his vehicle back without paying COP. We, therefore, conclude that the circumstances proved are consistent with guilt and preclude any rational hypothesis inconsistent with guilt. The evidence is sufficient for the jury to conclude that appellant intended to defraud COP and sustains his conviction beyond a reasonable doubt.

II. The prosecutor did not commit plain-error misconduct.

Appellant argues that the prosecutor committed plain-error misconduct. When the defendant fails to object during trial, alleged prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "An error is plain if it was clear or obvious." *Id.* (quoting *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002)). The defendant bears the burden of establishing error that is plain, but upon doing so the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant impact on the jury's verdict. *Id.*

Appellant argues that the prosecutor committed plain-error misconduct by eliciting hearsay statements and offering evidence without foundation. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Absent an exception, hearsay is not admissible. Minn. R. Evid. 802. Each of appellant's three alleged errors will be discussed in turn.

Appellant first alleges that the prosecutor elicited testimony from the owner of COP as if he was present for the release of appellant's vehicle. Appellant claims that testimony from the employee that was present for the release of the vehicle was needed to lay foundation for the invoice that was admitted into evidence. Pursuant to Minn. R. Evid. 803(6), records "kept in the course of a regularly conducted business activity" may be admissible at trial "if it was the regular practice of that business activity to make" such a record and "a qualified witness" is able to confirm such at trial. The owner testified about COP's policy for releasing vehicles, which includes providing proof of ownership and

paying a fee. And the owner confirmed that providing invoices is part of COP's standard practice. The prosecutor thus did not commit plain-error misconduct by obtaining the owner's testimony about the requirements for getting the vehicle released and offering the invoice as evidence because both are permissible under the business records exception to the hearsay rule.

Appellant next argues that the prosecutor committed misconduct by offering a copy of the check with "STOP PAYMENT" stamped on it because the bank employee that processed Ziemann's check-cancelation request did not testify at trial. An out of court statement offered to prove something other than the truth of the matter asserted is not hearsay. *See* Minn. R. Evid. 801(a), (b), and (c) 1989 comm. cmt. ("Hearsay is an out of court statement that is used in court to prove the truth of the matter asserted in the statement. If the out of court statement is being offered for some other purpose, such as to prove knowledge, notice, or for impeachment purposes it is not hearsay.") The check reading "STOP PAYMENT" could have been offered to show that COP was not paid for its services. Because the check could have been offered to prove something other than the truth of the matter asserted, the prosecutor did not commit plain-error misconduct by offering it into evidence. *See Ramey*, 721 N.W.2d at 302 (noting plain errors are "clear or obvious." (quotation omitted)).

Finally, appellant claims that testimony related to his wife's statement to law enforcement was hearsay and violated his confrontation right. At trial, the officer involved testified about his attempts to contact appellant about the canceled check.

> Q: Did you attempt to make further contacts with [appellant]?
> A: Yes, on multiple occasions.
>
> . . . .
>
> Q: Do you recall was that on May 25 of 2019?
> A: I believe on May 25 I made contact with his wife . . . by phone.
>
> Q: And did you indicate . . . that you were attempting to contact her husband?
> A: Yes. I informed her of the payment issue. She had told me that she was aware of the issue with the towing company payment and that [appellant] was in the hospital and did not have his phone on him but she would speak to him that week about making the payment to the towing company.

This line of questioning makes clear that the prosecutor's questions tried to outline the officer's attempts at contacting appellant rather than eliciting testimony about incriminating statements made by appellant's wife. And the officer's testimony that wife stated that she would speak to appellant about paying COP appears to have been offered to establish the officer's attempts at contacting appellant. These statements, therefore, are not hearsay. Minn. R. Evid. 801(c) (defining "hearsay" as statements offered "to prove the truth of the matter asserted"). Moreover, the prosecutor's questions were directed at what the officer said to appellant's wife rather than what appellant's wife said to the officer. *See State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) ("attempting to elicit or actually eliciting clearly inadmissible evidence may constitute misconduct"). Thus, this line of questioning does not suggest that the prosecutor elicited inadmissible testimony. The prosecutor therefore did not commit plain-error misconduct by asking the officer if he told appellant's wife that he was trying to contact appellant.

Appellant also claims that testimony about his wife's statement to law enforcement violated his constitutional right to confront witnesses. Both the United States and Minnesota Constitutions afford criminal defendants the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (noting that Confrontation Clause claims are analyzed the same under the federal and state constitutions). The Confrontation Clause prohibits testimonial statements from being offered for the truth of the matter asserted when the defendant is unable to cross-examine the declarant. *Anderson v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)). Because the statement was not offered for the truth of the matter asserted, it did not violate appellant's confrontation right.[1] And because appellant has demonstrated no error by the prosecutor eliciting this evidence, we need not address the remaining prongs of the plain-error test.

III. The district court properly denied appellant's motion for judgment of acquittal.

Appellant argues that the district court erred by denying his motion for judgment of acquittal, claiming that he was never identified as the defendant that was on trial. We review the denial of a motion for judgment of acquittal de novo. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013). Identification of the defendant must be proven beyond a reasonable doubt. *State v. Armstrong*, 249 N.W.2d 176, 178 (Minn. 1976). But

[1] Appellant also summarily states that testimony related to his wife's statement "likely violated the statutory bar on statements protected by marital privilege." We decline to address the issue. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (applying the rule that arguments not briefed are waived).

whether identification evidence is sufficient is a question for the jury. *State v. Otten*, 195 N.W.2d 590, 591 (Minn. 1972).

Our review compels us to conclude that there was enough evidence of appellant's identity as the defendant to submit the question to the jury. Although none of the witnesses identified appellant as the defendant during trial, appellant's testimony corroborated his identity as the defendant that was on trial. Appellant acknowledged that COP towed his vehicle, that he gave COP a check for $350 to release his vehicle, and that he canceled the check two days later. As a result, because there was enough evidence of appellant's identity as the defendant that was on trial to submit the question to the jury, the district court properly denied appellant's motion for judgment of acquittal.[2]

Affirmed.

[2] Because we have identified no errors, we need not consider appellant's final argument that the cumulative impact of the alleged errors warrants reversal.