STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2062

State of Minnesota,
Respondent,

vs.

Patricia Marie Viktora,
Appellant.

Filed July 18, 2011
Affirmed
Connolly, Judge

Mower County District Court
File No. 50-CR-10-463

Lori A. Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.*

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

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

CONNOLLY, Judge

Appellant challenges her conviction of theft of more than $5,000 but not more than $35,000, arguing that the district court committed plain error by not instructing the jury that it had to find the value of the stolen money beyond a reasonable doubt and by failing to give a *Spriegl* instruction. Because the district court did not commit plain error when it instructed the jury on theft and because any error in the omission of a *Spriegl* instruction was harmless, we affirm.

FACTS

When G.W., 87, visited the nursing home in which her husband resided, she met appellant Patricia Viktora, 64, who was a volunteer. Appellant began helping G.W. with tasks such as grocery shopping and provided assistance when G.W. was ill. When G.W. went to visit one of her sons over the 2009 Thanksgiving holiday, she gave appellant a garage-door opener with which she could enter G.W.'s house to care for G.W.'s birds.

When G.W.'s son brought her home, she wanted to show him the money she kept in an unlocked safe in the basement. G.W. thought it was about $9,000; she knew it had been $6,100 in September 2008, and she remembered adding to it in October and November 2008. She and her son went to the basement and found no money in the safe; one of them called the police. G.W. also called appellant, told her that money was gone from the safe, and asked her not to come over then.

But appellant came immediately and joined G.W., her son, and a police officer in the basement. The officer noted that appellant made a point of touching several items

and said her fingerprints would be all over the house, including on the safe, because G.W. had repeatedly asked her to put money in the safe.

When the officer interviewed appellant, she told him that (1) one day during G.W.'s absence, she went to the basement to check the water softener, noticed that the blanket covering the safe had been pulled up, and pulled it down; (2) she thought the safe was locked but pushed the door to make sure; (3) G.W. had asked her to put money in the safe but not to take anything out of the safe; and (4) she went into the basement on a later day to check the water softener again and saw nothing out of place.

Appellant was later interviewed by a detective, whom she told without being asked that G.W. had her "go down the basement, get money out of the safe." Appellant also told him that she thought she might have touched the safe's handle and that she never went into the basement after that day. When confronted with the discrepancies between her statements to the officer and her statements to the detective, appellant admitted to taking $2,750 of G.W.'s money from the safe.

The jury heard tapes of appellant's interviews with the officer and with the detective. It also heard appellant testify that (1) the detective had pressured her to confess to theft; (2) she had not taken any money from G.W.; (3) she came up with the figure $2,750 because she calculated that to be the value of the work she had done for G.W.; (4) G.W. had asked her to take $1,000 that was in a can in the kitchen and put it into the safe, but appellant refused; (5) G.W. had later asked her both to take money from the safe for groceries and to add more money into the safe; and (6) a set of G.W.'s keys was kept in her husband's room at the nursing home.

G.W. testified that she had never asked appellant to do anything with the safe.

The parties submitted virtually identical lists of 18 proposed jury instructions. The last three items on both lists were "16. Theft – Taking Property of Another – Defined," "17. Theft – Taking Property of Another – Elements," and "18. Value."

Before closing arguments, the jury was instructed:

> It's alleged that . . . [appellant] did intentionally and without claim of right, take, use, transfer, conceal, or retain possession of movable property belonging to [G.W.] and with the intent to permanently deprive [her] of said property. The property is identified as being $6,000 in cash.
>
> To this [appellant] has pled not guilty. This constitutes a denial of every material allegation in the Complaint. Therefore, it is necessary for the State of Minnesota through the Mower County Attorney to prove all of the material allegations to the degree stated in order to establish [appellant's] guilt.
>
> . . . .
>
> *The elements of [theft] are as follows:*
>
> *First, the money alleged to have been taken was the property of [G.W.]*
>
> *Second, [appellant] intentionally took the money. This means that [appellant] took the money on purpose and [appellant] knew or believed that it was the property of another person. . . .*
>
> *Third, [appellant] knew or believed that she had no right to take the money.*
>
> *Fourth, [G.W.] did not consent to [appellant's] taking it.*
>
> *Fifth, [appellant] intended to deprive the owner [of] possession of the money or believed that the act would deprive the owner permanently of possession.*
>
> *Sixth, [appellant's] act took place between November 24th and December 3rd, 2009, in Mower County.*
>
> *If you find that each of these elements has been proven beyond a reasonable doubt, [appellant] is guilty.*
>
> [Appellant] is presumed to be innocent of the charges made against . . . her, and that presumption abides with a

> defendant unless and until [appellant] ha[s] been proven guilty of the charge by proof beyond a reasonable doubt.
>
> The burden of proving guilt is on the State. [Appellant] does not have to prove . . . her innocence.[1]

Following closing arguments, the jury was instructed:

> [T]here will be two verdicts given to you when you retire into the juryroom. There will be a guilty verdict form and there will be a not guilty verdict form.
>
> I'm going to go through the forms with you.
>
> If you find that the State has not or has failed to prove beyond a reasonable doubt that [appellant] is guilty of Theft, you would use the form that says in the upper right-hand corner "Verdict of Not Guilty"[.] If that is your decision, the foreperson will sign that form, date it, and note on it the time that you reached the verdict.
>
> Now, if you find that the State has proved beyond a reasonable doubt that [appellant] is guilty of the crime of Theft, you'll use the form that says, "Verdict of Guilty" in the upper right-hand corner. Your foreperson will date and sign it, but before your foreperson does that if you [d]o find a verdict of guilty, you're going to be asked to consider the following:
>
> *You have an additional issue to determine and [it] will be put to you in the form of a question that will appear on the verdict form. The question is, "Was the value of the money more than $5,000 but not more than $35,000", or there's a second question, "Was the value of the money more than $1,000 but not more tha[n] $5,000". You will answer one of those questions "Yes." If you have a reasonable doubt as to the value of the money, you should answer "Yes" to the lesser values you believe it had.* Those two questions are on the

[1] The italicized language is taken from CRIMJIG 16.02. The comment to CRIMJIG 16.02 says, "*See* CRIMJIGs 16.76 to 16.83 for issues of value and nature of the property."

> verdict form and it says under each question "Yes" and "No".[2]

The jury found appellant guilty of the theft of more than $5,000 but not more than $35,000 of G.W.'s money. Imposition of her sentence was stayed, and she was placed on probation for ten years.

Appellant challenges her conviction, arguing that the trial court committed plain error by using the standard instructions rather than instructing the jury that it had to find the value of the money beyond a reasonable doubt and by not giving a *Spriegl* instruction sua sponte.

D E C I S I O N

1. Standard Instructions on Theft and Value

When it is not argued that an unobjected-to jury instruction violated the defendant's right to a jury trial, the instruction is generally reviewed under the plain-error standard. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007). To reverse a conviction because of a plain error in jury instructions, we must first determine that the instructions were misleading or confusing on fundamental points of law. *State v. Caine*, 746 N.W.2d 339, 353 (Minn. 2008).

Appellant argues that it was plain error not to instruct the jury that the value of the amount stolen is an element of theft and that the state therefore had the burden of proving that value beyond a reasonable doubt. But "jury instructions must be viewed in their

[2] The italicized language is taken from CRIMJIG 16.82.

entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). A review of the jury instructions here indicates that the jury was repeatedly instructed that the burden of proof of appellant's guilt for each element of the crime was on the state. Because the amount stolen would be irrelevant unless the jury found that appellant was guilty of theft, the jury was not asked to find the amount unless and until it found guilt. These instructions followed CRIMJIG 16.02 and CRIMJIG 16.82; they also reflected Minn. Stat. § 609.52, which first lists the acts constituting theft (Minn. Stat. § 609.52, subd. 2 (2010)) and then provides for sentencing according to the amount of the theft (Minn. Stat. § 609.52, subd. 3 (2010)). Appellant provides no authority for her implied arguments that the standard instructions misstate the law, that the statute is invalid, or that the district court committed plain error by instructing the jury using the standard instructions that reflected the relevant statute.

The jury was also instructed that, if it had a reasonable doubt about the value of the money, it was to choose the lesser amount—a quantitative determination. This instruction clearly differed from the "reasonable doubt" instruction given earlier that, if the jury had a reasonable doubt about any element of the theft, appellant was not guilty—a qualitative determination. Appellant's argument that the "reasonable doubt" instruction that preceded the instruction on the elements of theft should have been repeated before the instruction on the determination of value ignores this essential difference.

The district court did not commit plain error by using the standard instructions on theft and value. *See Caine*, 746 N.W.2d at 354-55 (holding that, even though standard

instruction did not specify the level of the state's burden, the trial court did not commit plain error by using the standard instruction).[3]

2. Omission of "Bad Acts" Instruction

"We evaluate the erroneous omission of a jury instruction under a harmless error analysis." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004).

The jury heard the tape of appellant's approximately two-hour interview with the detective. After telling appellant that he did not think she was a vicious person who would take money from an 87-year-old woman and suggesting that appellant needed money because of her husband's surgery, the detective said,

> I talked to the neighbors. They saw you in that house. Okay? During the summer when [G.W.] wasn't around. I mean, we got burglary charges. We got interfering with . . . felony investigation when you're touching everything with the deputy there. Everything. I don't think you're that kind of person. . . . I think bills and the surgery and the holidays just got so overwhelming. Okay?
>
> . . . I'm going to look the other way on entering her house when she's not there. I'm looking the other way [on] you touching everything, if you're sorry about this. . . . [But] [e]verything I'm seeing here just does not add up. You got to keep your stories straight.
>
> . . . .
>
> What you're telling [the deputy at G.W.'s house] is not what you're telling me, and people who are afraid, people who don't want to get caught . . . they have to keep things exactly the same, and you're not.

The detective then offered to not charge appellant with burglary or with interference with a felony investigation if she would cooperate by telling him what really

[3] *But see State v. Koppi*, ___ N.W.2d ___, ___ (Minn. June 8, 2011) (holding that standard CRIMJIG was erroneous). We do not imply that use of the standard instruction is never erroneous.

happened to G.W.'s money. Appellant then told the detective that the safe contained $2,700, not $6,000 as G.W. had said, and that appellant was angry with G.W.'s sons and felt "used" by them. When asked where the money was, appellant said that she had spent part of the money and had the rest. At the end of the interview, at appellant's suggestion, she and the detective hugged each other.

Appellant was charged only with theft, not with burglary or interference with felony investigation. Neither the attorneys nor the district court made any reference to burglary or interference with felony investigation in the jury's hearing, and the jury heard appellant testify, "I've never been in any trouble. I've never been in any contact with the court system or the law." The jury was instructed, "You are not to convict [appellant] of any offense of which [she] is not charged."

Appellant's attorney did not request a *Spriegl* or other-bad-acts instruction in regard to burglary or interference with felony investigation, and the district court explained why it would not give an instruction on lesser crimes.

> [W]e've been talking about felony obstruct and we've been talking about felony burglary. Now, I'm going to give the instruction that they're only supposed to consider the charged crime. If I start talking about lesser crimes, I don't know if I'm opening the door now to start speculating on whether I'm talking in that instruction about burglary or obstruct felony theft, but I think the case law is really pretty clear that you don't give the lesser crimes instruction unless there's evidence of a lesser crime.

Appellant argues that the district court should have given the *Spriegl* instruction sua sponte, relying on *State v. Meldrum*, 724 N.W.2d 15, 21 (Minn. App. 2006) (holding that *Spriegl* instruction "is necessary to ensure that jurors do not convict the defendant of

the uncharged *Spriegl* offense rather than the charged offense") *review denied* (Minn. Jan. 24, 2007). Here, there was no possibility of the jurors convicting appellant of any offense other than theft. The evidence pertained only to the taking of money from G.W.'s safe, and the jury was instructed only on the elements of theft. Thus, even if the district court did err by not giving a *Spriegl* instruction, that error was harmless; there is no reasonable likelihood that the omission affected the verdict. *See Lee*, 683 N.W.2d at 316 (erroneous omission of jury instruction is evaluated for harmless error); *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (plain error affects defendant's substantial rights only if there is a reasonable likelihood that it substantially affected the verdict).

The district court did not commit plain error by using the standard instructions rather than instructing the jury that it had to find the value of the money beyond a reasonable doubt, and any error in the omission of a *Spriegl* instruction was harmless.

Affirmed.