This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0160

State of Minnesota,
Respondent,

vs.

Abbott Morris Johnson,
Appellant.

Filed December 31, 2012
Affirmed
Crippen, Judge[*]

Scott County District Court
File No. 70-CR-11-261

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, 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; Hooten, Judge; and Crippen, Judge.

---

[*] Retired judge of the Minnesota Court of Appeals, serving 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

CRIPPEN, Judge

Appellant Abbott Johnson challenges his conviction for financial-transaction-card fraud, in violation of Minn. Stat. § 609.821, subds. 2(1), 3(a)(1)(iii) (2010). Because his asserted errors were not raised in trial proceedings and did not affect appellant's substantial rights, we affirm.

FACTS

On August 25, 2010, a customer used another individual's debit card to make two separate purchases at a gas station. The owner of the debit card noticed the purchases on his bank statement and reported it to police and his debit-card company. A sheriff's deputy investigated the incident. He obtained the gas station's "transaction journal," which confirmed the two purchases, as well as a security video, which depicted the person making the two purchases. The deputy then produced a still photograph from the video and sent out a tri-county crime alert. A police officer from another police agency notified the deputy that the man in the still photograph may be appellant. The deputy then assembled a six-photograph lineup that included appellant. After the gas-station clerk identified the photograph of appellant as the man who made the two purchases at issue, appellant was charged with financial-transaction-card fraud.

At trial, the state offered into evidence the transaction journal that the investigating deputy obtained from the gas station. The state offered the journal into evidence through the deputy, and defense counsel did not object to its admission into evidence. The journal indicated that the debit card was used twice on August 25, 2010,

to make purchases of $226.30 and $54.95. The gas-station clerk also testified about the value of the transactions:

> Q And, so, on that day, when you helped this man -- when he left the store, he left with real merchandise worth real money; correct?
>
> A Yes.
>
> Q And the receipts indicate that it was about . . . together about $281.25?
>
> A Yes.

Before closing arguments, the district court instructed the jury on the elements of financial-transaction-card fraud, including the date and place of the act, the taking of property of another, the use of a transaction card to obtain the property, the absence of the card owner's consent for the use, and the user's knowledge that he acted without the owner's consent. The court failed to instruct the jury on the value of the property obtained, and the jury made no findings regarding the value. Defense counsel did not object to the jury instructions. The jury subsequently found appellant guilty of financial-transaction-card fraud between $250 and $2,500.

Appellant now argues that the district court plainly erred by (1) failing to instruct the jury on the value element of financial-transaction-card fraud and (2) admitting into evidence the transaction journal without proper foundation.

D E C I S I O N

1.

District courts are allowed "considerable latitude" in their selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). But "[a]n instruction is in error if it materially misstates the law. Furthermore, it is well settled that the court's instructions must define the crime charged." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (citations omitted). "Failure to object to jury instructions before they are given generally constitutes a forfeiture of the right to an appeal based on those instructions." *State v. Vance*, 734 N.W.2d 650, 654 (Minn. 2007). But an unobjected-to instruction affecting a substantial right may be reviewed under the plain-error standard. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Under the three-prong test for reversing due to plain error, the defendant must show (1) error, (2) that was plain, and (3) that affected substantial rights. *Griller*, 583 N.W.2d at 740. "An error is 'plain' if it is clear or obvious." *State v. Kuhlmann*, 806 N.W.2d 844, 853 (Minn. 2011). "An error affects substantial rights if the error was prejudicial and affected the outcome of the case." *Id.* Appellant bears the burden to prove the error affected his substantial rights, which is considered a "heavy burden." *State v. Hokanson*, 821 N.W.2d 340, 356 (Minn. 2012) (quotations omitted).

If each prong is met, we then assess "whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740. The United States Supreme Court has determined that the plain-error exception is to be used "sparingly." *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046

(1985) (quotation omitted); *see Frazier v. Burlington Northern Santa Fe Corp.*, 811 N.W.2d 618, 627 (Minn. 2012) (approving *Young*, in civil proceeding). The integrity of proceedings is adversely impacted when a party is permitted to choose "to try a case on one theory while holding a second theory in reserve for a possible appeal." *Id.* at 628.

A person is guilty of financial-transaction-card fraud if he, "without the consent of the cardholder, and knowing that the cardholder has not given consent, uses or attempts to use a card to obtain the property of another." Minn. Stat. § 609.821, subd. 2(1). If the value of the stolen property is more than $250 but not more than $2,500, the person may be sentenced to prison for five years and/or to payment of a fine not more than $10,000. *Id.*, subd. 3(a)(1)(iii). Value is not listed as an element in the pattern jury instructions for financial-transaction-card fraud, an offense for which sentencing depends on the value of the property the person obtained or attempted to obtain. *See* Minn. Stat. § 609.821, subd. 3(a)(1) (listing the sentences for financial-transaction-card fraud based on the value of the property); *see also* 10 *Minnesota Practice*, CRIMJIG 16.52 (2006) (not listing value as an element). But comments to the pattern jury instructions for financial-transaction-card fraud contain a reference to additional jury instructions on the value and nature of the property involved. *See* 10 *Minnesota Practice*, CRIMJIG 16.52 cmt. (2006) (referencing 10 *Minnesota Practice*, CRIMJIG 16.82 (2006), which directs the jury, once they have found guilt beyond a reasonable doubt, to determine the value of the property obtained). And a jury determination of the value of the property is essential when the severity of the sentence depends on the value. *See, e.g.*, *State v. Gerou*, 283 Minn. 298, 302, 168

N.W.2d 15, 17-18 (1969) (finding that the jury must find the value of the property in a theft prosecution).

Appellant argues that the district court plainly erred by submitting jury instructions that omitted the value element of financial-transaction-card fraud. Because the value of the property obtained is an element necessary to determine the severity of a financial-transaction-card fraud sentence, it must be determined by the jury. *See State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006) (holding that under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the jury must decide fact issues that affect sentencing). Since the right to a jury determination of facts under *Blakely* cannot be forfeited by silence, appellant's failure to request a jury instruction on the value of the stolen property was not a waiver of his right to assert error. *See State v. Osborne*, 715 N.W.2d 436, 443 (Minn. 2006) (finding that silence or failure to object is not a waiver of the right to a jury determination of facts under *Blakely*). The district court's erroneous omission from its instructions is plain. *See State v. Brown*, 792 N.W.2d 815, 823-24 (Minn. 2011) (stating that an error is plain if it contravenes case law).

But the district court's omission of an element from the jury instructions does not necessarily require appellate reversal. *See Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999) (concluding that erroneous jury instructions were harmless when the omitted element was not contested at trial and the record contained evidence establishing the omitted element). The third prong of the plain-error analysis requires us to determine whether the plainly erroneous jury instructions affected appellant's substantial rights. "An error affects substantial rights if the error was prejudicial and

affected the outcome of the case." *Kuhlmann*, 806 N.W.2d at 853. And "[a]n erroneous jury instruction is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *Vance*, 734 N.W.2d at 659 (quotation omitted).

Appellant has failed to meet his heavy burden to show that the erroneous jury instructions affected his substantial rights. Appellant did not contest the value of the two transactions, and his theory of the case was always that this was a case of mistaken identity—that the man in the security video was not him. The jury's verdict shows that it did not believe this theory. Moreover, the evidence against appellant on the value element was strong. The state submitted, without objection, a transaction journal that confirmed that the value of the purchases was $226.30 and $54.95, for a total of $281.25. And even excluding the transaction journal, the gas-station clerk testified that "the receipts indicate that [the purchases were] . . . together about $281.25." It is especially significant that appellant did not offer any evidence to suggest that damages from the alleged conduct were less than $281.25. *Cf. Vance*, 734 N.W.2d at 661 (finding reversible error where appellant's testimony included denial of the element that was omitted from district court instructions); *State v. Watkins*, 820 N.W.2d 264 (Minn. App. 2012) (similar circumstances), *review granted* (Minn. Nov. 20, 2012).

Even if the district court had instructed the jury to make a finding on the value element, the outcome would not have differed. The erroneous jury instructions, therefore, did not affect appellant's substantial rights. *See Neder*, 527 U.S. at 18, 119 S. Ct. at 1838 (holding that the omission of an element may be harmless where it is

supported by "uncontroverted evidence"). Moreover, appellant seeks application of the plain-error exception in circumstances where his choice of a trial theory suggests that relief for appellant on the issue would not serve the fairness or integrity of the proceedings.

2.

Because appellant failed to object to the admission of the transaction journal into evidence, we again review the issue under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *Griller*, 583 N.W.2d at 740. Under the plain-error analysis, we must determine whether there was (1) error, (2) that was plain, and (3) that affected substantial rights. *Griller*, 583 N.W.2d at 740. Only if these prongs are met, we may correct the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c); *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). The rules of evidence bar hearsay unless it fits under a recognized exception. *See* Minn. R. Evid. 802 (barring admission of hearsay), 803 (listing exceptions to the hearsay rule), and 804 (same).

The business-records exception is a recognized exception to the hearsay rule. Minn. R. Evid. 803(6). Under this exception, "[a] memorandum, report, record, or data compilation, in any form" is admissible "if kept in the course of a regularly conducted business activity." *Id.* The exception has three requirements: (1) "that the evidence was kept in the course of a regularly conducted business activity," (2) "that it was the regular practice of that business" to record it, and (3) "that the foundation for [the] evidence is

shown by the custodian or other qualified witness." *Nat'l Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 61 (Minn. 1983).

Although the custodian need not testify, the person laying foundation must be familiar with how the business compiles its documents. *Compare id.* at 62 (holding that one business entity may submit the records of another business under the business-records exception if it can lay the foundational requirements), *and Kohn v. La Manufacture Francaise Des Pneumatiques Michelin*, 476 N.W.2d 184, 188 (Minn. App. 1991) (holding that test results were admissible under the business-records exception because an expert could testify that he was familiar with the results of the tests and how the tests were conducted), *review denied* (Minn. Dec. 13, 1991), *with In re Child of Simon*, 662 N.W.2d 155, 160-61 (Minn. App. 2003) (holding that evaluation letters were inadmissible under the business-records exception because no evidence showed that the witness was familiar with how the custodian compiled her records or evaluated her patients).

Appellant argues that the district court plainly erred by admitting into evidence the gas station's transaction journal, and that this error affected his substantial rights. The transaction journal was hearsay evidence admitted to prove the truth of the matter asserted—the date, time, and total value of the two alleged fraudulent transactions. *See* Minn. R. Evid. 801(c). Yet because the journal is essentially a recorded receipt of the two transactions, it is admissible under the business-records exception. Gas stations generally keep records or receipts of their customers' purchases. And these transactions are regularly conducted business activity.

But the district court erred by admitting the transaction journal into evidence without requiring the state's witness to lay the foundational requirements of Minn. R. Evid. 803(6). Although a gas-station employee presumably recorded the transactions in the journal, the state offered the transaction journal into evidence through the investigating deputy. Because the deputy was not the custodian of the transaction journal, he was required to show that he was at least familiar with how the gas station compiled its business records. *See Kohn*, 476 N.W.2d at 188. The deputy did not testify whether these transactions were recorded in the course of a regularly conducted business activity, whether it was the regular practice of the gas station to record these transactions in a journal, or whether he was familiar with how and when the gas station recorded these transactions. The gas-station clerk, who might have established foundation for admission of the record, did not testify regarding the journal. The district court erred by admitting the transaction journal without requiring the state to lay further foundation.

The error is plain if it is clear or obvious, meaning that "it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles." *Brown*, 792 N.W.2d at 823. The error in this case contravened the plain language of Minn. R. Evid. 803(6), which requires "the custodian or other qualified witness" to show that the business record is kept in the course of a regularly conducted business activity, and that it was the regular practice of the business to record it. Minn. R. Evid. 803(6); *Nat'l Tea Co.*, 339 N.W.2d at 61. The state laid none of this foundation before the district court admitted the transaction journal.

Despite the error, appellant did not establish the third prong of the plain-error analysis, which requires us to determine whether the plainly erroneous admission of the transaction journal affected appellant's substantial rights. *See Kuhlmann*, 806 N.W.2d at 853 (stating that the error must be prejudicial and affect the outcome of the case). Even without the admission of the transaction journal, the state elicited uncontroverted evidence on the value element; the gas-station clerk testified that "the receipts indicate[d] that it was about . . . $281.25." The evidence on the value element, even excluding the transaction journal, is sufficient to affirm the conviction. Moreover, the only issue disputed at trial was the identification of the man in the security video who made the two fraudulent purchases. The transaction journal merely confirmed the value of the purchases, an amount that was never disputed. And appellant does not now claim on appeal that he would produce evidence that the purchases were any amount less than $250. The admission of the transaction journal did not affect the outcome of the case. Accordingly, its admission did not affect appellant's substantial rights.

Affirmed.