STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1543

State of Minnesota,
Respondent,

vs.

Bryan Doyle Scherf,
Appellant.

Filed January 22, 2008
Affirmed
Kalitowski, Judge

Itasca County District Court
File No. CR-05-3194

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

John J. Muhar, Itasca County Attorney, Lori J. Flohaug, Assistant Itasca County Attorney, Itasca County Courthouse, 123 Northeast Fourth Street, Grand Rapids, MN 55744 (for respondent)

John M. Stuart, State Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

Appellant challenges his conviction for theft, arguing that because the jury was not asked to find that the value of the property stolen was more than $2,500, an element of the offense was not established beyond a reasonable doubt and his conviction must be reversed. Appellant further argues that because theft was the predicate felony for the burglary, his burglary conviction must also be reversed. We affirm.

D E C I S I O N

Appellant argues that his theft conviction should be reversed because the jury was never asked to determine that the value of the property appellant stole was more than $2,500. We disagree.

District courts are allowed "considerable latitude" in selecting jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This court reviews jury instructions "in their 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) (citation omitted). An instruction is erroneous "if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Appellant argues that the district court committed plain error in failing to instruct the jury on the value element of his theft offense. This court reviews unobjected-to jury instructions for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For an appellate court to grant relief for "an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* An error affects substantial

rights if it is prejudicial, in other words, "if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Id.* at 741. If all three prongs of the *Griller* test are satisfied, this court may "remedy the error to ensure fairness and the integrity of the judicial proceedings." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

Here, the first two prongs of the *Griller* test are satisfied. A defendant has the right "to have all the elements of the offense with which he is charged submitted even if the evidence relating to these elements is uncontradicted." *State v. Carlson*, 268 N.W.2d 553, 560 (Minn. 1978). And it is the prosecution's burden to prove every element of the offense beyond a reasonable doubt. *State v. Winston*, 412 N.W.2d 432, 433 (Minn. App. 1987). Minn. Stat. § 609.52 provides that "[w]hoever commits theft may be sentenced . . . to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both, if the value of the property or services stolen exceeds $2,500 . . . ." Minn. Stat. § 609.52, subd. 3(2) (2006). Accordingly, appellant was entitled to have the value element submitted to the jury, and the district court's omission of that element was plain error.

But appellant cannot establish that the error affected his substantial rights. The Minnesota Supreme Court has concluded that failure to submit an element of the offense to the jury is necessarily prejudicial in some situations. *E.g.*, *State v. Moore*, 699 N.W.2d 733, 738 (Minn. 2005). But the supreme court has also held that such an omission is harmless error when "there is no reasonable likelihood that a more accurate instruction would have changed the outcome . . . ." *Ihle*, 640 N.W.2d at 917.

Here we conclude that the error was harmless. The evidence of the stolen property's value that was presented at trial was uncontroverted. One of the victims estimated the value of the stolen items to be $30,000, well over the statutorily-required amount of $2,500. She also stated that one bracelet that was stolen was purchased for almost $5,000 just two months before it was stolen. Appellant never argued that the value of the stolen property was less than $2,500. Because appellant made no showing that the district court's error affected the outcome of the case, we conclude that appellant is not entitled to reversal of his theft conviction.

Finally, because we conclude that the district court's error was harmless, we reject appellant's argument that the district court's error also requires reversal of his burglary conviction.

Affirmed.