STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1836

State of Minnesota,
Respondent,

vs.

Janelle Elaine Wilson,
Appellant.

Filed October 13, 2009
Affirmed
Connolly, Judge

Meeker County District Court
File No. 47-CR-07-1094

Lori Swanson, Attorney General, Peter D. Magnuson, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101; and

Stephanie Beckman, Meeker County Attorney, Meeker County Courthouse, 325 Sibley Avenue North, Litchfield, MN 55355 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jodie L. Carlson, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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 two counts of felony theft by swindle under Minn. Stat. § 609.52, subd. 2(4) (2006), arguing that the evidence was insufficient to support the jury's verdicts, and that the prosecutor's statements in closing argument were misconduct amounting to plain error. Because we find that the evidence was sufficient to sustain the jury's verdicts, and that the prosecutor's statements in closing argument did not constitute plain error, we affirm.

FACTS

Appellant Janelle Elaine Wilson was convicted of two counts of felony theft by swindle, Minn. Stat. § 609.52, subd. 2(4). The first count involved a theft of $2,619.12 from Avenues for Care that took place in Meeker County between February 20, 2006, and August 19, 2006. The second count involved a theft of $950 from Avenues for Care that took place in Meeker County between August 20, 2006, and November 25, 2006.

Appellant, a licensed practical nurse, provided personal care services to her mother, who preferred to receive care at her house rather than move to a nursing home. The mother was financially eligible to receive care, and Meeker County authorized personal care services up to a maximum of 15 hours per week at the rate of $9.50 per hour to be provided by a personal care assistant. Appellant worked as that personal care assistant because her mother requested that she provide the care. She was not paid directly by the county, but instead was paid by Avenues for Care, a provider organization.

During the time appellant was providing personal care services for her mother, she also became employed at the Bethesda Heritage Center nursing home (Bethesda Nursing Home) in Willmar, Minnesota. Appellant submitted time sheets to Avenues for Care, many of which showed hours caring for her mother that overlapped hours that she worked at Bethesda Nursing Home. Because appellant was physically present at her job at Bethesda Nursing Home, she could not possibly have been at her mother's home providing care services during some of the times for which she billed Avenues for Care for those services. Appellant submitted time sheets at both jobs, which showed 276.75 overlapping hours billed during the Count I time period and 100 overlapping hours billed during the Count II time period.

After investigation, the state charged appellant with two counts of felony theft by swindle. The jury found appellant guilty, and she received a stay of imposition on each count on the conditions that she serve 30 days in jail, be placed on supervised probation for five years, and pay a $500 fine, fees, and $3,579.12 in restitution.

D E C I S I O N

I. The evidence was legally sufficient to sustain the jury verdicts convicting appellant of two counts of felony theft by swindle.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of 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 the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Review of a sufficiency-of-the-evidence claim is limited to determining whether the jury could have

reasonably concluded that the defendant was guilty of the charged offense. *State v. Griese*, 565 N.W.2d 419, 429 (Minn. 1997). The reviewing court "does not retry the facts, but instead considers the evidence in the light most favorable to the jury's verdict and assumes the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Id.* Circumstantial evidence is entitled to the same weight as direct evidence. *State v. Pirsig*, 670 N.W.2d 610, 614 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). If the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational theory other than guilt, a jury verdict based solely on circumstantial evidence will not be reversed. *Id.* A convicted person must point to evidence within the record that, in light of the evidence taken as a whole, makes a theory of innocence seem reasonable. *Id.* Because a jury is in the best position to evaluate circumstantial evidence, its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

To convict appellant of theft by swindle, the state had to prove four elements beyond a reasonable doubt: (1) that Avenues for Care paid money to appellant because of the swindle; (2) that appellant acted with the intention of obtaining for herself possession or title of the money; (3) that appellant's act was a swindle, defined as cheating another by deliberate artifice or scheme, which may be accomplished by a false representation as to past events; and (4) that appellant's acts took place in Meeker County during the periods alleged in the complaint. Minn. Stat. § 609.52, subd. 2(4); 10 *Minnesota Practice*, CRIMJIG 16.10 (1999).

The dispute in this case centers on whether appellant swindled Avenues for Care. The key evidence consists of time sheets reflecting overlapping hours—a series of instances in which appellant was at work at the nursing home and physically could not have been present at her mother's house providing care. The parties disagreed as to how the jury should have interpreted this evidence. Appellant argued at trial, and contends on appeal, that all of the hours for which she billed and received payment from Avenues for Care were worked, albeit sometimes mislabeled and marked at incorrect times. The state argued, and the jury found, that appellant intentionally defrauded Avenues for Care.

Appellant concedes that some of her time sheets contained erroneous times, but argues that the state's evidence was insufficient to support a finding that she intentionally defrauded Avenues for Care because she presented evidence that she made up the hours and was merely a sloppy bookkeeper. Appellant testified at trial that all of the hours—that is, the amount of hours rather than the particular times stated—for which she billed Avenues for Care were in fact performed, either by herself or by her daughter as a temporary substitute. Similarly, appellant's mother testified that she did receive all of the care listed on the time sheets.

The state presented evidence of repeated instances of overlapping billing. For the time period of February 20, 2006 through August 19, 2006, relevant to Count I, the jury was presented with evidence of 54 separate instances of overlapping billing in a 180-day period (amounting to 30% of the days), which totaled 276.75 hours. For the time period of August 20, 2006 through November 25, 2006, relevant to Count II, the jury was presented with evidence of 19 instances of overlapping billing in a 97-day period (nearly

20%), which totaled 100 hours. Further, for a number of months appellant submitted time sheets indicating that she spent more than 40 hours per week performing caretaking and housekeeping tasks at her mother's house—far in excess of the 15 hours per week authorized by Meeker County, and at a time when appellant was reporting hours worked at Bethesda Nursing Home. The state argued that the sheer volume of overlapping billing, both in terms of frequency and in terms of the number of hours, made it unreasonable to believe appellant's defense that she had been merely careless with her time sheets but did work all of the claimed hours. Further, the state argued, appellant's mother's testimony that appellant worked all of the hours was not credible because the mother admitted to the investigating police officer that she signed blank time sheets presented to her by appellant, although she backed away from this statement at trial by testifying that she again reviewed the time sheets (which she had already signed) after her daughter had filled in the times.

Viewing the evidence in the light most favorable to the convictions, it is clear that the jury did not find appellant and her mother credible, and disbelieved their testimony that appellant worked all of the hours that she billed. The jury is in the best position to make credibility determinations. *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008). From the 73 separate instances of appellant billing and receiving pay for work at times when she could not have performed it, combined with her billing hours for taking care of her mother and her house that amounted to more than a full-time job, the jury could reasonably have concluded that appellant intentionally obtained money that she did not earn by means of falsely representing the hours that she worked.

II. The prosecutor's unobjected-to references to appellant as "greedy" and to her defense as a "ploy for sympathy" in closing argument do not constitute plain error.

This court will reverse for prosecutorial misconduct only if, in relation to the whole trial, the misconduct impaired the defendant's right to a fair trial. *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009). When a defendant fails to object to an alleged error, as in this case, this court applies the plain-error standard of review. *Id.* On plain-error review, we determine whether (1) there was error, (2) the error was plain, and (3) the error affected the appellant's substantial rights. *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005). The burden is on the appellant to show that plain error occurred. *Leutschaft*, 759 N.W.2d at 418. Error is plain if it is clear or obvious and not hypothetical or debatable. *Id.* at 420. If we find that there was plain error that affected the appellant's substantial rights, we then determine whether we should address the error to ensure the fairness and integrity of the judicial proceedings. *MacLennan*, 702 N.W.2d at 235.

We have recognized an "important distinction" between prosecutorial misconduct and prosecutorial error: misconduct implies a deliberate or grossly negligent violation of a rule or practice, whereas error implies a mistake or misstep of the sort that trial lawyers will occasionally make. *Leutschaft*, 759 N.W.2d at 418. However, the standard of appellate review for prosecutorial error is the same as the standard of review for prosecutorial misconduct. *Id.*

Appellant challenges two aspects of the prosecutor's arguments and trial conduct: (1) the prosecutor's admonition to the jury to reject the defendant's "ploy for sympathy," and (2) the prosecutor's references to her as "greedy."

We first consider the prosecutor's admonition to the jury to reject appellant's "ploy for sympathy." A prosecutor is free to specifically argue that there is no merit to a particular defense or argument. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). This extends to reasonably anticipating arguments that defense counsel will make in closing arguments. *Id.* It is clearly improper, however, to belittle a defense in the abstract. *Id.* (holding that it is improper for a prosecutor to argue in closing that defense attorneys throw in collateral issues to get jury attention away from facts).

It is proper for a prosecutor to make statements in order to persuade a jury not to return a verdict based on sympathy for a defendant. *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985). The supreme court has found "nothing . . . improper" in a prosecutor's closing argument that reminded jurors of their roles as fact-finders and told them to determine "the truth" by looking to the evidence. *State v. Gates*, 615 N.W.2d 331, 341 (Minn. App. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

Looking at the prosecutor's closing argument as a whole, the prosecutor's references to sympathy likely did not divert the jury from its ultimate fact-finding role. The prosecutor argued that appellant "tried to milk the system" and specifically asked the jury to apply the law as instructed by the judge. The state emphasized the evidence pointing to appellant's intent, discussed the reasonable-doubt standard, and spent a

significant portion of his closing argument discussing the credibility of the various witnesses. While the prosecutor did spend a significant amount of time pleading with the jury not to decide the case based on sympathy for appellant, and did argue that appellant was attempting to elicit sympathy, the thrust of the closing argument was that her arguments and testimony were not credible and that the evidence proved beyond any reasonable doubt that she was guilty of theft by swindle.

Further, the district court specifically instructed the jury to find the facts objectively and to avoid sympathy: "In your deliberations you must put aside any sympathy, bias, or prejudice for or against either party in this case. You must be absolutely fair. Remember that it is fair to convict if the evidence and law require it." A jury is instructed before empanelment that it "must decide [the] case solely on the evidence produced in court and the law [as instructed by the judge], and not on the basis of bias, passion, prejudice, or sympathy." 10 *Minnesota Practice*, CRIMJIG 1.01B (2006). It defies common sense to find that it is prosecutorial misconduct, or even error, to make an argument to the jury based on the court's own proper instruction that sympathy should play no role in the jury's decision making.

We now consider the prosecutor's references to appellant as "greedy." Character attacks are improper during a prosecutor's closing argument. *State v. Washington*, 521 N.W.2d 35, 39 (Minn. 1994) (taking issue with the phrase "just the way the defendant is"). However, the state is entitled to prove motive even if motive is not an element of the crime. *State v. Ness*, 707 N.W.2d 676, 687 (Minn. 2006).

Appellant argues that the prosecutor's reference to her as greedy was a "gratuitous character attack." This argument would be more persuasive had she not been on trial for theft, a financial crime. The state's argument that appellant was greedy was not extensive, but instead consisted of a few sentences suggesting that greed was a fair prism through which to view the case—in short, that greed was the reason that the appellant stole money. The prosecutor used the word "greed" or "greedy" a total of three times, all at the start of the state's closing argument: "Ladies and gentlemen, just like I said yesterday, this case is a simple case. It revolves around one word. It revolves around greed. Greed. Somebody got greedy. Somebody tried to milk the system for all it was worth, and it worked. She got a lot of money." The state's theory of the case was that appellant deliberately engaged in a fraudulent scheme to obtain money from Avenues for Care to which she was not entitled. The argument that she acted out of greed was consistent with this theory and the evidence, and it was not improper for the prosecutor to say as much during closing argument.

The prosecutor's remarks in closing argument were not misconduct. Because there was no error, it is unnecessary to analyze whether the error was plain or affected appellant's substantial rights.

Affirmed.