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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1491**

State of Minnesota,  
Respondent,

vs.

Gale Allen Rachuy,  
Appellant.

**Filed August 13, 2012  
Affirmed in part, reversed in part, and remanded  
Halbrooks, Judge**

St. Louis County District Court  
File No. 69DU-CR-10-3321

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

Mark S. Rubin, St. Louis County Attorney, Kristen E. Swanson, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

**UNPUBLISHED OPINION**

**HALBROOKS**, Judge

Appellant challenges his convictions of felony issuance of a dishonored check and misdemeanor issuance of a dishonored check, arguing that (1) the state failed to prove

venue, (2) the district court violated appellant's right to testify in his own defense, (3) the district court improperly instructed the jury, and (4) the misdemeanor conviction must be vacated because the district court never announced a sentence on that charge. Because we conclude that the district court did not err during the trial, we affirm on the first three issues. But because the district court did not announce a sentence on the misdemeanor conviction, we reverse and remand for resentencing on that conviction.

### **FACTS**

On June 17, 2010, appellant Gale Rachuy went to Duluth Lawn and Sport, which is located in St. Louis County. David Chrysler, the store sales manager, helped appellant pick out a utility vehicle, mowers, a leaf blower, a trimmer, and a lawn tractor. Related to the utility-vehicle purchase, appellant completed and signed an application for registration with the Minnesota DNR. On July 8, Chrysler had the items delivered to appellant's address in Mahtowa, which is in Carlton County. The delivery driver received a check from appellant for \$14,279.32 and gave the check to Chrysler when he returned to the store. Peter Gassert, the owner and manager of Duluth Lawn and Sport, testified that his bank subsequently advised him that there were insufficient funds for appellant's check because the account had been closed. The bank for Duluth Lawn and Sport is located in St. Louis County. In the course of investigating the incident, Shana Greene, with the Duluth Police Department, showed Chrysler a photo lineup, and he identified appellant as the person who had purchased the items.

Tammy Fuller, a banking center manager at Bank of America, testified regarding appellant's bank account from which the dishonored check to Duluth Lawn and Sport

was written. She stated that a notice was mailed to appellant on February 23, 2010, informing him that his account was going to be closed. The bank officially closed the account on April 6, more than two months before appellant first visited Duluth Lawn and Sport.

In an unrelated incident, on August 13 or 14, appellant went to the Lakeside Express Shop in Duluth and purchased \$40 worth of gas. Robert Dock, owner of the Lakeside Express, testified that appellant asked Dock if he could write a check, but requested that Dock not cash the check for two days because of a family emergency in the Twin Cities. Dock, who wanted to help appellant out, agreed. When Dock later tried to deposit appellant's check, he discovered that the U.S. Bank account from which the check was written had been closed in December 2005.

The state charged appellant with one count of felony theft of services, one count of felony issuance of a dishonored check, and one count of misdemeanor issuance of a dishonored check. Appellant appeared pro se at trial. After the first day of trial, the state dismissed the count of felony theft of services. The jury found appellant guilty of the two remaining counts. The state then moved to have appellant sentenced as a career offender, and the jury found that appellant's conduct was part of a pattern of criminal conduct. The district court sentenced appellant to 60 months in prison. This appeal follows.

## **D E C I S I O N**

### **I.**

Under Minn. Stat. § 609.535, subd. 2 (2010), a person who “issues a check which, at the time of issuance, the issuer intends shall not be paid” is guilty of a crime. One of

the elements of the felony charge that the state had to prove beyond a reasonable doubt was that appellant's act took place on or about July 8, 2010, in St. Louis County. Appellant contends that the state failed to prove the venue element because the check made out to Duluth Lawn and Sport was presented to the delivery driver in Carlton County. Appellant's argument is without merit.

In prosecuting a charge, the state must try the defendant in the county where the offense was committed. Minn. Stat. § 627.01, subd. 1 (2010). The statute defines "county where the offense was committed" as "any county where any element of the offense was committed or any county where the property involved in an offense is or has been located or where the services involved in an offense were provided." Minn. Stat. § 627.01, subd. 2 (2010). Whether the state proved beyond a reasonable doubt the element of venue is a legal question, which we review de novo. *State v. Pierce*, 792 N.W.2d 83, 86 (Minn. App. 2010).

Here, the jury heard evidence that both Duluth Lawn and Sport and its bank are located in St. Louis County, where the case was tried. The additional fact that the dishonored check was given to the delivery driver at an address in Carlton County does not restrict the trial venue to Carlton County. Based on the application of the statutory requirements to the facts of this case, we conclude that the state met its burden and that St. Louis County was a proper venue for trial.

## **II.**

Appellant contends that the district court violated his right to testify and his due-process right to present a complete defense when it did not allow him to testify about his

financial situation or his whereabouts after he wrote the checks. Due process provides the defendant with the right to explain his conduct to a jury. *State v. Richardson*, 670 N.W.2d 267, 288 (Minn. 2003). The right to testify provides great protection against any restriction of the defendant's ability to explain his intent and the motivation underlying that intent. *Id.* But the district court may impose limits on a defendant's testimony and should exclude irrelevant testimony. *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984). This court reviews "evidentiary rulings under an abuse of discretion standard even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

Appellant wanted to testify that his financial situation was chaotic because he was in and out of jail. As a preliminary matter, appellant maintained throughout trial that he was not the person who wrote the check to Duluth Lawn and Sport. Given that theory of defense, any testimony as to appellant's financial situation would not have been relevant to the charge of felony issuance of a dishonored check. The proposed testimony would have only applied to the misdemeanor issuance of the \$40 check to the Express Shop.

Appellant argued at trial that the reason he did not return to pay Dock was because he was in jail after he wrote the check for the gas. Appellant also stated that, after he was arrested on federal charges on September 2, his bank accounts were frozen. In addition, appellant wanted to expand on the convictions that were admitted as *Spreigl* evidence to tell the jury who he was and why he was unable to pay Dock. The district court prohibited that testimony because any argument that appellant did not pay Dock because

he was in jail amounted to an alibi defense. And appellant did not give the required notice of that defense. *See* Minn. R. Crim. P. 9.02, subd. 1(5)(e). The district court also ruled that appellant could not testify about his criminal record and his financial situation because the information was irrelevant. The district court explained to appellant that the fact that “you couldn’t possibly have paid [Dock] and everybody has taken your money, that’s not relevant to whether or not you wrote the check on a closed account.”

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. If the evidence is not relevant, then it is not admissible. Minn. R. Evid. 402. The fact that appellant was in jail after he wrote the check to the Express Shop did not make it more or less likely that he did not intend to pay the check at the time he issued it. Likewise, the fact that the federal authorities seized his bank accounts after he wrote the Dock check was not relevant to appellant’s intent at the time he wrote the check. We agree that the testimony that appellant wanted to give was not relevant. Therefore, we conclude that the district court did not abuse its discretion by making these evidentiary rulings.

### **III.**

Appellant contends that the district court erred by instructing the jury that the law allows, but does not require, a jury to find the element of intent had been proved beyond a reasonable doubt if the jury found that appellant did not have accounts with the banks from which appellant wrote the checks. This court reviews the 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). If the jury instructions materially misstate the law, there is error. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). Appellant did not object at trial to the district court's instructions. A defendant's failure to object to a jury instruction generally constitutes a waiver of the right to appeal the instructions. *State v. Hersi*, 763 N.W.2d 339, 342 (Minn. App. 2009) (citing *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998)). But this court will review the unobjected-to instruction for plain error, which requires (1) error; (2) that is plain; and (3) that affects appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three prongs are met, we then determine whether we should address the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

In part, the district court gave the following instruction on the issuance of a dishonored check:

[T]he elements of issuing a dishonored check are:

First, the defendant issued a check to Duluth Lawn and Sport in payment for goods or services.

Second, the defendant intended at the time of issuing the check that it would not be paid.

In determining whether the requirement of intent has been proven beyond a reasonable doubt, you should consider all the evidence of intent. The law allows, but does not require, you to find such an intent from proof beyond a reasonable doubt of the following:

the defendant, at the time of issuing the check, did not have an account with the bank the check was drawn on.

The same instruction on intent was provided for the misdemeanor charge.

The statute provides that intent can be established upon “proof that, at the time of issuance, the issuer did not have an account with the drawee.” Minn. Stat. § 609.535, subd. 3(1) (2010). The district court’s instruction followed the language of the statute almost verbatim. Because the district court instructed the jury in a manner that is consistent with the statute, it did not err.

#### IV.

Appellant contends that, because the district court did not announce a sentence on the misdemeanor conviction, the misdemeanor conviction must be vacated. Minn. R. Crim. P. 27.03, subd. 4, provides:

When pronouncing sentence the court must:

(A) State precisely the terms of the sentence.

(B) State the number of days spent in custody in connection with the offense or behavioral incident being sentenced. That credit must be deducted from the sentence and term of imprisonment and must include time spent in custody from a prior stay of imposition or execution of sentence.

On appeal, this court may review a sentencing order to determine whether it is inconsistent with statutory requirements or inappropriate. Minn. R. Crim. P. 28.05, subd. 2. Whether the district court complied with the rules of criminal procedure is a question of law, which this court reviews de novo. *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

The following exchange occurred at the sentencing hearing:

THE COURT: Therefore, I am going to sentence you to 60 months to the Commissioner of Corrections, along with a \$50 fine, plus surcharges and fees. You will serve two-thirds of that sentence. One-third of it will be on supervised release.

If you violate any conditions of supervised release, obviously, you could go back in and serve the remainder of that time. There is—DNA is required, this is a felony, and \$40 in restitution to Mr. Dock will be ordered along—

PROSECUTOR: Your Honor, I apologize for interrupting the Court. Neither victim is interested in restitution from this defendant.

THE COURT: Okay. I won't order restitution then, but that fine and surcharges will be taken out of the prison wages. That will be all.

Although the district court clearly sentenced appellant on the felony conviction and started to address the misdemeanor conviction in its sentencing order, it ultimately failed to address the precise terms of the misdemeanor sentence as required under Minn. R. Crim. P. 27.03, subd. 4. Because the sentencing order is incomplete, we reverse in part and remand to the district court for sentencing on the misdemeanor conviction consistent with rule 27.03, subdivision 4. We affirm the other issues.

**Affirmed in part, reversed in part, and remanded.**