STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2016

State of Minnesota,
Respondent,

vs.

Brent W. Peterson,
Appellant.

Filed April 22, 2008
Affirmed
Wright, Judge

Hennepin County District Court
File No. 05044702

David E. Albright, 7814 131st Street West, Apple Valley, MN 55124 (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Willis, Judge; and Wright, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of theft by swindle, arguing that (1) there is insufficient evidence to support his conviction of count one, and (2) the jury instruction on the elements of a theft-by-swindle offense was erroneous. We affirm.

FACTS

AGA Medical Inc. (AGA) is a closely held corporation that manufactures devices used to treat various heart defects. Founded in 1995, AGA has successfully grown into a company with approximately 125 employees and approximately $90 million in annual sales. In connection with unrelated shareholder-dispute litigation, John Borg served as AGA's receiver and interim chief executive officer.

In spring 2004, Borg began to investigate the circumstances surrounding several large checks paid to Creative Data and Design, Inc. (CDD), a company owned and operated by appellant Brent Peterson. Borg discovered during this investigation that, between 2001 and 2004, William Liebesny, head of AGA's information technology (IT) department and longtime friend of Peterson, purchased more than $4.2 million in largely unnecessary computer hardware and software from CDD at grossly inflated prices. Not only were many of these transactions structured to bypass AGA's payment-oversight and inventory-control mechanisms, but Liebesny appeared to be directing Peterson as to the amount and nature of items to charge AGA. Between 2001 and 2004, Peterson transferred almost $900,000 to another business owned by Liebesny.

Based on this scheme, Peterson and Liebesny were charged with eight counts of theft by swindle (over $35,000), in violation of Minn. Stat. § 609.52, subds. 2(4), 3(1) (2004). Count one involved property that was not found when AGA performed a comprehensive inventory. The remaining counts involved hundreds of individual transactions. After a nine-day trial, the jury found Peterson guilty of all charges.[1] This appeal followed.

D E C I S I O N

I.

Peterson challenges the sufficiency of the evidence to support his conviction of count one of theft by swindle, which involved the missing equipment. Because most of the equipment was never located, the state introduced a list of items that were not found during the physical inventory process. Peterson argues that, because his conviction was based "entirely upon the circumstantial evidence of a list known to be inaccurate," there is insufficient evidence to prove that he is guilty of swindling AGA out of more than $35,000 as required by Minn. Stat. § 609.52, subd. 3(1) (2004).

Circumstantial evidence is entitled to the same weight as any other evidence. *State v. Pirsig*, 670 N.W.2d 610, 614 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). Indeed, circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100, 123 S. Ct. 2148, 2154 (2003) (quotation omitted). Whereas all evidence is ultimately probabilistic, *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 137-38 (1954), circumstantial

[1] In a separate proceeding, Liebesny was convicted of all charges.

evidence requires a jury to evaluate the probability that the confluence of underlying circumstances is more than mere coincidence, *see, e.g.*, *State v. Garceau*, 370 N.W.2d 34, 37-38 (Minn. App. 1985) (rejecting defendant's hypothesis that missing deposits could have been lost or stolen by bank employees because it was "inconceivable" that this would happen only when defendant was supposed to make deposits), *review denied* (Minn. Sept. 13, 1985).

A jury may convict based on circumstantial evidence if the circumstances proved are "consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Pirsig*, 670 N.W.2d at 614. Peterson argues that "[r]ational hypotheses of innocence abound." But, to be rational, a hypothesis of innocence must be more than merely metaphysically possible; it must be plausible. *Id.* Moreover, when reviewing a challenge to the sufficiency of evidence, we view the evidence in the light most favorable to the state's theory of the case and assume that the jury disbelieved any evidence to the contrary. *Garceau*, 370 N.W.2d at 37. Because it is not our role to retry the case, we will not disturb a guilty verdict if the jury, giving due regard to the presumption of innocence and the state's burden of proving guilt beyond a reasonable doubt, reasonably could have returned a guilty verdict. *Id.*

The evidence that is the crux of Peterson's challenge is a list prepared by Patricia Boudreau, an independent financial consultant hired by AGA's chief financial officer. In March or April 2004, Boudreau began compiling an inventory of AGA's fixed assets. Liebesny, who was responsible for knowing where the information technology assets were and what happened to them, was directed to provide Boudreau with this

information. But he proved uncooperative with Boudreau's efforts. After AGA terminated Liebesny on July 9, 2004, Boudreau was asked to perform "a more formal and thorough" physical inventory focusing on computer hardware and software. When Boudreau compared the list of located items to the master list in AGA's fixed-asset database, she determined that many items were missing. According to this comparative analysis, AGA was missing IT equipment valued at $595,596.14 that had been purchased from Peterson's company, CDD.

As the district court recognized, there are some inaccuracies in the list. For example, when Boudreau was compiling the list, she was unaware that Franck Gougeon, an AGA shareholder, had authorized AGA to maintain two or three servers to be kept off-site. Therefore, for our analysis, we will assume that these were the three highest-valued servers on Boudreau's list—a Compaq Proliant 380 valued at $29,520.74; a Compaq Proliant 580 valued at $54,487.63; and a Compaq Proliant valued at $30,400.60. In doing so, we reduce the value of missing assets by $114,408.97. We also exclude from the property under count one three shelving units with a value totaling $12,550.26 and the intangible items on the list, a co-location charge and warranties, with a value totaling $14,492. But even when we deduct $141,451.23 in equipment and services and limit our review to the remainder, ample evidence remains from which the jury could find beyond a reasonable doubt that Peterson's theft by swindle involved items with a total value of at least $35,000.

First, there is evidence from which the jury reasonably could conclude that a portion of the remaining property worth $454,144.91 was missing because Peterson never delivered it. For example, Stefanie Daughters, an employee in AGA's accounting department, testified that equipment purchases ordinarily were processed by the purchasing department and delivered to the receiving department, where receiving-department employees noted any discrepancies on the packing slip. During this inventory-control process, each item received an AGA fixed-asset sticker with an individual asset number that was entered into a database used to track AGA's assets. The accounting department later matched the packing slip with a corresponding invoice, which it paid when due. Daughters testified that Liebesny did not adhere to this system. And the purchasing department usually was unaware when Liebesny ordered IT equipment. In addition, Peterson split up high-volume purchases of identical products into multiple invoices, thereby structuring the purchases to allow Liebesny to avoid scrutiny and bypass the approval needed for invoices over $25,000. Liebesny's actions prevented the receiving department from checking for discrepancies in his orders and from recording their receipt. Also, Peterson and Liebesny circumvented the inventory-control process by presenting invoices directly to Daughters. Defying AGA's normal process of paying for equipment only after obtaining proof that it had been received, Daughters acceded to Liebesny's and Peterson's requests for immediate payment because she trusted Liebesny.

An employee in the IT department testified that Peterson double-billed AGA for individual items. And during Boudreau's inventory process, she discovered multiple fixed-asset stickers on single pieces of equipment, indicating that multiple pieces of equipment were missing.

From this evidence of procedural lapses involving Peterson and Liebesny, the jury reasonably could infer that the items on Boudreau's list were missing because Peterson did not deliver them and that Peterson and Liebesny circumvented AGA's asset-control systems to avoid detection.

Second, there is evidence from which the jury reasonably could conclude that another portion of the inventory relating to count one was missing because Peterson and Liebesny worked together to sell it on eBay. Boudreau testified that Liebesny was uncooperative with her inventory efforts and failed to provide any information about AGA's hardware and software assets for which he was responsible. Several IT department employees testified, however, that they saw Liebesny improperly selling AGA equipment on multiple occasions. Hardware items that were the same brand and model number as many of the missing items were found on Liebesny's eBay account, and e-mail correspondence between Peterson and Liebesny indicated that the two men were working together to sell items on eBay. When taken together with the actions of Peterson and Liebesny to circumvent AGA's inventory-control systems, the jury reasonably could

infer that many other items on Boudreau's list were missing because Liebesny and Peterson sold them on eBay.[2]

Third, the jury reasonably could infer that Peterson's actions constituted evidence of his consciousness of guilt. When the police searched the CDD offices, they recovered two computers with AGA asset stickers affixed to them. Although the record is unclear as to whether Peterson was authorized to have these computers, one of the computers was running a computer program designed to obliterate all data stored on the hard drive and the other had been purged already. In light of the other inculpatory evidence, the jury reasonably could infer that Peterson was in the process of covering his digital tracks.

Indeed, no single piece of evidence points conclusively to Peterson's guilt. But when the pieces of evidence not only fit together but also form a coherent body of probative evidence that Peterson committed the charged offense, the jury reasonably may rely on it to render a guilty verdict. Moreover, in view of the nature and quantity of this circumstantial evidence, it is inconsistent with any rational hypothesis other than that of guilt. The power of circumstantial evidence is not merely the picture that ultimately

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[2] Peterson's assertion that one of the shareholders "had been surreptitiously stealing AGA property" is unpersuasive. On cross-examination, Borg acknowledged that the shareholders accused one another of theft during the civil litigation. He also testified that sometime in early 2004, Liebesny informed Borg that somebody had entered Liebesny's office and stolen some IT equipment. Because Liebesny's office had been locked and there was no forced entry, Borg concluded that the perpetrator must have had a master key. Viewing the evidence in the light most favorable to the verdict, the jury reasonably could infer that Liebesny fabricated the burglary to explain the disappearance of the stolen items. Moreover, even if the jury believed that there was a burglary in early 2004, Boudreau lists a number of items with an acquisition date after the date of the burglary. Indeed, the missing items acquired in May and June have a total value of $66,818.25, which is almost double the $35,000 necessary for conviction.

emerges, but also the interlocking manner in which that evidence creates that picture. Our review of the record establishes that there is ample evidence from which the jury could find that hundreds of thousands of dollars worth of IT equipment—nearly all of which was purchased from Peterson when he and Liebesny engaged in an elaborate kickback scheme that circumvented AGA's financial and inventory controls—was missing as a result of Peterson's and Liebesny's elaborate swindle, and not by chance.

II.

Peterson also challenges each of his convictions, arguing that the jury instruction on the elements of a theft-by-swindle offense was erroneous. A district court has "broad discretion and considerable latitude" in selecting the language used to instruct the jury. *State v. Smith*, 674 N.W.2d 398, 400 (Minn. 2004). Reversible error does not exist when the jury instructions, read as a whole, correctly state the law in language that can be understood by the jury. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998).

The standard jury instruction on the elements of theft by swindle provides that "[t]he essence of a swindle is the cheating of another person by a deliberate artifice or scheme." 10 *Minnesota Practice*, CRIMJIG 16.10 (2006). Arguing that the standard jury instruction does not adequately describe the specific intent required for theft by swindle, Peterson requested an intent-to-defraud instruction. In response, the district court inserted the words "defrauding or" into the standard instruction and gave the following jury instruction: "The essence of a swindle is the defrauding or cheating of another person by a deliberate artifice or scheme." Peterson now argues that the jury

instruction erroneously permitted the jury to convict Peterson if it found that Peterson merely cheated.

An intent to defraud is an essential element of theft by swindle. *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). The statutory language defining the offense, however, does not include the term "intent." Minn. Stat. § 609.52, subd. 2(4) (2004). Rather, an intent to defraud is inherent in the meaning of the word "swindle." *See Fliecek*, 657 N.W.2d at 598 (defining "swindle" as to "cheat or defraud"). A person who engages in a deliberate scheme to cheat another out of property necessarily acts with intent to defraud because the terms "cheat" and "defraud" are synonymous. *The American Heritage Dictionary* 326 (3d ed. 1992); *Black's Law Dictionary* 230 (7th ed. 1999). Indeed, the theft-by-swindle statute codifies and expands the common-law crime of "cheating." *State v. Cunningham*, 257 Minn. 31, 37, 99 N.W.2d 908, 912 (1959). Accordingly, the district court did not err by inserting a synonym, that Peterson himself requested, into the standard jury instruction.

Affirmed.