STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1961

State of Minnesota,
Respondent,

vs.

Maia D. Ware,
Appellant.

Filed May 20, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 05074176

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, Minnesota 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Harten, 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

HUDSON, Judge

On appeal from her conviction of four counts of identity theft, appellant argues that (1) the trial court abused its discretion by instructing the jury on the defense of duress; (2) she was prejudiced by the instruction; (3) the instruction interfered with the jury's power of lenity; and (4) she was denied the effective assistance of counsel. We affirm.

FACTS

On August 18, 2005, Brooklyn Park police conducted a traffic stop on a vehicle owned by Sylvanus Freeman. During a search of the vehicle, officers located a number of papers that included cash-register receipts and handwritten notes. Six receipts had a full credit-card number on them, and a note was attached to each receipt that included a name, address, social security number, and birth date for a person. Freeman was arrested.

After contacting the people listed on the slips of paper, investigators concluded that the receipts came from an optometry office located in Minnetonka. The optometry office had also received calls from other victims who complained that their credit-card numbers were fraudulently used after they had visited the office. In total, investigators determined that the identities of 40 victims had been stolen after they used their credit cards at the optometry office where appellant was employed.

The office's computer records indentified appellant as the employee performing the payment transaction for all 40 victims, and many of the victims identified appellant as

the clerk who had handled their credit-card transactions. The office manager also confirmed that the handwriting on the notes found in Freeman's vehicle was appellant's.

Appellant was charged with four counts of felony identity theft in violation of Minn. Stat. § 609.527 (2004 & Supp. 2005). Freeman was charged with one count of felony identity theft and one count of felony financial transaction card fraud. Freeman pleaded guilty to identity theft, and his other charge was dismissed as part of the plea agreement. Freeman was also required to testify against appellant.

Appellant's jury trial began on May 24, 2006. Prior to trial, the state had moved the district court to prohibit appellant from presenting a defense of duress. Appellant's trial counsel told the court that appellant was not alleging any affirmative defenses, stating: "Judge, at this point, I'm not certain if there will be evidence of duress that would justify a jury instruction on duress as an affirmative defense." He argued, however, that appellant should be able to introduce "evidence of coercion, of force, that goes to the issue of intent, state of mind and *mens rea*," regardless of whether appellant was entitled to a jury instruction on duress. The district court told counsel that it would allow appellant to testify to and introduce evidence establishing any threats or coercion she experienced.

In his opening statement, appellant's trial counsel stated that Freeman threatened appellant with violence and coerced her into providing him with the credit-card numbers found in his vehicle. During the state's case-in-chief, 36 victims testified regarding the thefts of their identities. Freeman also testified for the state. He admitted fraudulently using the credit card-numbers found in his vehicle and stated that he received those

numbers from appellant. He testified that he had agreed to pay appellant $75 for each credit-card number she provided to him, and he also gave her a new cell phone that he had fraudulently purchased. Freeman denied ever pressuring appellant to give him credit card numbers or threatening her if she did not comply.

Appellant testified in her defense. She stated that she inadvertently took home a receipt including a customer's credit-card number one night because she was rushed as she was closing the office. She recounted that when she arrived home, she emptied her pockets and quickly put the receipt on a table in her apartment because she heard knocking on her door. Appellant's sister and Freeman had come to visit appellant, and she stated that Freeman stole the receipt on her table and immediately left. Appellant told the jury that three weeks later, she received a phone call from Freeman demanding more credit-card numbers, but she told him that she would not comply.

Appellant testified that because she kept refusing to provide Freeman with more credit-card numbers, Freeman continually harassed and threatened her and her family members with violence, told her that he would tell her boss and the police department that she was committing identity theft, smashed the windshield of her vehicle while she was inside the vehicle, and even flashed a gun at her on numerous occasions. Appellant also stated that Freeman's friends continually threatened her and even physically pushed her once because she refused to turn over credit-card numbers. Appellant told the jury that she was getting so many threats and visits from Freeman and his friends that she had to change her telephone number, but that doing so did not stop the harassment. Because she was coerced by the threats and harassment, and because she feared for her and her

family's safety, appellant testified that she finally gave Freeman the receipts later found in his vehicle. Appellant told the jury that she did not initially report the threats to the police because "if you get the police involved with these kind of people it would be worse harm that comes to you," and she was afraid of being shot by Freeman or his friends.

Ultimately, appellant testified that she only stole the credit-card numbers that she provided to Freeman, and she did not know how the other victims had their information stolen. Appellant denied personally using any of the credit-card numbers she took, and also denied that she had been paid for the numbers or received any fraudulently purchased goods.

At the jury-instruction meeting following appellant's testimony, the prosecutor informed the district court that the state no longer wanted to prohibit the duress instruction, and in fact requested it because the jury was "entitled to know when [duress] excuses behavior." Appellant's trial counsel objected, arguing that appellant was not alleging the defense of duress, but was instead rebutting the intent element of the crime of identity theft.

On the last day of trial, the prosecutor informed the district court that the state withdrew its request for the duress instruction. The district court stated that it planned to give the instruction to the jury to inform them of what conduct would constitute duress.

In his closing, appellant's trial counsel argued that appellant did not intend to commit identity theft and that she only intended to protect herself and her family. In

rebuttal, the prosecutor stated that the threats appellant received did not constitute duress because they did not amount to an immediate threat on appellant's life.

The district court instructed the jury that the state had the burden of proving appellant guilty of identity theft beyond a reasonable doubt and explained what "proof beyond a reasonable doubt" meant. The district court gave the following duress instruction to the jury:

> The defendant is not guilty of a crime if the defendant participated in the crime only because of a reasonable fear caused by threats of another person engaged in the commission of a crime that the defendant would be immediately killed if she refused to participate in the commission of a crime. The burden of proof on this issue is on the state. The state must prove that the defendant did not engage in the commission of a crime because of a reasonable fear of imminent death, but if the state does not so prove, the defendant is not guilty.
>
> That threats of future danger to the defendant's life have been made is not a defense. The defendant's reasonable fear of instant death must continue throughout the time the crime is committed and it must not have been possible for the defendant to withdraw in safety.

The jury returned verdicts of guilty on all four counts. Appellant was sentenced to an executed sentence of 52 months in prison, with 34 days of jail credit, and ordered to pay $91,323.68 in restitution.

D E C I S I O N

I

Appellant argues that the district court erred by instructing the jury on the defense of duress when she did not request the instruction and the evidence did not support such a

defense. The district court shall, in its discretion, state all matters of law that are necessary for the jury's information in rendering a verdict. Minn. R. Crim. P. 26.03, subd. 18(4), (5). The district court has considerable latitude in the selection of language for jury instructions. *State v. Gray*, 456 N.W.2d 251, 258 (Minn. 1990). Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). We will not reverse the district court unless the instruction constituted an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). An appellant who claims that the district court erred in regard to jury instructions bears the burden to show the error and any resulting prejudice. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

It is clear from the record that the district court gave the duress instruction because it determined that the jury should be instructed on the defense of duress, given the testimony that appellant was threatened and harassed. Appellant argues that after hearing the duress instruction, the jury could have concluded that because appellant did not meet the duress standard, she had no valid defense at all, and as a result, the jury likely totally rejected the evidence of threats and harassment. But there is nothing in the record to indicate that the jury did not take into account the threats and coercion that appellant faced in committing identity theft. It is more likely that the jury did not find appellant's testimony credible. And without the duress instruction, the jury would have been unclear as to the duress standard in Minnesota. Because the district court allowed the jury to hear appellant's testimony regarding the threats she received, it did not abuse its discretion by giving the jury the duress instruction to inform them of the duress standard in Minnesota.

Appellant also argues that she was prejudiced by the district court's duress instruction because it erroneously shifted the burden of proof to her to negate the intent element of the crime of identity theft. It is a due process violation for the district court to shift the burden of proof on the element of intent to a defendant. *State v. Charlton*, 338 N.W.2d 26, 30 (Minn. 1983). When an erroneous jury instruction eliminates a required element of the crime, the error is not harmless. *State v. Hall*, 722 N.W.2d 472, 479 (Minn. 2006).

Here, appellant claims that she was not introducing evidence of the threats she received to prove the defense of duress, but instead to rebut the element of intent by showing her state of mind at the time she gave Freeman the credit-card numbers. Minn. Stat. § 609.527, subd. 2, provides: "A person who transfers, possesses, or uses an identity that is not the person's own, with the *intent to commit, aid, or abet any unlawful activity* is guilty of identity theft . . . ." (emphasis added). Appellant admitted giving the credit-card numbers to Freeman and testified that she knew that Freeman was going to use them in unlawful activity. Thus, appellant acknowledged that she had the criminal intent required for the crime of identity theft, and the threats she received did not negate that intent. *See Dixon v. United States*, 126 S. Ct. 2437, 2442 (2006) (holding that the defense of duress does not negate defendant's state of mind when intent is element of offense).

It is clear that appellant was attempting to use the evidence of threats to *excuse* her behavior, which is, in effect, a claim of duress. Minn. Stat. § 609.08 (2004) provides:

> [W]hen any crime is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats

> creates a reasonable apprehension in the mind of such participator that in case of refusal that participator is liable to instant death, such threats and apprehension constitute duress *which will excuse* such participator from criminal liability.

(Emphasis added); *see also Dixon*, 126 S. Ct. at 2441 (holding duress defense excuses criminal behavior). Therefore, appellant was not prejudiced by the duress instruction when she was implicitly arguing for the jury to apply the duress defense to excuse her crime. Because the jury was instructed that the state had the burden of proof on the element of intent and the defense of duress, the burden of proving intent was not erroneously shifted to appellant.

Appellant argues that she was also prejudiced by the duress instruction because the district court failed to specifically inform the jury that it was the state's burden to prove *beyond a reasonable doubt* that she had not acted under duress. But a review of the jury instructions in their entirety shows that the district court informed the jury three times that the state had the burden to prove the elements of identity theft beyond a reasonable doubt. We have no problem concluding that after hearing this instruction three times and having its meaning explained, the jury understood that the state also had the burden to prove beyond a reasonable doubt that appellant was not acting under duress when committing identity theft. *See State v. Peirce*, 364 N.W.2d 801, 809 (Minn. 1985) (approving jury instruction that did not separately include the "beyond a reasonable doubt" phrase); *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998) ("[W]e are to assume that the jurors were intelligent and practical people.").

Furthermore, although appellant objected to the duress instruction as a whole, she did not object to the specific wording of the instruction. Therefore, we review the wording of the duress instruction for plain error. *See State v. Smith*, 674 N.W.2d 398, 400 (Minn. 2004) ("We will review the unobjected to jury instructions for plain error."). Plain error exists when the court contravenes clear and established law. *State v. Crowsbreast*, 629 N.W.2d 433, 438 (Minn. 2001). Here, the district court followed verbatim the recommended jury instruction for duress. *See* 10 *Minnesota Practice*, CRIMJIG 7.01 (2006). Doing so did not constitute plain error. *See, e.g., State v. Bolte*, 530 N.W.2d 191, 199 (Minn. 1995) ("We hold that the trial court did not commit plain error because the court expressly instructed the jury pursuant to CRIMJIG 11.02 . . . ."). Even if we assume for the sake of argument that the district court plainly erred when it omitted the phrase "beyond a reasonable doubt" from the duress jury instruction, such an error did not affect appellant's substantial rights because she did not present evidence that amounted to duress.

Lastly, appellant argues that the duress instruction "interfered with the jury's exercise of its power of lenity." Nothing in the record supports this contention, and appellant is not entitled to have the jury exercise lenity. *See State v. Perkins*, 353 N.W.2d 557, 562 (Minn. 1984) (holding constitution does not mandate a jury instruction in a criminal case which would inform jury of power of lenity).

The record indicates that that the district court properly instructed the jury on the duress defense even if appellant did not request such an instruction; appellant was not

prejudiced by the instruction; and the instruction did not interfere with the jury's power of lenity.

II

In a pro se supplemental brief, appellant claims that she was denied effective assistance of counsel. The district court did not consider this issue and appellant raises it for the first time on appeal. As a general matter, only those issues that the record shows were presented to and considered by the trial court can be reviewed by an appellate court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

However, under Minn. R. Civ. App. P. 103.04, we have discretion to address any issue as the interest of justice may require. Here, the interests of justice do not require this court to decide the merits of appellant's ineffective-assistance-of-counsel claim. Even if we were to consider this issue, the record is devoid of any information explaining trial counsel's decisions. "Generally, an ineffective-assistance-of-counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal" because "[a] postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (citation and quotation omitted).

Affirmed.