STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0467

State of Minnesota,
Respondent,

vs.

Dawn Marie Daniel,
Appellant.

Filed June 3, 2008
Affirmed in part and remanded
Connolly, Judge

Lake County District Court
File No. CR-06-240

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Russell Conrow, Lake County Attorney, Lake County Courthouse, 601 Third Avenue, Two Harbors, MN 55616 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Connolly, 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

CONNOLLY, Judge

Appellant challenges her theft convictions, arguing that (1) the evidence is insufficient, (2) it was reversible error to admit evidence of a prior conviction for impeachment purposes, and (3) the district court erred in calculating her sentence. Because the evidence is sufficient to support her convictions and because it was not reversible error to admit evidence of her prior felony conviction for impeachment purposes, we affirm her convictions. But because the circumstances surrounding the imposition of appellant's sentence are too ambiguous to allow meaningful review by this court, we remand to the district court for clarification.

FACTS

Appellant Dawn Daniel and her husband entered a purchase agreement for a parcel of real estate on a contract for deed[1] from Jay Nelson on March 26, 2004. Because Nelson was elderly and resided out of state, he let real-estate agent Timothy Melby handle the sale, including any negotiations with potential buyers. As a result, Nelson had no direct contact with appellant. All communication between potential buyers and Nelson took place through Melby.

The price of the property was $62,900. It was sold "as is." The contract provided that appellant would pay $525 per month with 6.5% interest per annum, with the first

[1] *In re Butler*, 552 N.W.2d 226, 229 (Minn. 1990) ("A contract for deed is a financing arrangement which allows a buyer—the vendee—to purchase property by borrowing the money for the purchase from the seller—the vendor. It is essentially a financing arrangement for a real estate sale in which the vendee has all the incidents of ownership except legal title.").

payment due on May 15, 2004.[2] It also required appellant to pay $500 in earnest money and $500 on the date of closing. Nelson testified that he received only one $500 payment from appellant. Melby also testified that appellant paid Nelson only the $500 in earnest money. Appellant testified that she made additional payments to Nelson in May and September. The contract was ultimately cancelled, and appellant left the property sometime in January 2005.

Nelson left various items of personal property on the parcel, including his 1970 Volkswagen Karmann Ghia. The contract contains two clauses related to personal property that are relevant to this appeal. First, the contract lists items of personal property that were included in the sale. The car was not on this list. Second, the contract specified that the "[s]eller agrees to remove ALL DEBRIS AND ALL PERSONAL PROPERTY NOT INCLUDED HEREIN from the property by the possession date." The contract did not detail what would happen to any property that Nelson left behind.

On May 29, 2004, appellant placed a classified advertisement on the Internet, offering to sell the car for $4,000. The advertisement stated "2nd owner" and "Clear Title." Andrew Murray, a California resident, responded to the advertisement. After some negotiation, Murray agreed to pay $2,500 for the car and sent a cashier's check to appellant on June 24, 2004. The car was eventually delivered to Murray without title documents and, according to Murray, in worse condition than described.

[2] The contract required appellant to make additional $500 monthly principal payments from May 15, 2004, to October 15, 2005. The balance of the contract was due April 15, 2007.

In October 2004, Nelson returned to the property and learned that his car had been sold. The police contacted appellant about the car shortly afterwards. On April 17, 2006, a criminal complaint was filed against appellant in connection with the sale of the car. A jury trial convicted appellant of theft of movable property in violation of Minn. Stat. § 609.52, subd. 2(1) (2004); theft by swindle in violation of Minn. Stat. § 609.52, subd. 2(4) (2004); and theft of a motor vehicle in violation of Minn. Stat. § 609.52, subd. 2(17) (2004). Based on her criminal-history score, the district court sentenced appellant to the presumptive 15-month imprisonment sentence, execution stayed for two years, subject to probation and six months in jail. This appeal follows.

D E C I S I O N

I. Is the evidence sufficient to support appellant's three convictions of theft?

When assessing the sufficiency of evidence, an appellate court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to permit the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The verdict should stand "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted)). "A defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

A conviction based on circumstantial evidence "will be upheld if the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of his guilt." *State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985) (quotation omitted), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2248 (1986). This court will affirm the jury's verdict "only if the circumstantial evidence forms a complete chain which, in light of the evidence as a whole, leads directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt." *State v. Laine*, 715 N.W.2d 425, 430-31 (Minn. 2006) (quotation omitted). Because a jury is generally in the best position to evaluate circumstantial evidence, its verdict is entitled to due deference. *State v. Berndt*, 392 N.W.2d 876, 880 (Minn. 1986).

A. Theft of movable property.

Anyone who "intentionally and *without claim of right* takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property" may be convicted of theft. Minn. Stat. § 609.52, subd. 2(1) (2004) (emphasis added).

Appellant argues that because "the unambiguous terms of the contract gave [appellant] a claim of right to the car," she "lacked the criminal intent necessary to establish a violation of Minn. Stat. § 609.52, subd. 2(1)," and she had a "reasonable belief of license or permission to dispose of the car." "If the defendant has a claim of right, he lacks the criminal intent which is the gravamen of the offense." *State v. Brechon*, 352

N.W.2d 745, 749 (Minn. 1984).[3] "Claim of right" means that a person has a reasonable belief of license or permission. *Id.* at 748.

Appellant's argument is unavailing. Nothing in the contract's language transferred title of property left behind by Nelson to appellant. *See Rudnitski v. Seely*, 452 N.W.2d 664, 668 (Minn. 1990) (holding that a contract for deed does not transfer personal property unless that personal property is included in the contract). As a result, there was no unambiguous language that gave appellant a right to the car. In addition, there is other evidence sufficient to permit the jury to reach the verdict that it did.

First, there is Melby's testimony. Melby testified that he told appellant numerous times to store Nelson's personal property in the garage because Nelson was planning to retrieve it. Melby also testified that appellant never asked him about the car. Nelson testified that appellant never inquired about the car and that he never gave her permission to sell it.

There are also appellant's own actions. She placed an advertisement on the Internet listing the car for sale. In this advertisement, she indicated that the car had "Clear Title" and that she was the "2nd owner." Neither of these statements were true. She made only one $500 payment to Nelson before selling his car for $2,500. She did not transfer any of these proceeds to Nelson, either to pay for the car or to fulfill her obligations under the contract. Appellant told Murray, who ultimately ended up buying the car, that she was the legal owner when in fact she was not. She also misrepresented the condition of the car to him.

[3] *Brechon* dealt with a trespass statute but its reasoning is persuasive here.

Most importantly the contract listed the items of personal property that were to be included in the transaction. The car was not listed. While the contract did require Nelson to remove all personal property, nothing in it transferred title to appellant any personal property left behind. Finally, when questioned by a deputy about whether she thought the car belonged to her, appellant responded, "No." This evidence is sufficient for the jury to conclude that appellant did not have a "claim of right" to the car.

Appellant argues that the evidence is insufficient to prove criminal intent because she took the property "with a reasonable and actual belief that property was abandoned." Appellant's argument is unpersuasive. The evidence discussed above establishes a sufficient basis for the jury to find that appellant's belief that the car was abandoned was not reasonable. There was sufficient evidence for the jury to reasonably conclude that appellant was guilty of theft of movable property.

B. Theft by swindle.

A person commits theft by swindle if "by artifice, trick, device, or any other means, [the person] obtains property or services from another person." Minn. Stat. § 609.52, subd. 2(4) (2004). "Theft by swindle requires the intent to defraud." *State v. Saybolt*, 461 N.W.2d 729, 735 (Minn. App. 1990), *review denied* (Minn. Dec. 17, 1990).

Appellant essentially argues that the evidence to support the theft-by-swindle conviction is insufficient because it is farfetched for the jury to believe that appellant entered into the contract for the purpose of defrauding Nelson. Appellant also argues that there is nothing criminal about defaulting on a contract for deed.

Appellant's arguments are unavailing. Regarding appellant's first point, a jury could reasonably conclude that appellant had the intent to defraud Nelson of his personal property when the contract was entered into. Appellant made only one $500 payment to Nelson before selling his car and keeping the proceeds for herself. While it is true that there is generally nothing criminal about defaulting on a contract for deed, appellant was not convicted for defaulting. She was convicted of selling a car that did not belong to her but which she obtained access to through the contract for deed. This, in combination with the evidence discussed above, is sufficient for the jury to conclude that appellant is guilty of theft by swindle.

C. Theft of a motor vehicle.

Anyone who "takes or drives a motor vehicle without the consent of the owner or an authorized agent of the owner, knowing or having reason to know that the owner or an authorized agent of the owner did not give consent" may be convicted of theft of a motor vehicle. Minn. Stat. § 609.52, subd. 2(17) (2004).

Appellant argues that there is insufficient evidence to prove intent because she "reasonably and honestly believed that the car had been abandoned, and that she was legally entitled to dispose of it."[4] Appellant's argument is unpersuasive for the reasons articulated above. There is sufficient evidence for a jury to reasonably conclude that appellant is guilty of theft of a motor vehicle.

[4] Even if appellant did believe the car was abandoned, she had a duty to remove it from the property and dispose of it in accordance with Minn. Stat. § 168B.011-.101 (2004).

In summary, the logical inferences drawn from all the evidence of appellant's acts are that she bought Nelson's house, lived in it for several months, made only one payment, and then sold his car without any claim of right. She did not have title to the car, she did not attempt to clarify the terms of the contract, and she sold the car claiming that she was its owner when in fact she was not. The jury heard appellant's testimony, and chose not to believe her self-serving explanation of events. Under the facts of this case, we see no reason to overturn the jury's guilty verdicts.

II. Was it an abuse of discretion for the district court to admit evidence of appellant's prior conviction for impeachment purposes?

Appellant argues that it was abuse of discretion to admit evidence of her 2004 felony-theft conviction for impeachment purposes at trial. But because appellant did not object to this evidence at trial, she now bears the burden of proving that (1) it was error, (2) the error was plain, and (3) the error affected her substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

In order to show error, appellant must establish that evidence of her prior conviction was more prejudicial than probative. Minn. R. Evid. 609(a)(1). When determining whether evidence is more prejudicial than probative, a district court must consider the five *Jones* factors:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). Here, presumably because of appellant's failure to object to the introduction of evidence of her prior conviction at trial, the district court did not conduct a *Jones* analysis. As a result, we must now apply the *Jones* factors to determine if it was error to admit evidence of appellant's prior conviction. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (holding that when a district court has failed to make a record of the *Jones*-factor analysis, a reviewing court will apply the factors itself to determine if the error was harmless).

A. The impeachment value of evidence of the prior crime.

Evidence of appellant's prior conviction had some impeachment value because it helped the jury see her "whole person." *Swanson*, 707 N.W.2d at 655 ("[A] prior conviction can have impeachment value by helping the jury see the 'whole person' of the defendant and better evaluate his or her truthfulness."). This factor weighs in favor of admission.

B. The date of the conviction and appellant's subsequent history.

Appellant concedes that the date of her prior conviction weighs in favor of admission.

C. The similarity of the past crime with the charged crime.

This factor weighs against admission. Appellant's prior conviction was for felony theft. Appellant was on trial for felony theft. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) ("The danger when the past crime is similar to the charged crime is that the likelihood is increased that the jury will use the evidence substantively rather than merely for impeachment purposes.").

D. The importance of appellant's testimony and the centrality of the credibility issue.

Courts often combine the fourth and fifth *Jones* factors. *E.g.*, *Swanson*, 707 N.W.2d at 655. In this case, credibility is a central issue because appellant's testimony contradicted the state's witnesses. Appellant testified that she believed the contract authorized her to sell the car, that she did not know that Nelson owned it, and that she thought it was abandoned. As a result, this factor weighs in favor of admission. *See id.* ("If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions."); *Bettin*, 295 N.W.2d at 546 ("[T]he general view is that if the defendant's credibility is the central issue in the case that is, if the issue for the jury narrows to a choice between defendant's credibility and that of one other person then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater.").

The *Jones* factors indicate that it was not error to admit evidence of appellant's prior conviction. Only one of the factors weighs against admission, and the rest weigh in favor of admission.

But even if it was error to let in appellant's prior conviction, it did not affect appellant's substantial rights. *Griller*, 583 N.W.2d at 741 (explaining that an error affects substantial rights "if the error was prejudicial and affected the outcome of the case"). Appellant answered only two questions about her prior offense, the district court gave the jury a cautionary instruction, and defense counsel referred to it in closing argument.

Under these circumstances, even if it was error to admit evidence of appellant's prior conviction, it did not affect her substantial rights.

III. Did the district court err in calculating appellant's sentence?

A. Was appellant sentenced on three counts arising out of one behavioral incident, contrary to Minn. Stat. § 609.035 (2004)?

Minn. Stat. § 609.035, subd. 1, provides that "if a person's conduct constitutes more than one offense under the laws of this state, *the person may be punished for only one of the offenses* and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." (Emphasis added.) At the sentencing hearing, the district court did not link appellant's sentence to a specific count. The judgments of conviction indicate that appellant was sentenced on all three counts. All three counts arose out of the same behavioral incident. As a result, the sentence as it currently stands is in violation of Minn. Stat. § 609.035, subd. 1. Therefore, we remand the case to the district court in order to clarify whether it sentenced appellant on all three counts or whether the court sentenced on one count and the judgments of conviction contain typographical errors.

B. Did the district court improperly impose a custody-status point for a probation violation when appellant was not on probation?

Sentences not authorized by law may be corrected at any time. Minn. R. Crim. P. 27.03, subd. 9. "[A] sentence based on an incorrect criminal history score is an illegal sentence—and therefore, under Minn. R. Crim. P. 27.03, subd. 9, correctable 'at any time'—a defendant may not waive review of his criminal history score calculation." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

A custody-status point is given if, at the time of the offense to be sentenced, the offender was on probation, or on a bail release, or under some type of justice-system supervision. Minn. Sent. Guidelines II.B.2. Appellant received a criminal-history point for being on probation. The incident that led to appellant being placed on probation occurred in September 2004. The criminal acts at issue in this case occurred by March 2004 (under the theory that the swindle underlying the theft-by-swindle charge occurred when the contract was entered into) or July 2004 (when appellant sold the car). Thus, it would be inappropriate to award a custody-status point for probation stemming from the September 2004 incident when calculating the sentence in this case because the September 2004 incident occurred before the crimes in this case were committed.

But the presentence-investigation report lists several other convictions, and it is possible that appellant was placed on probation for one of these offenses. It is also possible that appellant was not actually on probation at the time the crimes at issue in this case were committed. The record is not clear. We remand to the district court to clarify whether appellant was on probation for the September 2004 conviction or some other conviction at the time she committed her present offense.

C. Did the district court incorrectly calculate the offense severity level?

Sentences not authorized by law may be corrected at any time. Minn. R. Crim. P. 27.03, subd. 9.

Appellant's presumptive sentence was based on an offense severity level of three. Under the sentencing guidelines, severity-level three applies to thefts of more than $2,500 only. Minn. Sentencing Guidelines V., Offense Severity Reference Table. In this case,

the jury verdict indicates that the value of the car was "more than $500, but not more than $2,500." Therefore, appellant argues, the appropriate offense severity level is two. Respondent replies by pointing out that, under the sentencing guidelines, theft of a motor vehicle in violation of Minn. Stat. § 609.52, subd. 2(17) is a severity-level three offense.[5] This was the offense that the sentencing worksheet was based on. But it is not clear from the record which offense appellant was sentenced for at the sentencing hearing. As a result, we remand to the district court for a clarification on which count appellant was sentenced.

Affirmed in part and remanded.

[5] This is true when the motor vehicle is valued at greater than $2,500. In this case, the jury verdict form indicated that the car was worth less than $2,500. But theft under Minn. Stat. § 609.52, subd. 2(1), which appellant was convicted of, is a severity-level four offense.