STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1979

State of Minnesota,
Respondent,

vs.

Andrew E. Thomas,
Appellant.

Filed January 6, 2009
Affirmed
Stoneburner, Judge

St. Louis County District Court
File No. CR062784

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Melanie Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Duluth, MN 55802 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of theft of property valued at more than $500 but not more than $2,500, arguing that, because the jury was not instructed on and made no finding about the value of the stolen property, the state failed to prove every element of the offense charged. We affirm.

FACTS

A laptop computer was stolen from an office at St. Scholastica University. Appellant Andrew Thomas, who worked as a security guard at St. Scholastica through Securitas, an independent company that contracted with the university to provide security on campus, was charged with the theft under Minn. Stat. § 609.52, subds. 2(1), 3(3)(a) (2006) (making it a crime punishable by up to five years in prison and a fine of up to $10,000 for theft of property valued at more than $500 but not more than $2,500).

At trial, Thomas denied the theft and testified that during his work shift on December 27, 2005, a girl handed him a white plastic bag containing a laptop, mouse, and power supply. He took it home and installed a version of Windows XP from his own computer onto the laptop in and effort to identify the owner. He said that his personal photographs later found on the laptop must have been inadvertently included in the download.

The parties discussed stipulating to the value of the computer, but no stipulation was entered on the record. The state elicited testimony that the computer was worth $1,399, and Thomas responded affirmatively when his attorney asked him: "Can we all

agree that this laptop is worth 11, 12, $1,300.00, somewhere in that area?" But the district court failed to instruct the jury on the element of value of the stolen property, and the jury did not make any finding on the value of the property. Thomas did not object to the proposed jury instructions, but on appeal asserts that omission of the value element entitles him to a new trial.

D E C I S I O N

A party's failure to object to jury instructions at trial generally waives consideration of the issue on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But we may review the issue for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For an appellate court to grant relief for "an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* In this case, both parties assert, and we agree, that failure to instruct the jury on the element of value was error, and the error was plain.

Value is not listed as an element in any of the pattern jury instruction for theft of property. 10 *Minnesota Practice*, CRIMJIG 16.02 (2006) (listing elements of theft—taking property of another). But comments to CRIMJIG 16.02 refer to additional pattern instructions for "issues of value and nature of the property." *See* CRIMJIG 16.02 cmt. (referencing, in part, 10 *Minnesota Practice*, CRIMJIG 16.82 (2006), which directs the jury, once it has found guilt, to determine the value of the stolen property). And caselaw has long held that a jury determination of the value of stolen property is essential when the severity of the sentence depends on the value of the stolen property. *See State v. Gerou*, 283 Minn. 298, 302, 168 N.W.2d 15, 17–18 (1969) (stating that in the context of

a theft prosecution, "[i]t was necessary for the jury to find that the value of the property taken exceeded $100 but not $2,500"); *State v. Jordan*, 272 Minn. 84, 88, 136 N.W.2d 601, 605 (1965) (stating that the critical fact question in this theft case was "[h]ow much did [the accomplice] take?"); *State v. Biehoffer*, 269 Minn. 35, 44, 129 N.W.2d 918, 924 (1964) (stating that an essential element of first-degree grand larceny is proof that the property was valued at more than $25); *see also* 9A Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 52.2(D) (3d ed. 2001) (stating that "[s]ince value is an essential element [of a prosecution for theft,] it must be proved beyond a reasonable doubt").

We conclude that because value of the involved property is an element necessary to determine the severity of a theft-conviction sentence, it is to be determined by the jury. *See State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006) (holding that under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), if the sentence depends on a fact issue, the jury must decide the issue). And the right to a jury determination of facts under *Blakely* cannot be forfeited by silence. *State v. Osborne*, 715 N.W.2d 436, 442–43 (Minn. 2006). Therefore, Thomas's failure to request a jury instruction on the value of the stolen property did not constitute a waiver of his right to assert error. The district court committed plain error by failing to submit the issue of the value of the stolen property to the jury, and the first two prongs of the plain error test are satisfied.

But Thomas cannot establish that the error affected his substantial rights. Thomas argues that the error was "structural," requiring automatic reversal. We disagree. The United States Supreme Court and the Minnesota Supreme Court have applied a harmless-error analysis to cases involving failure to instruct on an element of the offense charged.

See Neder v. United States, 527 U.S. 1, 19–20, 119 S. Ct. 1827, 1839 (1999) (concluding that an error in jury instructions that omitted an element of the crime charged was harmless when the omitted element was not contested at trial and the record contained overwhelming evidence establishing the omitted element); *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (finding that defendant's substantive rights were not affected by jury instruction that omitted an element of the offense charged because there was "no reasonable likelihood that a more accurate instruction would have changed the outcome"); *State v. Spencer*, 298 Minn. 456, 464, 216 N.W.2d 131, 136 (1974) (declining to reverse an assault conviction where the jury was erroneously instructed that intent was not an element but controversy at trial centered on identity, not intent, of a shooter).

We conclude that in this case the error was harmless. The state's witness and Thomas testified that the value of the laptop was within the range of value charged. There is no evidence in the record that would have supported, as Thomas suggests, a determination by the jury that the laptop's value was less than $500. Because Thomas cannot show that the error affected the outcome of the case, we conclude that he is not entitled to reversal of his conviction or a new trial.

Affirmed.