STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1138

State of Minnesota,
Respondent,

vs.

David John Johnson,
Appellant.

Filed July 21, 2009
Affirmed
Halbrooks, Judge

Carver County District Court
File No. 10-CR-07-51

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

James W. Keeler, Jr., Carver County Attorney, Mark Metz, Assistant County Attorney, Carver County Justice Center, 604 East Fourth Street, Chaska, MN 55318 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

On appeal from his conviction of theft of more than $2,500, appellant argues that a witness's testimony about the content of the bank statement that was not admitted into evidence constituted plain error that affected his substantial rights. Because we conclude that appellant's substantial rights were not affected, we affirm his conviction.

FACTS

Appellant David John Johnson was alleged to have stolen several thousand dollars from the Domino's pizza store that he managed. In January 2007, appellant was charged with felony theft of more than $2,500, in violation of Minn. Stat. § 609.52, subd. 2(1) (2006).

A jury trial took place in February 2008. On the morning that trial was to commence, appellant's attorney objected to exhibit 7, a bank statement, on the ground that it had not been disclosed in a timely manner. Appellant's attorney stated that she would need time to have an investigator review the document. The district court then asked the state's attorney if he was "able to prove up this case without this document." The state's attorney replied:

> Certainly. . . . My alternative was to give [appellant's attorney] an opportunity to at least review it. She says she would have to get an investigator. I don't know why . . . . This is a document from U.S. Bank, it's a business record exception that the deposits were not made. [The witness] can testify about this anyway. So he is going to be able to testify that he reviewed documents from U.S. Bank and didn't see any deposits and this just verifies that with an actual document.

The district court ruled:

> All right. . . . I do think it's untimely and apparently the defense is claiming they cannot just review it within an hour and cure any problems that are presented by the untimeliness of the document. I am going to sustain the objection as to Exhibit 7. I assume the state can proceed with its other evidence.

The state's first witness was Deputy Patrick Barry of the Carver County Sheriff's Office. Deputy Barry testified that a fellow officer had taken a report in December 2006 that "indicated that the manager for Domino's had an employee that had taken deposits from the store." Deputy Barry reviewed the report and made contact with the complainant, Edward Mays. On cross-examination, Deputy Barry stated that he had not examined any "actual bank statement[s]," but had reviewed a printout of what Mays said should have been deposited. Deputy Barry also reviewed exhibit 1, a corrective-action form that described discipline taken against appellant for failing to make several store deposits in December 2006.

The state's second and final witness was Mays, who supervised several Domino's stores in December 2006. During that time, appellant was the manager of the Domino's store in Chanhassen. As manager, appellant was responsible for making deposits after the close of business each night. As per standard procedure, the manager or assistant manager "would make the deposit, do all the paperwork, put the money into a plastic deposit bag, then the closing driver and the manager or assistant manager or whoever is closing inside that night would go to the bank and make a night deposit at the U.S. Bank in Chanhassen."

Mays testified that he would "check on the internet" to make sure that the deposits had been made. He stated that this was done "every morning," but that weekend deposits would not show up until the following Monday. Mays noticed suspicious account activity in December 2006: "[T]he deposits started what we call 'floating', it would show up two or three days later. That's usually a red flag [that] a manager is taking money and using money from other deposits to cover the deposit that's late and so on and so on." Mays suspected appellant because "[i]t was his deposits that were floating." On December 12, 2006, Mays confronted appellant about the late-appearing deposits. Appellant explained that he had forgotten to make them.

Exhibit 2 was introduced. Exhibit 2 is a consolidated sales recap for the week of December 10–18, 2006. The exhibit shows the amount of money from the Chanhassen Domino's store that should have been deposited in the bank on a daily basis, the name of the manager responsible for each deposit, and the date and time when the manager entered the daily deposit amount into the computer. Mays testified that the following six deposits were never made: $887.20 for December 10; $591.89 for December 12; $545.41 for December 14; $2,102.62 for December 15; $1,363.39 for December 16; and $809.20 for December 17. Mays testified that the other deposits for this week "showed up" on the bank statement on the first of the month. Mays explained that a deposit can take 24 or 48 hours to appear online. Mays also testified that a December 11 deposit by the assistant

manager did not appear until "the first of the month." Mays stated that the missing deposits totaled "a little over seven thousand dollars, [$]7,081 I believe."[1]

The state also introduced exhibit 6, which included daily sales recaps and copies of the deposit slips for each of the six missing deposits. Mays testified that the original deposit slips would be taken to the bank with the cash and receipts. The employee who prepares the deposit slip writes the deposit amount, the number of the plastic bag, and his or her name on the slip. The six deposit slips for the missing deposits were prepared by "David." Mays testified that "David" is appellant.

On December 19, 2006, Mays spoke with appellant at the Chanhassen Domino's store "[b]ecause the deposits had not shown up and it was a week later. I wanted to find out from him directly where the money was." When Mays asked appellant where the money was, appellant told Mays that he had taken the money to pay a drug dealer. Mays telephoned the owner of the store, and they "decided to do a written termination and try to recover our money that was missing."

The state introduced exhibit 1, a corrective-action form dated December 19, 2006. The form, signed by both Mays and appellant, notes that the deposits for December 10, 12, 13, 14, 15, 16, and 17 were missing.[2] On the form, Mays described the situation: "Store . . . is missing 7 deposits. Dave told me he took a loan out from the store. [T]hat

[1] The six missing deposits total $6,299.71. Mays's computation appears to include the assistant manager's December 13 deposit.

[2] At the time, the assistant manager's December 13 deposit had not appeared in bank records. On redirect, Mays testified that the December 11 and December 13 deposits had been made by the assistant manager; Mays knew this because he had checked "our bank statement and on line."

is why the deposits were not made." Mays testified that employees are not permitted to take a loan from store proceeds. The form also states that no further late deposits would be tolerated, and all missing deposits were to be given to Mays by December 20, 2006, or appellant's employment would be terminated. Mays testified that he saw appellant sign the form and that he knew appellant had read it because appellant "took about 20 or 30 seconds to look it over before he signed it." Mays testified that he neither forced nor threatened appellant to sign the form. When appellant did not give the missing deposits to Mays, the latter called police on December 21, 2006.

Appellant did not testify and presented no evidence. The jury found him guilty. Sentencing took place on April 11, 2008. The district court stayed imposition of a sentence and placed appellant on probation for ten years. On June 4, 2008, the district court ordered appellant to pay restitution.[3] This appeal follows.

D E C I S I O N

Appellant argues that the admission of Mays's testimony as to the content of the bank statement that was not admitted into evidence constituted plain error that affected his substantial rights. We conclude that although the admission of the testimony was plain error, appellant's substantial rights were not affected.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation

[3] Appellant does not challenge the restitution order on appeal.

omitted). When a defendant fails to object to the admission of evidence, this court's review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To meet this standard, the defendant must show "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If those three requirements are met, "we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (quotation omitted).

A. Plain error

Appellant argues that the admission of Mays's testimony regarding the content of the bank statement violated several rules of evidence. We agree.

Mays's testimony about the content of the bank statement is hearsay. *See* Minn. R. Evid. 801(a). And hearsay is not admissible except as provided by the rules of evidence "or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802. The state argues that Mays's testimony was properly admitted under the hearsay exception for records of regularly conducted business activity. *See* Minn. R. Evid. 803(6). But rule 803(6) allows for the introduction of records themselves; it makes no provision for a witness to testify about the content of business records that have not been admitted. The state points to no other hearsay exception that would permit Mays's testimony about the content of the bank statement.

The admission of Mays's testimony also violates rule 1002, commonly known as the "original writing" or "best evidence" rule. Minn. R. Evid. 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or

photograph is required, except as otherwise provided in these rules or by Legislative Act." Because Mays's testimony was meant to prove the content of the bank statement and because there has been no showing that the original bank statement had been destroyed or made unobtainable, *see* Minn. R. Evid. 1004, his testimony violated rule 1002.

Finally, Minnesota caselaw predating the rules of evidence[4] and caselaw from other jurisdictions support the conclusion that a witness may not testify as to the content of business records that are not admitted into evidence. *See Jarecki Mfg. Co. v. Ryan*, 114 Minn. 38, 41, 130 N.W. 948, 948 (1911) (concluding that a witness's testimony that business records did not show that an account had been paid should not have been admitted because "[w]ithout the books being in evidence such testimony as to their contents was incompetent"); *see also* 5 *Jones on Evidence* § 33:18, at 147 (7th ed. 2003) ("If the [business] record is relied upon as proof of facts, the record itself must be introduced. It would not suffice for a witness to testify that he has examined a company's record and then relate from the witness stand what the record said.") (citing *United States v. Wells*, 262 F.3d 455 (5th Cir. 2001); *United States v. Marshall*, 762 F.2d 419 (5th Cir. 1985); *St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc.*, 456 N.E.2d 551 (Ohio Ct. App. 1982)).

An error is plain if it is "clear" or "obvious," *Strommen*, 648 N.W.2d at 688, or if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Because Mays's testimony as to the content of the bank

[4] The rules of evidence went into effect July 1, 1977.

statement violated rules 802 and 1002, we conclude that it was plain error to allow the testimony.

B. Substantial rights

An error affects substantial rights if there is "a reasonable likelihood that the error substantially affected the verdict." *Strommen*, 648 N.W.2d at 688. Appellant contends that without Mays's testimony about the bank statement, the only evidence that a theft occurred is his admissions to Mays. Appellant, citing Minn. Stat. § 634.03 (2006), argues that these admissions are not sufficient to support a conviction. We disagree.

Minnesota law provides that "[a] confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed . . . ." Minn. Stat. § 634.03; *State v. Koskela*, 536 N.W.2d 625, 629 (Minn. 1995). The purpose of this statute is to make admissions reliable and to protect against the risk of conviction for a crime that never occurred. *See In re C.M.A.*, 671 N.W.2d 597, 601 (Minn. App. 2003). The statute requires that evidence independent of the confession "need only be evidence reasonably necessary to establish the corpus delicti." *State v. Nordstrom*, 146 Minn. 136, 139, 178 N.W. 164, 165 (1920); *see also State v. Vaughn*, 361 N.W.2d 54, 56 (Minn. 1985) (explaining that sufficient corroboration is "sufficient independent evidence from which the jury could infer that the statements were trustworthy and that therefore the property in question was stolen"); *C.M.A.*, 671 N.W.2d at 601 ("[T]he statute requires that the corroborating evidence show the harm or injury and that it was occasioned by criminal activity; it need not show that the defendant was the guilty party because the confession itself provides that link.").

Appellant's statement to Mays that he had taken the money and the signed corrective-action form are confessions within the meaning of the statute. *See Vaughn*, 361 N.W.2d at 56 ("A confession is any statement by a person in which he explicitly or implicitly admits his guilt of a crime."). But we conclude that without these confessions, and without Mays's erroneously admitted testimony as to the content of the bank statement, there is sufficient evidence that the property in question was stolen. First, Mays's report to the police indicates that a crime occurred. Second, the six missing deposits for which appellant was responsible—as established by exhibit 2 and by Mays's proper testimony—totaled more than $2,500. We conclude that there was sufficient evidence that the crime occurred, independent of appellant's confessions. The jury was therefore entitled to convict appellant based on his statements to Mays that he had taken the money.[5] *See Nordstrom*, 146 Minn. at 138, 178 N.W. at 165 ("[I]f the confession and other evidence together make proof beyond a reasonable doubt, that is sufficient.").

We therefore hold that although it was plain error to admit Mays's testimony as to the content of the bank statement that was not admitted into evidence, appellant's substantial rights were not affected.

Affirmed.

[5] We note that appellant's attorney conducted an extensive cross-examination of Mays.