STATE OF MINNESOTA
IN COURT OF APPEALS
A09-279

State of Minnesota,
Respondent,

vs.

Shannon Ranae Johnson,
Appellant.

Filed March 16, 2010
Affirmed
Minge, Judge

Hennepin County District Court
File No. 27-CR-08-25553

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Schellhas, Judge.

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

MINGE, Judge

Appellant challenges her conviction of theft by swindle, Minn. Stat. § 609.52 (2006), on the grounds that: (1) evidence of evictions was improperly admitted; (2) the

restitution order is not supported by sufficient evidence; and (3) the state's key witness was not credible. We affirm.

FACTS

This criminal proceeding arises out of appellant Shannon Johnson's transfer of a mysterious check to her friend Kelly Surgenor. In the spring of 2007, appellant received a check for $5,500 in the mail. She claimed that she did not know the maker, a certain Ugo Ignorato, or exactly why the check had been sent to her. She surmised that it might have been associated with her efforts to sell a car. Appellant claimed she intended to throw the check away, but that Surgenor urged her to cash it. However, Surgenor testified that appellant prevailed on her to use her bank account to cash the check to avoid fees. In April, appellant endorsed the check over to Surgenor. Because at the time appellant was renting a house from Surgenor, Surgenor retained $600 for May rent and wrote a new check to appellant for the remaining $4,900. After appellant cashed Surgenor's $4,900 check, Mr. Ignorato's $5,500 check bounced, and Surgenor complained to her bank and the police that she had been defrauded. Appellant was charged with one count of felony theft by swindle. Minn. Stat. § 609.52, subds. 2(4), 3(2) (2006).

A jury trial was conducted. Surgenor testified that she had never been reimbursed for the $4,900 check she wrote to appellant nor was she compensated for the May rent she previously accepted out of the bad check. Appellant also testified. During cross-examination, the prosecution began to question appellant regarding her financial situation over the months preceding the alleged crime including whether she had been the subject

of eviction proceedings. Appellant objected to this line of questioning; from the transcript, it appears the grounds for the objection were relevancy and prejudice. The prosecution responded that the purpose of the inquiry was to show that appellant's financial problems established a motive to steal. The district court overruled the objection. Evidence was then adduced that appellant had a dramatic drop in income and that she had been receiving emergency assistance to cover rent. When the prosecutor asked, appellant denied that she was in any financial hardship or that she had been evicted in recent months. The prosecution then moved to admit evidence of three evictions. Appellant's counsel responded:

> [Appellant's Counsel]: I've seen them and at this point I guess they are what they are. They're judgments. I don't know whether they come from default proceedings or what, but I can inquire on the redirect that's—
>
> The Court: Any objections?
>
> [Appellant's Counsel]: It's a piece of paper. Go ahead and admit it.

In November 2008, the jury found appellant guilty. This appeal followed.

D E C I S I O N

I.

The first issue raised by appellant is whether the district court properly admitted evidence of eviction proceedings. We first note that objections at trial "must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Otherwise, the district court is not alerted to and has no chance to decide the arguments presented on appeal. *Id.* If there was a proper objection, we review evidentiary rulings for an abuse of discretion. *State v. Amos*, 658

N.W.2d 201, 203 (Minn. 2003). But, if the defense failed to properly object, we apply the plain-error standard. Minn. R. Crim. P. 31.02. Under that standard, we consider (1) whether there is error; (2) whether the error is plain; and (3) whether the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If those criteria are established, we only reverse if the error seriously affected the fairness and integrity of the proceedings. *Id*. (citing *Johnson v. United States*, 520 U.S. 461, 469-70, 117 S. Ct. 1544, 1550 (1997)).

A. *Collateral/Extrinsic*

On appeal, appellant first challenges the eviction-related evidence as collateral and extrinsic. At trial, appellant's objection to the prosecutor's inquiry about eviction appears to have been on grounds of relevancy and unfair prejudice. Minn. R. Evid. 402, 403. Appellant did not argue the eviction judgments were improper extrinsic evidence. When the court records of eviction were specifically admitted, appellant was afforded and declined an opportunity to object on other grounds. Because appellant did not object based on the ground that evictions were extrinsic evidence, we apply plain-error analysis to this issue.

A prosecutor cannot produce extrinsic evidence to prove collateral matters, even if the witness's testimony regarding such matters is false. *See State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998) (quotations omitted). This rule exists to limit court time devoted to "matters only relevant to a witness's credibility." McCormick on Evidence (6th ed.) 233 (2006). Appellant relies on a corollary to this caselaw rule: Minnesota Rule of Evidence 608(b). Rule 608(b) broadly excludes extrinsic evidence of prior untruthful

misconduct—namely, prior lies or dishonest acts outside the immediate court proceeding. *See, e.g.*, *Ripka v. Mehus*, 390 N.W.2d 878, 880-81 (Minn. App. 1986) (finding expert's perjury in an unrelated proceeding collateral but allowed under rule 608(b)).

Here, rule 608(b) does not apply because the eviction evidence was offered to contradict appellant's in-court testimony rather than establish deceitful conduct that occurred outside the courtroom. Therefore, we look to caselaw that specifically addresses impeachment by contradiction. *See State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984) (finding caselaw, rather than rule 608(b), controls the admissibility of extrinsic evidence offered to contradict a witness); McCormick, *supra*, at 235 ("Although extrinsic evidence of untruthful acts is almost always considered collateral, extrinsic evidence offered [to specifically contradict a witness's testimony] is sometimes collateral but sometimes non-collateral.").

The supreme court elaborated on the collateral-evidence issue with respect to trial testimony in *State v. Waddell*, 308 N.W.2d 303, 304 (Minn. 1981). It stated "that use of the adjective 'collateral' is not particularly useful in determining whether to bar contradiction by either cross-examination or by independent or extrinsic evidence." *Id.* The *Waddell* court then applied a balancing test akin to that in Minnesota Rule of Evidence 403, weighing the probative value of the impeachment evidence against the potential for wasted judicial resources and unfair prejudice. *Id.*; *see also State v. Mattson*, 359 N.W.2d 616, 618 (Minn. 1984); *State v. Myers*, 359 N.W.2d 604, 608 (Minn. 1984); *Becker*, 351 N.W.2d at 927.

The district court found that the eviction inquiry went towards establishing appellant's motive to steal and also helped prove intent. Motive and intent to obtain Surgenor's property through swindle help establish an essential ingredient of the crime. *See* Minn. Stat. § 609.52, subd. 2(4) (requiring "swindle . . . by artifice, trick, device, or any other means") (2006); *see State v. Campion*, 353 N.W.2d 573, 580 (Minn. App. 1984) (finding previous financial difficulty relevant to proving motive for theft by swindle). The evidence is probative and material.

It is generally "worth the additional court time entailed in hearing extrinsic evidence" when the fact alleged is "logically relevant to the merits of the case as well as the witness's credibility." McCormick, *supra*, 235. Entering the eviction evidence took almost no court time or resources; records of the eviction action were easily authenticated either by the appellant as the witness or as public records. Because motive is relevant to the theft charge against appellant, we conclude that the district court did not plainly err in determining that the eviction evidence was not collateral and was admissible.[1]

[1] Appellant asserts that the district court and the state agreed that the issues were collateral during the sidebar. After the district court allowed inquiry into the evictions to proceed, the prosecutor uttered, "[u]nless she denies," followed by the court's response, "[c]orrect." Appellant claims that the prosecutor's statement was an acknowledgement that he could not introduce the exhibits if "she denie[d]" she was evicted. The state asserts that it meant to say 'if she *doesn't* deny," because the exhibits then would be inadmissible as unduly cumulative. The state's view is inconsistent with what was actually said, but is consistent with the context of the ruling and the district court's admittance of the exhibits shortly following the exchange. In these circumstances, we find neither party's explanation determinative in deciding this appeal.

B. *Spreigl*

Appellant also argues on appeal that the evictions constitute prior bad acts and are therefore inadmissible character evidence. *See* Minn. R. Evid. 404(b). Although at best it is ambiguous whether appellant objected on this basis, we will consider whether it was either abuse of discretion or plain error for the district court to not exclude the eviction evidence under rule 404(b) or *Spreigl*. *See State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965).

If evidence of the prior evictions were prior bad acts, the evidence would have to meet the *Spreigl* test to be admitted. *State v. Stewart*, 643 N.W.2d 281, 296 (Minn. 2002); *State v. Bauer*, 598 N.W.2d 352, 364 (Minn. 1999). The state does not dispute appellant's assertion that there was no *Spreigl* notice or *Spreigl* review by the district court. Rather, the state asserts that the exhibits do not qualify as 404(b) evidence at all, claiming there was no need to follow *Spreigl* procedures.

To constitute a "bad act" under rule 404(b), the conduct must, in and of itself, impugn or negatively reflect upon the defendant's character. This definition conforms to the policy of the rule, which is to prevent the factfinder from "consider[ing] the bad acts as proof of a defendant's bad character and tendency to act similarly in the case before the jury." *State v. Butenhoff*, 484 N.W.2d 60, 62 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). "The exclusion of bad acts evidence is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on

his or her previous misdeeds." *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985).

An eviction is not a criminal proceeding. It does not necessarily impugn or negatively reflect upon one's character or credibility. An eviction can be initiated for any number of reasons that may or may not involve unsavory character traits. This case provides an apt example of such a reason. Appellant faced eviction proceedings because of the erratic income associated with her employment. Although an eviction may involve deceitful nonpayment of promised debts, the chain of logic that leads to that conclusion is too attenuated to require the procedures of rule 404(b). When the implications for bad character are so indirect, the danger of unfair prejudice targeted by the rule is diluted. Therefore, we conclude that the district court did not abuse its discretion by admitting this evidence without subjecting it to rule 404(b)'s *Spreigl* test.

II.

The next issue raised by appellant is whether the district court erred by including rent of $600 in the restitution award. The district court may order restitution based on the loss sustained by the victim as a result of the offense and the resources of the defendant. Minn. Stat. § 611A.045, subd. 1(a) (2006). District courts have broad discretion when awarding such damages. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999).

The statutes establish the procedure for challenging the restitution amount or requesting a hearing:

> (a) At the sentencing, dispositional hearing, or hearing on the restitution request, the offender shall have the burden to produce evidence if the offender intends to challenge the

> amount of restitution or specific items of restitution or their dollar amounts. This burden of production must include a detailed sworn affidavit of the offender setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim or victims. The affidavit must be served on the prosecuting attorney and the court at least five business days before the hearing. . . . .
>
> (b) An offender may challenge restitution, but must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later. Notice to the offender's attorney is deemed notice to the offender. The hearing request must be made in writing and filed with the court administrator. A defendant may not challenge restitution after the 30-day time period has passed.

Minn. Stat. § 611A.045, subd. 3(a-b). This procedure must be followed in challenging a restitution award. *See*, *e.g*., *State v. Bauer*, 776 N.W.2d 462, 480 (Minn. App. 2009) ("Because [the defendant] failed to challenge restitution before the district court, his claim is procedurally barred."); *Mason v. State*, 652 N.W.2d 269, 272-73 (Minn. App. 2002) (affirming rejection of restitution challenge because of untimely hearing request), *review denied* (Minn. Dec. 30, 2002).

Appellant argues in her brief that no documentation or finding established that the $600 May rent was not paid. Yet, when the district court deliberated and found that the total loss to Surgenor included $600 of rent, appellant did not object to this determination. Appellant neither submitted an affidavit challenging the restitution amount nor requested a hearing. Because of the failure to take such statutorily required

steps and the lack of any explanation for not following the statutory procedure, we affirm the restitution order.

III.

Appellant also submitted a pro se supplemental brief that raised additional issues. The brief primarily attacks Surgenor's credibility. "[W]eighing the credibility of witnesses is the exclusive function of the jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Because there is no showing that there is a reason for departing from this standard of review, we do not further consider this issue. We have considered the other issues raised in appellant's pro se brief and conclude that none provide a basis for relief.

Affirmed.

Dated: