STATE OF MINNESOTA
IN COURT OF APPEALS
A09-358

State of Minnesota,
Respondent,

vs.

Scott Richard Rosenlund
and 10Springs Homes,
Appellants.

Filed March 9, 2010
Affirmed
Hudson, Judge

Hennepin County District Court
File Nos. 27-CR-07-113374; 27-CR-07-113379

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Robert D. Sicoli, Law Offices of Robert D. Sicoli, Minneapolis, Minnesota; and

Sarah M. MacGillis, MacGillis Law, PA, Minneapolis, Minnesota (for appellants)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

HUDSON, Judge

On appeal from conviction of theft by swindle and racketeering, appellants argue that the district court abused its discretion by not instructing the jury in accordance with

their requested instruction regarding intent for theft by swindle; by declining to submit appellants' proposed "theory of the defense" instruction to the jury; and by ranking appellants' racketeering charge as a level IX offense. Because the district court did not abuse its discretion, we affirm.

FACTS

Appellant Scott Rosenlund and his company, appellant 10Springs Homes, were charged with one count of racketeering and multiple counts of theft by swindle for a series of transactions in which they, with other codefendants, allegedly deceived mortgage lenders to obtain loans for real estate purchases and home construction. The codefendants included a real estate agent who bought and sold the homes and the mortgage broker to whom appellants directed individuals purportedly purchasing the homes from 10Springs Homes. Several other uncharged individuals also participated in the alleged offenses.

Appellants were builders and developers of new homes who specialized in building homes that cost a million dollars or more. Real estate developers typically get money through a line of credit from a bank or commercial lending arrangements. Appellants did not obtain money in this way. Instead, appellants recruited "straw buyers" as borrowers to fund the purchase of lots for development. Under the system employed by appellants, a straw buyer's assets and income would be falsely inflated in the straw buyer's mortgage loan application to the lender. Appellants would arrange for thousands of dollars to be temporarily deposited into the straw buyer's bank account that corresponded with the inflated account balance stated in the application. The money was put into a straw buyer's account to make it appear that the borrower had sufficient funds

to make payments on the loans. When a verification of deposit was performed by the lender to ensure that sufficient funds were in the straw buyer's account, it would show the funds in the account, but it would not show the source of the funds or the amount of time that the funds had been in the account. After the lender had verified the account balance, the money was withdrawn. For their participation, the straw buyers were paid out of the loan proceeds, and in some cases, received a percentage of profits when the property was eventually resold following development.

The testimony at trial centered around seven transactions that followed this basic pattern. Specifically, testimony indicated that this scheme used false loan applications and false HUD-1 documents, which "deprived the lender of having the factual information in order to accurately . . . assess the risk [of whether the] borrower [has] the ability to . . . pay the loan back[.]" The false documents and artificially inflated bank accounts depicted a "false portrait" of the borrower's ability to qualify for or pay back the loans. The evidence also indicated that lenders have different standards for residential mortgages than for investment properties. Generally, mortgage lenders will not approve mortgages in which money lent for purchase is actually paid back to the borrower. According to the state, appellants' false statements or omissions induced the lenders to make the loans.

Seven of these alleged thefts by swindle made up the predicate offenses for the racketeering charge.

Appellants' defense was primarily based on lack of intent to defraud the lenders. At trial, appellants requested that the jury instructions include specific language about the intent to defraud required for theft by swindle. Appellants also requested that the court

give a jury instruction concerning "good faith." The district court refused the requests and instead gave the pattern jury instruction from the Minnesota-Practice Jury Instruction Guide concerning the elements of theft by swindle and intent. Appellants objected to the instructions given.

The jury found appellants guilty of racketeering and found that all seven predicate counts of theft by swindle were proved beyond a reasonable doubt. At sentencing, the district court ranked the unranked racketeering offense at offense level IX. The district court stated that it was persuaded to rank the offense at level IX by referring to similar cases and noting the number and seriousness of the offenses, including the large amount of money involved. The district court then sentenced appellant Rosenlund to 84 months' imprisonment. The district court ordered restitution and did not impose a fine on appellant 10Springs Homes, stating that it "would prefer to have any money go towards restitution." This appeal follows.

D E C I S I O N

I

Appellants argue that the district court abused its discretion by not instructing the jury in accordance with their requested instruction that the crime of theft by swindle requires proof of specific intent to defraud. Whether to give a proposed jury instruction is within the discretion of the district court and will not be overturned absent an abuse of discretion. *State v. Saybolt*, 461 N.W.2d 729, 735 (Minn. App. 1990), *review denied* (Minn. Dec. 17, 1990).

The district court is granted "considerable latitude" in the selection of language for jury instructions. *State v. Traxler*, 583 N.W.2d 556, 560 (Minn. 1998). The district court

is not required to give a proposed jury instruction if it determines that the substance of the request is contained in the instructions given. *Saybolt*, 461 N.W.2d at 735. "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). Instructions may vary from case to case, but may not materially misstate the law. *Traxler*, 583 N.W.2d at 560. An appellant must show that the district court's error in failing to give a requested instruction materially prejudiced his rights. *State v. Rachuy*, 495 N.W.2d 6, 11 (Minn. App. 1993), *aff'd as modified*, 502 N.W.2d 51 (Minn. 1993).

Theft by swindle occurs when a person "by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person[.]" Minn. Stat. § 609.52, subd. 2(4) (2006). Theft by swindle requires intent to defraud. *Saybolt*, 461 N.W.2d at 735; *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003). "Inherent in the intent requirement is that a swindler must act affirmatively to defraud another." *Flicek*, 657 N.W.2d at 598.

Here, the district court gave the pattern jury instructions for theft by swindle as follows:

> Theft by swindle defined. The statutes of Minnesota provide that whoever obtains property or services from another person by swindling, whether by artifice, trick, or device, is guilty of a crime.
>
> . . . .
>
> The elements of theft by swindle over $35,000 are:
>
> First. The lenders gave up possession of the loan funds . . . to the defendant or another because of the swindle.

> Second. The defendant acted with the intention of obtaining for himself or another the possession of the loan funds.
>
> Third. The defendant's act was a swindle. The essence of a swindle . . . is the cheating of another person by a deliberate artifice or scheme. It is not necessary that lenders had a special confidence in the defendant, a swindle can be accomplished by false representation as to either past or future facts. A swindle may include a trick or a scheme consisting of mere words and actions and it does not require the use of some mechanical or other device.
>
> Fourth. The defendant's act took place on or about the aforementioned dates in Hennepin County.
>
> If you find that each of these elements have been proven beyond a reasonable doubt the defendant is guilty. If . . . you find that any element has not been proven beyond a reasonable doubt the defendant is not guilty.

Appellants assert that the instructions given did not adequately state or convey the element of intent to defraud. Appellants argue that the instruction makes it appear to the jury that appellants only had to intend to obtain the loan funds, not to deceive. But the instruction states that the lenders must have released the loan funds "because of the swindle." It goes on to state that a swindle is "the cheating of another by a deliberate artifice or scheme" and that "a swindle can be accomplished by false representation." Thus, the jury was required to find that the funds were obtained because of a swindle consisting of "cheating . . . by a *deliberate* artifice or scheme" (emphasis added). This instruction adequately conveys that the jury must find intent to defraud through an affirmative act. Even though the instructions do not include the specific phrase "intent to defraud," we conclude that they do not materially misstate the law or eliminate an element of the crime.

Furthermore, appellants' defense that they lacked fraudulent intent was argued to the jury. Specifically, the defense addressed the jury on the issue of intent during closing arguments. Counsel for appellants' codefendant argued that the defendants had to intend to deceive or cheat the banks. Appellants' counsel endorsed this argument and also argued that the swindle itself had to be intentional. This tends to negate any prejudice to appellants from the district court's failure to give the requested instruction. *See, e.g.*, *State v. Blasus*, 445 N.W.2d 535, 542 (Minn. 1989) (finding no abuse of discretion for failure to give a requested jury instruction when issue was argued in closing arguments); *State v. Daniels*, 361 N.W.2d 819, 832 (Minn. 1985) (same). Thus, even if the district court erred in not giving the intent instruction requested by appellants, the failure did not materially prejudice appellants' rights and the issue of intent was adequately presented to the jury.

II

Appellants also argue that the district court abused its discretion by refusing to instruct the jury on the defense's theory of the case. Appellants argue that the district court should have given their requested instruction on "good faith" to the jury.

Whether or not to give a proposed instruction is within the discretion of the district court. *Saybolt*, 461 N.W.2d at 735. A defendant is entitled to an instruction on his or her theory of the case if there is evidence to support it. *Id.* But the district court may reject a requested instruction if the substance of the proposed instruction is adequately presented in the district court's charge. *Id.*

Here, appellant requested an instruction on "good faith" as a defense to theft by swindle. The requested instruction, based on an Eighth Circuit case, states that "[b]ad

faith is an essential element of fraudulent intent. Good faith constitutes a complete defense to one who is charged with an offense of which fraudulent intent is an essential element." It also states that fraudulent intent requires knowing and intentional deceit.

The requested instruction simply restates that appellants needed to act with fraudulent intent in order to be convicted of theft by swindle. As discussed above, the district court instructed the jury on the applicable burden of proof, the elements of the crime, and the required mental state. Therefore, the substance of the proposed "theory of the defense" instruction was adequately presented in the district court's charge. Accordingly, the district court did not abuse its discretion by refusing to instruct the jury on the defense's theory of the case. *See, e.g.*, *Blasus*, 445 N.W.2d at 542 (stating that the district court need not give a requested instruction if its substance is contained within the court's charge).

Furthermore, to the extent that the requested instruction is not simply restating the mens rea requirement, it is confusing and has no support in our current caselaw. The term "good faith" is not defined in the proposed instruction, and the instruction confuses whether the actor had to act with fraudulent intent to deceive the bank or whether the actor had to intend to break the law. As a general rule, ignorance of the law is not a defense. *State v. Jacobson*, 697 N.W.2d 610, 615 (Minn. 2005). Theft by swindle only requires that the actor intentionally engaged in the prohibited conduct, not that the actor knew his actions were illegal. And there is no authority to support the proposition that good faith is an affirmative defense to theft by swindle. Therefore, the district court did not abuse its discretion by refusing to give the proposed instruction.

III

Finally, appellants argue that the district court abused its discretion in ranking the unranked racketeering offense at level IX. Appellants contend that the district court did not adequately weigh the factors for determining the severity level of an unranked offense and did not conduct a fair comparison to other similarly situated offenders.

District courts have broad discretion to sentence for racketeering because it is not ranked in the Minnesota Sentencing Guidelines. *State v. Kujak*, 639 N.W.2d 878, 883 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002). The assignment of a severity level for an unranked offense is reviewed for abuse of discretion. *State v. Kenard*, 606 N.W.2d 440, 442 (Minn. 2000). When assigning a guideline severity level to an unranked offense, the district court should consider: (1) the gravity of the conduct underlying the offense; (2) the severity level assigned to ranked offenses with elements similar to the unranked offense; (3) "the conduct of and severity level assigned to other offenders for the same unranked offense"; and (4) the severity level assigned to other offenders engaging in similar conduct. *Id.* at 443. The list of factors is not exhaustive and no single factor is determinative. *Id.* The district court may rely on "information from the Sentencing Guideline Commission on other offenders sentenced on the same or similar offenses" to guide the exercise of the district court's discretion. *Id.*

In relation to the gravity of the offense, the district court considered: the sophistication of the scheme; the large number of offenses; the number of people drawn into the scheme and hurt or forced into bankruptcy; the period of time over which the scheme took place; and the very large amount of money involved, estimated by the district court at between nearly $6 million and $15 million. The district court noted that white-collar crime should be treated as a "serious offense" and that appellants' scheme

involved fraud and misrepresentation, planning and recruitment of straw buyers, and manipulating money.

The district court also stated that it was "most persuaded by the cases that are similar" to the racketeering offense here. Before sentencing, respondent submitted sentencing memoranda that identified other cases involving mortgage fraud and similar white-collar crime offenses with large amounts of money involved. These cases showed offense severity level rankings at level IX, and similar sentences.

Furthermore, the predicate offense here, theft of over $35,000, is ranked as a level VI offense on the offense severity reference table. Minn. Sent. Guidelines V. Ranking racketeering at a higher level than the predicate offenses on which that charge is based has been upheld by this court. *See, e.g.*, *State v. Huynh*, 504 N.W.2d 477, 484 (Minn. App. 1993) (ranking racketeering at level VIII where predicate offense of coercion was ranked at level III), *aff'd*, 519 N.W.2d 191 (Minn. 1994).

Appellants argue that a guidelines commission report shows that racketeering offenses are most frequently ranked at level VI. But appellants acknowledge that the report also shows that a number of racketeering offenses were ranked at level IX or higher. And *Kenard* suggests that the severity level assigned to other offenders who engaged in similar conduct is just one of many factors to be considered by the district court. 606 N.W.2d at 443. The district court here amply supported its decision to rank appellants' racketeering offense at level IX. Because the district court adequately considered and applied the *Kenard* factors, it did not abuse its broad discretion when ranking the racketeering offense at level IX.

Affirmed.