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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0837**

State of Minnesota,
Respondent,

vs.

Melissa Kay Hirsch,
Appellant

**Filed March 27, 2017
Affirmed
Worke, Judge**

Washington County District Court
File No. 82-CR-14-1695

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges her conviction of aiding and abetting third-degree burglary, arguing that the district court erred by allowing the state to impeach her with a prior gross-misdemeanor theft conviction because it was not a crime of dishonesty. We affirm.

FACTS

In 2014, L.A. moved out of his townhome in Cottage Grove, leaving behind some personal property. Soon after, L.A.'s home went into foreclosure. On April 26, 2014, L.A. returned to his townhome to pick up some property. L.A. discovered that his vehicle had all the wheels removed and the locks drilled out, and noticed several items missing from the garage and home.

Appellant Melissa Kay Hirsch lived in the townhome next door to L.A. On his way to Hirsch's to ask her if she had seen anything suspicious, L.A. saw one of his vehicle's wheels in Hirsch's garage. L.A. asked Hirsch about his property, and she told him that she removed his property so that the sheriff would not seize it. Hirsch had never called L.A. to tell him that she removed his property for safekeeping. Hirsch was charged with aiding and abetting third-degree burglary.

During Hirsch's jury trial, L.A. testified about discovering his property missing and Hirsch's claim that she took the property for safekeeping. He also testified that he never asked Hirsch to watch over his property or gave her permission to enter his property.

J.S., Hirsch's ex-boyfriend, testified that after notice of a sheriff's sale had been posted on L.A.'s property, he decided to take L.A.'s property for safekeeping and discussed

his plan with Hirsch. But when J.S. pleaded guilty to third-degree burglary, he stated that Hirsch directed him over the phone to take L.A.'s property. J.S. testified that he removed property on two occasions. Hirsch was not present the first time, but she acted as a lookout when J.S. took property the second time. J.S. testified that on April 26, when L.A. asked about his missing property, he and Hirsch tried to explain that they had his property for safekeeping, but L.A. did not give them a chance to return his property because he called the police. J.S. also testified that he once saw an individual who had "a pretty good reputation for stuff like that" leaving L.A.'s home.

The state moved to impeach Hirsch should she choose to testify with a prior gross-misdemeanor theft conviction. After the district court ruled that the state could impeach Hirsch with the prior conviction, she decided not to testify. The jury found Hirsch guilty of aiding and abetting third-degree burglary. This appeal followed.

D E C I S I O N

Hirsch argues that the district court erred by allowing the state to impeach her testimony with a prior gross-misdemeanor theft conviction because it was not a crime of dishonesty. A district court's ruling on the impeachment of a witness by prior conviction is reviewed for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). The district court's decision will not be reversed absent a clear abuse of discretion. *State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985). To prevail, an appellant must show error and prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

For the purpose of attacking the credibility of a witness,
evidence that the witness has been convicted of a crime shall
be admitted only if the crime (1) was punishable by death or

imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

Minn. R. Evid. 609(a). Hirsch's prior conviction was not a felony. Accordingly, Hirsch's testimony could have been impeached by evidence of a prior gross-misdemeanor conviction only if it involved dishonesty or false statement. *See id.*

"Crimes directly involving dishonesty or false statement are automatically admissible without regard to the seriousness of the punishment and without any balancing of probative value against prejudice being required." *State v. Bettin*, 295 N.W.2d 542, 545 (Minn. 1980).¹ The only restriction on the admissibility of a prior conviction of a crime involving dishonesty or false statement for impeachment purposes is that no more than ten years has elapsed between the conviction and the date of the charged offense. *See* Minn. R. Evid. 609(b) (providing that "[e]vidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of the conviction"); *Ihnot*, 575 N.W.2d at 585 ("[T]he date of the charged offense is the appropriate end point for the 10-year period that determines whether a conviction is stale under Minn. R. Evid. 609(b)."). The date of Hirsch's prior theft conviction was April 9, 2015; the date of the charged offense was April 26, 2014. Because the prior theft conviction occurred after the charged offense,

¹ Because the only way a gross misdemeanor can be used for impeachment is if it involves dishonesty or false statement, the district court unnecessarily analyzed the *Jones* factors in determining that the state could impeach Hirsch with a prior conviction. *See State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978).

staleness is not an issue and Hirsch's prior conviction is admissible for impeachment purposes if it involved dishonesty or false statement.

If "dishonesty is an element of the crime" of conviction, evidence of the conviction falls within the plain language of rule 609(a)(2) and is admissible. *State v. Head*, 561 N.W.2d 182, 187 (Minn. App. 1997), *review denied* (Minn. May 28, 1997). If dishonesty is not an element of the crime of conviction, evidence of the conviction is admissible if the crime was committed in a manner involving dishonesty. *State v. Ross*, 491 N.W.2d 658, 659 (Minn. 1992). Rule 609(a)(2) contemplates admissibility of crimes involving "acts directly bearing on a person's character for truthfulness"; dishonesty refers "only to those crimes involving untruthful conduct." *State v. Darveaux*, 318 N.W.2d 44, 48 (Minn. 1982) (quotation omitted). Hirsch's prior conviction was for theft of leased or rented property.

Depending on the act of thievery involved, theft may be a crime involving dishonesty or false statement. *State v. Sims*, 526 N.W.2d 201, 202 (Minn. 1994). Theft by shoplifting generally is not a crime involving dishonesty or false statement. *Darveaux*, 318 N.W.2d at 48. But theft by swindle, theft by fraud, and theft by false representation are crimes involving dishonesty or false statement. *State v. Swinger*, 800 N.W.2d 833, 836 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011).

Here, the record shows that Hirsch was previously convicted of theft—leased or rented personal property, in violation of Minn. Stat. § 609.52, subd. 2(a)(9) (2014). Under this statute, a person is guilty of theft if she

leases or rents personal property under a written instrument . . .

(i) with intent to place the property beyond the control of the lessor conceals or aids or abets the concealment of the property or any part thereof; or

(ii) sells, conveys, or encumbers the property or any part thereof without the written consent of the lessor, without informing the person to whom the lessee sells, conveys, or encumbers that the same is subject to such lease or rental contract with intent to deprive the lessor of possession thereof; or

(iii) does not return the property to the lessor at the end of the lease or rental term, plus agreed-upon extensions, with intent to wrongfully deprive the lessor of possession of the property; or

(iv) returns the property to the lessor at the end of the lease or rental term, plus agreed-upon extensions, but does not pay the lease or rental charges agreed upon in the written instrument, with intent to wrongfully deprive the lessor of the agreed-upon charges.

Minn. Stat. § 609.52, subd. 2(a)(9).

Hirsch failed to return a rented car. *See id.*, subd. 2(a)(9)(iii). When Hirsch rented the car, she entered into a contract promising to return the car by a certain date. She failed to return the vehicle, so she was dishonest when she agreed to return the vehicle. We conclude that Hirsch's prior theft conviction was for a crime of dishonesty or false statement. Therefore, the district court did not abuse its discretion by allowing the state to impeach Hirsch with the prior theft conviction if she testified.

Hirsch claims that the district court's decision to allow the state to impeach her with a prior conviction if she testified was prejudicial error because she decided not to testify based on the district court's ruling. "A defendant has a constitutional right to present [her] version of events to a jury." *State v. Zornes*, 831 N.W.2d 609, 628 (Minn. 2013). But a

defendant's decision to not testify due to the threat of impeachment is "not critical" if the defendant's "theory of the case was presented to the jury by . . . other means." *State v. Lund*, 474 N.W.2d 169, 173 (Minn. App. 1991).

Here, Hirsch's theory of the case was presented to the jury. L.A. testified that Hirsch told him that she removed the property to make sure that the sheriff did not seize it. A police officer also testified that Hirsch told L.A. that she removed the property for safekeeping. J.S. testified that he decided to take L.A.'s property for safekeeping. J.S. also testified that on one occasion, he saw an individual who had "a pretty good reputation for stuff like that" leaving L.A.'s home. Although Hirsch did not give the district court any indication regarding the substance of her testimony, it seems likely that she would have similarly testified that L.A.'s property was moved for safekeeping. Accordingly, even if the district court erred in its ruling, Hirsch failed to establish prejudice.

Affirmed.