

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A16-1600**

State of Minnesota,  
Respondent,

vs.

Bang Tang Wuol,  
Appellant.

**Filed July 31, 2017  
Affirmed in part, reversed in part, and remanded  
Bratvold, Judge**

Mower County District Court  
File No. 50-CR-15-1912

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Kristen M. Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Rodenberg, Judge; and  
Bratvold, Judge.

**UNPUBLISHED OPINION**

**BRATVOLD**, Judge

Appellant argues his convictions of felony theft and receiving stolen property must  
be reversed because the state constructively amended the complaint when it argued an

aiding-and-abetting theory for the first time during closing, and the amendment prejudiced his substantial rights. Alternatively, appellant asserts his conviction of receiving stolen property must be vacated because it is a lesser-included offense of theft. Because we discern no error from the state's constructive amendment of the complaint, we affirm in part. But because receiving stolen property is a lesser-included offense of theft, we reverse in part and remand to the district court with instructions to vacate the formal adjudicated conviction of that count, consistent with this opinion.

### **FACTS**

Around 5:00 a.m. on April 26, 2015, two officers responded to a dispatch report of two men seen carrying two televisions down a bike path. An officer approached K.K., a juvenile, and saw two televisions and a backpack lying on the ground behind him. Meanwhile, the other officer found appellant Bang Wuol lying on the ground in a tree line nearby. Wuol had two cell phones, a cell phone charger, a remote control for an LG television, and a PlayStation controller in his possession. In response to questions, K.K. said all items belonged to Wuol, who was moving in with him. Separately, Wuol told the officers that the items did not belong to him but belonged to a friend, whose name he could not remember. The officers confiscated the property, believing it was stolen, but dropped off K.K. and Wuol at K.K.'s mother's house because the officers had no "reason to hold them at that point."

An officer later searched the backpack and found a laptop with its charger, a PlayStation controller, and games. The officer started the laptop and discovered it belonged to L.F. When police contacted L.F., she told them that several belongings were missing

from her townhome, including a: laptop computer (\$400–500); Sony PlayStation 3 (\$350); DVD (\$25–30); 42-inch LG television (\$400); 32-inch Vizio television (\$250); purse containing \$80 cash; and two cell phones (\$200 and \$100).

Because the confiscated property matched the inventory of missing property that L.F. provided, police continued their investigation. K.K. told police that he was “involved” in taking the property and planned to sell it because he needed money. K.K. also told police that they would find L.F.’s purse near her townhome. Police found the purse across the street from the townhome with all of its contents, except the \$80 cash.

The state charged Wuol with first-degree burglary, theft, and receiving stolen property. The complaint alleged that Wuol was guilty of felony-level offenses because “the value of the stolen property was more than \$1,000, but not more than \$5,000.”

Wuol waived his right to a jury trial, and the district court held a court trial on August 1, 2016. During his defense, Wuol testified he was “highly intoxicated” on the morning of April 26, 2015, and did not remember carrying “anything.” Wuol also testified that he knew K.K. but did not remember meeting him on April 26. Wuol denied being near L.F.’s townhome on April 26 or the night before.

During closing arguments, the state conceded that it lacked sufficient evidence to convict Wuol of first-degree burglary because the evidence was “thin on whether or not Mr. Wuol was ever in” L.F.’s townhome. The state argued that the evidence established beyond a reasonable doubt that Wuol was guilty of a felony because the stolen property was worth over \$1,000. In response, Wuol’s attorney argued that “at best” he only could be convicted of a gross misdemeanor based on the value of the property he actually

possessed. In rebuttal, the state responded “that aiding and abetting would come into play here, so [Wuol] would be responsible for the total value of the property that he and [K.K.] had.”

The district court acquitted Wuol of first-degree burglary but convicted him of felony theft and receiving stolen property. The district court discredited Wuol’s testimony that he was so intoxicated “he didn’t know what he was doing,” finding that Wuol’s conduct and statements to police established that he intentionally transferred and concealed L.F.’s property “knowing that it wasn’t his to have.”

The district court relied on an aiding-and-abetting theory to reach felony-level offenses, stating that K.K. and Wuol “together had property in an amount in excess of a thousand dollars but less than \$5,000; thereby making them or at least Mr. Wuol guilty of that felony count.” The district court later sentenced Wuol to two executed sentences of one year and one day, to be served concurrently with each other. Wuol appeals.

## DECISION

**I. The district court did not plainly err in allowing the state to constructively amend the complaint to add an aiding-and-abetting theory to establish felony-level offenses.**

Wuol argues that his convictions must be reversed because the state’s constructive amendment of the complaint to add aiding and abetting prejudiced his substantial rights. Because Wuol did not object at trial, we will apply the plain-error standard of review. *State v. Beaulieu*, 859 N.W.2d 275, 279 (Minn. 2015). Wuol bears the burden of establishing an error, that is plain, and that affects his substantial rights. *Id.* An error is “plain” if it clearly contravenes caselaw or a rule. *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010).

Initially, we consider whether the state constructively amended its complaint against Wuol. A person who commits theft or receiving stolen property may be sentenced up to five years if “the value of the property or services stolen is more than \$1,000 but not more than \$5,000.” Minn. Stat. § 609.52, subd. 3(3)(a) (2014); Minn. Stat. § 609.53, subd. 1 (2014). Here, the state’s complaint alleged felony theft and receiving stolen property but did not allege aiding and abetting or cite the aiding-and-abetting statute. *See* Minn. Stat. § 609.05, subd. 1 (2014) (“A person is criminally liable for a crime committed by another if the person intentionally aids . . . the other to commit the crime.”).

We conclude that the state constructively amended the complaint when it argued during closing that Wuol was guilty of a felony based on aiding and abetting. *See State v. DeVerney*, 592 N.W.2d 837, 845–46 (Minn. 1999) (noting that “the indictment was never formally amended,” but jury instructions that added vicarious-liability theory was a “variance” from the indictment, subject to rule 17.05); *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997) (concluding that state constructively amended the complaint when, midtrial, the district court allowed the state to reopen its case to present additional evidence on new charge).

Next, we consider whether the district court plainly erred in allowing the constructive amendment. Minnesota Rule of Criminal Procedure 17.05 provides that a district court may allow the state to amend the complaint “at any time before verdict” if: (1) “no additional or different offense is charged,” and (2) “the defendant’s substantial rights are not prejudiced.” *See State v. Ostrem*, 535 N.W.2d 916, 922 (Minn. 1995) (providing the rule 17.05 “two-step process”). Wuol concedes, and we conclude, that

aiding and abetting is not an additional or different offense. See *DeVerney*, 592 N.W.2d at 846 (“We have long held that aiding and abetting is not a separate substantive offense and can be added at any point prior to a verdict or finding.”). Thus, rule 17.05’s first requirement is satisfied because the state did not add a new or different offense.

Regarding the second requirement, the state argues that Wuol’s substantial rights were not prejudiced because the first requirement was satisfied. The state relies on *Ostrem*, which held that, “in order to prejudice the substantial rights of the defendant, it must be shown that the amendment either added or charged a different offense.” 535 N.W.2d at 923 (quoting *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982)). Wuol responds that we must analyze the prejudice prong, even if no new offense was added. We agree with Wuol that rule 17.05 has two independent requirements. See *Guerra*, 562 N.W.2d at 13 (labeling the second requirement as an “*independent* proscription” (emphasis added)); see also *DeVerney*, 592 N.W.2d at 846–47 (analyzing the second requirement after concluding that the first requirement was met). Therefore, we will analyze the second rule 17.05 requirement.

Wuol presents three reasons why the state’s constructive amendment prejudiced his substantial rights, which we address in turn. Before beginning, we note that the parties appear to agree that, if Wuol had been convicted based solely on the value of the property he actually possessed, he could have only been convicted of gross misdemeanor-level offenses. See Minn. Stat. § 609.52, subd. 3(4) (2014) (gross misdemeanor-level theft based on stolen property valued between \$500 and \$1,000).

First, Wuol argues the complaint provided inadequate notice of an aiding-and-abetting theory. But the complaint alleged felony-level offenses for stolen property worth more than \$1,000. The probable-cause statement attached to the complaint described K.K.'s involvement and listed all of the stolen property, with an estimated total value of \$3,000. A court may consider police reports and statements in determining whether a defendant has notice of the state's theory. *See State v. DeFoe*, 280 N.W.2d 38, 40 (Minn. 1979) (concluding appellant had notice of state's aiding-and-abetting theory because the complaint together with "the reports and statements attached" to it made "clear" the state's theory and there was "no possibility that [appellant] was confused as to the nature of the charges"). Because the complaint and probable-cause statement implicitly alleged aiding and abetting, Wuol had adequate notice of the nature of the charges and the state's aiding-and-abetting theory.

Second, Wuol argues that, during trial, the state's theory changed because the state focused solely on the property within Wuol's "immediate possession" until rebuttal, when it first mentioned the "total value of the property." It is true that the state cross-examined Wuol about whether he remembered carrying anything, which Wuol denied because he was "highly intoxicated." But the state began its case by asking L.F. to identify which items she found missing and the value of each item, totaling between \$1,805 and \$1,910. Additionally, the state questioned the responding officers about K.K.'s and Wuol's conduct, proximity, and statements. The record established that Wuol and K.K. admitted that they were "moving" the property, although K.K. said the property belonged to Wuol and Wuol denied that, saying it belong to "a friend." The record also established that some

of L.F.'s property was found hidden on Wuol and that K.K. planned to sell the items. Taken together, the record supports the inference that Wuol was intentionally helping K.K. commit the crime of theft and establishes that the state relied on aiding and abetting throughout trial and did not change its theory in any meaningful way.

Third, Wuol argues the amendment prejudiced his substantial rights because it occurred at the “eleventh hour” and he was unable to present an adequate defense. *See DeVerney*, 592 N.W.2d at 846 (“[T]he opportunity to prepare a defense in a criminal case is a substantial right.”). Wuol maintains that his trial theory was that “his conduct and the items he actually possessed did not reach felony level valuations.” But the record reflects that Wuol defended the charges by asserting he was too intoxicated to form intent and by challenging the value of the stolen property.<sup>1</sup> Wuol asserts that he would have asked different questions during witness examination had he known about the state’s aiding-and-abetting theory. We are unpersuaded because, as discussed, the complaint and related probable-cause statement, as well as the direct testimony of L.F. and police officers, provided notice that the state was relying on the value of all the stolen property to support felony-level charges. We therefore conclude that the state’s constructive amendment did not prejudice Wuol’s substantial rights. Accordingly, the district court did not plainly err in allowing the state to constructively amend the complaint to add aiding and abetting.

---

<sup>1</sup> During cross-examination of L.F., Wuol challenged her initial estimation of the property value by asking her how long she had owned the property and whether she thought the property had decreased in value over time.



**II. Wuol's formal adjudication of guilt of receiving stolen property must be vacated because it is a lesser-included offense of theft.**

Whether a crime is a lesser-included offense is a legal question that we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). A person may only be convicted of “the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). Minnesota defines an “included offense” as a “lesser degree of the same crime,” or a “crime necessarily proved if the crime charged were proved.” *Id.* Appellate courts look not to the guilty verdict, but to the “formal adjudication of guilt” in “the official judgment of conviction” to determine whether a defendant has been convicted of a lesser-included offense. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999).

Here, the warrant of commitment directs entry of judgment adjudicating Wuol guilty of theft under Minn. Stat. § 609.52, subd. 2(a)(1), and receiving stolen property under Minn. Stat. § 609.53, subd. 1. Wuol argues, and the state concedes, that his adjudicated conviction of receiving stolen property must be vacated as a lesser-included offense of theft because it stemmed “from the same conduct on the night of the theft.” We agree. *See State v. Lee*, 683 N.W.2d 309, 315 (Minn. 2004) (holding that “a person may not be convicted of both theft and receiving stolen property with respect to property involved in the same transaction.”). Therefore, we reverse Wuol’s receiving-stolen-property conviction because it is a lesser included-offense of theft and remand to the district court with instructions to vacate the formal adjudication of guilt on that charge, but to leave the guilty verdict in place. *See State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014)

(describing proper procedure for preserving guilty verdict on non-adjudicated conviction),  
*review denied* (Minn. Dec. 16, 2014).

**Affirmed in part, reversed in part, and remanded.**