STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2079

State of Minnesota,
Respondent,

vs.

Jennifer Lynn Mulvihill,
Appellant.

Filed September 18, 2017
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CR-16-2312

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Jesson, Judge.

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

JESSON, Judge

On appeal from her felony theft convictions, appellant Jennifer Lynn Mulvihill argues that the district court committed reversible error by admitting hearsay evidence

regarding the stolen property's value and that the evidence was insufficient to prove that the stolen property's value was more than $1,000. Because the challenged testimony was not hearsay, and because the evidence was sufficient to prove that the value of the stolen property was more than $1,000, we affirm.

FACTS

Around 5:00 p.m. on December 13, 2015, Jennifer Hirschi was working at Sundance, a store in the Galleria shopping center in Edina, when she found a bracelet that had fallen into a basket of merchandise. Because Hirschi did not want to be responsible for what might be an expensive bracelet, she decided to take it to Guest Services, which managed the Galleria's shopping-center-wide lost and found. While on the floor, Hirschi called Guest Services and spoke to Diane Syverson. Hirschi explained that she found a valuable bracelet, and Syverson told her to bring it to Guest Services where it would be locked in a safe. Hirschi then walked to Guest Services and gave Syverson the bracelet.

About 10 to 15 minutes later, Syverson received a phone call from an upset woman who said that she lost her bracelet. After telling the woman that she could come to Guest Services, Syverson requested that a member of security come to the Guest Services desk. When Kiley Budge, a security officer, arrived at Guest Services, Syverson explained that someone was coming to check on a lost bracelet and showed Budge the bracelet that was found in Sundance. Shortly thereafter, a woman came to Guest Services and said that she lost her bracelet. Syverson asked for the woman's identification, and the woman produced a Costco card bearing the name Jennifer Mulvihill. Mulvihill described the bracelet as having diamonds, and Syverson gave Mulvihill the bracelet that was found in Sundance.

That evening, J.P. arrived home and noticed that a bracelet that she had worn while at the Galleria was missing. The following day, J.P. called Guest Services and was told that no bracelet was in the lost and found. J.P. then began calling each of the stores where she had shopped on December 13, 2015. When J.P. called Sundance to inquire about her lost bracelet, an employee told her that a bracelet had been found and turned into Guest Services. J.P. called Guest Services again and was told that she would have to call back when the director of security was available. On December 15, 2015, J.P. spoke with the director of security, who explained that another person claimed the bracelet shortly after it was turned into Guest Services. A member of the Galleria's security contacted the Edina police, and Officer Seeger conducted an investigation.

In January 2016, Mulvihill was charged with one count of felony theft by swindle in violation of Minn. Stat. § 609.52, subd. 2(a)(4) (2014), and one count of felony theft by finding and appropriating lost property in violation of Minn. Stat. § 609.52, subd. 2(a)(6) (2014). At trial, several exhibits were received and Hirschi, Syverson, Budge, Officer Seeger, and J.P. testified. The jury found Mulvihill guilty of both felony theft offenses. On October 4, 2016, the district court formally adjudicated Mulvihill guilty of both offenses[1] and stayed imposition on both counts. Mulvihill now appeals.

[1] Generally, whether a defendant was formally adjudicated guilty of an offense is determined by looking at the official judgment of conviction. *State v. Jackson*, 363 N.W.2d 758, 760 n.4 (Minn. 1985). Here, the sentencing order makes clear that Mulvihill was formally adjudicated guilty of both felony theft by swindle and felony theft by finding and appropriating lost property.

D E C I S I O N

It is the state's burden to prove every element of an offense beyond a reasonable doubt. *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984). Here, the state was required to prove that the stolen bracelet's value was more than $1,000. Minn. Stat. § 609.52, subd. 3(3)(a) (2014). Mulvihill asserts that the state failed to meet this burden because: (1) it relied on inadmissible hearsay evidence to prove the bracelet's value; and (2) the testimony regarding the bracelet's 1999 purchase price was insufficient to prove the bracelet's value.

I. The challenged testimony was not hearsay.

Mulvihill argues that the district court committed reversible error by admitting J.P.'s testimony that her husband told her that he bought the bracelet for $2,000 because that testimony was inadmissible hearsay.

At trial, defense counsel made an unspecified objection to J.P.'s testimony that $2,000 had been paid to purchase her bracelet. Under Minn. R. Evid. 103, "[e]rror may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection . . . appears of record, stating the specific ground of objection, if the specific ground was not apparent from context." Minn. R. Evid. 103(a)(1). But nothing in rule 103 precludes an appellate court from taking notice of plain errors affecting substantial rights. Minn. R. Evid. 103(d). To determine the standard of review where an unspecified objection was made at trial, an appellate court must determine if the specific ground for the objection is clear from the context. *State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011). "If the specific

ground for the objection is not clear from the context, then [an appellate court] review[s] the admission of evidence under a plain-error analysis." *Id.*

Here, defense counsel's unspecified objection occurred as follows, during the direct examination of J.P.:

> PROSECUTOR: Where had you gotten the bracelet?
> J.P.: My husband gave it to me before the birth of our daughter and he purchased it in 1999, December of 1999. So it was a gift.
> PROSECUTOR: Do you know where he got it?
> J.P.: I don't know for sure. I don't know for sure.
> PROSECUTOR: All right. And do you know how much was paid for it?
> J.P.: $2,000.
> DEFENSE COUNSEL: Objection.

Because the specific ground for defense counsel's objection is not clear from the record, we review the admission of J.P.'s testimony for plain error. Under the plain-error standard, the defendant must show "(1) error (2) that was plain and (3) that affected the defendant's substantial rights." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

First, we must determine whether the district court erred by admitting J.P.'s testimony. "[W]e review evidentiary decisions for an abuse of discretion." *State v. Chavez-Nelson*, 882 N.W.2d 579, 588 (Minn. 2016); *see State v. Burrell*, 772 N.W.2d 459, 469 (Minn. 2009) (providing that evidentiary rulings on hearsay statements are viewed for clear abuse of discretion). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). When an out-of-court statement is offered for some other purpose, such as to prove knowledge, the statement is not hearsay. Minn. R. Evid.

801 1989 comm. cmt.; *see State v. Litzau*, 650 N.W.2d 177, 183 n.4 (Minn. 2002) (explaining that an officer may reconstruct the steps in a criminal investigation and testify that he spoke to an informant, but cannot disclose the substance of that conversation).

When asked if she knew how much had been paid for the bracelet, J.P. responded, "$2,000." Because J.P.'s response did not include any out-of-court statement, this testimony was not hearsay.

On cross-examination, defense counsel elicited the following testimony:

> DEFENSE COUNSEL: Okay. You were asked about the value of the bracelet, correct?
> J.P.: Mm hm.
> DEFENSE COUNSEL: Okay, but you didn't purchase it, right?
> J.P.: No.
> DEFENSE COUNSEL: Did you see a receipt for it?
> J.P.: No.
> . . . .
> DEFENSE COUNSEL: Okay. So you did not get the bracelet appraised?
> J.P.: No.

On redirect, the prosecutor asked J.P. if she knew "whether those were real diamonds" in the bracelet, and J.P. replied, "[M]y husband gave it to me and . . . since [he] has told me what he paid for it and so my assumption is that they were real diamonds." Although J.P.'s response refers to an out-of-court statement, the statement was not offered to prove the true amount paid for the bracelet. Rather, J.P. testified regarding her husband's statement to prove that she had knowledge about whether the diamonds in her bracelet were real. For this reason, J.P.'s response was not hearsay.

Mulvihill attempts to combine J.P.'s testimony on direct, in which she states that $2,000 was paid for the bracelet, with J.P.'s testimony on redirect, in which she states that her husband told her what he paid for the bracelet. Only by combining J.P.'s testimony on direct and redirect can Mulvihill assert that J.P. "testified that her husband told her the value of the bracelet was $2,000." Mulvihill does not cite any legal authority to support her argument that these statements, which are separated by several pages in the trial transcript, should be read together to form a single statement that must be excluded as hearsay. We decline to combine J.P.'s statements in the manner suggested by Mulvihill.

Relying on *Bartl v. City of New Ulm*, 245 Minn. 148, 151-52, 72 N.W.2d 303, 306 (1955), Mulvihill further asserts that an estimate of a piece of property's value by a person who did not purchase the property amounts to inadmissible hearsay. Mulvihill's reliance on *Bartl* is misplaced. In *Bartl,* a witness who was engaged in the plumbing business was asked about the cost of tanks the same size as the plaintiff's damaged tanks. 245 Minn. at 151, 72 N.W.2d at 306. "The witness testified that since the tanks were special equipment he had to 'acquire quotations' from another source." *Id.* at 152, 72 N.W.2d at 306. Because "an estimate of value of property from a witness *other than the owner* based solely on price quotations obtained by means of a special inquiry constitute[s] hearsay," the supreme court held that the district court properly excluded the witness's testimony as hearsay. *Id.* (emphasis added). Here, J.P., the owner of the bracelet, testified as to its value. For this reason, the holding of *Bartl* is inapposite.

Because Mulvihill has failed to show that the district court erred by admitting hearsay evidence, she cannot establish plain error.

II. The evidence was sufficient to prove that the bracelet's value was more than $1,000.

Mulvihill next argues that the evidence produced at trial was insufficient to prove that the bracelet's value was more than $1,000. When the sufficiency of the evidence is challenged, an appellate court reviews "the evidence to determine whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Fairbanks*, 842 N.W.2d 297, 306-07 (Minn. 2014) (quotation omitted). "The reviewing court must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Heiges*, 806 N.W.2d 1, 17 (Minn. 2011) (quotation omitted).

The theft statute defines "value" as "the retail market value at the time of the theft, or if the retail market value cannot be ascertained, the cost of replacement of the property within a reasonable time after the theft." Minn. Stat. § 609.52, subd. 1(3) (2014). "A jury can properly accept an owner's testimony as to the value of his or her own property." *State v. Clipper*, 429 N.W.2d 698, 700 (Minn. App. 1988).

At trial, several witnesses testified regarding the bracelet's value. J.P. testified that her husband purchased the bracelet for $2,000 in 1999. Hirschi described the bracelet as containing diamonds, yellow gold, and white gold or platinum. Hirschi further testified that she had worked in retail for a long time, had experience with both costume jewelry and fine jewelry, and believed that the bracelet she found contained real gold and real diamonds based upon the bracelet's appearance and weight. Budge also described the bracelet as a diamond bracelet and testified that it looked expensive to her.

Relying on *State v. Stout*, 273 N.W.2d 621, 623 (Minn. 1978), Mulvihill asserts that J.P.'s testimony regarding the bracelet's purchase price is not conclusive evidence of the bracelet's value. In *Stout*, the supreme court held that a store owner's testimony that he would have sold the ring that was stolen from his store, which had a $2,995 price tag, for less than $2,500 precluded a finding that the value of the ring was more than $2,500. 273 N.W.2d at 623. Although the supreme court recognized that testimony as to the price on a price tag is ordinarily sufficient to justify a finding that the price listed was the retail market value of the item, it concluded that the price on a price tag is not conclusive because the price charged by a store may not accurately reflect the market value of the item. *Id.* Unlike in *Stout*, no evidence concerning the seller's markup of the bracelet was presented here. In the absence of any evidence suggesting that the bracelet's price differed from its market value, J.P.'s testimony that $2,000 was paid for the bracelet in 1999 was sufficient to justify a finding that the bracelet had a retail market value of $2,000 in 1999.

Mulvihill additionally argues that evidence of the 1999 purchase price was insufficient to prove that the bracelet's value exceeded $1,000 because the bracelet could have depreciated over time. However, Mulvihill offered no evidence to show that the bracelet depreciated. This court has upheld convictions where the state presented evidence of the original purchase price and the age of the stolen items, even when the current market value of the stolen goods was indeterminable. *See Clipper*, 429 N.W.2d at 700; *Herme v. State*, 384 N.W.2d 205, 208 (Minn. App. 1986), *review denied* (Minn. May 22, 1986). Here, J.P. described the bracelet's original purchase price and age when she testified that her husband purchased the bracelet for $2,000 in 1999. From this testimony, the jury could

infer that the bracelet had a retail market value of more than $1,000 at the time of the theft or a replacement cost of more than $1,000 within a reasonable time after the theft.

From our careful review of the record, we conclude that the evidence was sufficient to prove that the bracelet's value was more than $1,000.

Affirmed.