STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1086

State of Minnesota,
Respondent,

vs.

Mony Vetsouvanh,
Appellant.

Filed July 19, 2021
Affirmed in part, reversed in part, and remanded
Slieter, Judge

Cottonwood County District Court
File No. 17-CR-18-608

Keith Ellison, Attorney General, Kirsi Poupore, Assistant Attorney General, St. Paul, Minnesota; and

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Slieter, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from judgments of conviction for theft by false representation, appellant Mony Vetsouvanh argues that the district court erred by admitting evidence that she previously pleaded guilty to theft of unemployment benefits and that she provided "kickback" payments to Medicaid recipients. Vetsouvanh also claims the district court erred by convicting her of all six felony theft counts. Because the district court did not commit reversible error by the admission of the contested evidence, we affirm in part. However, because three counts for which the district court entered convictions were part of the same criminal act, we reverse in part, and remand.

FACTS

Respondent State of Minnesota charged Vetsouvanh with three counts of felony theft by false representation, in violation of Minn. Stat. § 609.52, subd. 2(a)(3)(iii) (2014), with reference to Minn. Stat. § 609.52, subd. 3(2) (2014) (relating to thefts of over $5,000) (counts one through three); and, by amended complaint, with three counts of felony theft by false representation, in violation of Minn. Stat. § 609.52, subd. 2(a)(3)(iii), with reference to Minn. Stat. § 609.52, subd. 3(3)(d)(iv) (2014) (relating to theft of public funds) (counts four through six). The complaint alleged three criminal acts which occurred during six-month periods over an 18-month period. As a result, counts one through three and four through six correlate to the same three criminal acts.

Before trial, the district court granted the state's motion over Vetsouvanh's objection to introduce *Spreigl* evidence of Vetsouvanh's 2015 guilty plea to felony theft of her son's unemployment benefits by false representation.[1] The district court separately denied Vetsouvanh's motion *in limine* to prevent the state from introducing evidence of Medicare "kickback" payments.

[1] Because the district court in that matter entered a stay of adjudication, Vetsouvanh was not convicted of the offense.

The following facts are derived from the jury trial. Between 2015 and 2016, Vetsouvanh worked as a Lao medical interpreter for Kim Tong Translation Services (KTTS). In this capacity, she provided interpreter services for Medicaid patients at hospitals and clinics. An investigator in the Medicaid Fraud Control Unit began investigating Vetsouvanh after an insurance provider submitted "credible allegations of fraud" that "interpreter logs were being submitted and paid out that did not have underlying medical services."

The manager of KTTS's accounting department testified that KTTS possessed contracts to provide interpreter services with UCare, Blue Cross, Blue Shield, Health Partners, and Medica. These insurers are billed by KTTS for services based on the individual interpreter's timesheets. KTTS pays a portion of the amount billed directly to the interpreter. Interpreters are obligated to track their time spent for services provided. Interpreters provide a form to a clinic's front desk staff upon arrival to record that they appeared with a patient, and staff sign and date the form at the end of the appointment. Certain clinics have interpreter worksheets, and the clinic staff and interpreter must each sign the worksheets.

The fraud investigator reviewed the insurer's claims, KTTS's interpreter claims and logs, the service-recipient's medical data, clinic data of medical appointments, Vetsouvanh's personal bank account records, and Vetsouvanh's time records of her outside employment. The investigation uncovered 802 interpreter logs submitted by Vetsouvanh which did not correspond to underlying medical appointments, and her time records indicated that she was working at other employment during some of these times. In total, Vetsouvanh received $33,617.33 for interpreter services to which she was not entitled.

A clinical director of a clinic at which Vetsouvanh provided interpreter services established that medical appointments appear on a clinic's electronic medical records. He stated there is a "zero percent" chance that medical services are provided for which there is no corresponding documentation or underlying medical appointment.

In sum, the state called seven witnesses and offered 19 exhibits during trial. Vetsouvanh exercised her right to remain silent and provided no witness testimony. The jury returned a guilty verdict for each of the six counts. At sentencing, the district court entered convictions for all six counts and imposed sentences for counts one through three.

Vetsouvanh appeals.

DECISION

I. The district court did not commit reversible error by admitting the contested evidence.

Vetsouvanh asks us to review two evidentiary rulings. First, we review the district court's allowance of *Spreigl* evidence[2] submitted by the state of Vetsouvanh's prior guilty plea to felony theft involving the unlawful receipt of unemployment benefits in the name of her deceased son. Second, we review the district court's ruling allowing the state to admit evidence of Medicare "kickback" payments consisting of three personal checks Vetsouvanh wrote to Medicaid recipients whose personal information she used to submit

[2] The admissibility of evidence of other crimes or acts is governed by Minn. R. Evid. 404(b). Such evidence is commonly referred to as "*Spreigl* evidence" after the supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

interpreter claims to her employer.[3] We presume, without so ruling, that admission of both items of evidence was error but conclude that any such error was harmless.

Because Vetsouvanh objected to the evidence, we review her claims for harmless error. An error is harmless if there is "no reasonable possibility that it substantially influence[d] the jury's decision." *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (alteration in original) (quotation omitted). An appellant bears the burden of demonstrating that they were prejudiced as a result of error. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). When considering whether erroneously admitted evidence significantly influenced the jury's verdict, appellate courts consider whether the district court gave a limiting instruction, the prosecutor "dwelled on the evidence in closing argument[,] and whether the evidence of guilt was overwhelming." *State v. Riddley*, 776 N.W.2d 419, 428 (Minn. 2009).

First, the district court provided the jury with a cautionary instruction before the presentation of Vetsouvanh's prior guilty plea and repeated this instruction during final instructions, using the language of 10 *Minnesota Practice*, CRIMJIG 2.01, 3.16 (2020). "[Appellate courts] presume a jury follows a court's cautionary instruction." *See Riddley*, 776 N.W.2d at 428. Vetsouvanh did not object to the district court's cautionary instruction during trial.

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[3] The district court, in addition to finding the evidence relevant, determined that the checks were "intrinsic and certainly part of the overall scheme." Vetsouvanh and the state disagree on how to characterize the "kickback" payments. Vetsouvanh asserts that it is improperly admitted *Spreigl* evidence and the state asserts that it is proper immediate-episode evidence. We do not decide the character of the evidence because we presume error in admitting the evidence but that such error is harmless.

Vetsouvanh, relying on *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002), argues that the district court's cautionary instruction "exacerbated the potential" to improperly influence the jury. Her reliance on *Strommen* for this proposition is misplaced. *Strommen* involved an improper character attack though the defendant had not placed his character in issue. *Strommen*, 648 N.W.2d at 687. The district court subsequently gave the *Spreigl*-associated limiting instruction found in CRIMJIG 3.16. *Id.* Though the supreme court stated that the "cautionary instruction" given to the jury "exacerbated its prejudicial effect," it did so on the basis that a curative, rather than a cautionary, instruction was proper.[4] *Id.* The district court here properly gave a cautionary instruction to the jury, and we presume that the jury followed the district court's instructions. *See Griffin*, 887 N.W.2d at 262.

Second, the state did not "dwell[] on the evidence" in closing arguments because it did not discuss either Vetsouvanh's prior guilty plea or the "kickback" payments at any time during its closing or rebuttal arguments.

Third, the evidence of Vetsouvanh's guilt was overwhelming. The state presented the fraud investigator's thorough investigation of the insurance claims, three clinic employees stating that their handwriting was forged on Vetsouvanh's interpreter worksheets, and evidence that Vetsouvanh was working at other employment during times she claimed to be working for KTTS as an interpreter. The state presented 802 interpreter

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[4] Further, in a later-decided *Spreigl*-evidence case, the supreme court noted, when comparing the Eighth Circuit Model Instruction and the Minnesota CRIMJIG, "CRIMJIG 3.16 more generally limits the jury's use of the evidence to determining whether defendant committed those acts with which the defendant is charged," and found the Minnesota instruction the more appropriate. *Ture v. State*, 681 N.W.2d 9, 18 (Minn. 2004) (quotation omitted).

worksheets completed by Vetsouvanh which did not correspond to underlying medical appointments. The clinic director testified that there was "zero chance" that the clinic provides medical services without an underlying medical appointment.

Therefore, assuming the district court erred by admitting the evidence of Vetsouvanh's prior guilty plea and the Medicare "kickback" payments, there is no reasonable possibility that the evidence substantially affected the verdict and we affirm.

II. The district court erred by entering six convictions.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2020). "[S]ection 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Chavarria-Cruz*, 839 N.W.2d 515, 523 (Minn. 2013) (quotation omitted). "Whether multiple offenses form part of a single behavioral act is a question of fact," but where the facts are undisputed, this court reviews *de novo* whether the offenses are part of the same behavioral incident. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). To determine whether offenses arise from a single behavioral incident, appellate courts consider such factors as "time and place . . . [and] whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006) (alteration in original) (quotation omitted).

When a defendant is convicted of more than one charge for the same act, a district court should "adjudicate formally and impose sentence on one count only." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Whether a conviction violates section

609.04 is a question of law subject to *de novo* review. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Vetsouvanh was charged with six felony counts of theft by false representation. Counts one through three correlate to three six-month time periods, aggregated over the 18 months of the ongoing offense. Counts four through six repeat the allegations of the first three counts. The lone difference between counts one through three and counts four through six is that the latter three counts involve the theft of public funds, a factor relating to sentencing only. *See* Minn. Stat. § 609.52, subd. 3(3)(d)(iv).

Because Vetsouvanh was convicted for acts committed during the same criminal act, entering convictions for theft of public funds is improper pursuant to section 609.04, subdivision 1. We, therefore, reverse in part and remand to the district court to vacate Vetsouvanh's adjudication of guilt for counts four through six.

Affirmed in part, reversed in part, and remanded.