

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1404**

State of Minnesota,
Appellant,

vs.

Peggy Lynn Nelson,
Respondent.

**Filed March 28, 2022
Reversed and remanded
Smith, Tracy M., Judge**

Otter Tail County District Court
File No. 56-CR-20-695

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michelle M. Eldien, Otter Tail County Attorney, Benjamin G. A. Olson, Assistant County Attorney, Fergus Falls, Minnesota (for appellant)

Melvin R. Welch, Welch Law Firm LLC, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Klaphake, Judge.*

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant the State of Minnesota charged respondent Peggy Lynn Nelson with theft of movable property based on alleged unauthorized transactions she made involving her

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

employer's financial accounts. Before trial, the district court issued an order establishing the jury instructions in the case, and those instructions directed that electronic funds deposited into a financial account are not "movable property" for purposes of the theft statute. In this pretrial appeal, the state argues that the district court's instructions are erroneous and that the pretrial order has a critical impact on its prosecution because it will lead to dismissal of the charge or a judgment of acquittal. We agree, and we reverse and remand.

FACTS

The criminal complaint alleges that Nelson, an employee at InVision Eye Care, set up an unauthorized PayPal account that was linked to InVision's business checking account and business credit card and that she used that PayPal account to make personal purchases and to make payments to her son and to herself. The complaint further alleges that Nelson made an unauthorized withdrawal of funds from InVision's business account "as a bonus" and that she added personal time to her employee account without authorization, resulting in overpayment to her. Based on these alleged actions, the state charged Nelson with one count of felony theft of movable property, in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2016).

Before trial, the state submitted proposed jury instructions. The district court then drafted its own proposed jury instructions and sent them to counsel. The relevant portion of the district court's proposed instructions read as follows:

The elements of theft are:

First, the defendant took, used, transferred, concealed, or retained possession of movable property.

“Movable property” is property whose physical location can be changed.

Intangible property, such as funds deposited in a financial account or funds accessed using a financial transaction card, is not “movable property.”

(Emphasis added.)

The first sentence in the proposed instructions was drawn from the standard jury instruction stating the elements of theft. *See 10 Minnesota Practice*, CRIMJIG 16.02 (2015). The second sentence was the standard jury instruction defining “movable property,” *see* CRIMJIG 16.77, which mirrors the statutory definition of “movable property,” *see* Minn. Stat. § 609.52, subd. 1(2) (2016). The third sentence, in italics, was drafted by the district court to describe its understanding of the law as applicable to this case.

The state objected to the italicized language. When the district court overruled the state’s objection, the state informed the district court of its intent to appeal the decision per Minn. R. Crim. P. 28.04, subd. 2. The district court then issued its written order, confirming its instructions. In the accompanying memorandum explaining its reasoning, the district court stated that, based on its review of caselaw, funds in a financial account do not have a “physical location” because “[t]hey are bookkeeping entries without any obvious physical manifestation,” and, because the funds lack a physical location, their physical location cannot be moved.

The state appeals.

DECISION

Critical Impact

As a preliminary matter, we must determine whether we will even reach the merits of the state's appeal. Although the rules of criminal procedure permit the state to seek appellate review of a pretrial order, *see* Minn. R. Crim. P. 28.04, subd. 1(1), we will reverse a pretrial order only if the state can (1) show that the district court's ruling was erroneous and (2) "clearly and unequivocally show . . . that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotation omitted); *see also State v. Serbus*, 957 N.W.2d 84, 87 (Minn. 2021). Critical impact is a threshold issue, and appellate courts will not review a pretrial order absent such showing of critical impact. *See State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017).

We agree with the state that the critical impact standard is met in this case. All the "movable property" at issue relates to transactions in financial accounts. As the state argues, under the district court's determination of the applicable law, the charge is subject to dismissal for lack of probable cause. An order for dismissal of a charge satisfies the critical-impact standard. *See State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009) ("[A]n order that dismisses DWI charges, even when other charges remain, will have a critical impact on the prosecution's case."); *see also Serbus*, 957 N.W.2d at 87 (stating that "[b]ecause the district court dismissed the charge, critical impact is met"). As the state also asserts, if the case is not dismissed but rather goes to trial, it is subject to a judgment of acquittal; in fact, the district court stated in its pretrial order that "if the State were to

proceed to a jury on the current Complaint, then Defendant could move for a directed verdict at the close of the State's case, and the Court would grant this motion as a matter of law." An acquittal as a matter of law clearly would also have a critical impact on the state's prosecution.

Nelson argues that, because the state could charge her under alternative theories of theft other than movable-property theft, such as theft by false representation, *see* Minn. Stat. § 609.52, subd. 2(a)(3)(i) (2016), theft by swindle, *see id.*, subd. 2(a)(4) (2016), or theft of corporate property, *see id.*, subd. 2(a)(15) (2016), the state has not shown any critical impact. But this argument misses the mark. What matters in our consideration of a pretrial ruling's critical impact is whether the ruling has a critical impact on the current charge. *See Underdahl*, 767 N.W.2d at 684. Here, the pretrial ruling will lead to dismissal of the theft-of-movable property charge against Nelson or an acquittal as a matter of law. The state has established the ruling has a critical impact on the state's ability to prosecute its case.

Jury Instructions

With the threshold for reviewing the pretrial order satisfied, we turn to the merits of the state's appeal. The state argues that the district court erred in how it defined "movable property," contending that the district court's definition is contrary to the plain language of section 609.52, subdivision 1(2). We agree.

Generally, we review "a district court's jury instructions for an abuse of discretion." *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019) (citation and quotation omitted). "A district court abuses its discretion if it fails to properly instruct the jury on all elements of

the offense charged.” *Id.* “An instruction is in error if it materially misstates the law.” *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (citation omitted). Here, the issue is whether the district court properly defined a statutory term in its proposed jury instructions. This is a question of statutory interpretation that we review de novo. *See State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017).

The object of statutory interpretation is to “ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2020); *see also Roberts v. State*, 945 N.W.2d 850, 853 (Minn. 2020). We apply the plain meaning of a statutory provision if the legislative intent “is clear from the unambiguous language of the statute.” *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 716-17 (Minn. 2014). “When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16. “A statute is to be enforced literally as it reads, if its language embodies a definite meaning which involves no absurdity or contradiction.” *Arlandson v. Humphrey*, 27 N.W.2d 819, 823 (Minn. 1947) (quotation omitted).

Under the relevant provision of the theft statute, a person commits theft when they “intentionally and without claim of right take[], use[], transfer[], conceal[] or retain[] possession of *movable property* of another without the other’s consent and with intent to deprive the owner permanently of possession of the property.” Minn. Stat. § 609.52, subd. 2(a)(1) (emphasis added). Movable property is defined as “property whose physical location can be changed, including without limitation things growing on, affixed to, or found in land.” *Id.*, subd. 1(2). From this statutory definition, the district court determined

that “intangible property, such as funds deposited in a financial account or funds accessed using a financial transaction card” do not qualify as “movable property.”¹

A plain reading of the statute does not support the district court’s conclusion that the funds were immovable property. For property to be “movable,” the property’s physical location must be able to be changed. *Id.* While funds deposited in a checking account are not stored as physical currency, the funds representing that currency can move from account to account. When an account holder transfers funds from one account to another, the funds physically *move* into the new account even though they were not touched.

The state presents a persuasive example illustrating this point. Because withdrawn funds become currency—which is movable property—the funds themselves must be movable property before their withdrawal. Here, InVision deposited currency into its business account. Then, when Nelson allegedly transferred the funds electronically, she could have withdrawn the funds from her personal checking account as currency. In addition, assuming that Nelson’s personal account was at a different bank than InVision’s

¹ We pause to address the use of the term “intangible” in the district court’s instruction. As noted above, Nelson argues that the state could charge her under a different provision of the theft statute rather than the movable-property provision. Each of the provisions that Nelson cites requires the theft of “property.” *See* Minn. Stat. § 609.52, subd. 2(a)(3)(i) (theft by false representation), subd. 2(a)(4) (theft by swindle), subd. 2(a)(15) (theft of corporate property). “Property” is defined by the statute as “all forms of *tangible* property.” *Id.*, subd. 2 (2016) (emphasis added). By arguing that these other provisions of theft apply, Nelson necessarily concedes that the funds qualify as “property” and were thus “tangible.” Though the district court stated that it was using the word “intangible” simply as a “descriptive term” to assist the jury, we observe that using the term “intangible” might confuse the jury about whether the funds are, in fact, “property,” a matter that does not appear to be at issue in the case.

account, the funds would have had to move from one bank to another before Nelson could withdraw the funds as currency.

Nelson's arguments that the district court properly interpreted section 609.52, subdivision 1(2), are unpersuasive. Nelson argues that, because the definition of "movable property" is narrower than the definition of "property," "movable property" must exclude certain property and thus must exclude the property here. But the statute already excludes some "property" from "movable property"—under the statute, real property is not movable property. *See id.*, subd. 1(1) (2016). Thus, while "movable property" is a narrower category than "property," Nelson's argument that "movable property" must exclude the property here is unavailing.

Nelson also argues that the principle that a statute must be construed to give effect to all of its provisions leads to the conclusion that the property is not "movable property" because other provisions under the statute "could encompass the conduct alleged" in this case. It is true that we must interpret a statute "to give effect to all its provisions." Minn. Stat. § 645.16. But the fact that conduct might qualify as theft under more than one provision of the theft statute (a fact that Nelson concedes by citing several provisions that could apply) does not mean that our interpretation of the movable-property definition does not give effect to all of the statute's provisions.

We conclude that the district court erred when it classified the funds as non-movable property in its proposed jury instructions. We therefore reverse the pretrial order and remand for further proceedings.

Reversed and remanded.