STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0659

State of Minnesota,
Respondent,

vs.

Melissa Ann Miller,
Appellant.

Filed April 21, 2025
Affirmed in part, reversed in part, and remanded
Larson, Judge

Douglas County District Court
File No. 21-CR-22-1859

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

Thomas A. Jacobson, Alexandria City Attorney, Katelyn K. Steffel Spangrud, Assistant City Attorney, Alexandria, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Evan A. Ottaviani, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Slieter, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

On direct appeal, appellant Mellissa Ann Miller challenges her gross-misdemeanor- and misdemeanor-theft convictions. First, Miller asserts that respondent State of Minnesota presented insufficient evidence to sustain the gross-misdemeanor conviction

because it failed to prove that she took property with a value exceeding $500. Second, Miller argues that she is entitled to a new trial due to prosecutorial misconduct. We conclude that the state presented insufficient evidence to sustain Miller's gross-misdemeanor-theft conviction, but we do not discern that the prosecutor engaged in misconduct warranting a new trial. Accordingly, we affirm in part, reverse in part, and remand for the district court to vacate Miller's gross-misdemeanor-theft conviction and sentence Miller for the misdemeanor-theft conviction.[1]

FACTS

On September 6, 2022, an asset-protection investigator (the investigator) at a retail store in Alexandria, Minnesota, received information about a customer stealing merchandise. According to the report, the customer would enter self-checkout and selectively scan some, but not all, of the items in her cart. The investigator watched the customer leave self-checkout and take a bag of ice without paying for it. The investigator asked the customer to follow him to address the problem, but she refused and left the store.

The September 6, 2022 incident spurred an investigation into Miller's previous transactions at the store. After accessing her transaction history and identifying her vehicle, the investigator identified the customer as Miller. The investigator reviewed the store's

[1] On appeal, Miller argues the district court erred when it entered convictions for both gross-misdemeanor and misdemeanor theft because the misdemeanor is an included offense to the gross misdemeanor. *See* Minn. Stat. § 609.04 (2020). But because we conclude that the state presented insufficient evidence to sustain the gross-misdemeanor-theft conviction, we need not address this argument. Instead, we reverse and remand for the district court to sentence Miller on the misdemeanor-theft conviction and to vacate the gross-misdemeanor-theft conviction.

security-camera footage and identified multiple incidents when Miller used self-checkout to steal merchandise from July 2022 through September 2022.

On October 13, 2022, the state charged Miller with gross-misdemeanor theft under Minn. Stat. § 609.52, subds. 2(a)(1), 3(4) (2020), and alleged that Miller stole over $500 worth of merchandise. The state later amended the complaint to add a misdemeanor-theft charge under Minn. Stat. § 609.52, subds. 2(a)(1), 3(5) (2020), for the same conduct.

The case proceeded to a jury trial in January 2024. The sole witness was the investigator. The investigator described Miller stealing merchandise on 11 occasions, and he identified the incidents using security-camera footage, receipts, and inventory reports. The investigator indicated that, in calculating the value of one item, he used the lowest possible price, and for another item, he used a discount price. The investigator testified that, based on his arithmetic, Miller stole $501.91 in merchandise.

After the investigator testified, the district court instructed the jury that "[t]he defendant is presumed innocent" and the "presumption remains . . . unless and until she has been proven guilty beyond a reasonable doubt." The parties then proceeded to closing argument. The prosecutor made the following statement:

> Now, members of the jury, I mean, we're right there. We're right there at $501.91. But here is the thing, that's only the identified loss from [the store] that [the investigator] was able to determine. And when we talk about reasonable doubt, I want you to keep in mind that when [the investigator] was identifying these prices, at every single turn he gave Ms. Miller the benefit of the doubt. If he wasn't able to identify a certain item, [the store] took the loss. If he was comparing an item and maybe he couldn't tell a hundred percent what that item was, he compared it to similar items and would assign the lowest value of those similar items to the item that she took.

> So when you are thinking about whether or not the State has met or satisfied that piece of it beyond a reasonable doubt, we have an identified loss of $501.91.

Shortly thereafter, the prosecutor also said, with regards to the investigator's testimony about pricing a drink to reflect a discount: "He didn't feel it was fair to assign a lot [sic] greater than what everyone else was paying, so he gave her the lower amount . . . ."

On rebuttal, Miller's counsel stated: "Members of the jury, it is clear there is reasonable doubt here. . . . [Y]ou will all have the opportunity to review all of the receipts, the footage and all of the evidence you've seen here today. As fact finders, it is clear reviewing all the evidence the numbers don't add up. The State hasn't met their burden of proof."

Once both parties presented their arguments, the district court again reminded the jury that "Miller is presumed innocent of the charges made," and "[t]he presumption remains with her unless and until she has been proven guilty beyond a reasonable doubt." The case was then submitted to the jury. After deliberation, the jury returned guilty verdicts on both the gross-misdemeanor and misdemeanor-theft counts. The district court proceeded to convict Miller on both counts. For the gross-misdemeanor-theft conviction, the district court sentenced Miller to 364 days in jail with 349 days stayed, a $100 fine, and two years of probation. For the misdemeanor-theft conviction, the district court did not impose a sentence, reasoning that it was a lesser-included offense.

Miller appeals.

DECISION

On direct appeal, Miller challenges her convictions on two primary grounds. First, she asserts that the state presented insufficient evidence to sustain the gross-misdemeanor-theft conviction because the state did not prove that she stole over $500 worth of merchandise. Second, she argues that she is entitled to a new trial due to prosecutorial misconduct. We address each argument in turn.

I.

Miller first argues that the state presented insufficient evidence to sustain the gross-misdemeanor-theft conviction because it failed to prove beyond a reasonable doubt that she stole more than $500 of merchandise. In Minnesota, a person who "intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession" is guilty of theft. Minn. Stat. § 609.52, subd. 2(a)(1).

The theft statute authorizes five different maximum sentences, depending on the value of property that was stolen. *See* Minn. Stat. § 609.52, subd. 3 (2020). When the value[2] of the stolen property "is $500 or less," the person is guilty of a misdemeanor. *See id.*, subd. 3(5).[3] And if the value of the stolen property "is more than $500 but not more

[2] "'Value' means the retail market value at the time of the theft . . . ." Minn. Stat. § 609.52, subd. 1(3) (2020).

[3] A "[m]isdemeanor" is "a crime for which a sentence of not more than 90 days or a fine of not more than $1,000, or both, may be imposed." Minn. Stat. § 609.02, subd. 3 (2020).

than $1,000," the person is guilty of a gross misdemeanor. *See id.*, subd. 3(4).[4] If the state charges a defendant with stealing more than $500 worth of property, the value of the stolen property is incorporated into the essential elements of the offense. *See State v. Matousek*, 178 N.W.2d 604, 609 (Minn. 1970); *State v. Saybolt*, 461 N.W.2d 729, 733-35 (Minn. App. 1990), *rev. denied* (Minn. Dec. 17, 1990).[5]

Here, Miller contends that the state failed to prove the merchandise she stole was worth more than $500. "When evaluating the sufficiency of the evidence, appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which [s]he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). "The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict." *Id.* "The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the

[4] A "[g]ross misdemeanor" is "any crime which is not a felony or misdemeanor" and that has a maximum fine of $3,000. Minn. Stat. § 609.02, subd. 4 (2020); *see also id.*, subd. 2 (2020) (defining a "[f]elony" as "a crime for which a sentence of imprisonment for one year or more may be imposed").

[5] We note that, in an ordinary case, the classification of Miller's offense as a gross misdemeanor pertains to sentencing, not the validity of her underlying conviction. *See* Minn. Stat. 609.52, subd. 3 (titling subdivision 3 "Sentence"); *see also* Minn. Sent'g Guidelines cmt. 2.B.701 (Supp. 2021) (recognizing "that the classification of criminal conduct as a felony, gross misdemeanor, misdemeanor, or petty misdemeanor is determined legally by the sentence given"). However, because the district court entered convictions for both gross-misdemeanor and misdemeanor theft, we analyze the propriety of Miller's gross-misdemeanor conviction as a separate offense.

State's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *Id.*

The state can prove the value of stolen property with either direct or circumstantial evidence. *State v. Stout*, 273 N.W.2d 621, 623 (Minn. 1978). "Direct evidence is evidence based on personal knowledge or observation that, if true, proves a fact without inference." *State v. Olson*, 887 N.W.2d 692, 700 (Minn. App. 2016) (citing *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004)). When the state supports an element with direct evidence, we painstakingly review "the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted).

Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). We apply a heightened two-step standard when reviewing the sufficiency of circumstantial evidence. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). First, we "identify the circumstances proved." *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). In this step, "we defer to the jury's acceptance of the proof of these circumstances" and "assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Id.* at 598-99 (quotations omitted). Second, we determine if the circumstances proved, when viewed in their entirety, "are consistent with guilt and inconsistent with any rational hypothesis except that of guilt," and "not simply whether the inferences that point to guilt are reasonable." *Id.* at 599 (quotation omitted). During this

step, we do not defer "to the fact finder's choice between reasonable inferences." *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010) (quotation omitted). The circumstantial evidence the state presents "must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

Here, after we painstakingly reviewed the record, we conclude that the state presented direct evidence that Miller stole $484.13 worth of merchandise, as reflected in the table below.

Date	Item	Cost	Total
July 19, 2022	Toilet Paper	$11.88	$26.86
	Frozen Chicken	$14.98	
July 23, 2022	Pizza	$3.62	$23.50 + 1 unknown
	Pasta	$5.28	
	Ice Cream	$7.24	
	Cheese	$5.28	
	Ginger Ale	$2.08	
	Unknown		
July 30, 2022	Vinegar	$2.98	$2.98 + 2 unknown
	Unknown		
	Unknown		
August 2, 2022	Tortillas	$4.48	$40.34 + 2 unknown
	Drink	$1	
	Granola	$3.52	
	Drink	$2.98	
	Beef Patties	$10.82	
	Beef Patties	$10.82	
	Snack Boxes	$1.68	
	Snack Boxes	$1.68	
	Snack Boxes	$1.68	
	Snack Boxes	$1.68	
	Unknown		
	Unknown		

August 4, 2022	Pan	$5.97	$5.97
August 5, 2022	Boxer Shorts	$18.98	$86.84 + 1 unknown
	Socks	$14.98	
	Meat	$18.16	
	Meat	$18.16	
	Chicken	$16.56	
	Unknown		
August 14, 2022	Vacuum Cleaner	$128	$145.96 + 1 unknown
	Chips	$6.48	
	Chips	$6.48	
	Shorts	$5	
	Unknown		
August 15, 2022	Sausage Sticks	$9.64	$90.78
	Deli Meat	$5.38	
	Pizza Rolls	$9.88	
	Watermelon	$5.98	
	Health Shake	$11.98	
	Health Shake	$11.98	
	Health Shake	$11.98	
	Health Shake	$11.98	
	Health Shake	$11.98	
August 23, 2022	Stuffing	$2.28	$12.28
	Sweatshirt	$10	
August 29, 2022	Ginger Ale	$2.08	$13.96
	Toilet Paper	$11.88	
September 3, 2022	Deli Food	$6.97	$34.66 + 1 unknown
	Clothing	$7.50	
	Pens	$7.68	
	Notebook	$2.63	
	Socks	$9.88	
	Unknown		
TOTAL: $484.13 + 8 unknown items			

The table corrects for a several mathematical errors that the investigator made during his testimony. First, the investigator testified that Miller stole $38.66 on August 2, 2022, but the actual value, based on his testimony about the price of the individual items, was $40.34. Similarly, based on the investigator's testimony about the individual items

that Miller stole on August 14, 2022, the total value was $145.96, contrary to his testimony that she stole merchandise worth $152.44.[6] In addition, for September 3, 2022, the investigator testified that Miller brought two clothing items to self-checkout, one worth $12.98 and another worth $7.50. The investigator opined that Miller stole one item with a listed price of $7.50. But the investigator's total value for the items that she stole that day incorrectly included, not only the $7.50 item, but also, the $12.98 item.[7] When we correct these errors, the evidence shows that Miller stole $484.13 in merchandise plus eight unknown items.[8] Because the direct evidence does not prove that Miller stole more than $500 worth of merchandise, we turn to the circumstantial-evidence test to determine whether the state presented sufficient evidence to sustain a gross-misdemeanor conviction.

Here, the circumstances proved regarding the value of the stolen items include the following: (1) from July through September 2022, Miller stole merchandise from a store; (2) after the investigator reviewed surveillance footage, receipts, and inventory reports, he was able to identify and determine the value of some, but not all, of the stolen merchandise; (3) the total value of the stolen merchandise the investigator identified was $484.13; (5) the

[6] Both parties agree the investigator made these errors.

[7] The state does not appear to dispute the quantity of clothing items stolen, only the value.

[8] Miller takes issue with the investigator's methods for identifying and determining the value of the merchandise. However, the investigator provided extensive testimony about reviewing security-camera footage and receipts, determining the items missing from inventory, and reviewing retail pricing. And to the extent that the investigator controlled for uncertainty in identifying the precise value of the merchandise, he prescribed lower rather than higher prices. Therefore, when we view the record in the light most favorable to the verdict, we conclude that the investigator's methods were reliable.

value of the individual items ranged from $1 to $128; and (6) Miller stole eight items that the investigator was not able to identify.

Moving to the second step, we agree with the state that the circumstances proved are consistent with guilt. Specifically, it is reasonable to infer—based on the varying prices of the merchandise—that the value of the eight unknown items brought the total value of the merchandise Miller stole to over $500. But that same evidence also supports Miller's argument that the circumstances proved are consistent with a "rational hypothesis except that of guilt," *Silvernail*, 831 N.W.2d at 599 (quotation omitted), namely, that the value of the unknown items did not exceed $500. Miller stole a wide range of items from the store, including low-priced items like ginger ale ($2.08), a drink ($1), multiple "snack boxes" ($1.68), stuffing ($2.28), and a notebook ($2.63). Given the lack of information about the unknown items in the record, it is equally reasonable to infer that the eight unknown items did not bring the total value of the merchandise to over $500. Thus, the evidence is consistent with a reasonable inference that Miller stole $500 or less of merchandise.

For this reason, we conclude the state failed to prove Miller stole more than $500 worth of merchandise beyond a reasonable doubt. Because the state must present sufficient evidence to meet the value threshold, *see Matousek*, 178 N.W.2d at 610, we reverse Miller's gross-misdemeanor-theft conviction.

II.

Miller also argues that she is entitled to a new trial because the state engaged in prosecutorial misconduct during closing argument. Specifically, she challenges the prosecutor's statements that "[w]e're right there," over the $500-threshold, "when we talk

about reasonable doubt," and that the investigator gave "Miller the benefit of the doubt." Miller also contests the prosecutor's statement that, when the investigator assigned "the lowest value" to a drink, he was being "fair."

"The overarching concern regarding prosecutorial misconduct . . . is that [the] misconduct may deny the defendant's right to a fair trial." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Prosecutors are ministers of justice who "have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt." *Id.* When we review for "prosecutorial misconduct during a closing argument, we look to the closing argument as a whole, rather than to selected phrases and remarks." *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotation omitted).

When a defendant does not object at trial to alleged prosecutorial misconduct, we apply the modified plain-error test. *See Ramey*, 721 N.W.2d at 302. First, Miller must demonstrate "that the prosecutor's conduct constitutes an error that is plain." *Id.* "An error is plain if it is clear or obvious." *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (quotation omitted). If Miller identifies a plain error, the burden shifts to the state to demonstrate "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Ramey*, 721 N.W.2d at 302 (quotations omitted). Whether the state met its burden depends on "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 681-82 (Minn. 2007). Finally, even if we identify a plain error affecting substantial rights, we reverse only if it is necessary to "to ensure fairness

and the integrity of the judicial proceedings." *Bernhardt v. State*, 684 N.W.2d 465, 475 (Minn. 2004) (quotation omitted).

Assuming without deciding that the prosecutor's statements were plain error,[9] we conclude that the state met its burden to show that there is no reasonable likelihood that the absence of misconduct would have had a significant effect on the verdict.

First, the evidence presented by the state to prove that Miller stole $500 or less was strong.[10] The investigator provided detailed testimony about reviewing security-camera footage and receipts, determining the items missing from inventory, and reviewing retail pricing. While there were a few mathematical errors, there was also significant unrebutted evidence, including security-camera footage, that demonstrated Miller took merchandise from the store on 11 different occasions.

Second, defense counsel had the opportunity to challenge many of the disputed statements during closing arguments. For instance, after the prosecutor used the phrase "benefit of the doubt" to describe the investigator's actions, defense counsel rebutted the

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[9] We do not condone the prosecutor's use of the phrase "benefit of the doubt" in proximity to the reasonable-doubt standard. *See State v. Vacko*, No. A16-0864, 2017 WL 1046307, at *5 (Minn. App. Mar. 20, 2017) ("The prosecutor's use of the phrase 'benefit of the doubt' might confuse a jury because 'doubt' suggests a connection to 'beyond a reasonable doubt.'"), *rev. denied* (Minn. May 30, 2017); *State v. Jahnke*, No. A04-151, 2005 WL 147573, at *2 (Minn. App. Jan. 25, 2005) ("We note at the outset that the prosecutor's phrase 'the benefit of the doubt' was awkward and poorly chosen because the repetition of the word 'doubt' in the phrase suggests a connection to 'beyond a reasonable doubt.'"), *rev. denied* (Minn. Mar. 29, 2005).

[10] Because we reverse Miller's gross-misdemeanor-theft conviction, we analyze the impact to substantial rights with regard to the misdemeanor-theft conviction only. *See Al-Naseer*, 788 N.W.2d at 481 n.5 (refraining from addressing an additional challenge to a conviction once the court determined insufficient evidence supported the conviction).

argument stating that "it [was] clear that there [was] reasonable doubt" because the state's numbers did not "add up."

Third, the district court's instructions regarding the proper legal standard both before and after closing argument mitigated any potential harm from the prosecutor's comments. *See Vacko*, 2017 WL 1046307, at *4-5 (emphasizing the broader scope of closing argument and the district court's presumption-of-innocence instruction in determining that the prosecutor's use of the phrase "benefit of the doubt" did not merit relief on plain-error review); *see also Jahnke*, 2005 WL 147573, at *2 (same).[11]

For these reasons, we conclude that, even if the prosecutor committed plain error misconduct—an issue we do not decide—there was no reasonable likelihood that the absence of the challenged statements would have affected Miller's guilty verdict for misdemeanor theft.

Accordingly, we conclude the state failed to prove that Miller stole more than $500 worth of merchandise to sustain her gross-misdemeanor-theft conviction. But because the prosecutor's challenged statements did not affect Miller's substantial rights with respect to the misdemeanor-theft conviction, we conclude that Miller is not entitled to a new trial. Thus, we reverse and remand for the district court to vacate Miller's gross-misdemeanor-theft conviction and to resentence Miller for the misdemeanor-theft conviction.

Affirmed in part, reversed in part, and remanded.

[11] We note these opinions are nonprecedential and, therefore, not binding. To the extent we cite nonprecedential opinions, we do so only for persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).