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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1123

State of Minnesota,
Respondent,

vs.

Brad Robert Grunig,
Appellant.

Filed May 25, 2010
Affirmed
Johnson, Judge

Nobles County District Court
File No. 53-CR-08-1298

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

Gordon Lynn Moore, III, Nobles County Attorney, Kimberly Pehrson, Assistant County Attorney, Worthington, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

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

JOHNSON, Judge

A Nobles County jury found Brad Robert Grunig guilty of financial transaction card fraud based on evidence that he used a stolen credit card to purchase goods at a Walmart store. On appeal, Grunig argues that the evidence is insufficient to support the jury's verdict and that the district court erred by admitting into evidence certain portions of the testimony of two law enforcement officers. We affirm.

FACTS

A woman's handbag was stolen from her Jackson County home just before midnight on the evening of May 4, 2008. No one witnessed the theft, and the woman did not realize that her handbag was missing until the following morning. Investigator Kelly Mitchell of the Jackson County Sheriff's Department was assigned to investigate the theft.

On May 5, 2008, the Jackson County woman called the company that had issued her a credit card to report that it had been stolen. She learned that the credit card had been used at a Walmart store in the city of Worthington in nearby Nobles County at approximately 1:00 a.m. that same day. Upon further inquiry, Investigator Mitchell learned that the credit-card transaction at the Walmart store had been captured by the store's video surveillance cameras. The video recording of the cash register does not clearly show the features of the person who made the purchase because the image is grainy and because the camera was mounted high overhead. But that video recording

shows clearly enough that a man made the purchase, and another video recording shows the same man driving out of the parking lot in a grey or silver minivan.

Approximately one week after the credit-card transaction at Walmart, a Cottonwood County sheriff's deputy, Jeff LaCanne, responded to a report that a grey or silver minivan had crashed into a tree and had been abandoned. Deputy LaCanne found a number of items near the minivan, including pawn-shop receipts that revealed Grunig's name, date of birth, physical description, and driver's license number. For reasons that are not fully explained, Deputy LaCanne contacted Investigator Mitchell to convey information about the crashed minivan and the items found at the scene of the crash. Deputy LaCanne and Investigator Mitchell later searched the interior of the minivan; their search revealed items that were the same brand and type as items that had been purchased at Walmart with the stolen credit card, including a bottle of Rain-X (a liquid that is designed to improve visibility through a vehicle's windshield in rainy weather) and a package of white Dickie socks. In addition, the search revealed a wallet that belonged to the Jackson County woman whose handbag was stolen.

As part of the investigation into the stolen credit card, Investigator Mitchell and Detective David Hoffman of the Worthington Police Department compared Grunig's driver's license photograph to the man in the Walmart video recording. Based on the resemblance and the items found in the van, as well as the van's resemblance to the minivan in the other Walmart video recording, the state charged Grunig in August 2008 with financial transaction card fraud, in violation of Minn. Stat. § 609.821, subd. 2(1) (2006).

At the one-day jury trial in February 2009, the state presented the testimony of six witnesses: the Jackson County woman whose handbag was stolen, the asset-protection coordinator of the Walmart store, the Walmart cashier who handled the credit-card transaction, Deputy LaCanne, Investigator Mitchell, and Detective Hoffman. Grunig did not testify. The jury found Grunig guilty. The district court imposed a sentence of 15 months of imprisonment. At Grunig's request, the district court executed the sentence even though the presumptive sentence under the sentencing guidelines is a stayed 15-month sentence. Grunig appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Grunig first argues that the evidence is insufficient to support the jury's verdict of guilty. When considering a claim of insufficient evidence, this court conducts a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008). If a conviction is based on circumstantial evidence, it "receives stricter scrutiny than a conviction based on direct evidence." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010). To uphold a conviction based solely on circumstantial evidence, the evidence "must be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quotation omitted). "'Circumstantial evidence 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.'" *Stein*, 776 N.W.2d at 714 (quoting *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002)). Nonetheless, "we have recognized that 'the jury is in the best position to evaluate the evidence' and we 'will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.'" *Id*. (alteration in original) (quoting *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998)).

A person is guilty of financial transaction card fraud if he, "without the consent of the cardholder, and knowing that the cardholder has not given consent, uses or attempts to use a card to obtain the property of another." Minn. Stat. § 609.821, subd. 2(1). Grunig does not dispute that the victim's credit card was used without her permission. Rather, Grunig contends that the evidence does not prove beyond a reasonable doubt that he is "the person depicted on the video making the transaction at Walmart shortly after 1:00 a.m. on May 5, 2008." Grunig contends that the state's circumstantial evidence is insufficient "because it fails to eliminate other rational hypotheses other than guilt." The state acknowledges that the evidence is not overwhelming. Indeed, there is no evidence that Grunig stole the handbag containing the credit card, and none of the state's witnesses was able to positively identify Grunig as the person who made the purchases at Walmart with the stolen credit card.

"A conviction may stand, despite . . . [eyewitness'] failure to identify the defendant, if circumstantial evidence offered is strong enough to exclude any reasonable hypothesis of innocence." *State v. Jackson*, 741 N.W.2d 146, 154 (Minn. App. 2007) (alteration in original) (quotation omitted), *review denied* (Minn. Oct. 21, 2008). In this

case, the circumstantial evidence is more than strong enough. As described above, the Walmart video recording shows a person who resembles Grunig using the victim's credit card and leaving the Walmart parking lot in a grey or silver minivan. One week later, a similar grey or silver minivan was found in nearby Cottonwood County containing items belonging to the Jackson County woman whose handbag was stolen, items of the same type as were purchased at Walmart with the victim's stolen credit card, and items bearing Grunig's name and identifying personal information.

The state's evidence, though circumstantial, creates a "complete chain" that leads directly to Grunig's guilt. *Stein*, 776 N.W.2d at 714 (quotation omitted). Grunig contends that there are "multiple, innocent reasons" to explain the evidence. But "we will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Id*. (quotation omitted). Rather, the state's circumstantial evidence "is strong enough to exclude any reasonable hypothesis of innocence." *Jackson*, 741 N.W.2d at 154 (quotation omitted). Thus, the evidence is sufficient to support the conviction.

II. Admissibility of Evidence

Grunig also argues that the district court erred by admitting into evidence certain portions of testimony by law enforcement officers, which testimony tended to support the conclusion that Grunig made the Walmart purchase with the stolen credit card. Specifically, Grunig challenges the admission into evidence of Investigator Mitchell's testimony that the man in the Walmart video recording resembles Grunig and Detective

Hoffman's testimony that the man in the Walmart video recording resembles Grunig's booking photograph.

A district court's rulings concerning the admissibility of evidence generally are subject to an abuse-of-discretion standard of review. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But at trial, Grunig did not object to the challenged evidence on the same grounds that he now urges on appeal. Thus, we review the district court's admission of the challenged testimony for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

A. Whether Plain Error Exists

1. Investigator Mitchell's Testimony

Grunig first challenges Investigator Mitchell's testimony on direct examination that the person in the Walmart video recording resembles Grunig. The relevant portion of the examination is as follows:

> [MS. PEHRSON:] How are you able to link [Grunig] to the use of this credit card?
>
> [INVESTIGATOR MITCHELL:] Through the video photo, or the video and the photographs that were obtained through Walmart, and also there were items in the van with the name Brad Grunig on them.
>
> . . . .
>
> And I compared the photograph and the video to a driver's license picture of Brad Grunig.
>
> . . . .
>
> [MS. PEHRSON:] What [in] the video is comparable to the Defendant that we see here in court today?
>
> [INVESTIGATOR MITCHELL:] The facial features appeared similar to the Defendant.

Grunig contends that this testimony is inadmissible lay opinion testimony or inadmissible expert opinion testimony because it was unhelpful to the jury. *See* Minn. R. Evid. 701, 702, 704. More specifically, Grunig contends that because Investigator Mitchell did not previously know him, Investigator Mitchell should not have been allowed to testify that Grunig resembled the person in the video. In response, the state contends that the testimony is not opinion testimony but, rather, is fact testimony that describes the investigative process by which the officers came to suspect that Grunig was the man in the Walmart video.

In light of the state's responsive argument, we need not analyze whether the challenged evidence is admissible under rules 701, 702, or 704. In certain circumstances, the state may offer evidence "to give jurors the context for an investigation." *Griller*, 583

N.W.2d at 743. In *Griller*, the supreme court affirmed the admission of evidence of the investigation of the defendant, who was being tried for second-degree murder. The court reasoned that the evidence was admissible to explain the excavation of the defendant's back yard, which revealed a human skeleton. *Id*. at 738-39, 743. Similarly in *State v. Czech*, 343 N.W.2d 854 (Minn. 1984), the supreme court affirmed the admission of evidence of an undercover investigation of the defendant. The court reasoned that the evidence was admissible to explain a recorded confession in which the defendant implicated himself in other crimes. *Id*. at 856. And in *State v. Lee*, 266 N.W.2d 181 (Minn. 1978), the supreme court affirmed the admission of evidence that two eyewitnesses identified the defendant while reviewing more than 1,000 photographs. The court reasoned that "[i]f the state had not been permitted to show the manner in which defendant was originally identified, it is quite possible that the jury would not have credited the identification testimony." *Id*. at 182.

As in these cases, the testimony that Grunig challenges concerns the investigation that led to the criminal charge against him. Investigator Mitchell's testimony is phrased in the past tense, which indicates that he was not making a statement about his contemporaneous observation of Grunig but, rather, was describing how, during the investigation, he came to suspect that Grunig was the person who had used the stolen credit card at Walmart. In light of the caselaw cited above, the district court did not clearly err by admitting Investigator Mitchell's testimony concerning the investigation of Grunig. *See Griller*, 583 N.W.2d at 743; *Czech*, 343 N.W.2d at 856; *Lee*, 266 N.W.2d at 182.

2. Detective Hoffman's Testimony

Grunig also challenges Detective Hoffman's testimony on direct examination that the person in the Walmart surveillance video recording resembles Grunig. The relevant portion of the examination is as follows:

> [MS. PEHRSON:] Did you view the video from Walmart?
>
> [DETECTIVE HOFFMAN:] Yes, I did.
>
> [MS. PEHRSON:] And after viewing that video what did you do?
>
> [DETECTIVE HOFFMAN:] I compared it to a booking photograph of Mr. Grunig.
>
> . . . .
>
> [MS. PEHRSON:] And the information that you sent to the County Attorney's office, who did you identify as being the Defendant?
>
> [DETECTIVE HOFFMAN:] Brad Grunig.
>
> [MS. PEHRSON:] And why did you list him as being the Defendant?
>
> [DETECTIVE HOFFMAN:] From the information I received from Investigator Mitchell and from watching the videotape.
>
> . . . .
>
> [MS. PEHRSON:] What about viewing that tape led you to believe it was the Defendant?
>
> [DETECTIVE HOFFMAN:] From seeing a photograph of him and comparing it to the videotape I believed it was the same person.

Grunig contends that Detective Hoffman's testimony is impermissible opinion testimony. *See* Minn. R. Evid. 701, 702, 704. In response, the state contends that Detective Hoffman's testimony, like Investigator Mitchell's testimony, is fact testimony concerning the course of the investigation. The state is correct. Detective Hoffman also described, in the past tense, how he identified Grunig as a suspect in the use of the stolen credit card based on information he received from Investigator Mitchell. Thus, Detective Hoffman's testimony is admissible evidence of the investigation of Grunig. *See Griller*, 583 N.W.2d at 743; *Czech*, 343 N.W.2d at 856; *Lee*, 266 N.W.2d at 182.

Grunig also contends that the district court plainly erred in admitting Detective Hoffman's testimony because, during the direct examination, the prosecutor once referred to Grunig's booking photo, which was not in evidence. Grunig objected to the prosecutor's question, and the district court sustained the objection. Grunig does not argue that a new trial is warranted on the ground that the question constitutes prosecutorial misconduct. The prosecutor's question may have elicited evidence that generally is inadmissible, but the objection was sustained. In any event, the asking of the question does not negate the state's argument that evidence of Detective Hoffman's investigation was otherwise admissible "to give jurors the context for an investigation." *Griller*, 583 N.W.2d at 743.

Thus, in light of the caselaw cited above, the district court did not clearly err by admitting Detective Hoffman's testimony concerning the investigation of Grunig. *See Griller*, 583 N.W.2d at 743; *Czech*, 343 N.W.2d at 856; *Lee*, 266 N.W.2d at 182.

B. Whether Grunig's Substantial Rights Were Affected

Even if the district court plainly erred by admitting the challenged testimony of Investigator Mitchell and Detective Hoffman, Grunig's argument nonetheless would fail because he cannot demonstrate that any error affected his substantial rights. *See Strommen*, 648 N.W.2d at 688. To demonstrate that plain error affects his substantial rights, Grunig must show "that there is a reasonable likelihood that the absence of the [alleged] error would have had a significant effect on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation marks omitted).

For several reasons, the challenged testimony of Investigator Mitchell and Detective Hoffman is unlikely to have had a significant effect on the jury's verdict. First, their testimony concerning the investigation was only a small part of the state's case. Second, the jurors had the opportunity to view the Walmart video recordings themselves and, thus, to make their own comparisons between the man shown in the Walmart video recording and Grunig, who was seated in court during trial. Although testimony by law enforcement officers sometimes is particularly persuasive, *see State v. DeShay*, 669 N.W.2d 878, 885 (Minn. 2003), the jurors in this instance were able to draw their own conclusions about the video recording. Third, in closing argument, the prosecutor referred to the challenged evidence for its proper purposes and no more. The prosecutor stated to the jury that, *during the investigation*, Investigator Mitchell believed that Grunig resembled the man in the Walmart video recording. The prosecutor also stated to the jury, "it is now up to you, the jury, to decide if you believe the person in the video was the Defendant Brad Grunig." In addition, the prosecutor candidly pointed out to the jury

that the case was based on circumstantial evidence: "There is nobody here to testify that, yes, in fact, [Grunig] is exactly the man that we saw who bought the items that night." Fourth, as described above, the state introduced abundant physical evidence that connected Grunig to the credit-card transaction at Walmart. Thus, even if the admission of the challenged testimony was plain error, Grunig cannot establish that such error affected his substantial rights. *Strommen*, 648 N.W.2d at 688.

In sum, the district court did not commit plain error warranting a new trial by admitting into evidence the testimony by Investigator Mitchell and Detective Hoffman concerning their investigation of Grunig.

Affirmed.