

NOT DESIGNATED FOR PUBLICATION

No. 98,154

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAMES L. WILSON,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; J. DEXTER BURDETTE, judge. Opinion filed August 1, 2008. Reversed and remanded for new trial.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Cathy A. Eaton, assistant district attorney, *Jerome A. Gorman*, district attorney, and *Paul J. Morrison*, attorney general, for appellee.

Before GREENE, P.J., MARQUARDT and LEBEN, JJ.

GREENE, J.: James L. Wilson appeals his conviction of felony theft, arguing insufficient evidence and instruction error. Concluding there was clear error in the

manner in which the jury was instructed, we reverse his conviction and remand for new trial.

Factual and Procedural Background

When Esteban Lozano returned from work one November afternoon, he noticed his dog barking in an unusual manner. As he went to the backyard to investigate, he saw an African-American man with a black jacket and black hood jump over the fence. When he was unable to apprehend the man, he returned to the house to find two small televisions missing and a big-screen television dragged out of the house and sitting by the back stairs to the patio. Thereafter he encountered Wilson, who denied involvement.

After Lozano returned to the house to further investigate, Wilson brought a set of house-keys to him and delivered the two televisions, a DVD player, and some satellite equipment. Wilson told Lozano's niece (because Lozano did not speak English) that he found the items in his backyard and the keys on the floor.

Wilson was charged with one count of burglary and one count of theft, and the formal information carefully detailed the items stolen as including only a 27-inch television and a 15-inch television.

At trial the evidence of value of missing items ranged from \$300 to \$2,500, but all such valuation evidence was unclear on whether it included the big-screen television. In any event, the jury acquitted Wilson of burglary but convicted him of felony theft. He appeals.

Was There Sufficient Evidence to Support Wilson's Conviction for Felony Theft?

When the sufficiency of the evidence is reviewed in a criminal case, this court must consider all of the evidence, viewed in a light most favorable to the prosecution, and determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Parker*, 282 Kan. 584, 597, 147 P.3d 115 (2006). An appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. *State v. Vanek*, 39 Kan. App. 2d 529, Syl. ¶ 1, 180 P.3d 1087, *rev. denied* 286 Kan. ___ (2008). A conviction for even the gravest offense may be sustained by circumstantial evidence. Circumstantial evidence is evidence of events or circumstances from which a reasonable factfinder may infer the existence of a material fact in issue. *State v. Lopez*, 36 Kan. App. 2d 723, 725, 143 P.3d 695 (2006).

Wilson's challenge to the sufficiency of the evidence is that the State failed to prove that the fair market value of property listed in the information was at least \$1,000

but less than \$25,000 as required by K.S.A. 21-3701(a)(3). The valuation issue is compounded by the fact that the formal information listed the stolen items as including the two television sets, whereas much of the testimony on value also referenced the big-screen or 52-inch television set.

The value of stolen property is determined by its fair market value at the time of the theft. *State v Thomas*, 24 Kan. App. 2d 734, Syl. ¶ 1, 953 P.2d 1043 (1998). An owner of stolen property is qualified to render an opinion on the value of items stolen. 24 Kan. App. 2d at 736.

Here there were three witnesses as to value, the victim (Lozano's niece Maria Perez) and two police officers. The victim testified as follows:

"Q. [Prosecutor]: I want to know about the value of all the property that was taken, not just the things that were not returned.

"A. [Perez]: I don't know exactly. There were many things. And the big TV, I'm still paying for it.

"Q. "Can you estimate?

" A. Some \$2,000.

....

"Q. [Defense counsel]: Ms. Perez, how did you determine what the value of those items were on the particular day that they were taken?

"A. Well, it's just that the big TV cost around \$2,000."

Perez was never asked for the individual values of the items stolen, which included a DVD player, four women's rings, and a satellite receiver box. Moreover, she never gave a collective estimate of value without referring to the big-screen television.

The police officers were unclear in their valuation testimony. Their testimony failed to clarify whether value estimates included or excluded the big-screen television. Young testified that the value was \$2,000 to \$2,500, but he gave this number from memory and in response to a question asking if Perez had given him an estimate on the value of the items. In his affidavit, however, Young valued the property at \$1,100, excluding the big-screen television. There is no indication that the affidavit was submitted to the jury as evidence. Erwin testified that the value was somewhere between \$300 and \$1,000, however, he also stated the value from memory because he was missing a page of the notes he was referencing. Both officers gave their estimates immediately after referencing a list of items that included the big-screen television. Wilson presented no evidence as to the value of any of the items.

We are troubled about the lack of clarity of the value evidence presented. Viewing the evidence in the light most favorable to the prosecution, however, we

conclude the jury could have discerned that the value of items stolen, as charged in the formal information, exceeded \$1,000. For this reason, we reject Wilson's challenge to the sufficiency of the evidence.

Did the District Court Err in Giving an Instruction that Broadened the Crime Charged in the Formal Information?

Wilson made no contemporaneous objection to the jury instruction given by the district court. Therefore, when a party neither suggests an instruction nor objects to its omission, an appellate court applies a clearly erroneous standard when reviewing a district court's failure to give a particular instruction. See K.S.A. 22-3414 (3); *State v. Cooperwood*, 282 Kan. 572, 581, 147 P.3d 125 (2006). Instructions are clearly erroneous only if the reviewing court is firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred. *State v. Trotter*, 280 Kan. 800, 805, 127 P.3d 972 (2006).

Wilson challenges the trial court's elements instruction because it stated that the property stolen included three television sets (an apparent inclusion of the big-screen television), whereas the formal information listed the stolen property included only a 27-inch television set and a 15-inch television set. Wilson argues this instruction

"improperly expanded the allegations contained in the complaint" and that there is "a real possibility the jury would have returned a different verdict" had the error not been made.

We begin with reiterating that the formal information clearly charged Wilson with theft of the two smaller television sets. At the preliminary hearing, the court found there was probable cause to bind the defendant over "as charged." At no time thereafter was there any motion to amend the information.

The challenged instruction stated:

"In Count II, for a further, different and second count herein, the defendant is charged with the crime of theft of property of the value of more than \$1,000.00. The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

1. That Maia Perez was the owner of the property, to-wit: jewelry, *three television sets*, a DVD player, and a satellite receiver box;
2. That the defendant obtained or exerted unauthorized control over the property;
3. That the defendant intended to deprive Maria Perez permanently of the use or benefit of the property;
4. That the value of the property was more than \$1,000.00; and

5. This act occurred on or about the 21st day of November, 2005, in Wyandotte County, Kansas."

An elements instruction should be confined to acts charged in the information and should not be broader than the information. *State v. Hemby*, 264 Kan. 542, 550, 957 P.2d 428 (1998). Instructions given in violation of this rule, however, have been excused in cases where the substantial rights of the defendant have not been prejudiced. *State v. Wade*, 284 Kan. 527, 534-35, 161 P.3d 704 (2007). Prejudice will generally not be found where the challenged instruction is supported by the evidence, does not charge an additional crime, does not surprise the defendant, and does not mislead the defendant in the preparation of his or her defense. *State v. Turbeville*, 235 Kan. 993, 998, 686 P.2d 138 (1984).

Here, the evidence presented included the discovery of the big-screen television dragged outside the house and left on the patio. Unauthorized exercise of control over this television was a reasonable inference from this evidence. Accordingly, we cannot conclude that the instruction was not supported by the evidence nor can we conclude there was surprise by the inclusion of three television sets among the stolen items.

We are troubled, however, that the expansion in the elements instruction did charge an additional crime, *i.e.* the theft of the big-screen television, or may have

elevated the crime from a misdemeanor to a felony. As noted by Wilson on appeal, this addition was severely prejudicial given the lack of clarity in the valuation evidence. Moreover, we have no difficulty in believing that there might have been a different verdict if the elements instruction had been restricted to the two smaller television sets. Because the valuation testimony was lacking in clarity, restricting the instruction to the formal charge would have presented a realistic opportunity for the jury to find that the value of items stolen did not exceed the \$1,000 threshold.

We conclude the expansion of the elements instruction here was clear error and requires that we reverse Wilson's conviction and remand for a new trial.

Did the District Court Err in Failing to Instruct on the Lesser Included Offense of Misdemeanor Theft?

We need not reach this issue based upon our reversal for an erroneous elements instruction, but we do so only to demonstrate that our mandate is supported on this ground as well. Wilson's final claim of error is the trial court should have instructed on the lesser included offense of misdemeanor theft. He requested no such instruction at trial, so we review for clear error as noted above.

A trial court has a duty to instruct on all lesser included offenses supported by the evidence admitted in a case. While misdemeanor theft is clearly a lesser included offense of felony theft, it is not necessary to give the instruction where the value of the stolen goods is established to be over the felony limit and where there is no evidence of a value of less than the felony limit. *Thomas*, 24 Kan. App. 2d at 736. The evidence supporting a lesser included offense need not be overwhelming. *State v. Wickliffe*, 16 Kan. App. 2d 424, 426, 826 P.2d 522 (1992). The instruction should be given even if the evidence is weak and inconclusive or consists solely of the defendant's testimony. *State v. Staab*, 230 Kan. 329, 339, 635 P.2d 257 (1981).

Based purely on the murky valuation evidence, and understanding that Wilson was never charged with theft of the big-screen television, the evidence clearly supported an instruction on the lesser included offense of misdemeanor theft. Moreover, for the same reason that there is a real possibility of a different verdict if a proper elements instruction had been given, there is also a real possibility the jury would have convicted Wilson on the lesser included offense. This was clear error and also supports a reversal of Wilson's conviction and a remand for new trial.

Reversed and remanded for new trial.