STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0468

State of Minnesota,
Respondent,

vs.

Kristi Dannette Mcneilly,
Appellant.

Filed December 19, 2022
Affirmed
Cleary, Judge[*]

Hennepin County District Court
File No. 27-CR-19-13419

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Robert D. Richman, St. Louis Park, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Segal, Chief Judge; and Cleary, Judge.

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

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant challenges her conviction of theft by swindle. She contends that (1) the district court erred by denying her motion to suppress evidence because the searches of her law office and electronic devices were unreasonable and because the warrant authorizing the search of her law office and the warrant authorizing the search of files on her electronic devices were overbroad; (2) the district court erred by denying her motion to disqualify the Hennepin County Attorney's Office from prosecuting her case; and (3) the district court erred by instructing the jury that a claim of right was not a defense to theft by swindle. We affirm.

FACTS

On June 10, 2019, respondent State of Minnesota charged appellant Kristi Dannette Mcneilly with one count of theft by swindle in violation of Minn. Stat. § 609.52, subd. 2(a)(4) (2018). The state alleged that appellant swindled her client, MW, out of "fifteen thousand dollars by misrepresenting that she could make his potential criminal charges go away by paying funds to a police union."

MW's potential criminal charges arose in May 2018 when law enforcement, including Minnetonka police officers, searched his house. Officers found a bottle in MW's safe that was later confirmed to contain narcotics and marijuana in JS's—MW's boyfriend—possession. MW contacted appellant because she had previously represented MW and because she had suggested that she had experience in criminal law. After they met, MW paid appellant a $20,000 availability retainer and entered into a retainer

agreement because appellant had indicated that Hennepin County was building a significant case against him. He also paid appellant a $2,500 retainer for JS's case.

On November 5, 2018, appellant told MW that she urgently needed to speak to him. Appellant said that a detective from the Minnetonka Police Department and the prosecuting attorney had asked her to meet with them about MW's case, which she said was usually not a good sign. MW testified that this conversation made his "anxiety [go] through the roof." Appellant went to MW's house and informed him that she had talked to the detective and the prosecutor and that they told her that they had a case against MW. Appellant told MW that he was facing 15 to 20 years in prison. She then told MW that they had discussed a way to make his case go away: the state would not charge him if he agreed to either be a confidential informant and pay $35,000 to the police union or pay $50,000 to the union without having to be a confidential informant. Appellant showed MW a confidential informant form to give him an idea of what the agreement would involve. MW told appellant that he wanted to pay the $50,000 and not be an informant but that he could only pay $15,000 that day and the remainder over the next few months.

Appellant told MW that she needed to confirm with the detective that the proposed payment would work. She went to the garage to make a call, and when she returned, she told MW that the detective had agreed. Appellant and MW went to the bank together. MW obtained a cashier's check payable to Mcneilly Law for $15,000 and wrote "LEGAL FEE" on the memo line. MW gave appellant the check, and she immediately deposited it in her account.

After paying appellant, MW began to question the deal, so he asked an attorney that he worked with for advice. His co-worker had a friend at the Hennepin County Attorney's Office who suggested that MW reach out to another attorney. MW followed the co-worker's friend's advice and found a new attorney. MW met with the new attorney, who said that he would look into having an investigation started and suggested that MW ask appellant for a refund and itemized receipts indicating how the money had been spent. MW emailed appellant and asked her for a refund and an accounting of how the money had been spent. Appellant refused to refund the money, contending that the money had been "paid as directed."

MW's new attorney informed the Chief of the Minnetonka Police Department that an allegation had been made against the detective in this case. In response, the Minnetonka Police Department referred the case to the Burnsville Police Department and placed the detective on administrative leave. The Burnsville Police Department investigated the allegations. The investigator did not find any evidence connecting the Minnetonka police or the Hennepin County Attorney's Office to the alleged swindle. The detective and the Hennepin County Attorney's Office denied involvement.

In February 2019, the Burnsville investigator obtained a search warrant for appellant's home. Burnsville police officers executed the search warrant and seized MW's physical file, a desktop computer, a computer tower, a laptop, two external hard drives, and two thumb drives from her home and home office. In March 2019, Burnsville police officers obtained a warrant authorizing the search of the computer, computer tower, laptop, hard drives, and thumb drives that the police had seized from appellant's home office. A

forensic examiner from the Dakota County Electronic Crimes Task Force reviewed the data obtained from appellant's devices for files that related to confidential informant forms, MW, JS, and the detective.[1]

In June 2019, the State charged appellant with one count of theft by swindle. In May 2020, appellant moved to suppress the evidence seized from her home and from the searches of the devices taken from her home and home office. After an evidentiary hearing, the district court denied appellant's motion to suppress, concluding that the search of appellant's client files was not unreasonable. In September 2020, appellant moved to disqualify the Hennepin County Attorney's Office. The district court denied appellant's motion to disqualify.

In October 2021, the case was tried to a jury. The jury found appellant guilty of theft by swindle. The district court sentenced appellant to a stayed sentence of twelve months and one day in prison.

Appellant appeals.

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[1] On the same day that the second warrant was issued, appellant "sought relief from the search of [her] office and seizure of perhaps a thousand client files." *In re K.M.*, 940 N.W.2d 164, 168 (Minn. 2020). The district court denied appellant's motion, concluding that "the seized property is being held in good faith as potential evidence in a matter that is uncharged at this time." *Id.* at 169. Appellant filed a petition for a writ of prohibition with the court of appeals, and this court denied the petition. *Id.* Appellant filed a petition for review to the Minnesota Supreme Court, and the supreme court granted review. *Id.* The supreme court affirmed the district court's determination that the property was being held in good faith. *Id.* at 171.

DECISION

I. The district court did not err by denying appellant's motion to suppress.

"When reviewing a district court's pretrial order on a motion to suppress evidence, 'we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo.'" *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)).

a. The searches of appellant's home, home office, and digital files were reasonable.

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures" by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Reasonableness is the "touchstone of the Fourth Amendment." *United States v. Knights*, 534 U.S. 112, 118 (2001). Whether a search was unreasonable depends on the facts of the case. *State v. Davis*, 732 N.W.2d 173, 178 (Minn. 2007). We review "the district court's legal determinations de novo." *Gauster*, 752 N.W.2d at 502 (quotation omitted).

Appellant first contends that the search of an attorney's office and computers violates the attorney-client privilege and the work-product doctrine and is therefore constitutionally unreasonable. The purpose of the attorney-client privilege is to "encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client." *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979). "[T]the attorney-client privilege belongs to the client." *In re Disciplinary Action Against Houge*, 764 N.W.2d 328, 340 (Minn. 2009). The work-product doctrine is distinct from the attorney-client

privilege. It prevents an attorney's work product from being readily discoverable to ensure the effective representation of clients. *O'Connor v. Johnson*, 287 N.W.2d 400, 403 (Minn. 1979).

Appellant cites *O'Connor* in support of her argument. In *O'Connor*, the Minnesota Supreme Court determined that it was unreasonable to search a law office to investigate the attorney's clients. Emphasizing that there was "no claim of wrongdoing by the attorney," the supreme court held "that a warrant authorizing the search of an attorney's office is unreasonable and, therefore, invalid when the attorney is not suspected of criminal wrongdoing and there is no threat that the documents sought will be destroyed." *Id.* at 402, 405.[2]

Appellant acknowledges that this court has not considered whether the search of an attorney's office is unconstitutional if the attorney herself is accused of wrongdoing. But the supreme court has distinguished *O'Connor* from a case involving the search of an attorney's office in which the attorney was accused of wrongdoing. In *In re K.M.*, the supreme court noted that its holding in *O'Connor* "was carefully limited to the search of an attorney's office when the attorney is not suspected of criminal wrongdoing and there is no threat that the documents sought will be destroyed." 940 N.W.2d at 171 (quotation omitted). Moreover, in *National City Trading Corp. v. United States*, the Second Circuit

[2] Appellant also cites *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395 (Minn. 1979) in support of her argument. But *Kahl* is distinguishable from this case because it addressed the "narrow issue" of whether an employer-insurer is precluded from asserting the attorney-client privilege in a workers' compensation proceeding to impose a penalty for unreasonably and vexatiously delaying payment under Minn. Stat. § 176.225 (1978). 277 N.W.2d at 397.

distinguished *O'Connor* from a case in which an attorney was engaged in wrongdoing. 635 F.2d 1020, 1025 (2d Cir. 1980). The Second Circuit noted that the search of a law office of an attorney engaged in wrongdoing is not unreasonable if it is "executed with special care to avoid unnecessary intrusion on attorney-client communications." *Id.* at 1026.

Here, the search of appellant's law office was not unreasonable because the police were investigating her wrongdoing. *O'Connor* is distinguishable from this case because the police did not search appellant's home office to investigate the wrongdoing of her clients. The police were investigating appellant's wrongdoing, which was directly related to her role as an attorney. The policy behind the attorney-client privilege and the work-product doctrine focuses on enabling the effective representation of clients, not on protecting an attorney from an investigation into their own wrongdoing. *See Nat'l Texture Corp.*, 282 N.W.2d at 896 (noting that the attorney-client privilege works "to enable the attorney to act more effectively on behalf of his client"). Appellant cannot exempt herself from a search warrant by keeping the evidence of her wrongdoing in her law office. *See Nat'l City Trading Corp.*, 635 F.2d at 1026 (noting that a "criminal enterprise does not exempt itself from a search warrant by conducting its business and keeping its records in its lawyer's office"). The search of an attorney's office and files whom the police are investigating for wrongdoing is not per se unreasonable.

Appellant also contends that the search was unreasonable because there was not an appropriate procedure for review of her client files. Appellant contends that this procedure should include a process for review of materials by a neutral judge or a special master; the

ability for the attorney to review the documents; and a procedure for the district court to decide unresolved claims of privileged information.

Minnesota courts have not yet established a procedure for determining whether seized files contain privileged information. Appellant relies on other jurisdictions to support her argument that the police should have used a neutral judge or special master to review the items seized from appellant's law office. Appellant cites *United States v. Stewart* as support. No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002). In *Stewart*, the court reasoned that a special master was required because there was "no way to ensure that the two [United States attorneys] on the privilege team have not and will not have any involvement with cases involving the clients of other attorneys in the defendant's law suite." 2002 WL 1300059, at *7; *see also United States v. Abbell*, 914 F. Supp. 519, 519 (S.D. Fla. 1995).

But other jurisdictions have determined that a filter team was sufficient where "no privileged information, factual or otherwise, flowed from the taint team to the prosecution team." *United States v. Neill*, 952 F. Supp. 834, 842 (D.D.C. 1997). In *United States v. Hunter*, the warrant application included detailed instructions designed to "limit invasion of confidential or privileged or irrelevant material." 13 F. Supp. 2d 574, 583 (D. Vt. 1998). The court determined that this screening procedure was adequate. *Id.*

Appellant asserts that other jurisdictions have disapproved of the use of filter teams. In *In re Search Warrant Issued June 13, 2019*, the Fourth Circuit determined that the district court erred in appointing a filter team composed of lawyers from the United States Attorney's Office, a legal assistant, a paralegal, agents of the IRS and DEA, and forensic

examiners. 942 F.3d 159, 165, 181 (4th Cir. 2019). The Fourth Circuit determined that the district court erred by approving the team without first determining what had been seized in the search and by "disregarding" the policy underlying the attorney-client relationship. *Id.*

Here, the steps that the state took to limit the invasion into the attorney-client relationship were adequate. While appointing a special master may be preferable to the use of a filter team, here the approach the investigators took was reasonable.[3] A forensic examiner from the Electronic Crimes Task Force reviewed the electronic devices that the police had seized from appellant's home and home office to filter out what documents related to the current case. The forensic examiner knew that the files belonged to an attorney and used specific search terms to search the files that were meant to limit the scope of the search to items that pertained to the case. She reviewed the results of the search by skimming through "a sentence or so" and by looking at the file name and location of the file to determine if the results were related to the case. For the file types that could not be searched, she did a manual review by filtering out older documents and reviewing file names. If the file name did not reveal what matter it was related to, she would review the document to determine if it was related to appellant's representation of MW and JS.

Appellant contends that police "did nothing to protect the privileges." But the search here was not a "unregulated rummaging" through appellant's records. *See Hunter*,

[3] *See Hunter*, 13 F. Supp. 2d at 583 n.2 (noting that it is preferable for potentially privileged records to be screened by a special master or the magistrate judge); *Neill*, 952 F. Supp. at 841 (noting that the more traditional approach is review of the contested materials by a neutral and detached magistrate).

13 F. Supp. 2d at 583. The independent forensic examiner acted as a filter team, carefully conducting the search. There was no risk that she, unlike the prosecutors in *Stewart*, would be involved with prosecuting other clients of appellant. The steps taken by the state to limit the invasion into the attorney-client relationship were sufficient. Whether a search was unreasonable depends on the facts of the case, and here the forensic examiner's review of appellant's devices was not unreasonable. *Davis*, 732 N.W.2d at 178.

b. The search warrants were not overbroad.

Appellant contends that the search warrants were facially invalid because they "lacked necessary particularity and were overbroad."[4]

The Fourth Amendment requires that a search warrant particularly describe the place to be searched and the items to be seized. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "This requirement prohibits law enforcement from engaging in general or exploratory searches." *State v. Bradford*, 618 N.W.2d 782, 795 (Minn. 2000). "[W]hen determining whether a clause in a search warrant is sufficiently particular, the circumstances of the case must be considered, as well as the nature of the crime under investigation and whether a more precise description is possible under the circumstances."

[4] The state contends that appellant forfeited this argument because she did not argue it below. But appellant did not forfeit this argument. In appellant's motion to suppress, she contended that the search warrant "lacked specificity in the items described." The state responded to this argument, contending that "[t]he search warrant for [appellant]'s electronic devices did particularly describe the place to be searched and the items sought to be seized." The district court determined that "the search warrant described a specific place to be searched and the items the [s]tate sought to seize." The issue was thus presented to and considered by the district court, and this court may consider it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

State v. Fawcett, 884 N.W.2d 380, 387 (Minn. 2016) (quotation omitted). "The standard to be used in this determination is one of practical accuracy rather than technical nicety." *State v. Miller*, 666 N.W.2d 703, 713 (Minn. 2003) (quotation omitted).

Appellant contends that the first warrant authorized the search and seizure of the entire contents of her devices without limitation. We disagree. In *United States v. Summage*, the Eighth Circuit determined that a warrant that authorized the seizure of, among other items, "computer(s)" was not overbroad. 481 F.3d 1075, 1077 (8th Cir. 2007). The court emphasized that "[t]he requirement of particularity must be assessed in terms of practicality." *Id.* at 1079. The court held that the warrant was not overbroad because "[a]t the time the warrant was applied for, the officers knew only that a video and photographs of the alleged incident supposedly existed, not the particular format in which these items were being kept." *Id.*

On the other hand, in *State v. Bachman*, even though the affidavit specifically described the objects of the search, the resulting warrant broadly authorized a search of the computers for "Photographs, Internet Searches, Communications including but not limited to e-mail, Videos, User Information, Stored Data, as well as *any and all data on [the] hard drive*." No. A14-0996, 2015 WL 46547, at *1 (Minn. App. Jan. 5, 2015) (emphasis added).[5] This court determined that the warrant was overbroad because it did not

[5] Nonprecedential cases are not binding, but they may be persuasive. *City of St. Paul v. Eldredge*, 788 N.W.2d 522, 526-27 (Minn. App. 2010), *aff'd*, 800 N.W.2d 643 (Minn. 2011).

particularly limit the search to the "specific items described in the affidavit supporting probable cause for the search." *Id.* at *6.

Here, the first warrant, which authorized the search of appellant's home and seizure of her devices, was not overbroad. The first warrant here did not authorize the search of "any and all data on the hard drive." It authorized the search and seizure of these items found at appellant's home and home office: "[c]omputers such as laptops, desktops, and or towers[,] [e]lectronic devices which could contain or access files held remotely[,] . . . [and] [a]ny files, invoices, or [d]ocuments associated with representation of [MW] and [JS]." The warrant here is like the warrant in *Summage*; the warrant authorizing the search of appellant's home authorized the seizure of "computers." Moreover, when the Burnsville investigators applied for the warrant, they did not know whether the files would be physical or contained on the computer and hard drives. *See Summage*, 481 F.3d at 1079 ("The requirement of particularity must be assessed in terms of practicality.").

Further, computers and hard drives are analogous to containers. In *State v. Johnson*, this court determined that a computer is analogous to a container because a computer can create and store data that the owner does not intend others to view. 831 N.W.2d 917, 922 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013). The court quoted the Eighth Circuit, noting that "[a] search warrant authorizing the search of defined premises also authorizes the search of containers found on that premises which reasonably might conceal items listed in the warrant." *Id.* at 923 (quoting *United States v. Johnson*, 709 F.2d 515, 516 (8th Cir. 1983)). This court determined that a hard drive was "effectively a 'container'" of the data that the search warrant authorized a search for and that the warrant

authorized the agents to "analyze the hard drive to determine whether it contained that data." *Id.* at 924.

Here, the devices, like the hard drive in *Johnson*, were effectively containers of the files, invoices, or other documents associated with appellant's representation of MW and JS that the warrant authorized the agents to seize. *See id.* at 923 (stating that "[a] search warrant authorizing the search of defined premises also authorizes the search of containers found on that premises which reasonably might conceal items listed in the warrant" (quotation omitted)). Therefore, the warrant authorizing the search of appellant's home was not overbroad and the district court did not err in denying appellant's motion to suppress.

Appellant contends that the second warrant was overbroad because it did not limit the search to a specific time frame and to communications related to MW's November 5, 2018, payment to appellant. Appellant cites *Burrows v. Superior Court of San Bernardino County*, 529 P.2d 590 (Cal. 1974) in support of her argument. In *Burrows*, the court determined that the district court erred by denying the motion to suppress because the warrant authorized the seizure of all the petitioner's financial records without regard to the persons with whom the transactions had occurred or the date of the transactions. 529 P.2d at 597.

The second warrant here was not overbroad. The warrant authorized the seizure of "[f]iles related to communications, calendar events, invoices, retainer agreements, casefiles, and documents pertaining to [MW and JS,] . . . [c]alendar events, communications, or documents showing contact with [the detective,] . . . [c]onfidential

informant form[,] . . . [and] [a]ny files or notes associated with [the] representation of [MW] and [JS]. This case is not like *Burrows* in which the warrant authorized the seizure of *all* of petitioner's financial records. Here, the warrant did not authorize a "general or exploratory search[]." *See Bradford*, 618 N.W.2d at 795. The second warrant did not limit the search to a specific timeframe, but it nonetheless sufficiently narrowed the search by effectively limiting it to information concerning the detective, MW, and JS. And while law enforcement was aware of the general timeline of the alleged swindle, including the payment on November 5, 2018, communications and information related to the crime could have occurred far in advance of that payment. *See Summage*, 481 F.3d at 1079 (emphasizing that "[t]he requirement of particularity must be assessed in terms of practicality"). Moreover, if the investigators were limited to communications only related to MW's payment, it is possible that their search would not have returned evidence regarding the alleged collusion with the Hennepin County Attorney's Office and the Minnetonka police or evidence of the confidential informant form. The warrant limited the search to documents that were relevant to the case. The second warrant was thus not facially invalid, and the district court did not err by denying appellant's motion to suppress the evidence.

II. The district court did not err by denying appellant's motion to disqualify the Hennepin County Attorney's Office.

Appellant contends that district court erred by denying her motion to disqualify the Hennepin County Attorney's Office. The parties dispute which standard of review applies. Appellant contends that this court reviews the district court's denial de novo, citing *State*

v. Pratt, 813 N.W.2d 868 (Minn. 2012). In *Pratt*, the supreme court determined that whether a judge violated the Code of Judicial Conduct is reviewed de novo. 813 N.W.2d at 876. Appellant contends that "[t]he same standard applies in determining whether a prosecutor has violated the Rules of Professional Conduct." To support this proposition, appellant cites *State v. Wyrobek*, No. A06-1936, 2007 WL 1532139, at *5 (Minn. App. May 29, 2007), *rev. denied* (Minn. July 17, 2007), contending that "when issues of pretrial procedure, such as governmental conflict of interest, involve due process issues, review is de novo."

However, the standard of review of the district court's denial of a motion to disqualify counsel is settled law. "We review the district court's decision regarding disqualification of counsel for an abuse of discretion." *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 816 (Minn. 2014). A district court abuses its discretion when it bases its decision on an erroneous view of the law or when its decision is contrary to the facts in the record. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011).

This court looks to the Minnesota Rules of Professional Conduct to determine whether a lawyer has a conflict of interest. *Pearson v. State*, 891 N.W.2d 590, 601 (Minn. 2017). "[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a former client, or a third person or by a personal interest of the lawyer." Minn. R. Prof. Conduct 1.7(a)(2). Rule 1.7 applies to lawyers who are currently serving as public officers or employees. Minn. R. Prof. Conduct 1.11(d)(1). But "[b]ecause of the special problems raised by imputation within a government agency,

paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees." Minn. R. Prof. Conduct 1.11 cmt.

Appellant contends that attorneys within the Hennepin County Attorney's Office were either co-conspirators with appellant or victims, and that as a result the Hennepin County Attorney's Office had a conflict of interest that required its disqualification. Appellant argues "[t]his conflict of interest is substantially stronger" than the conflict of interest in *Stepp v. State*, No. C1-00-1002, 2001 WL 118517 (Minn. App. Feb. 13, 2001), *rev. denied* (Minn. Apr. 25, 2001). In *Stepp*, the prosecutor allegedly had an undisclosed familial relationship with Stepp's co-defendant. 2001 WL 118517, at *4. This court did not decide whether the prosecutor had a conflict of interest because even if the prosecutor did have a conflict of interest, it did not lead to prejudicial treatment of Stepp. *Id.*

Appellant may not exclude the entire Hennepin County Attorney's Office from prosecuting her case simply because she implicated it in a crime for which there is no evidence that it took part in. Appellant contends that the Hennepin County Attorney's Office had a strong incentive to find someone other than its prosecutors to blame, but when the state charged appellant, investigators had already determined that the Hennepin County Attorney's Office was not involved in a scheme to bribe or swindle MW. This is not like *Stepp*, in which the prosecuting attorney allegedly had a direct familial relationship with the defendant's co-defendant. Here, the prosecutor who worked on MW's drug case and was implicated in the crime was not the prosecutor in appellant's case. Moreover, even if that prosecutor did have a conflict, that conflict is not imputed to the entire Hennepin

County Attorney's Office. *See* Minn. R. Prof. Conduct 1.11 cmt. The district court did not base its decision on an erroneous view of the law. *See City of N. Oaks*, 797 N.W.2d at 24. The district court properly exercised its discretion by determining that "there is no conflict of interest" and denying appellant's motion to disqualify the Hennepin County Attorney's Office.

Appellant also contends that the district court should have disqualified the Hennepin County Attorney's Office because the "policies underlying the advocate-witness rule are implicated here" because two Hennepin County Attorneys testified at trial. Under the advocate-witness rule, a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Minn. R. Prof. Conduct 3.7(a).

Here, the district court determined that "Assistant County Attorneys on the State's list of potential witnesses may not appear in court for this case or sign any motions or pleadings in this case." At trial, the Hennepin County Attorney's Office complied with the district court's order, and the prosecutors working on appellant's case did not appear as witnesses. The advocate-witness rule is not implicated.

III. The district court did not err by instructing the jury that a claim of right is not a defense to theft by swindle.

Appellant contends that the district court erred by instructing the jury that a claim of right is not a defense to theft by swindle. "We review a district court's jury instructions for an abuse of discretion." *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019). This court typically affords the district court "broad discretion and considerable latitude in choosing the language of jury instructions." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012)

(quotation omitted). The "district court abuses its discretion if the jury instructions confuse, mislead, or materially misstate the law." *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted). Even if the instruction was erroneous, "a defendant is not entitled to a new trial if the error was harmless." *State v. Schoenrock*, 899 N.W.2d 462, 466 (Minn. 2017).

The state contends that in *State v. Lone*, 361 N.W.2d 854 (Minn. 1985), the court analyzed a similar jury instruction. In *Lone*, the district court instructed the jury that "[i]f a theft by swindle has been proved, it is no defense that the victim received something of value for the money." *Id.* at 857. The court determined that the instruction was not erroneous, concluding that "[i]n theft by swindle, value becomes irrelevant." *Id.* at 860.

The state also cites *State v. Andrade*, No. A06-797, 2007 WL 1598849 (Minn. App. June 5, 2007), *rev. denied* (Minn. Aug. 21, 2007), contending that a claim of right is irrelevant to the crime of theft by swindle. In *Andrade*, Andrade contended that he was not guilty of theft by swindle because he only intended to deprive his client of the amount owed in attorney's fees. 2007 WL 1598849, at *4. The court held that "a claim of right is irrelevant to the crime of theft by swindle." *Id.* at *5.

Here, after instructing the jury on the elements of theft by swindle, the district court, over appellant's objection, instructed the jury that "[i]t is also not a defense to assert some claim of right to the funds, [n]or is it a defense to balance the value of what was taken against the value of something given to [MW]." Appellant contends that the district court abused its discretion because a defendant may "assert a claim of right to raise doubts about

whether the State established" that appellant acted with intent to defraud and whether MW paid the money because of the fraud, two of the elements of theft by swindle.

Here, the jury instruction was not a misstatement of the law. The instruction at issue is similar to the instruction in *Lone*. Both instructions inform the jury that it is not a defense that the appellant was entitled to payment because they gave the victim something of value. Appellant contends that whether appellant had a claim of right to the money was relevant because "if [appellant] was simply trying to collect on an outstanding debt, her claim of right would be relevant to whether she acted with an intent to defraud." But "[i]n theft by swindle, value becomes irrelevant." *Lone*, 361 N.W.2d at 860. The jury instruction here is consistent with Minnesota case law and was therefore not confusing, misleading, or a misstatement of the law. The district court did not abuse its discretion. *See Taylor*, 869 N.W.2d at 14-15.

Appellant contends that sufficiency of the evidence cases "are not a good source of jury instructions." But appellant does not cite a case to support this proposition, and *Lone* was not a sufficiency of the evidence case. Appellant also contends that "[a] jury instruction which provides a list of factors that are 'not a defense' is unduly argumentative." But again, appellant does not cite a case to support her argument. Further in *Lone*, the supreme court found that a jury instruction was proper that stated that a claim of right was not a defense. 361 N.W.2d at 857.

Even if the district court abused its discretion in instructing the jury, appellant did not contend that the error was prejudicial. "Alleged errors in jury instructions are reviewed under the harmless error test." *State v. Gatson*, 801 N.W.2d 134, 147-48 (Minn. 2011).

"Under the harmless error standard, a defendant who alleges an error that does not implicate a constitutional right must prove there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011) (quotations omitted). Appellant did not establish how the instruction was prejudicial and therefore did not "prove there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.* (quotations omitted).

Affirmed.