**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A06-2443**

State of Minnesota,
Respondent,

vs.

Vandale A. Willis,
Appellant.

**Filed May 13, 2008**
**Reversed and remanded**
**Crippen, Judge***

St. Louis County District Court
File No. CR-06-3531

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Melanie S. Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North 5th Avenue West, Suite 501, Duluth, MN 55802 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Schellhas, Judge; and Crippen, Judge.

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

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

**CRIPPEN,** Judge

Challenging his three controlled substance convictions, appellant Vandale Willis contends that admission of an incriminating lab report violated his Confrontation Clause rights. We reverse and remand for a new trial.

## FACTS

On June 7, 2006, Duluth police executed a search warrant issued on evidence that appellant and Derek Carothers were involved in narcotics sales. When the men were searched in the apartment named in the warrant, officers found $939 on Carothers's person, and a substance suspected to be crack cocaine was found in between appellant's buttocks. Bus tickets from Chicago were discovered among appellant's belongings in the apartment, indicating that both men had recently arrived in Duluth from Chicago. The search of the apartment also revealed two large baggies containing what was suspected to be powder cocaine. One baggie held the substance in individually packaged smaller baggies. A spoon and a digital scale also were seized.

Field tests on the suspected narcotics seized in the search indicated that the substance was cocaine. The substance then was sent to the Minnesota Bureau of Criminal Apprehension (BCA) for further testing. Appellant admitted to police that he and Carothers each had transported approximately one ounce of cocaine (two ounces equals 56 grams) on a bus trip from Chicago, intending to sell the drugs, and that they had sold approximately half the total cocaine they brought to Duluth.

Appellant was charged with separate felony counts of selling, possessing, and importing a controlled substance, in violation of Minn. Stat. § 152.021, subd. 1(1) (2004) (first-degree sale); Minn. Stat. § 152.021, subd. 2(1) (2004) (first-degree possession); and Minn. Stat. § 152.0261, subd. 1 (2004) (importation). Appellant requested a trial by the district court without a jury. A BCA lab report was introduced as an exhibit at his trial, indicating that the suspected narcotics were in fact cocaine, with a total weight of 30.1 grams.

The district court found that appellant was acting in concert with Carothers and aided and abetted Carothers's sale of narcotics, thus holding appellant responsible for the entirety of the cocaine found in the apartment as well as that found on his person. Finding him guilty on all three counts, the court sentenced appellant to 98 months for importation and 122 months for sale, to be served concurrently.

**D E C I S I O N**

Appellant contends that the use of the BCA lab report violated his confrontation rights under U.S. Const. amend. VI and Minn. Const. art. I § 6. Initially, the parties dispute whether appellant's attorney properly objected to the exhibit; the record shows that counsel said "we understand that the report . . . may be admitted into evidence pursuant to statute, but we do not agree with its contents."

"An objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993) (holding that an objection on grounds of "legal conclusion" did not alert trial court to hearsay and Confrontation Clause issues that appellant raised on appeal), *review denied* (Minn. Oct. 19, 1993). And

generally only "clear and specific objections raised before the district court" will preserve the issue of admissibility of a particular piece of evidence for appeal. *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000). Counsel's general objection did not alert the district court to appellant's claimed rights under the Confrontation Clause. Thus, if the report's introduction is to warrant reversal of appellant's convictions it must constitute plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The issue of whether confrontation rights have been violated is a question of law that we review de novo. *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007). We have discretion to consider a claim of evidentiary error despite it not being brought to the attention of the district court if it constitutes plain error. *Griller*, 583 N.W.2d at 740; Minn. R. Crim. P. 31.02. The plain error standard requires that the defendant show error that was plain and that affected substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

"[A]n error is 'plain' if it was 'clear' or 'obvious.'" *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). Generally, this degree of error "is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). And "an error affects substantial rights where there is a 'reasonable likelihood' that the absence of the error would have had a 'significant effect' on the [fact-finder's] verdict." *Reed*, 737 N.W.2d at 583 (quoting *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005)). It is the defendant's burden to show the error significantly affected the verdict. *Reed*, 737 N.W.2d at 583-84. If there is a showing of plain error, the appellate

court must also consider whether the topic should be addressed to ensure the fairness or integrity of the judicial process. *Ramey*, 721 N.W.2d at 302.

The supreme court has determined that a BCA lab report offered at trial to prove that a substance seized from the defendant was cocaine is testimonial hearsay, and thus such a report generally cannot be admitted under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), unless the analyst who prepared the report testifies at trial. *State v. Caulfield*, 722 N.W.2d 304, 306-07, 310 (Minn. 2006). After an in-depth analysis of the proper application of the harmless-error test, the court held that the erroneous admission of the lab report in *Caulfield* was not harmless even though Caulfield admitted the substance found in his possession was cocaine and field tests of the substance indicated the same. *Id*. at 314-17. The BCA report in this case has probative value both as to the nature of the suspected narcotics, as in *Caulfield*, and, in addition, to the weight of the substance.

Although *Caulfield* was not decided until after the district court sentenced appellant, its admissibility holding governs our appellate decision on plain error. *See State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (determining plain error based on the law in effect at the time of appellate review).

Respondent points to the absence of a proper objection, but a similar argument was made by the state in *Caulfield*,[1] prompting the supreme court to note that plain error

[1] Even though Caulfield's counsel objected on confrontation grounds at trial, the state argued Caulfield had still "forfeited" his right to bring such a claim on appeal because he did not comply with Minn. Stat. § 634.15, subd. 2(a) (2004). *Caulfield*, 722 N.W.2d at 310-11. The 2004 version of this statutory provision stated that BCA lab reports are

could still be reviewed. *Caulfield*, 722 N.W.2d at 311 (rejecting state's outright argument that appellant could not dispute the testimonial hearsay issue on appeal because he "forfeited" his Confrontation Clause rights).

Respondent also relies on *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978), which allows hearsay evidence to be admitted with probative force when no objection is made. But *Hamilton* did not address a defendant's Confrontation Clause rights, and unobjected-to hearsay admissible with probative force under the rules of evidence may still violate a defendant's post-*Crawford* confrontation rights if it is testimonial. *See Crawford*, 541 U.S. at 50-51, 124 S. Ct. at 1364 (rejecting "the view that the Confrontation Clause" depends on the law of evidence of current force because such a view would "render the Confrontation Clause powerless"). *Caulfield* is directly on point here, explicitly prohibiting the admission of reports such as the one introduced at appellant's trial. Thus, appellant has met his burden to demonstrate both "error" and that this error was "plain."

In evaluating reasonable likelihood that this error significantly affected the outcome of appellant's trial, we must give weight to the persuasiveness of the erroneously admitted evidence. *See Caulfield*, 722 N.W.2d at 317 (stating that in no case has the supreme court ever held admission of "direct and persuasive evidence on an

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admissible in lieu of an analyst's live testimony unless a defendant requests the analyst appear in person 10 days before trial. The *Caulfield* court held this implied statutory waiver of confrontation rights was unconstitutional in part, *id.* at 313, resulting in 2007 legislation modifying the statute to comply with the court's concerns. *See* 2007 Minn. Laws ch. 54, art. 3, §§ 12-13, at 249-50.

element of the crime" did not affect the verdict solely because other less persuasive evidence of guilt is strong).

Each felony count for which appellant was convicted required that the narcotic underlying the crime consist of cocaine, heroin, or methamphetamine. Minn. Stat. §§ 152.021, subds. 1(1), 2(1), .0261, subd. 1 (2004). And the sale crime requires 10 or more grams be sold. Minn. Stat. § 152.021, subd. 1(1). The possession and importation crimes require a larger amount, 25 grams, be possessed or imported. Minn. Stat. §§ 152.021, subd. 2(1), .0261, subd. 1. Appellant has shown a reasonable likelihood that the erroneous admission of the BCA report had a significant effect on the district court's finding of guilt regarding these two elements.

The BCA report was the only evidence introduced at appellant's trial on the weight of the seized cocaine apart from its packaging.[2] Furthermore, the district court expressly and specifically relied on the lab report when finding appellant guilty after his trial concluded, stating that the "BCA lab report shows" that the three exhibits of the seized cocaine introduced at trial "are 7.2 grams for Exhibit 1, . . . 17.6 grams for Exhibit 2, and 5.3 grams for Exhibit 3," which is a total of 30.1 grams.

The BCA report also stated without equivocation that the substance was cocaine. Although there was other testimony on this issue at trial, this testimony makes clear the

[2] Although there were some passing references by witnesses at appellant's trial regarding the weight of the narcotics—usually to identify which of the three different exhibits of the cocaine was being discussed—these referenced weights were of the substance as measured immediately after it was seized and while still in its packaging. The accuracy of appellant's admission that he and Carothers each carried 28 grams of cocaine from Chicago is persuasive, but the lab report is more persuasive on the weight of cocaine not already sold.

weakness of its own conclusions. A Duluth police officer explained that although the substance was believed to be cocaine, it was sent to the BCA for "further testing . . . to see whether or not there is indeed a presence of cocaine as we expected." Similarly, the officer performing field tests stated that the tests were not "conclusive" and that they are used to determine whether a substance should be sent to the BCA for further testing. Thus, even the officers who testified to this point still regarded the BCA report as the definitive evidence on the nature of the suspected narcotics. It is persuasive that appellant himself thought the substance was cocaine, but nothing in the record shows appellant's belief to be more reliable than the belief of the officer.

Finally, we must determine if the plain error justifies upsetting the convictions. The BCA report was admitted in clear violation of appellant's constitutional rights. Perhaps somewhat uniquely, the record demonstrates that the fact finder specifically relied on this constitutionally unsound evidence in finding appellant guilty. Without the BCA report, the remaining evidence establishing the weight and nature of the narcotics is either of questionable accuracy or equivocal, significantly less than probative and compelling. *See Caulfield*, 722 N.W.2d at 317. Thus, the integrity and reputation of the judicial process would be ill served if we allowed appellant's convictions to stand given these circumstances.

Appellant also claims that the district court erred in imposing multiple sentences and that the officers violated his Fourth Amendment rights after detaining him pursuant

to the search warrant. Because we reverse appellant's convictions based on the Confrontation Clause, we decline to address these additional claims of error.

**Reversed and remanded.**