STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0473

State of Minnesota,
Respondent,

vs.

Darnell McDaniels,
Appellant.

Filed June 24, 2008
Affirmed
Lansing, Judge

Olmsted County District Court
File No. CR-06-5634

Lori Swanson, Attorney General, Kimberly Parker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, Olmsted County Courthouse, 151 Fourth Street Southeast, Rochester, MN 55904-3712 (for respondent)

Melissa Sheridan, Assistant State Public Defender, Suite 320, 1380 Corporate Center Curve, Eagan, MN 55121 (for appellant)

Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and Hudson, Judge.

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

LANSING, Judge

A jury found Darnell McDaniels guilty of third-degree controlled substance crime and conspiracy to commit third-degree controlled substance crime. Because McDaniels was not denied effective assistance of counsel by his attorney's alleged conflict of interest, the police officers' testimony did not clearly involve prior bad acts, the informant's reference to a prior crime did not affect McDaniels's substantial rights, and the evidence was sufficient to support McDaniels's conspiracy conviction, we affirm.

F A C T S

The two charges of controlled-substance crime against Darnell McDaniels stem from a controlled buy between McDaniels and a police informant. Based on the informant's report about a man named "Big," who sold crack cocaine, a Rochester police officer arranged the controlled buy in November 2005.

Before arranging the controlled buy, the officer used the informant's description of Big and his relationships and activities together with the officer's own recollections and the police department's database to confirm that "Big" was a name used by Darnell McDaniels. The officer showed the informant a photo lineup and the informant identified McDaniels as the man he knew as Big.

To effectuate the controlled buy, the police informant called Big's cell-phone number and said that he wanted to purchase crack cocaine. The informant again called Big to tell him that he was ready to meet. The informant recognized Big's voice and

knew that it was definitely Big who was speaking. Big told the informant to go to the McDonald's restaurant and to be there within five minutes of the call. The call was monitored and recorded by the police officer.

The officer gave the informant $100 to purchase the crack cocaine. As the informant walked toward McDonald's, a young woman approached him, opened her mouth, and showed him two small bags on her tongue. At the same time, the informant saw Big across the alley. The informant asked the young woman where Big was and she said he was around but "I'm the one." She then took the bags from her mouth, handed them to him, and he gave her $100. The conversation was recorded and videotaped. As the informant walked away, he saw over his shoulder, the young woman and Big walking across the parking lot.

A deputy from the Olmsted County Sheriff's Office had parked near McDonald's to observe the transaction. Based on pictures of McDaniels, he recognized him standing near the McDonald's drive-thru area. He watched the young woman join McDaniels and then saw her walk around the other side of the restaurant, out of his sight. He had a listening device that enabled him to hear her conversation with the informant and he then watched as the young woman rejoined McDaniels and the pair walked away. The Bureau of Criminal Apprehension confirmed that the two small bags purchased by the informant contained a rock-like substance that was cocaine.

At a pretrial conference in September 2006, the public defender assigned to represent McDaniels told the district court that he had previously represented the informant in another case but that case was "over now." He said that the informant had

called him recently and "it would be better" if McDaniels had a different lawyer. The district court questioned whether this was "actually a conflict of interest." The district court told the attorney "your office will have to make [checking into it] a priority, obviously," and the attorney said he would look into it. The district court then pointed out that the attorney's supervisor was sitting nearby. The supervisor said that he would look into it and the court specifically asked the public defender's office to "deal with the attorney issue." The case proceeded to trial a month later. The record does not reflect any additional discussions about the attorney's potential conflict of interest.

D E C I S I O N

I

The state and federal constitutions guarantee the right to counsel in criminal trials. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel includes the right to *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Id.* at 687, 104 S. Ct. at 2064.

A lawyer's performance is deficient if he represents a client despite having a conflict of interest. *See Wood v. Georgia*, 450 U.S. 261, 271-72, 101 S. Ct. 1097, 1103-04 (1981) (noting that defendant had "right to representation that is free of conflicts of interest"). A conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer."

Minn. R. Prof. Conduct 1.7(a)(2). Thus, the existence of a conflict of interest typically depends on whether the lawyer's decisions were "materially limited." Because of this limitation, prejudice to the defendant is generally presumed when the lawyer had a conflict of interest. *See Mickens v. Taylor*, 535 U.S. 162, 167-70, 122 S. Ct. 1237, 1241-43 (2002) (discussing cases in which deficient performance and prejudice inquiries overlapped).

A lawyer does not, however, provide deficient representation if the mere *possibility* of a conflict exists. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980). But the definition of conflict includes flexible terms, such as "significant risk" and "materially limited." Minn. R. Prof. Conduct 1.7(a)(2). As a result, it can be difficult to distinguish between actual and possible conflicts. Because the defendant's counsel is in the best position to determine whether an actual conflict exists, courts will defer to counsel's pretrial assertion that a conflict exists. If counsel objects to representation on the basis of a conflict, the district court must make inquiries to determine whether a conflict actually exists. *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S. Ct. 1173, 1178-79 (1978). The failure to make inquiries requires reversal. *Id.* at 490-91, 98 S. Ct. at 1182. But when counsel does not object to representation, the existence of an actual conflict must be established directly. *See Sullivan*, 446 U.S. at 348, 100 S. Ct. at 1718 (holding that "defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance").

In this case, McDaniels argues that his counsel objected to representing him on the basis of a conflict and the district court failed to inquire into whether a conflict actually existed. This argument is not supported by the facts. At the pretrial hearing, McDaniels's attorney disclosed that he had previously represented the police informant. According to the attorney's statement, his representation of the informant was completed, and he did not indicate in any way that the representation was related to McDaniels's case. Although the attorney said that the police informant had recently called him, he did not say that it related to a legal issue. The managing attorney for the public defender's office was in the courtroom at the time of the hearing, and the district court requested that the managing attorney "deal with the attorney issue." In the month between the pretrial hearing and the trial, McDaniels's attorney did not raise any objections to representing McDaniels, and he did not move the court to appoint a different attorney.

The facts establish that the attorney merely advised the court about the situation and did not assert that a conflict actually existed. Because the attorney did not assert that a conflict existed, there is no basis for deferring to the attorney's belief that a conflict existed. Thus, the *Holloway* rule does not apply. Under the circumstances, the district court was not required to inquire into whether a conflict actually existed. McDaniels has only argued that the district court failed to make an adequate inquiry—he has not argued that a conflict of interested can be established directly. Therefore, we see no basis for concluding that McDaniels received ineffective assistance of counsel and we reject his argument.

II

McDaniels argues that his conviction should be reversed because the state introduced improper evidence of prior bad acts under *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). McDaniels challenges the police officers' testimony about prior contact with McDaniels and the informant's testimony that he previously purchased drugs from McDaniels. McDaniels did not object to this testimony. Generally, the failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). But under the plain-error doctrine, we may consider the evidentiary issues if there is (1) error, (2) that is plain, and (3) that affects the defendant's substantial rights. *Id.* at 685. An error is "plain" if it was "clear" or "obvious." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002).

The officers' testimony did not constitute plain error. In *State v. Strommen*, the supreme court held that an officer's testimony that he knew the defendant from "prior contacts and incidents" constituted improper character evidence. 648 N.W.2d 681, 687-88 (Minn. 2002). In this case, the officers' testimony was similar. One officer testified that he searched a database of "prior contacts" to determine whether McDaniels used the name "Big." Another officer testified that he knew who Big was before the date of the controlled buy. But *Strommen* did not establish a per se rule that references to a defendant's prior contacts constitute improper character evidence. In *Strommen*, identity was not an issue and it was relevant that the state had previously introduced improper testimony that the defendant "said that he killed somebody" and had been charged for that separate crime. *Id.* at 688. In this case, the prior contacts and the officer's

knowledge could have been the product of noncriminal activity. Thus, we cannot conclude that the officers' testimony was clearly or obviously evidence of prior bad acts.

The informant's testimony, however, did refer to another crime. He testified about a 1997 controlled purchase from McDaniels. The state argues that this evidence was admissible to prove identity. *See* Minn. R. Evid. 404(b) (allowing evidence of other crimes or misconduct to show identity). But before *Spriegl* evidence is admitted, the state must complete a number of steps, including giving notice of its intent to introduce the evidence. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). The state did not complete those steps before admitting the evidence. Therefore, the admission of this evidence constituted plain error.

Nonetheless, we conclude that the error did not affect McDaniels's substantial rights. An error affects substantial rights if there is a reasonable likelihood that the error substantially affected the verdict. *State v. Smith*, 582 N.W.2d 894, 896 (Minn. 1998). The evidence obtained in the controlled buy, however, was simply overwhelming. This evidence included the observations of the controlled buy and the recorded telephone conversation between McDaniels and the informant. We conclude that there is no reasonable likelihood that the jury's decision was affected by the informant's brief reference to McDaniels's prior conduct. Accordingly, we conclude that McDaniels is not entitled to a new trial.

III

In his pro se supplemental brief, McDaniels challenges the sufficiency of the evidence to support his conviction for conspiracy to commit third-degree controlled

substance crime. A challenge to the sufficiency of the evidence requires a "thorough analysis of the record to determine whether the evidence . . . was sufficient to permit the jury to reach its verdict." *State v. Spann*, 574 N.W.2d 47, 54 (Minn. 1998). The reviewing court does not retry the facts, but instead views the evidence in the light most favorable to the jury's verdict and assumes the jury believed the witnesses' testimony that supported the verdict and disbelieved the evidence that did not. *State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994).

A conspiracy exists when someone "conspires with another to commit a crime and . . . one or more of the parties does some overt act in furtherance of such conspiracy." Minn. Stat. § 609.175, subd. 2 (2006). A conspiracy conviction requires proof of a criminal agreement. *State v. Hatfield*, 639 N.W.2d 372, 378 (Minn. 2002).

Several pieces of evidence could allow the jury to reasonably conclude that McDaniels and the unidentified woman entered into a criminal agreement to sell crack cocaine: the informant's testimony that he called and spoke with Big about buying crack cocaine; the police officer's testimony that records indicated Big was an alias for McDaniels and that he verified the informant's prepurchase call to McDaniels after obtaining McDaniels's phone records; the informant's testimony that Big told the informant to meet him at McDonald's; the informant's and the deputy's testimony that they saw McDaniels in the alley near McDonald's while the woman was delivering the crack cocaine; the informant's testimony that the woman gave him the crack cocaine, received the money, and told him that Big "was around;" and the informant's and the deputy's testimony that they saw the woman rejoin McDaniels after the purchase. This

testimony is corroborated in audio and video recordings of the controlled buy, which the jury heard and viewed. The evidence, taken in the light most favorable to the jury's verdict, allows the jury to reasonably conclude McDaniels conspired to sell crack cocaine.

Affirmed.