STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1983

State of Minnesota,
Respondent,

vs.

James R. Willette,
Appellant.

Filed January 5, 2010
Affirmed
Ross, Judge

Pine County District Court
File No. 58-CR-07-883

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

John K. Carlson, Pine County Attorney, Pine County Courthouse, 635 Northridge Drive Northwest, Suite 310, Pine City, MN 55063 (for respondent)

Marie L. Wolf, Interim Chief Public Defender, Bridget Kearns Sabo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Crippen, Judge.*

* 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

ROSS, Judge

This appeal calls into question the state's ability to introduce evidence of a criminal defendant's unsolicited confession made to a district court judge at the defendant's initial bail-setting appearance. Appellant James Ryan Willette confessed during his initial appearance to taking his landlord's guns without permission. On appeal from his convictions of theft and possession of a firearm by a felon, Willette now challenges the admission of his confession on Fifth and Sixth Amendment grounds and based on the Minnesota Rules of Criminal Procedure. Willette also argues that the district court erroneously allowed the prosecutor to elicit evidence of his criminal history, that the prosecutor committed misconduct by introducing evidence of certain uncharged bad acts and by arousing the jury's passions, and that he was deprived of effective assistance of counsel. Because Willette's confession did not result from a violation of the Constitution or of the rules, and because none of the other alleged errors prejudiced him, we affirm.

FACTS

James Willette met Leslie Brogren when Brogren volunteered in prison ministry at a facility where Willette was incarcerated. Willette later rented a room in Brogren's Pine City home. Brogren owned a number of guns, five of which he noticed were missing. Brogren suspected and questioned Willette, who admitted that he had taken and pawned them. But Willette was unable to redeem the guns, and Brogren reported them to the

police as stolen and evicted Willette. The state charged Willette with four counts of theft, four counts of possession of a firearm by a felon, and four counts of temporary theft.

Just before his initial appearance in the district court, Willette was present as the district court advised an unrelated defendant of his constitutional rights, including the right to counsel and the right to remain silent. Willette then made his initial appearance. The district court first appointed him an attorney and then asked Willette if he had any questions about his rights, stating, "I just did a rights advisory a little while ago." Willette responded, "I did hear his. I understand them, Your Honor."

The district court proceeded to set bail with conditions. The county attorney argued that bail be set at $25,000 based on Willette's being a flight risk and a threat to public safety. The district court then asked Willette whether he "wish[ed] to comment on the issue of bail or release conditions." Willette responded much broader than those issues, confessing to the theft:

> Yes, Your Honor. These weapons were not used in the commission of a crime. I needed some money to pay bills, and I was living with the individual at the time. And, yes, I did take them without his permission, but I just took them to the pawn shop, Your Honor. They were not used in a crime. I do have family in Pine City. I have an ex-wife and two daughters. . . . I'm not a threat to the public. Like I said, they were not used in a crime. They were only taken to the pawn shop to pay some bills. And so I would ask that that be taken into consideration of bail. . . . I do have roots in this community. I would appear.

The district court set bail at $25,000.

Several days later, Willette appeared before the district court with his attorney for his scheduling hearing. Willette indicated that he planned to ask the district court to

suppress his confession made at his initial appearance. But at the omnibus hearing several weeks later, Willette made no challenge to his confession's admission.

At a January 2008 pretrial hearing, the parties apparently engaged in an off-the-record discussion about the admissibility of Willette's courtroom confession, and the district court took a suppression motion under advisement. The district court judge who considered the suppression motion and presided at trial was not the judge who presided at the initial hearing. The district court ultimately denied Willette's motion to suppress, concluding that the confession was voluntary and that Willette had been adequately advised of his right to remain silent.

Before trial, Willette stipulated to being ineligible to possess a firearm so that the prosecution would not have to introduce evidence of his prior felony conviction of aggravated robbery to establish that fact. The district court instructed the prosecutor to refer to Willette as a person "ineligible . . . to possess a firearm," stating that this was "ambiguous enough that . . . it would [not] be prejudicial to Mr. Willette." The district court also agreed to permit the prosecutor to elicit from Brogren only that Willette had "a criminal history" but told the prosecutor to warn Brogren and the state's other witnesses not to use the term "felon" in front of the jury.

Despite the district court's instructions not to refer to Willette as a felon, the prosecutor did so once in his opening statement. The district court denied Willette's consequent motion for a mistrial but admonished the prosecutor. The prosecutor never used the term "felon" again, but he did elicit testimony from Brogren that Brogren had met Willette while volunteering in a program that "minister[s] to the prisoners in jail."

The prosecutor introduced into evidence and highlighted during closing argument the portion of the transcript of Willette's initial appearance in which he confessed to taking Brogren's guns without permission. Willette did not object.

The prosecutor also elicited testimony about several bad acts that Willette allegedly committed, and he referred to these in his closing argument: Brogren was missing a fifth gun in addition to the four Willette was charged with stealing; Brogren was also missing power tools and a "fish house"; Brogren found some of his power tools in Willette's moving boxes after he evicted him; and Willette had not been current on paying his rent.

The prosecutor also introduced testimony tending to create jury sympathy for Brogren: Brogren was a 71-year-old lifetime resident of Pine City; he was involved in charitable activities, including, at one time, prison ministry; Brogren "thought [Willette] was down and out and [he] wanted to try to help him as much as [he] could"; Brogren would lend Willette his car and once drove Willette to the airport; Brogren took out loans to help Willette; and Brogren felt that Willette "took advantage of [him]." In closing argument, the prosecutor referred to some of these facts and characterized Brogren as "the unfortunate victim of trying to give someone a chance." And he suggested to the jury that Willette had preyed upon Brogren's sympathies.

The jury convicted Willette of two counts of permanent theft, two counts of temporary theft, and four counts of possession of a firearm by an ineligible person. The district court sentenced Willette to 60 months in prison. This appeal follows.

D E C I S I O N

I

Willette first argues that the district court's admission of his confession violated his right to counsel, his right to remain silent, and Minnesota Rule of Criminal Procedure 6.02. Although Willette moved to suppress his confession on Fifth Amendment grounds, he did not refer to the Sixth Amendment or rule 6.02. And he presents a different Fifth Amendment theory on appeal than he presented to the district court.

When the defendant fails to object to the admission of evidence, we review under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). We will reverse only if the district court committed error that was plain and that affected Willette's substantial rights. *See Griller*, 583 N.W.2d at 740. An error affects a defendant's substantial rights if it is reasonably likely that the absence of the error would have significantly affected the jury's verdict. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007).

Right to Counsel

Willette argues that his confession should have been suppressed under the Sixth Amendment because the district court's decision to have a contested bail hearing forced him to represent himself at a critical stage of the prosecution. We are not persuaded. Generally, the remedy when evidence is obtained in violation of the Constitution is exclusion of that evidence at a future trial. *State v. Jackson*, 742 N.W.2d 163, 177−78 (Minn. 2007). The Sixth Amendment guarantees a criminal defendant the "assistance of counsel for his defense." U.S. Const. amend VI; *see also* Minn. Const. art. I, § 6 (same).

The right to counsel attaches at the defendant's initial appearance. *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2592 (2008).

After the right to counsel has attached, the defendant is entitled to be represented by counsel at all critical stages of prosecution. *United States v. Wade*, 388 U.S. 218, 227, 87 S. Ct. 1926, 1932 (1967). Although the right to counsel attaches at a defendant's initial appearance, the defendant does not have the right to counsel at a hearing in which the sole purpose is to fix bail and appoint an attorney. *State ex rel. Ahlstrand v. Tahash*, 266 Minn. 570, 570, 123 N.W.2d 325, 326 (1963). Willette's initial appearance was a hearing for the sole purpose of fixing bail and appointing counsel. Willette therefore did not have a right to counsel at his initial appearance.

Willette argues that a defendant's initial appearance is a critical stage of the prosecution. But the cases he cites are inapposite. *See Kirby v. Illinois*, 406 U.S. 682, 688, 92 S. Ct. 1877, 1882 (1972) (stating that the right to counsel attaches at the time of arraignment); *State v. Kluck*, 299 Minn. 161, 166, 217 N.W.2d 202, 206 (1974) (stating that a preliminary hearing is a critical stage of the prosecution). The hearing at issue in this case was neither an arraignment nor a preliminary hearing but an initial appearance. Willette also cites *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999 (1970), for the proposition that counsel can be influential at a preliminary hearing by making effective arguments in matters such as bail. *Coleman* is factually distinguished from this case. *Coleman* involved a preliminary hearing at which, in addition to setting bail, the state circuit court determined whether the state's case was strong enough to proceed to trial. 399 U.S. at 8, 90 S. Ct. at 2002−03. And the legal principles under which the Court held

the preliminary hearing in *Coleman* to be a critical stage do not apply here. *Coleman* states that the critical-stage determination depends on "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation" and whether counsel has "the ability . . . to help avoid that prejudice." *Id.* at 7, 90 S. Ct. at 2002 (quotation omitted). There is no inherent potential for prejudice to a defendant's rights in a proceeding such as Willette's initial appearance, in which the limited purposes were to inform him of the charges, to appoint counsel, and to set bail. *Cf. Ahlstrand*, 266 Minn. at 570, 123 N.W.2d at 326.

Willette's own impulse, not the nature of the proceeding, caused him to blurt out a confession in response to an unrelated question about bail. Willette does not contend that he was interrogated or that the district court deliberately elicited his confession. And the facts do not invite that contention. Willette's initial appearance was not a critical stage of the prosecution, and the fact that he offered his confession without having counsel present at the hearing was not the result of a violation of his rights under the Sixth Amendment.

Compelled Testimony

Willette also contends that his confession should have been suppressed because it was compelled in violation of his Fifth Amendment privilege against self-incrimination. This argument also fails to persuade us. The Fifth Amendment provides that "[n]o person . . . . shall be compelled in any criminal case to be witness against himself." U.S. Const. amend. V; *see also* Minn. Const. art. I, § 7 (same). The privilege against self-incrimination allows a person to "refuse to answer official questions put to him in any

other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Johnson v. Fabian*, 735 N.W.2d 295, 299 (Minn. 2007) (quotation omitted).

A witness ordinarily must affirmatively claim the privilege and is deemed to have waived it if he answers an incriminating question. *Minnesota v. Murphy*, 465 U.S. 420, 427−29, 104 S. Ct. 1136, 1142−43 (1984). An exception to the general rule that a witness must affirmatively claim the privilege exists when "the assertion of the privilege is penalized so as to foreclose a free choice to remain silent, and compel incriminating testimony." *Id.* at 434, 104 S. Ct. at 1146 (quotation omitted). In these "penalty" cases, a statement is compelled "when the state attaches sufficiently adverse consequences to the choice to remain silent that a person is compelled to speak." *Fabian*, 735 N.W.2d at 300. So, for example, the state might compel testimony when it imposes increased jail time on a convicted sex offender who refuses to discuss his crimes in a prison-based treatment program, *id.* at 311−12, or when a probation officer tells a parolee that his probation will be revoked if the parolee invokes the privilege as to crimes that are not the subject of the probation, *Murphy*, 465 U.S. at 435, 104 S. Ct. at 1146.

Willette asserts that the possibility that he would remain jailed pending trial or pay "a considerable amount of money to secure [his] release" was an adverse consequence of remaining silent that compelled him to testify against himself. The assertion is flawed for two reasons. First, the district court never expressed or implied that Willette's failure to incriminate himself would be penalized. Second, the unexpected and unsolicited confession was unresponsive to the district court's inquiry about bail. Willette does not

argue that he was interrogated by the district court or deprived of a *Miranda* warning. (This was his argument before the district court, but he has abandoned this argument on appeal.) The district court did not compel Willette to testify by threatening a penalty; Willette voluntarily gave up his Fifth Amendment privilege by expounding freely about his crime.

Rule 6.02

Willette argues that his confession should have been excluded under Minnesota Rule of Criminal Procedure 6.02, subdivision 3, as evidence derived from a pre-release investigation. He concedes that a pre-release investigation is generally conducted by the district court's probation service and cites no authority for his contention that "the rule should apply with equal force to questions from the court regarding conditions of release."

We need not dwell on the question of error; we conclude that even if the admission of Willette's confession was error, it did not affect Willette's substantial rights because the confession could not have significantly affected the jury's verdict in light of the overwhelming evidence of guilt. Both Deputy Rebecca Lawrence and Brogren testified that Willette had admitted to taking the guns. The prosecutor also introduced a pawn ticket bearing Willette's signature and a color image of his driver's license. Willette's earlier courtroom confession merely added the detail of his attempt to justify his theft, but the theft was established through other, equally compelling evidence. The district court's ruling admitting Willette's confession was not plain error affecting his substantial rights.

II

Willette argues that the district court erred by allowing the state to elicit evidence of his criminal history. We review a district court's evidentiary rulings for abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Willette can prevail only if he shows that the district court exceeded the bounds of its discretion in a manner that prejudiced him. *See id.* Generally, a defendant is not prejudiced by trial errors if the evidence of guilt is otherwise strong. *See, e.g.*, *State v. Hall*, 764 N.W.2d 837, 843 (Minn. 2009).

A defendant charged with being a felon in possession of a firearm may keep his prior conviction from the jury by stipulating to it. *State v. Davidson*, 351 N.W.2d 8, 11 (Minn. 1984). But if facts relating to the conviction are relevant to some other issue in the case, evidence of these facts is admissible if its probative value outweighs its potential for unfair prejudice. *Id.*; *cf.* Minn. R. Evid. 403 (stating that court may exclude relevant evidence if it is unduly prejudicial).

In light of Willette's stipulation that he was ineligible to possess a firearm, the relevance of his criminal history was minimal, while its prejudicial impact was great. But even if the district court exceeded its discretion by allowing the criminal-history evidence, Willette has not established that this prejudiced him unduly. The evidence against him was too strong for the district court's allegedly erroneous ruling to have mattered. As stated, the prosecutor also presented Willette's separate confession to Brogren, and he introduced the incriminating documentary evidence. In light of this

overwhelming evidence of Willette's guilt, the district court's allowing the prosecutor to elicit general evidence that Willette had a criminal history was of marginal consequence.

III

Willette argues that the district court committed plain error by allowing the prosecutor to elicit testimony about his prior bad acts without following procedures and to inflame the jury's passions during closing argument. Willette did not object at trial to the prosecutor's alleged misconduct.

We review unobjected-to prosecutorial misconduct under a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 299−300 (Minn. 2006). An error is plain if it violates caselaw, a rule, or a standard of conduct. *Id.* at 302. If Willette establishes misconduct that was plain error, the state bears the burden of proving that the error did not affect his substantial rights. *See id.* at 299-300. An error affects substantial rights if it was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. Although we agree with Willette that some of the prosecutor's actions were not proper, for the reasons that follow we hold that the state on appeal has carried its burden to show that the misconduct did not affect the outcome.

Introducing Evidence of Willette's Prior Bad Acts

Willette claims that it was misconduct for the prosecutor to elicit, and to reference in his closing argument, testimony about certain bad acts that Willette may have committed in addition to the charged offenses. Evidence of crimes and bad acts other than the charged crime, known as *Spreigl* evidence, is admissible to a limited extent to prove a defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity,

or absence of mistake or accident" with respect to the charged crime. Minn. R. Evid. 404(b). Rule 404(b) imposes three requirements on a prosecutor wishing to introduce *Spreigl* evidence. The prosecutor must (1) give notice of his intent to admit the evidence, (2) clearly indicate what he intends to prove with it, and (3) prove the alleged crime or bad act by clear and convincing evidence. *Id.* In addition, the evidence must (4) be relevant to the prosecutor's case and (5) have a probative value that is not outweighed by its potential for unfair prejudice to the defendant. *Id.*

This court has held that a prosecutor's injecting bad-acts evidence into the trial without complying with rule 404(b)'s requirements for the admission of *Spreigl* evidence constitutes misconduct. *See State v. Fields*, 730 N.W.2d 777, 782−83 (Minn. 2007) (summarizing, on review, this court's conclusion that prosecutor's use of other-crime evidence without notice required by rule 404(b) constituted error). Although the supreme court ultimately reversed this court's conclusion that the prosecutor had committed misconduct, it did so because this court had failed to consider the evidence's admissibility under Minnesota Rule of Evidence 608(b) (use of other-crime evidence for direct impeachment). *Id*. at 783−84. The supreme court characterized 608(b)'s notice requirement as aspirational, distinguishing it from 404(b), whose requirements "clearly" must be followed before introducing *Spreigl* evidence. *Id.* at 784. The supreme court thus did not disturb this court's conclusion that failure to comply with rule 404(b) could constitute misconduct. The prosecutor here failed to comply with rule 404(b)'s requirements for the admission of *Spreigl* evidence, a failure that *Fields* suggests constitutes misconduct. And unlike the prosecutor in *Fields*, the prosecutor here had no

alternative, legitimate ground under rule 608(b) to use the evidence for impeachment because Willette never took the stand.

The state asserts that the required notice was given because Willette "was aware of these offenses," having heard Deputy Lawrence testify to them and having been given her police report containing information about them. According to the state, the evidence therefore did not "surprise" Willette. This argument essentially asserts that one instance of *Spreigl* evidence (Deputy Lawrence's testimony about Willette's bad acts) can serve as the notice for another instance of *Spreigl* evidence (Brogren's testimony about Willette's bad acts). Deputy Lawrence's testimony itself should have been the subject of a *Spreigl* notice to Willette if it contained evidence of other crimes or bad acts. And even if Willette received a copy of Deputy Lawrence's police report before trial, this disclosure cannot replace the required express notice, which would have drawn Willette's attention to the specific acts that the prosecutor intended to introduce.

The state argues alternatively that the bad acts at issue here fall within Minnesota Rule of Criminal Procedure 7.02's exception for "offenses . . . that may be offered . . . as a part of the occurrence or episode out of which the offense charged against defendant arose." The state suggests that the fifth missing gun, other missing property, and the overdue rent were all part of the "same episode of economic criminal activity against Brogren" and thus are excepted from rule 404(b)'s notice requirement. This argument has initial appeal, but it relies on a case distinguishable on the facts. *See State v. Snyder*, 375 N.W.2d 518, 524 (Minn. App. 1985) (holding that the state did not have to provide notice to introduce evidence of a defendant's drunk driving because the drunk driving

was part of the same series of events as the assault offense being tried), *review denied* (Minn. Dec. 13, 1985). Willette's alleged theft of a fifth gun and other personal property and the fact that he was behind on his rent are not so related that notice is unnecessary. The state did not establish that the guns were all stolen together. The state urges that these bad acts are relevant to Willette's motive for the charged thefts (financial distress) and to his intent to permanently deprive Brogren of the guns. But the minimal relevance to the charged crime does not render the acts part of the same "occurrence or episode" of events under rule 7.02. Willette therefore has established misconduct by the prosecutor, the allowance of which constituted plain error because it clearly violated rule 404(b).

But the state has carried its burden to show that the plain error did not violate Willette's substantial rights. In light of the overwhelming nature of the evidence of Willette's guilt, the errors did not affect the trial's outcome.

Inflaming Jury's Passions

Willette argues that the prosecutor inflamed the passions of the jury by appealing to their sympathy for Brogren. A prosecutor should not make arguments "calculated to inflame the passions or prejudices of the jury." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (quotation omitted). But a closing argument need not be colorless. *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006). The prosecutor made several statements that might arguably have generated jury sympathy for Brogren. He characterized Brogren as "the unfortunate victim of trying to give someone a chance." He suggested that Willette had preyed upon Brogren's kindness. He suggested that Brogren had been made to feel "gullible," "taken advantage of," and "used." But we are not persuaded that these

comments amount to misconduct. While they might arouse sympathy, they also are mostly statements of fact that humanize the story without stirring up undue emotional outrage. And even if the prosecutor committed misconduct by these references in his closing argument, the state has shown that prohibiting them would not have had any effect on the verdict. The prosecutor's emphasis on Brogren's goodness had no impact on the outcome because, again, the evidence against Willette was overwhelmingly strong without it. Because the statements did not affect the jury's verdict, allowing them was not plain error that affected Willette's substantial rights.

IV

Finally, Willette argues that he was denied the effective assistance of counsel because his attorney failed to object to the admission of his confession "on all applicable constitutional and statutory grounds." Willette's supplemental pro se brief takes issue with other specific deficiencies in his attorney's performance. He argues that all of these deficiencies prejudiced his case, entitling him to a new trial. We conclude otherwise.

The Sixth Amendment provides a criminal defendant the right to have counsel for his defense. U.S. Const. amend. VI. Defense counsel may deprive a defendant of this right "simply by failing to render adequate legal assistance." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984) (quotation omitted). To prevail on an ineffective-assistance claim, the defendant must establish (1) that his counsel's performance was objectively deficient and (2) that counsel's deficient performance actually prejudiced him. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Because we conclude that Willette's counsel's allegedly deficient performance did not prejudice the

defense, we resolve this challenge by addressing only the second prong. *See id.* at 697, 104 S. Ct. at 2069 (stating that a court need not address both prongs if it concludes that the defendant's showing on one is insufficient).

Willette argues that his attorney's failure to move the district court to suppress evidence on additional grounds was "obviously prejudicial" because if the jury had not heard the confession, "it may well have had reasonable doubt as to his guilt." To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Willette's argument suffers from two infirmities. First, it fails to establish any reasonable probability that the result of the trial would have been different absent his attorney's alleged errors, in light of the other compelling evidence of Willette's guilt. Second, it erroneously assumes that the additional grounds for suppression that Willette's attorney failed to argue had any chance of success. There is no reasonable probability of prejudice where counsel fails to make a motion that the district court would have denied if it had been made. *See Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004). We have already noted the substantial evidence of Willette's guilt, and we conclude that the district court would have appropriately denied Willette's suppression arguments had he made them. Willette therefore did not suffer any prejudice from his attorney's allegedly deficient performance.

In his pro se brief, Willette appears to argue that he was prejudiced because more aggressive questioning of prosecution witnesses could have raised reasonable doubts that

Willette committed the thefts. Willette argues that his trial attorney failed to suggest to the pawn shop manager that one of his employees might have accepted Willette's driver's license from some unidentified criminal who actually brought the guns in to be pawned. He also argues that his attorney failed to force Brogren to admit that many people came to his house to visit Willette and that one of these others might have taken the guns. And Willette argues that his attorney should have emphasized in his cross-examination of Brogren that Willette's admission that he "pawned" the guns did not necessarily mean that Willette personally took them from Brogren's home.

But these facially implausible lines of defense cross-examination would have likely hurt Willette's already slim chance of acquittal. And Willette's attorney did suggest in his closing argument that the state had not proven that Willette was the person who took the guns. In light of the substantial evidence against Willette, there is no reasonable probability that the result of the trial would have been different absent his attorney's alleged errors.

Affirmed.