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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-475**

State of Minnesota,
Respondent,

vs.

Agapito Vallejo, Jr.,
Appellant.

**Filed March 2, 2010
Affirmed
Bjorkman, Judge**

Murray County District Court
File No. 51-CR-07-316

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General,
St. Paul, Minnesota; and

Paul Malone, Murray County Attorney, Slayton, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Sharon E. Jacks, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Stoneburner, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of first-degree controlled-substance crime.
Because the district court did not commit plain error that prejudiced appellant's

substantial rights in admitting statements regarding the credibility of the confidential informant, and because appellant cannot show that the admission of prejudicial character evidence affected his substantial rights, we affirm.

FACTS

On August 2, 2007, Murray County Deputy Sheriff Chris Lewis, an agent of the Buffalo Ridge Drug Task Force, received information from a detective in Willmar that a confidential informant (CI) was willing to make a controlled buy of methamphetamine from appellant Agapito Vallejo, Jr. Agent Lewis met the CI that day at a predetermined location. The CI told Agent Lewis that Vallejo had methamphetamine to sell, and that the sale would take place either at a residence in Fulda or a residence in Iona. Before proceeding, the CI was searched for contraband and money, fitted with an audio transmitter, and given an unmarked vehicle and \$600 in marked bills.

The CI first drove to the Fulda residence. Agent Lewis and other task force members followed in another unmarked vehicle. The CI knocked on the door, but received no answer. He attempted to reach Vallejo on his cell phone, then drove to the residence in Iona. The CI knocked on the door of the residence, but again received no answer. He made another call to Vallejo, and then entered the residence.

Once inside, the CI was not visible to the officers. But they could hear the conversation within the residence through the transmitter. The CI spoke with Vallejo and purchased one-half ounce of methamphetamine from him. Agent Lewis heard the conversation, but did not understand enough Spanish to know exactly what was being said. After the transaction, the CI and Vallejo walked out of the house and stood for a

short time on the deck. Agent Lewis was in his vehicle approximately two blocks away, but could see the two men, and identified the man standing with the CI as Vallejo. According to Agent Lewis, Vallejo's voice sounded the same as the voice of the person who sold the methamphetamine to the CI inside the house.

The CI then got into his vehicle and drove to meet Agent Lewis at a pre-arranged location. While driving away from the residence, the CI told Agent Lewis that he did not trust Vallejo, that Vallejo had a gun, and that "he . . . just shoots you just like that you know." At the meeting place, the CI handed Agent Lewis a bag containing a substance that the BCA determined to be approximately 14 grams of methamphetamine.

Vallejo was charged with one count of first-degree controlled-substance crime for selling more than ten grams of methamphetamine while in possession of a firearm, in violation of Minn. Stat. §§ 152.021, subd. 1(1), 609.11, subd. 5 (2006); and one count of first-degree controlled-substance crime for selling more than ten grams of methamphetamine, in violation of Minn. Stat. § 152.021, subd. 1(1). The firearm possession issue was bifurcated for later consideration in the event that Vallejo was found guilty of the controlled-substance offense.

At trial, defense counsel cross-examined Agent Lewis about the CI's reliability, focusing on whether the CI was considered a "confidential reliable informant." On redirect examination, the prosecutor further inquired, without objection, as to whether the CI was reliable. Agent Lewis responded that a police officer in Willmar had advised him that the CI had provided information in other cases and that the CI's assistance had led to convictions and the discovery of evidence.

The jury deliberated for less than an hour before finding Vallejo guilty of selling more than ten grams of methamphetamine. The jury found that Vallejo did not possess a firearm at the time he committed the controlled-substance offense. The district court imposed the presumptive 84-month sentence. This appeal follows.

D E C I S I O N

I. The admission of testimony regarding the CI's reliability did not constitute plain error that affected Vallejo's substantial rights.

Vallejo argues that the district court erred by admitting Agent Lewis's testimony that the CI was reliable. Vallejo challenges this testimony concerning the CI's reliability on three grounds: that the testimony was inadmissible hearsay; that it was inadmissible lay opinion testimony; and that it violated Vallejo's Sixth Amendment right to confrontation. The state argues that Vallejo waived these arguments by eliciting the challenged testimony.

A party "opens the door" to evidence by introducing material that creates a right in the opponent to respond with material that otherwise would be inadmissible. *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007); *see also State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006). This doctrine is grounded in fairness and common sense, and prevents a party from gaining an unfair advantage by presenting "a misleading or distorted representation of reality." *Bailey*, 732 N.W.2d at 622 (quotation omitted). The supreme court has also held that a defendant cannot raise his own trial strategies as grounds for reversal on appeal. *State v. Helenbolt*, 334 N.W.2d 400, 407 (Minn. 1983). But the

invited-error analysis does not apply to plain errors. *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007).

Because Vallejo failed to object to the admission of this testimony at trial, we review the admission under the plain-error standard. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights.” *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740). “If those three prongs are met, we may correct the error only if it ‘seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* (quotations omitted).

We need not determine whether the admission of this testimony was error because, on this record, Vallejo has not established that admission of the testimony prejudiced his substantial rights. The evidence of Vallejo’s guilt was strong. Agent Lewis directed a controlled purchase of methamphetamine from Vallejo and the transaction itself was preserved in an audio recording. Agent Lewis observed Vallejo talking with the CI after the sale and testified Vallejo’s voice matches that on the recording. Admission of Agent Lewis’s testimony regarding the CI’s reliability, which Vallejo himself initiated, did not affect the outcome of the trial.

II. The district court did not commit reversible error by admitting statements that were prejudicial to Vallejo.

Vallejo asserts that the district court committed reversible error by allowing the CI’s non-responsive trial testimony that Vallejo sold drugs on the streets of Willmar and

the transcript of the CI's statement to Agent Lewis, immediately after the controlled buy, that Vallejo had a gun and "shoots you just like that." Vallejo argues that these statements are inadmissible character evidence. *See State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965) (evidence of prior bad acts not generally admissible); *see also* Minn. R. Evid. 404(b) (same). When, as here, a defendant does not object to alleged *Spreigl* evidence at trial, our review is limited to whether the district court committed plain error by failing to sua sponte declare the evidence inadmissible, or provide a limiting instruction to the jury, and whether the error affected the defendant's substantial rights. *State v. Vick*, 632 N.W.2d 676, 684–85 (Minn. 2001); *Griller*, 583 N.W.2d at 740. An error affects a defendant's substantial rights where the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741.

Minn. R. Evid. 404 generally precludes the admission of evidence of character or prior bad acts. The CI's statements that Vallejo was selling drugs in Willmar and has a propensity to shoot people go to Vallejo's character, and do not fall within any of the exceptions that would render the evidence admissible. The error in admitting these statements is plain because their admission contravenes an evidentiary rule. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (defining plain error as one that violates established caselaw, a rule, or a standard of conduct).

The critical inquiry is whether the admission of these statements affected the outcome of the case. *State v. Vick*, 632 N.W.2d 676, 685-86 (Minn. 2001) (third prong of plain-error analysis requires a showing that the "error was so prejudicial as to have affected the outcome of the case"). The CI's non-responsive statement that Vallejo sold

drugs in Willmar was undoubtedly prejudicial. But Vallejo must show that the error affected his substantial rights. *See State v. Smith*, 582 N.W.2d 894, 896 (Minn. 1998) (noting that an error affects substantial rights if there is a reasonable likelihood that the error substantially affected the verdict). Our review of the record reveals that Vallejo’s conviction was amply supported by the rest of the CI’s testimony and Agent Lewis’s identification and other testimony. And the CI’s statement regarding Vallejo selling drugs was fleeting—it was not referenced again at trial. Such a statement is unlikely to substantially affect the verdict, especially in light of the instructions to jurors that a finding of guilt requires proof beyond a reasonable doubt.

Likewise, the statement that Vallejo “shoots you just like that” did not affect Vallejo’s substantial rights. The statement was contained in the transcript of the audio recording of the controlled buy and never read to the jury. Not only did the defense fail to object to admission of the transcript, but counsel attempted to introduce it into evidence during the defense’s case in chief. Even if the jury reviewed the statement during its brief deliberations, the jury found that Vallejo did not possess a firearm when he committed the controlled-substance offense.¹ The verdict itself, along with the strong evidence of guilt, demonstrates that the outcome of the case was not affected by the admission of the CI’s statement to Agent Lewis.

¹ Although the issue of whether Vallejo possessed a firearm was reserved, the jury was given a verdict form that asked them to determine whether Vallejo possessed a firearm at the time he committed the controlled-substance offense. The jury found that he did not.

Because the admission of the challenged statements did not affect Vallejo's substantial rights, he is not entitled to a new trial.

Affirmed.