STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1240

State of Minnesota,
Respondent,

vs.

Scott Michael Blahowski,
Appellant.

Filed June 22, 2010
Affirmed
Connolly, Judge

Washington County District Court
File No. 82-CR-08-9311

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Doug Johnson, Washington County Attorney, Maura J. Shuttleworth, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of first-degree felony possession of a controlled substance, alleging that two witness statements at trial referencing his felony arrest warrant and previous felony conviction amounted to plain error affecting his substantial rights such that a new trial was warranted. Although these statements were made or admitted in error, appellant has failed to meet his burden of showing that they were prejudicial or deprived him of a fair trial. We affirm.

FACTS

Appellant Scott Michael Blahowski was charged with first-degree possession of a controlled substance in violation of Minn. Stat. § 152.021, subd. 2(1) (2008), and obstruction of legal process in violation of Minn. Stat. § 609.50, subd. 1(2) (2008). The state alleged that appellant was arrested shortly before midnight on November 29, 2008, on an outstanding felony warrant; that appellant resisted arrest; and that appellant possessed 25 grams or more of a mixture containing methamphetamine. At trial, the jury found appellant guilty of first-degree possession of methamphetamine, but found him not guilty of obstructing arrest or legal process. The district court imposed a sentence of 134 months in prison, which was an upward durational departure. Appellant now challenges his conviction.

At the start of the trial but outside the presence of the jury, defense counsel moved the district court to preclude any testimony about or reference to credit-card fraud, which is the offense for which appellant's arrest warrant issued. The district court ruled that the

state could elicit testimony that appellant was arrested pursuant to a felony warrant, but not that the underlying crime was credit-card fraud. Defense counsel did not object to this decision.

The state's first witness was Forest Lake Police Officer Jonathan Glader. According to his testimony, Officer Glader was at a gas station on a break with Sergeant Richard Peterson and Officer Mark Richert when he saw appellant walking out of the gas station. Officer Glader recognized appellant and believed an arrest warrant had been issued. When asked how he knew that there was a warrant for appellant's arrest, Officer Glader stated: "I had received information earlier on my shift that he did have a warrant from one of my co-workers. Upon running his information on our computers I did see that he did have a felony-level warrant for his arrest." Defense counsel did not object to Officer Glader's use of the word "felony."

Officer Glader then testified that he called the dispatch center, which verified that the arrest warrant was still active, and he asked Officer Richert to take appellant into custody. Officer Glader testified that appellant physically resisted the arrest by struggling to keep his hands free. Officer Glader "advised [appellant] numerous times that he had the warrant for his arrest and that he needed to put his hands behind his back." None of Officer Glader's other references to the arrest warrant indicated that it was for a felony, but simply reiterated that the officers were arresting appellant because a warrant for his arrest had been issued.

Officer Glader testified that Officer Richert eventually succeeded in handcuffing appellant. Officer Glader and Sergeant Peterson searched appellant. Officer Glader

searched the left side of his person and found "a small clear plastic baggy that contained a green leafy substance" as well as "a scale that had a crystallized substance on it." Appellant was then placed in Officer Richert's squad car and brought to the police department. When taken out of the car, Officer Glader searched the back seat, where he found "a small clear empty plastic bag." Officer Glader testified that the officers then took appellant to the holding-cell area, where he watched Officer Richert conduct a more thorough search of appellant. He testified that he "observed Officer Richert locate a bulge near the breast area of [appellant's] left side jacket pocket and, upon opening that pocket, Officer Richert removed a plastic baggy [that] contained a large amount of a white crystallized substance along with 17 clear plastic baggies." The substance was about the size of a fist. Appellant was still wearing his jacket at the time it was being searched.

Officer Glader testified that the items were then taken for evidence and that appellant was secured in a temporary holding cell. Officer Glader had checked the holding cell before placing appellant inside it. He heard a "hollow ping" sound inside the holding cell and went inside, where he found a small glass pipe, which was not in the cell before appellant was placed inside. After transporting appellant to the Washington County Jail, Officer Glader returned to the police department and began processing the evidence.

Officer Richert also testified at trial. He testified that he was on break with Officer Glader and Sergeant Peterson at the gas station shortly before midnight. Officer Richert was inside making a purchase when he "noticed [appellant] was in the store and

was just walking out as well." The prosecutor's follow-up question was: "You said that you noticed [appellant]. Do you know [him]?" When Officer Richert responded that he did, the prosecutor asked him how, to which he replied, "Because I've had numerous contacts with him throughout my career with Forest Lake and that he's a convicted felon." Defense counsel moved to strike, and the district court stated, "Strike. The jury will disregard the last statement." Defense counsel did not move for a mistrial. Upon further questioning by the prosecutor, Officer Richert again testified that he recognized appellant in the store that night and identified him as the defendant.

Officer Richert then testified that when Officer Glader reported that the warrant was confirmed, Officer Richert informed appellant that he was under arrest. After some struggle, he handcuffed appellant. Officer Glader and Sergeant Peterson then "did a cursory search of his body," which Officer Richert described as essentially a pat-down for weapons. Appellant was then placed in Officer Richert's squad car. Officer Richert had searched his squad car at the beginning of his shift around 7:00 p.m., and no one had since been in the back seat. He took appellant to the Forest Lake Police Department, took appellant out of the car, and watched as Officer Glader and Sergeant Peterson searched the back seat. Officer Richert then took appellant to the police department's intake area and searched him. Officer Richert testified that he "felt a large ball of something" on the left side of appellant's jacket, and then "reached into the jacket and . . . pulled out a ball of white crystallized substance along with [small plastic] baggies." He described the ball of white crystallized substance as being the size of a fist.

The state also procured testimony from Lucas Hanegraaf, an investigator with the Forest Lake Police Department; Paula Reber, a forensic scientist at the State of Minnesota Bureau of Criminal Apprehension Forensic Science Laboratory in St. Paul (BCA); and Jo Anne Strickler, who was in charge of records and the evidence room at the Forest Lake Police Department. Hanegraaf explained police department procedures with regard to evidence and retaining the chain of custody. He transported the physical evidence in appellant's case from the police department to the BCA, introduced the chain-of-evidence sheet, and introduced various trial exhibits, including the bag of crystalline substance. Reber explained BCA protocols regarding the handling and testing of evidence. She testified that she weighed and tested the crystalline substance. It weighed 53.5 grams exclusive of packaging. Both preliminary testing and analysis with a gas chromatograph mass spectrometer revealed that the substance contained methamphetamine. Strickler described the police department's evidence-handling procedures. She discussed the handling and storage of the physical evidence in this case.

The only other witness was appellant, who testified in his own behalf. Appellant testified as to the amount of force that the three police officers used to arrest him. He testified that he "was screaming" when Officer Glader pulled one of his fingers back. One of the officers kicked him twice and it was "very painful." Appellant admitted that, in the initial search before the officers brought him to the police department, Officer Glader removed various items from appellant's pockets, including a substance resembling "a little bit of marijuana." Appellant testified that the officers took him to the

police department, where a more thorough search was conducted, during which an officer unzipped and checked inside all of the pockets of his jacket.

When asked by defense counsel if he knew anything about the trial exhibits, and specifically the plastic bag with the methamphetamine in it, appellant testified:

> I'm not sure. I don't know. I had no knowledge of, like they said, there was a hidden compartment in a jacket? I had no knowledge of a hidden compartment in a jacket. And I had no knowledge of a pipe that is put into a jail cell and I had—and I just don't know where the money came from, either, that was found after the fact, after they find—first they find a baggie in a car after I've been searched. They find a bag of dope as big as your fist in a pocket they took my cigarettes out of. They find 27 dollars in my wallet. They find a glass pipe in a cell I had [no] knowledge of. They find a stack full of money in my wallet I have no knowledge of. Where did it come from?

On cross-examination, the prosecutor also asked appellant about the fist-sized bag of methamphetamine. Appellant replied that Officer Richert "apparently" did find a bag of a white crystalline substance in one of his front jacket pockets during the search at the police department. When asked if the jacket was ever out of his control during this time, appellant stated, "You know, I wouldn't say anybody done anything to me. I'm not accusing anybody of doing anything. I just don't know."

Appellant filed a pretrial motion to suppress evidence as the product of an illegal search and seizure due to the police officers' use of excessive force. At trial, defense counsel argued to the jury that the police used excessive force, which negated the charge of resisting arrest. Defense counsel also argued that there were problems with the chain

of custody. Appellant's attorney does not raise either issue on appeal. This appeal follows.

D E C I S I O N

This court may review the unobjected-to admission of evidence for plain error. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006); Minn. R. Crim. P. 31.02. On plain-error review, the defendant must show that (1) there was error, (2) the error was plain, and (3) the error affected his substantial rights. *Manthey*, 711 N.W.2d at 504. If these three prongs are met, this court then decides whether it should address the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

"The district court is given great latitude in its evidentiary rulings." *State v. Griller*, 583 N.W.2d 736, 742 (Minn. 1998). The decision to admit evidence lies within the "sound discretion" of the district court, and on review "it is important that we view the picture presented at trial as a whole." *Id.* at 743 (quotation omitted).

With respect to the second prong, error is plain if it is clear or obvious and not hypothetical or debatable. *State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. App. 2009). The error must have been "clear under applicable law at the time of conviction." *Manthey*, 711 N.W.2d at 504. *But see Griller*, 583 N.W.2d at 741 (considering whether the error was plain at the time of the appeal). Error is usually plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Hersi*, 763 N.W.2d 339, 344 (Minn. App. 2009) (quotation omitted).

With respect to the third prong, error affects a defendant's substantial rights when it deprives him of a fair trial. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). "This

prong is satisfied if the defendant meets his 'heavy burden' to show that the error was prejudicial and affected the outcome of the case." *Id.* This "requires that the error have a significant effect on the verdict." *Griller*, 583 N.W.2d at 741.

I. Officer Glader's statement that appellant was arrested pursuant to a "felony-level warrant" did not affect his right to a fair trial.

Appellant argues that the admission of Officer Glader's testimony that the warrant for appellant's arrest was a "felony-level warrant" was plain error that affected his substantial rights. Appellant concedes that the fact that he was arrested pursuant to a valid warrant was relevant to the charge of obstructing arrest, but contends that the fact that it was for a felony was inadmissible.

Appellant cites *State v. Utter*, in which we held that the district court erred in admitting evidence of the defendant's unspecified prior conviction for impeachment purposes under Minn. R. Evid. 609(a)(1). 773 N.W.2d 127, 133 (Minn. App. 2009). We reasoned that the potential for prejudice is increased by informing the jury of an unspecified prior crime through a sanitized prior conviction, since that "allowed the jury to speculate that the prior crime had much greater impeachment value than it may actually have had." *Id.* at 132. Further, by stripping the prior conviction of its content, the district court "discarded the measure by which the jury could assess" the probative value of the evidence. *Id.*

Here, the district court admitted evidence of appellant's felony warrant because it helped to explain the context of how and why appellant was arrested. The state needed to tell the story of appellant's arrest to prove that he unlawfully resisted arrest. But while

the fact that appellant was arrested pursuant to a valid arrest warrant was relevant, the fact that a felony underlay the warrant was not. The thrust of our decision in *Utter* is that admitting evidence of unspecified prior crimes invites the jury to improperly speculate and "assume the worst," yet fails to provide the jury with additional information upon which a decision could be properly based. *Id.* at 133. It plainly follows that informing the jury that appellant's arrest warrant was a "felony-level warrant" failed to add any appropriate content to the state's case. Thus, this statement was admitted in error and the error was plain.

Although we find plain error, we do not believe that this error deprived appellant of a fair trial. The state presented physical evidence and two police officers' testimony that they seized the bag of methamphetamine from appellant during a search at the police department. In fact, appellant did not even expressly deny that the methamphetamine was in his possession, but merely stated that his recollection of that event was unclear. Further, given that Officer Glader's statement was made in the context of explaining to the jury how and why appellant was arrested, the jury's finding that appellant was not guilty of resisting arrest belies the conclusion that the jury based its conviction of first-degree possession of a controlled substance on improper inferences drawn from Officer Glader's statement. We conclude that appellant has not met his heavy burden of showing that the error significantly affected the guilty verdict.

II. Officer Richert's statement that appellant was a "convicted felon" did not affect his right to a fair trial.

Appellant also argues that a new trial is warranted due to the prosecutor's elicitation of Officer Richert's testimony that appellant was a convicted felon. The state concedes that Officer Richert's statement was error, but contends that the statement was not prejudicial.

Appellant relies heavily on *State v. Strommen*, in which the supreme court reversed and remanded for a new trial. 648 N.W.2d 681 (Minn. 2002). Strommen was convicted of attempted robbery. *Id.* at 682. One of the participants testified that she was afraid of Strommen because he told her that he had kicked in doors and had once killed a person during a fight. *Id.* at 684. The supreme court stressed that the district court should have instructed the jury to disregard the inadmissible testimony; it had instead instructed the jury that the evidence could only be properly used to determine whether the defendant committed the acts charged in the complaint. *Id.* at 687. The arresting officer in *Strommen* also testified that he knew Strommen from "prior contacts and incidents," which was not relevant because Strommen's identity was not at issue. *Id.* at 687-88. The supreme court held that this testimony was prejudicial. *Id.* We find *Strommen* distinguishable. In terms of likely impact on a jury's deliberation, stating that a person is a felon falls far short of stating that he is a murderer. More importantly, the district court properly instructed the jury to disregard the inadmissible statement regarding appellant's status as a felon.

Appellate courts must presume that jurors followed the district court's instructions. *State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002). Lack of subsequent reference to "an imprecise suggestion of any prior bad acts" by the defendant supports a determination that admitting such unobjected-to statements at trial is not error. *Id.* Further, we must look to the record as a whole when determining whether an error was prejudicial. *Id.* at 927. The specificity of the challenged statements, compared to the evidence supporting the defendant's culpability, is relevant on appeal. *Id.* "Strong evidence of a defendant's guilt for the charged crime can support the conclusion that the jury rested its verdict on properly admitted evidence and that it was unlikely that the error had a significant effect on the verdict." *Id.* at 926-27.

Here, Officer Richert's statement that appellant was a convicted felon was never referred to again. Appellant's acquittal on the obstructing-arrest charge tends to show that the jury followed the district court's instruction to disregard this statement, since a jury improperly basing its decision on speculation about a defendant's criminal past would not be likely to only find the defendant guilty of one of two charged offenses. *See State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) (reasoning that jury's acquittal on one count indicated that improper statement was not prejudicial). Indeed, if the jury believed all of appellant's own testimony, it could have convicted him of possession but acquitted him of obstruction. Further, the record contains strong evidence supporting the conclusion that appellant in fact possessed 53.5 grams of a substance containing methamphetamine, including the physical evidence and the testimony of two police officers that they discovered the methamphetamine while searching appellant. Thus, we

conclude that appellant has failed to meet his heavy burden of showing that the guilty verdict on the charge of first-degree possession of a controlled substance was significantly affected by Officer Richert's isolated statement.

III. Pro Se issues.

In his pro se supplemental brief, appellant appears to argue that there was a problem with the chain of custody, Officer Glader's testimony was not credible, evidence should have been suppressed, and reasonable doubt existed. Appellant fails to fully explain these issues or provide legal authority or reasoning in support of his claims. "Assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Ouellette*, 740 N.W.2d 355, 361 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Because we find no obvious prejudicial error related to these claims, we do not consider them.

Affirmed.