STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1723

State of Minnesota,
Respondent,

vs.

David Lee Clifton,
Appellant.

Filed December 14, 2010
Affirmed
Wright, Judge

Beltrami County District Court
File No. 04-CR-08-3621

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Timothy R. Faver, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Mark D. Nyvold, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

WRIGHT, Judge

Appellant challenges his conviction of third-degree sale of cocaine, arguing that he is entitled to a new trial because (1) the district court abused its discretion by admitting evidence that appellant sold cocaine to the confidential informant on a prior occasion and

(2) the state failed to disclose impeachment evidence against the confidential informant, which prejudiced appellant's right to a fair trial. In his pro se supplemental brief, appellant also argues that he received ineffective assistance of counsel. We affirm.

FACTS

On November 23, 2007, a confidential informant (CI) for the Paul Bunyan Drug Task Force met with appellant David Lee Clifton to purchase cocaine. The CI had been arrested previously for a felony drug offense and agreed to set up three drug purchases in order to avoid prosecution. Only one of those drug transactions is at issue here. Before the meeting with Clifton, police searched the CI's vehicle and his person for hidden drugs and provided the CI with a recording and transmitting device, which allowed the police to hear most of the conversation during the drug transaction between the CI and Clifton. During the controlled buy, the CI agreed to pay Clifton $100 for cocaine, although the CI did not clarify the amount to be purchased. In a December 12, 2007 interview with Beltrami County Deputy Sheriff Robert Billings, Clifton admitted that he sold cocaine on November 23, 2007. Clifton subsequently was charged based on this sale.

Following a jury trial, Clifton was convicted of third-degree sale of cocaine, a violation of Minn. Stat. § 152.023, subds. 1(1), 3(b) (2008). After the trial, Clifton learned that the CI had been charged with misdemeanor theft ten days before Clifton's trial. Clifton moved for a mistrial and a new trial based on the state's failure to disclose the CI's misdemeanor charge, with which Clifton argued he could have impeached the CI. The district court denied Clifton's motions. This appeal followed.

D E C I S I O N

I.

Clifton argues that the district court erred by admitting in evidence three separate references to prior sales of cocaine by Clifton to the CI. Clifton did not object to any of these statements at trial. Ordinarily, an appellant who fails to object at trial forfeits the right to challenge the admission of the evidence on appeal. *State v. Bauer*, 598 N.W.2d 352, 363 (Minn. 1999). To overcome such forfeiture, an appellant must demonstrate that the district court committed plain error. Minn. R. Crim. P. 31.02 (stating that appellate court may consider plain error affecting substantial rights even if such error was not raised before district court); *Bauer*, 598 N.W.2d at 363 (establishing appellant's burden to demonstrate district court's error); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (applying rule 31.02). In doing so, we consider (1) whether there is an error, (2) whether such error is plain, and (3) whether it affects the defendant's substantial rights. *Griller*, 583 N.W.2d at 740. An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), or if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects a defendant's substantial rights if it was "prejudicial and affected the outcome of the case." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). If the three plain-error factors are established, we next consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740, 742 (explaining that appellate courts may exercise discretion to correct plain error if the error "seriously

affect[ed] the fairness, integrity or public reputation of judicial proceedings" (quotation omitted)).

Clifton argues that the CI's testimony that he had dealt with Clifton before was inadmissible evidence of a prior bad act, Minn. R. Evid. 404(b), which should not have been considered by the jury. Evidence of other crimes, wrongs, or acts is "not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). This evidence may be admissible for other purposes, including to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* But such evidence is properly admitted only if the following five requirements are met:

> (1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id; *see also State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006) (citing this standard).

Clifton contends that none of these requirements was met. We address in turn each of the three references to Clifton's prior drug sales to the CI.

A.

As to the first reference, Clifton fails to consider that the CI's testimony was in response to defense counsel's question during cross-examination:

> [DEFENSE COUNSEL]: And you gave him $100, and you didn't know how much you were going to get?

[CI]: I dealt with him before. He has always done me right.

"The invited error doctrine prevents a party from asserting an error on appeal that he invited or could have prevented in the court below." *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). But this doctrine does not apply to plain errors. *Id.* And even if the admission of this testimony constitutes an error that is plain under the first two prongs of the *Griller* plain-error test, the third prong requires the error to be "prejudicial and [to have] affected the outcome of the case." 583 N.W.2d at 741. The defendant bears the heavy burden of persuasion on this prong. *Id.*

Clifton argues that the admission of this reference resulted in significant prejudice and affected the outcome of the case because (1) without evidence of the prior drug sale, the state's evidence was not strong; (2) the CI had a strong incentive to lie so as to avoid prosecution for his drug offense; and (3) Clifton's December 12, 2007 admission to police was weak evidence because he was intoxicated at the time. We disagree. There is direct evidence of the drug transaction. The jury knew that the CI participated in the controlled buy to avoid prosecution for drug offenses. And Deputy Billings's testimony countered Clifton's intoxication claim when he testified that Clifton appeared sober during the questioning. Thus, the plain-error standard has not been met.

Because the admission of the first reference to his prior drug sale to the CI does not fall within the plain-error exception to the invited-error doctrine, Clifton is not entitled to relief on this ground.

B.

The jury heard the second reference to Clifton's prior sale of cocaine to the CI in the recording of the controlled buy that was played for the jury. During the buy, the CI asked Clifton, "It's the right amount right? You did me like you did last time?" The state argues that, because the CI's reference to the prior sale of cocaine was made during the controlled buy at issue here, it was a part of the immediate episode and, therefore, admissible. We are not persuaded.

Evidence of offenses that are part of the offense for which the defendant is being tried, also called immediate-episode evidence, is distinct from evidence of other bad acts under Minn. R. Evid. 404(b). *State v. Kendell*, 723 N.W.2d 597, 608 (Minn. 2006). When determining whether two acts were committed as part of a single episode, we evaluate the temporal and geographic proximity of the acts and whether the acts were "motivated by an effort to obtain a single criminal objective." *See id.* at 607-08 (discussing immediate-episode evidence in the context of severance of offenses). Although the second reference was made in temporal proximity to the charged offense, the prior act of selling cocaine was not. Moreover, the prior drug sale was not related to the same criminal objective as the charged offense. Rather, they are two unconnected incidents. *See State v. Riddley*, 776 N.W.2d 419, 425-26 (Minn. 2009) (surveying decisions that "illustrate the type of close causal and temporal connection required to satisfy the narrow immediate-episode exception"); *see also State v. Fardan*, 773 N.W.2d 303, 316 (Minn. 2009) (rejecting immediate-episode argument because, although committed in temporal proximity, the charged offense "was not committed to facilitate

the other offenses, and the other offenses were not committed to facilitate [the charged offense]").[1] Contrary to the state's argument, the CI's reference to the past drug sale is not immediate-episode evidence.[2]

In addition to failing to give notice of its intent to introduce the evidence of the prior sale, as required by Minn. R. Evid. 404(b)(1), the state failed to provide notice of the purpose for which it intended to use this prior bad-act evidence, as required by Minn. R. Evid. 404(b)(2), and to demonstrate by clear-and-convincing evidence that Clifton, in fact, committed the prior sale, as required by Minn. R. Evid. 404(b)(3). A district court's admission of evidence despite the state's failure to meet the first two notice requirements of rule 404(b) does not necessarily constitute reversible error. *See State v. Bartylla*, 755 N.W.2d 8, 20-22 (Minn. 2008) (holding that district court did not abuse its discretion by admitting rule 404(b) evidence despite state's failure to provide notice or specify a purpose). And the district court's failure to address whether there is clear-and-convincing evidence that Clifton actually committed the prior act also is not dispositive under the circumstances of this case.

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[1] This evidence also is akin to evidence that we have deemed to be "extrinsic" to the charged offense. *See State v. Hollins*, 765 N.W.2d 125, 131-33 (Minn. App. 2009) (holding that testimony reflecting that the defendant was "rolling a blunt" at the time of his arrest, which was unrelated to the controlled substance offenses of which defendant was charged, was extrinsic to the charged offenses and that its admission was subject to plain error analysis).

[2] We observe that, even if the second reference was immediate-episode evidence, its admissibility would be determined by Minn. R. Evid. 403, which renders such evidence admissible unless the probative value of the immediate-episode evidence is "substantially outweighed" by the danger of unfair prejudice. *Kendell*, 723 N.W.2d at 609. The balancing test for admissibility under rule 403 sets the bar for exclusion higher than it is under rule 404.

Here, the reference to the prior sale is relevant as required by rule 404(b). Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. The reference is relevant because it explains why the C.I. did not explicitly mention "crack" or the terms of the transaction during his conversation with Clifton. In light of Clifton's past sale, an explicit reference might have appeared forced and unnatural, thereby alerting Clifton to the CI's status as an informant. Clifton's past sale to the CI is probative of Clifton's intent and the absence of mistake as to the nature of the transaction. Indeed, the district court admitted other similar bad-act evidence after reaching the same conclusion.[3] Although the state's compliance with rule 404(b) requirements as to one piece of evidence does not absolve the state of its responsibility to comply with those requirements when using other 404(b) evidence, the district court's ruling as to other substantially similar evidence supports our analysis of the relevance and probative value of the evidence at issue here.

The fifth requirement of rule 404(b) is that the evidence's probative value is not "outweighed by its potential for unfair prejudice to the defendant." Minn. R. Evid. 404(b). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *State v. Smith*, 749 N.W.2d 88, 95

[3] The state notified Clifton of its intent to offer as evidence a December 12, 2007 recorded police interview during which Clifton admitted other prior sales in the community. Although the state did not use this evidence at trial, the district court ruled preliminarily that Clifton's statement about prior sales satisfied the rule 404(b) requirements and was relevant to "intent, lack of mistake, [and] modus operandi."

(Minn. App. 2008) (citing *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650 (1997)). The potential unfair prejudice attributable to this evidence is minimal because defense counsel had already elicited the evidence of Clifton's past drug sales to the CI.

Although the district court's admission of this evidence despite the state's failure to satisfy the first three requirements of rule 404(b) constitutes an error that is plain, it was not prejudicial to Clifton and did not affect the outcome of the case. As discussed above, direct evidence of the drug transaction, the jury's knowledge that the CI participated in the controlled buy to avoid prosecution for drug offenses, and Deputy Billings's testimony regarding Clifton's December 12, 2007 confession, all support the state's case and the jury's guilty verdict.

Any error in admitting the second reference to the prior drug sale during the recorded controlled buy without adherence to the procedural notice requirements of rule 404(b) did not affect the outcome of the case. Therefore, Clifton is not entitled to relief on this ground.[4]

C.

The third reference to Clifton's prior drug sale to the CI is contained in a recording of the CI's post-buy statement to the police during which an officer asked the CI if he had purchased drugs from Clifton in the past and the CI replied, "Yes, I have."

[4] Because Clifton failed to meet the third prong of the *Griller* test as to this recorded reference to his prior bad acts, we need not address whether the error "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings." *See Griller*, 583 N.W.2d at 740, 742 (quotation omitted).

This evidence is relevant to and probative of what took place during the charged offense, and it explains why the CI and Clifton were able to complete the transaction using such vague terms. As with the CI's statement in the controlled-buy recording, the state failed to provide notice of its intent to introduce the evidence, and it did not give notice of the purpose for which it intended to use the evidence. Thus, the admission of this statement satisfies the first two prongs of the *Griller* test.

But as with the second statement, admission of this statement was not prejudicial. Because defense counsel was the first to elicit evidence of a prior drug transaction, and the state used the specific reference obtained during defense counsel's cross-examination in its closing argument, the jury would have been exposed to the substance of the statement multiple times even without the CI's second and third references to the prior sale. The cumulative effect of repeating the evidence may have enhanced its weight, but we also are mindful that both the statement made during the transaction and the statement made immediately after it were short, passing references within fairly lengthy recordings. And the direct and circumstantial evidence of the offense conduct was very strong. Because we conclude that it did not affect Clifton's substantial rights, admission of this third reference to Clifton's prior bad acts was not reversible error. *See supra* n.4.

II.

Clifton next argues that he is entitled to a new trial because the state failed to disclose that the CI had been charged with a misdemeanor theft ten days before Clifton's trial. Because he could have used this information to impeach the CI's credibility at trial, Clifton contends that he was denied a fair trial.

In a criminal case, the state has an affirmative duty to disclose evidence that is favorable and material to the defense. *Brady v. Maryland*, 373 U.S. 83, 86-87, 83 S. Ct. 1194, 1196-97 (1963); *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). To constitute a *Brady* violation, "[f]irst, the evidence at issue must be favorable to the accused, either because it is exculpatory or it is impeaching. Second, the evidence must have been suppressed by the state, either willfully or inadvertently. Third, prejudice to the accused must have resulted." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999)). A new trial is warranted "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 460 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)). Whether there is a reasonable probability that the state's failure to disclose the evidence affected the outcome of the case presents a mixed question of fact and law, which we review de novo. *Id.*

As to the first *Brady* prong, the misdemeanor charge was not favorable impeachment evidence. In its posttrial order, the district court correctly reasoned that the evidence was inadmissible under Minn. R. Evid. 609 because the CI had not been convicted. In addition, defense counsel impeached the CI's credibility extensively during cross-examination and highlighted that impeachment in her closing argument, emphasizing that the CI worked as an informant to avoid prosecution for his felony drug offense. On this record, there is no reasonable likelihood that the CI's misdemeanor theft charge would have added even limited impeachment value favorable to Clifton.

Although the district court found, and the record supports, that the state's suppression of the evidence was not willful, the second *Brady* prong is met even as to inadvertent suppression of evidence. But when a *Brady* violation is inadvertent, that fact can weigh in favor of the state. *See California v. Trombetta*, 467 U.S. 479, 488, 104 S. Ct. 2528, 2533 (1984). The third *Brady* prong is dispositive here because the state's failure to disclose the misdemeanor theft charge was not prejudicial to Clifton. In *State v. Miller*, the Minnesota Supreme Court concluded that the defendant was not prejudiced by the state's inadvertent failure to disclose evidence of a witness's criminal record because the defendant had successfully impeached the witness by other means. 754 N.W.2d 686, 706 (Minn. 2008). The same is true here. Clifton impeached the CI extensively. The jury knew that the CI faced possible drug charges and that he participated in the controlled buy so as to avoid prosecution for those offenses. Defense counsel also pressed this issue when cross-examining both the CI and Deputy Billings. The jury was well-informed of evidence bearing on the CI's credibility and his motive to provide false testimony. This evidence of the CI's prior drug use, possible felony charges, and agreement with the police provided far more relevant and persuasive grounds for doubting the CI's credibility than a misdemeanor theft charge arising from an unrelated matter. Any cumulative impact that the misdemeanor theft charge might have provided as impeachment evidence was not significant enough to have changed the outcome of the case. Thus, the district court did not err by denying Clifton's motion for a new trial on this ground.

III.

Clifton next argues that, even if these errors were not individually sufficient to warrant a new trial, their cumulative effect is more than sufficient to do so. An "[a]ppellant is entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Keeton*, 589 N.W.2d 85, 91 (Minn. 1998). We have reversed and remanded for a new trial a criminal case in which the errors were harmless when considered individually but reversible when considered cumulatively. *State v. Duncan*, 608 N.W.2d 551, 558 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). *Duncan* involved six claims of prosecutorial misconduct, three claims as to the erroneous admission of rule 404(b) evidence, and one claim as to an erroneous jury instruction. *Id.* at 555-58. Unlike here, at least one of the claimed errors in *Duncan* was objected to at trial. *Id.* at 557. And we specifically observed in *Duncan* that the case "was a relatively close one." *Id.* at 558; *see also State v. Jahnke*, 353 N.W.2d 606, 608-11 (Minn. App. 1984) (granting new trial based on the cumulative effect of two instances of serious and deliberate prosecutorial misconduct and two instances of improper use of character evidence).

The record before us is distinguishable in numerous respects. There are fewer instances of error, and none is as severe. The state's evidence included Clifton's confession, an audio recording of the controlled buy, and physical evidence of the cocaine the CI obtained from Clifton. Taken together, this evidence establishes overwhelming support for the jury's verdict, even without any rule 404(b) evidence. The cumulative effect of any errors shown does not entitle Clifton to a new trial.

IV.

Finally, in his pro se supplemental brief, Clifton asserts dissatisfaction with his counsel's performance, which we interpret as an ineffective-assistance-of-counsel claim. Pro se litigants are held to the same standards as attorneys. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). When a brief does not contain citations to the record or to legal authority in support of the issues raised, such issues are deemed waived. *Id.* Because Clifton fails to cite the record or any legal authority in support of the arguments in his pro se brief, his ineffective-assistance-of-counsel claim fails.

Affirmed.