STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2088

State of Minnesota,
Respondent,

vs.

Shanard Trevon Ellis,
Appellant.

Filed March 11, 2008
Reversed and remanded
Schellhas, Judge

St. Louis County District Court
File No. K7-03-600042

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

Melanie S. Ford, St. Louis County Attorney, 100 North Fifth Avenue West, #501, Duluth, MN 55802 (for respondent)

John M. Stuart, State Public Defender, Bridget Kearns Sabo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant was convicted of controlled-substance crime in the second degree. Because the district court improperly admitted testimonial hearsay in violation of appellant's right to confrontation, we reverse and remand for a new trial.

FACTS

Appellant Shanard Trevon Ellis challenges his conviction for controlled-substance crime in the second degree in violation of Minn. Stat. § 152.022, subd. 1(1) (2004) (sale of a total of more than three grams of cocaine, heroin, or methamphetamine on one or more occasions within a 90-day period).

Beginning in November 2002, Officer Jamie Jungers of the Duluth Police Department, using paid informants, coordinated four separate controlled drug buys from appellant. Three of those coordinated buys were successful in obtaining narcotics. After the first successful controlled buy, appellant was taken into custody. Appellant's vehicle was searched incident to that arrest, and more narcotics were recovered. Appellant was charged and later released on bond.

Subsequent to his release, two more successful controlled buys were made from appellant. Appellant was arrested before a fourth buy could be completed. The buys occurred between November 2002 and January 2003. All of the various offense dates were ultimately consolidated into one charge of second-degree controlled-substance crime.

At trial, three separate reports from the Minnesota Bureau of Criminal Apprehension (BCA) were admitted into evidence pursuant to Minn. Stat. § 634.15, subd. 2(a) (2004), without objection from appellant, who was pro se. These reports identify the substances recovered as a result of the three successful drug buys and the search of appellant's vehicle incident to his arrest following the first controlled buy, as crack cocaine. The reports also establish that a total of 6.1 grams of crack were recovered. No analysts from the BCA were called to testify about the reports at trial. This appeal followed.

D E C I S I O N

Appellant contends that he is entitled to a new trial because the admission of testimonial hearsay evidence at his trial violated his rights under the Confrontation Clause. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6; s*ee also Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004) (holding that testimonial hearsay may be admitted only upon a showing that the declarant is unavailable and that the defendant had a prior opportunity to cross-examine the declarant). "Generally, evidentiary rulings—including the admission of chemical or scientific test reports—are within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). "But whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law this court reviews de novo." *Id.*

Respondent attempts to argue that appellant waived the protection of the rules of evidence by failing to object to the admission of the reports at trial. *See State v. Blom*,

682 N.W.2d 578, 617 (Minn. 2004) ("It is a well-established principle of law that a defendant may waive the protection of evidentiary rules."); *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978) ("Where an objection is not made, hearsay evidence will be admitted and has probative force."). This argument, however, does not address the admission of testimonial hearsay in violation of a defendant's constitutional right to confrontation.

The United States Supreme Court in *Crawford* stated, "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51, 124 S. Ct. at 1364. The Supreme Court concluded that the Confrontation Clause applies to witnesses who bear testimony and that testimony is a statement made "for the purpose of establishing or proving some fact." *Id.* Where the admission of testimonial hearsay evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. *Id.* at 68, 124 S. Ct. at 1374.

The Minnesota Supreme Court has held that a BCA report admitted without supporting testimony is testimonial hearsay. *Caulfield*, 722 N.W.2d at 309 (finding that "[t]he report functioned as the equivalent of testimony on the identification of the substance seized from [defendant]."). "*Crawford* mandate[s] that all testimonial statements be excluded unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the declarant." *Id.* at 308. It is the state's burden to prove that the report is not testimonial. *Id.* BCA reports are "the

types of statements about which the Court in *Crawford* expressed concern—affidavits and similar documents admitted in lieu of present testimony at trial." *Id.* at 309. The BCA reports in this case were prepared for litigation and were introduced by the state for the purpose of proving beyond a reasonable doubt the elements of identity and quantity of the substance recovered. The BCA reports here were testimonial hearsay. *Id.* Because the district court admitted those reports in the absence of a showing that the analysts who prepared them were unavailable and that appellant had a prior opportunity for cross-examination, appellant's right to confrontation was violated. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374; *Caulfield*, 722 N.W.2d at 312.

Appellant, acting pro se at trial, failed to object to the admission of the BCA reports. He now argues that this court should review the admission of the BCA reports for "plain error." In general, 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). However, this court may exercise discretion to consider an issue if it constitutes plain error or a defect affecting substantial rights of appellant, even if such issue was not brought to the attention of the district court. 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 (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49 (1997))). "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.* (quotation omitted)

(citing *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)). The burden is on appellant to show that the district court committed a "plain error" that prejudiced his case by admitting the reports. *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1983).

Appellant has satisfied the first prong of the plain-error test by showing that the admission of the BCA report as testimonial hearsay was error. *Caulfield*, 727 N.W.2d at 310.

Appellant has also satisfied the second prong of the plain-error analysis. *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). To satisfy the second prong, the error must be plain at the time of the appeal. *Id.* An error is "plain" if it is clear or obvious. *Id.* The decision in *Caulfield* was handed down on October 5, 2006, prior to an appeal being filed in this case. Because *Caulfield* was decided before this appeal was filed, appellant has satisfied the second prong of the plain-error test. *See Griller*, 583 N.W.2d at 741 (noting that error was plain when at the time of trial the district court correctly stated the law, but later that same law became incorrect based on a case decided during appeal).

Appellant has also satisfied the third prong of the plain-error test because "the error was prejudicial and affected the outcome of the case." *Id.* Plain error is prejudicial if there is a "reasonable likelihood" that the error "had a significant effect" on the jury's verdict. *Id.* Appellant bears the "heavy burden" of showing that an error was prejudicial. *State v. Vance*, 734 N.W.2d 650, 659 (Minn. 2007) (citing *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002)).

A person is guilty of controlled-substance crime in the second degree if, "on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of three grams or more containing cocaine, heroin, or methamphetamine." Minn. Stat. § 152.022, subd. 1(1) (2004).

The admission of the BCA reports was prejudicial as they were the only evidence by which the jury could determine whether appellant sold more than three grams of crack cocaine within the prescribed 90-day period. The admission of the reports likely affected the jury's verdict and the outcome of the case. *Griller*, 583 N.W.2d at 741.

Even if the factors of the plain-error test are satisfied, we will not grant appellant a new trial unless "the unobjected-to error should be addressed to ensure fairness and integrity of the judicial process." *State v. Reed*, 737 N.W.2d 572, 584 (Minn. 2007) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). "[The Minnesota Supreme Court has] declined to grant a defendant a new trial where the unobjected-to error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

Appellant argues that because the conviction is based on evidence admitted in violation of his rights under the Confrontation Clause, the fairness and integrity of judicial proceedings are implicated. We agree. Because the jury relied upon evidence contained in reports admitted in violation of appellant's constitutional rights, we reverse the conviction and remand to the district court for a new trial.

Because we have determined that appellant is entitled to a new trial based on a violation of his right to confrontation, we need not reach the other issues raised in this appeal.

Reversed and remanded.