STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1176

State of Minnesota,
Respondent,

vs.

Nathan Lee Adams,
Appellant.

Filed May 21, 2012
Affirmed
Bjorkman, Judge

Wadena County District Court
File No. 80-CR-10-156

Lori Swanson, Attorney General, Kimberly R. Parker, Jennifer R. Coates, Assistant Attorney General, St. Paul, Minnesota; and

Kyra L. Ladd, Wadena County Attorney, Wadena, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his controlled-substance conviction, arguing that the district court committed plain error by admitting vouching testimony and improperly instructing the jury. We affirm.

FACTS

Appellant Nathan Lee Adams was charged with third-degree controlled-substance sale. At trial, the state presented evidence that a "confidential reliable informant" named J.R. had engaged in a successful controlled drug buy from Adams. J.R. testified that Red Blair introduced him to Adams with the intention of facilitating a cocaine sale. After some discussions about the quantity and price of the cocaine, Adams handed four "halves" (half grams) of crack cocaine to Blair to give to J.R., and J.R. handed $350 to Blair, who gave it to Adams. The state submitted an audio recording of the transaction, which substantially corroborated J.R.'s testimony, though it was inaudible at times.

By contrast, Adams testified that Blair stole the cocaine from him and sold it to J.R. He testified that he was high on cocaine when Blair and J.R. entered his apartment and that Blair took four halves of crack cocaine from a bun basket in the kitchen and gave them to J.R. in exchange for $350. Adams testified that he repeatedly verbally refused to sell the drugs, but he also testified that he was too high to speak throughout the encounter. The jury found Adams guilty as charged, and this appeal follows.

For the first time on appeal, Adams argues that the prosecutor elicited improper vouching testimony and the district court incorrectly instructed the jury regarding "mere presence." Adams raises several additional challenges in a supplemental pro se brief.

D E C I S I O N

I. The district court did not commit plain error by allowing the prosecutor to elicit testimony defining a confidential reliable informant.

Where, as here, the appellant challenges unobjected-to prosecutorial conduct, this court applies a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). To establish plain error, an appellant must demonstrate that the challenged conduct constituted an error that is plain—i.e., an error that is "clear" or "obvious" because it contravenes case law, a rule, or a standard of conduct. *Id.* (quotation omitted). If the appellant establishes plain error, the burden shifts to the state to demonstrate that the conduct did not affect the appellant's substantial rights. *Id.* If these burdens are met, we must "assess[] whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009) (quotation omitted).

Prosecutors may not elicit vouching testimony from trial witnesses. *Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996). Improper vouching testimony is testimony that another witness is telling the truth or that one believes one witness over another. *See State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998) (holding that police officer did not vouch for an informant by testifying that the informant had helped police in prior cases).

Adams argues that the testimony of Fergus Falls Police Officer Jess Schoon vouched for J.R.'s credibility:

> PROSECUTOR: Now, in this matter did you use a confidential informant?
> SCHOON: Yes, I did, confidential reliable informant.
> PROSECUTOR: And you used the term "confidential reliable informant." Is there a difference in the term "confidential reliable informant" versus "confidential informant"?
> SCHOON: Yeah, there certainly is. A "confidential informant" is somebody that can maybe give me information, and if I can corroborate that information, it gives them a certain level of credibility. However, taking that even further, if I work with an individual for a longer period of time and maybe work several cases together and am able to corroborate more information, they just become more and more reliable. Pretty soon they get the title of a "confidential reliable informant."

This testimony was part of a broader discussion of the use of informants and controlled buys, and Officer Schoon did not make any statements regarding J.R.'s truthfulness on any particular occasion. Adams cites to no legal authority prohibiting testimony that merely defines "confidential reliable informant" without discussing the trustworthiness of a particular informant. Consequently, any error in admitting this testimony was not plain.

Moreover, the admission of this testimony did not affect Adams's substantial rights. The likelihood of prejudice from vouching testimony is lessened when the appellant cross-examines the witness regarding the vouching testimony. *See In re Welfare of D.D.R.*, 713 N.W.2d 891, 902 (Minn. App. 2006). Adams's counsel spent considerable time cross-examining Officer Schoon regarding J.R.'s credibility. Officer Schoon acknowledged that J.R. was arrested for drug use, began serving as a confidential informant to "work himself out of" a criminal charge, did not receive any police training,

and was paid more for his work if it led to more or higher criminal charges. And Officer Schoon conceded that he did not know whether J.R. continued to use drugs. This cross-examination substantially lessened any prejudice related to the challenged testimony.

Furthermore, the evidence of guilt was strong even without the challenged testimony. J.R.'s testimony was substantially corroborated by other evidence including the audio recording, physical evidence, and the testimony of Officer Schoon regarding the circumstances of the controlled buy. The audio recording reveals that Adams expressed no objection to the drug transaction and appears to negotiate the terms of the sale. And Adams's testimony was inconsistent with itself and with the recording. For instance, he testified that he was too high to verbally protest Blair's theft of his cocaine, yet he also testified that he verbally refused to sell drugs. On this record, we conclude that there is no reasonable likelihood that the challenged testimony affected Adams's substantial rights.

II. The district court did not commit plain error by instructing the jury regarding "mere presence."

Adams challenges a jury instruction substantively identical to the instruction he requested. "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 the invited-error doctrine does not apply if an error satisfies the plain-error test. *State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008). We therefore consider whether the instruction constituted a plain error that affects Adams's substantial

rights and, if so, whether it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See State v. Gutierrez*, 667 N.W.2d 426, 433-34 (Minn. 2003).

We review jury instructions to determine whether, as a whole, they "convey to the jury a clear and correct understanding of the law of the case." *State v. Johnson*, 699 N.W.2d 335, 339 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). In doing so, we presume that the jury followed the instructions as given. *State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002).

Adams contends that the italicized portion of the following instructions allowed the jury to convict him if it believed he only intended to aid, but did not actually aid, in the drug sale:

> There are a few other legal concepts that I'm going to provide instruction on, and the first is entitled "liability for crimes of another," or, "aiding and abetting." The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it. The defendant is guilty of a crime, however, only if the other person commits a crime. The defendant is not liable criminally for aiding, advising, hiring, counseling, conspiring or otherwise procuring the commission of a crime unless some crime is actually committed.
>
> Now the concept of "mere presence." *Mere presence at the scene of a crime, without more, is not enough for you to find the defendant guilty under the aiding and abetting law. However, a person's presence at the scene of a crime does constitute aiding and abetting if the State has proven beyond a reasonable doubt that the defendant knew that a crime was going to be committed and that the defendant intended his presence or actions to further commission of that crime. The defendant's presence, companionship and conduct before and*

> *after the offense are circumstances from which a person's participation and the criminal intent may be inferred.*

We are not persuaded. The aiding and abetting instruction specifically provides that a person is guilty of aiding and abetting only if he or she "intentionally aided [another] person in committing" an offense. Nothing in the mere-presence instruction undermines or confuses that charge. Rather, the instruction confirms that a defendant's presence at a crime scene, without evidence that the defendant knows about the crime and intends to further it, is insufficient to sustain a guilty verdict for aiding and abetting a crime. And the district court instructed the jury to consider all of the instructions together. Accordingly, we discern no error in the challenged instruction.

Moreover, even if the mere-presence instruction was erroneous, it did not prejudice Adams. As described above, the evidence of guilt was strong. The evidence focused on what Adams actually did to further the drug sale, not his intentions. And neither the prosecution nor the defense made any argument that Adams intended to aid in the sale but took no steps to do so. On this record, the claimed error in the jury instructions is not reasonably likely to have affected the verdict.

Finally, Adams raises numerous challenges in his supplemental pro se brief, including some arguments unrelated to this case. But because Adams does not cite any authority in his brief, he has waived these challenges. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).

Affirmed.