STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1049

State of Minnesota,
Respondent,

vs.

Nicholas Theodore Jackson,
Appellant.

Filed September 16, 2013
Affirmed
Hooten, Judge

Ramsey County District Court
File No. 62-CR-10-9696

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Hooten, Judge.

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

HOOTEN, Judge

In his appeal from a conviction for second-degree intentional murder, appellant claims that the district court erred by denying his motion to suppress evidence of spent bullet casings and by admitting the portion of his custodial interrogation in which he

admitted to methamphetamine use. Because the district court did not abuse its discretion in finding that appellant failed to show any prejudice from the lack of DNA testing on the casings or as a result of the admission of the challenged portion of his interrogation, and did not err in denying appellant's motion to suppress evidence from the casings, we affirm.

FACTS

Incident of November 9, 2010

On November 9, 2010, appellant arrived at the St. Paul residence of G.C. on Payne Avenue in St. Paul with a friend named "Nate" and some electronics that he wanted G.C. to fix. While at the residence, appellant showed G.C. his .22 caliber gun. G.C. also learned that appellant's friend had a .45 caliber gun and bullets in a bag.[1]

N.M. arrived at the residence around 10:20 or 10:30 p.m. to visit with G.C.'s son, C.C. Upon arrival, she was shown into the house by C.C.'s mother, where she saw two males, one of whom introduced himself as "Nate." According to N.M., Nate, later identified as Nate Durick, appeared angry and was wearing a sweatshirt with a hood. She recalled seeing another male for approximately 15 or 30 seconds and noted that he was also wearing a sweatshirt. Minutes after her arrival, N.M. left with C.C. to visit a friend's residence nearby. After spending a few minutes at the friend's residence, they walked towards an intersection near C.C.'s residence, at which time N.M. heard ten or eleven

[1] The testimony at trial also revealed that appellant purchased either a ".22 or .32" caliber gun from an acquaintance and that he had been seen with the gun by G.C. a few weeks prior to November 9, 2010, and by another acquaintance on the date of the incident.

shots. After about "eight seconds," N.M. saw two men run across an alley and away from the scene between two houses. She recognized these individuals as the males inside C.C.'s residence "kind of by the sweatshirts and saggy pants," and recalled that one male directed the other individual she recognized as "Nate." C.C. and G.C. heard C.C.'s mother scream. The victim, J.S., was lying, face down and gasping for breath, by the corner of the residence. J.S. visited the residence earlier that night looking for C.C.'s sister. He later died from bullet wounds.

Investigation

St. Paul police officers recovered numerous spent bullet casings from the alley behind the Payne Avenue residence and discovered a bloody trail from a nearby intersection to the place where J.S. was found after the shooting. Officers recovered three casings from a .22 caliber gun and nine casings from a .45 caliber gun. Spent bullet casings were also recovered from an alley behind a residence on Hatch Avenue, a location "[s]everal miles away" from the crime scene on Payne Avenue, after a complaint was received on the morning of November 10, 2010, from a homeowner on Hatch Avenue who reported that there were multiple .45 caliber casings in the alley behind his residence and that his wife heard gun shots during the night. Police found spent casings and a glass drug pipe in the alley. Investigators later determined that these casings may have been related to the shooting on Payne Avenue.

On November 10, 2010, the St. Paul crime lab performed fingerprint analysis on the casings from Payne Avenue, but the analysis did not produce identifiable prints. DNA testing was not performed on the casings. On November 12, 2010, most of the

casings were sent to the Minnesota Bureau of Criminal Apprehension (BCA) for ballistics analysis. On February 11, 2011, a forensic scientist with the BCA's firearm section analyzed the casings from both sites. A comparison of the .45 caliber casings from each scene concluded that they were all fired from the same firearm. Similarly, the six .22 caliber casings were also fired from the same firearm. Testing also established that a piece of a bullet recovered from J.S.'s body was from a .22 caliber bullet.

Prior Incidents

W.M., a friend of J.S., testified that about four days before the incident, he and J.S were involved in a fight near the Payne Avenue residence. He explained that he, J.S., and another friend saw appellant walking down the street with two friends. J.S. walked towards appellant, who, in turn, walked towards W.M. with a bottle. Appellant and J.S began fighting, and one of the other individuals with appellant threw a rock at W.M. The groups fought for about four or five minutes, and W.M. thought that as a result of the fight, one of appellant's friends was knocked unconscious. W.M. thought that J.S. punched appellant in the face before leaving the scene. W.M. also testified that J.S. took the lead in approaching appellant and initiating the fight.

Confessions during confinement

While confined in the Ramsey County jail in January and February of 2011, appellant spoke to L.M., an acquaintance who was also in jail. L.M. recalled that appellant was "kind of gloating" about the shooting incident. Appellant described his past relationship with J.S. and stated that they "shared a girlfriend," stated that J.S. set his aunt's porch on fire, and recalled that J.S. stole some "dope" from him. Appellant told

L.M. that on the night of the shooting he was with his friend Nate when they went to the Payne Avenue residence, encountered J.S., and had an argument during which appellant showed J.S. a gun. L.M. testified that appellant informed him that J.S. "tried to run away and then they ended up starting to shoot at him." Appellant stated that he had "a little .22 that looked like a Luger" and that Durick had "a big, chunky .45." Appellant admitted to L.M. that he had an "ongoing feud" with J.S., that words were exchanged before he showed J.S. the gun, and that he shot first. Appellant also admitted to L.M. that he had used the gun earlier, saying that he was "testing it out."

P.V. was also confined in the Ramsey County jail in early 2011 and he and appellant worked together as "swampers" cleaning jail units for two months. As they worked together, they would discuss their respective cases. According to P.V., appellant disclosed that he was in jail on suspicion of murder, that he was with someone else during the night of the shooting "waiting for the victim to show up at a house," and that J.S. "jumped" appellant a week and a half before the incident. P.V. also testified that appellant said that each of them had a gun and that he shot first.

Pre-trial Proceedings

On November 15, 2010, appellant was charged with unintentional second-degree murder while "aiding and abetting and being aided and abetted by another." The state later added an additional charge of intentional second-degree murder with the same aiding and abetting language. At a motion hearing on December 16, 2010, the state obtained a buccal swab from appellant's cheek "to serve as a known evidentiary sample of [appellant's] DNA for the purpose of comparison to evidence that was recovered from

the murder scene, specifically .22- and .45-caliber casings." At a pre-trial hearing on January 18, 2011, the district court informed appellant that "there was some DNA found" on "some casings of cartridges" and that the DNA results from the BCA would not arrive until early April. However, even though appellant and the prosecutor assumed that DNA testing was being performed, appellant learned in early May 2011 that no DNA testing was performed on the casings. Appellant made no request for independent testing during the pre-trial proceedings.

Rasmussen Hearing

At the *Rasmussen* hearing, appellant complained that he was unable to seek DNA testing on the casings because the handling and manipulation of the casings by the state had made such testing impossible. Appellant called a forensic DNA analyst from a private laboratory, Bode Technology Group (Bode), who testified that Bode is available to test spent shell casings for DNA, explaining that it utilizes a "MiniFiler kit" to "amplify th[]e larger areas of DNA" on casings. The analyst explained that despite a common belief that heat from firing a bullet destroys any DNA on the casing, "at least one study shows that [a] casing does not get as hot as previously believed" upon firing, leaving DNA on the casing. However, the analyst admitted that the study demonstrated that profiles from casings were available only in 163 of 616 cases. The analyst also admitted that Bode has successfully acquired DNA from spent casings in approximately 12 cases with a success rate of 10% out of the casings examined. She conceded that "the greater number of forensic scientists believe that heat affects the ability to get DNA from

a casing" and that she is not aware of any other laboratories that have successfully acquired DNA from spent casings.

Sergeant Shay Shackle of the St. Paul Police testified that the St. Paul crime lab "do[es] not collect possible DNA off of fired shell casings," but does test casings for fingerprints because the chances of finding identifiable fingerprints on casings is greater than finding useable DNA. After the St. Paul lab was unsuccessful in its fingerprint testing of the casings found at the Payne Avenue and Hatch Avenue locations, the casings, a saliva sample from Durick, live ammunition, and the glass pipe were transferred to the BCA. The BCA confirmed with the St. Paul Police Department on November 16, 2010, that it was to do ballistics testing, but no DNA testing, on the casings.[2]

In response to testimony from appellant's forensic expert, a forensic scientist supervisor at the BCA testified that the BCA recently "brought online the MiniFiler kit," which "is designed to work with fragmented or degraded DNA." However, the BCA had not validated the MiniFiler kit at the time the casings were submitted. The BCA, during its later validation of the kit, found that when it was working with small samples of DNA, it was "potentially detect[ing] extraneous DNA" or DNA that it did not "intend to test" from other sources. Due to this concern, the BCA only utilizes the MiniFiler kit when they obtain a threshold minimum amount of DNA. The supervisor testified that the BCA

[2] The BCA employee who conducted the ballistics examination of the casings testified that she did not wear gloves when conducting her examination and admitted that she did not clean the microscope used in the examination after each comparison.

has performed DNA testing on casings, but only in cases where there is not any other evidence in the case and there has been a specific request for DNA, rather than fingerprint, testing.

According to the supervisor, it is theoretically possible to perform both fingerprinting and DNA on a casing, but "when something is processed for latent prints, chemicals are applied to those surfaces," which "tends to reduce the potential or the amount of DNA that was on that surface, if there was any." Also, swabbing a spent shell casing potentially destroys any fingerprints that might be on the casing, and swabbing could eliminate the possibility of DNA remaining on the item if there is only a small amount of DNA present. The supervisor further testified that upon request for DNA and fingerprint analysis, testing for DNA is usually done before testing for fingerprints, but performing a print analysis, rather than both tests, is preferred in light of the BCA's unsuccessful attempts to obtain DNA profiles from casings.

In denying appellant's motion to suppress, the district court found that, despite recent experiments attempting to test casings for DNA, "[i]t is far more likely than not that DNA testing on the spent shell casings recovered at both scenes would have failed to yield any results." The district court concluded that the police acted in good faith in not testing the casings for DNA, that such decision did not violate the discovery rule or appellant's due process rights, and was not prejudicial. At trial, a jury found appellant guilty of second-degree intentional murder. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion in denying the motion to suppress and erred in deciding that law enforcement violated his due process right to present a defense. Appellant highlights the timeline of events leading up to the *Rasmussen* hearing, noting that (1) all casings, aside from three, were delivered to the BCA on November 12, 2010; (2) appellant made his initial appearance on November 16, 2010, the same date on which the BCA confirmed that DNA testing was not requested on the casings; (3) the remainder of casings were delivered to the BCA on November 19, 2010; (4) the ballistic analyst retrieved the casings on November 26, 2010; and (5) the state requested an order requiring appellant to provide a buccal swab for DNA testing on December 16, 2010.

Appellant notes that the motion and supporting affidavit requesting the swab states that the purpose of the motion was to perform DNA testing of the casings, but it was not until early May 2011 that he learned that no DNA testing was performed on the casings. Appellant argues that as a result, any chance of successful DNA testing was destroyed during the ballistics examination.

Appellant first claims that the state committed discovery violations warranting suppression of evidence relating to the spent bullet casings, arguing that the state violated Minn. R. Crim. P. 9.01, subd. 1(4)(b), which provides that "the prosecutor must allow the defendant to conduct reasonable tests." Appellant also alleges that, contrary to the rule, the state did not allow appellant to conduct reasonable tests on the casings because any

DNA on the casings was destroyed or compromised as a result of the state's handling and ballistic testing of the casings.

The forensic experts presented substantial evidence supporting and explaining the decision to forego DNA testing in favor of fingerprint testing. The evidence was overwhelming that at the time the casings were tested, the possibility of testing the casings for DNA using the MiniFiler was, at best, theoretical.[3] The rule does not provide a defendant with an unfettered opportunity to conduct testing, but only the opportunity to conduct "reasonable tests." Based upon our review of the expert testimony and the evidence presented at the *Rasmussen* hearing, we conclude that the district court did not abuse its discretion in finding that, because DNA testing by appellant would have more than likely been fruitless, it was not a "reasonable" test under the circumstances.

Appellant also argues that the state violated the portion of Minn. R. Crim. P. 9.01, subd. 1(4)(b), that provides that "[i]f a test or experiment . . . might preclude any further tests or experiments, the prosecutor must give reasonable notice and opportunity to the defense so that a qualified expert may observe the test or experiment." Because the fingerprint analysis of the recovered casings occurred before appellant was charged, the notice requirement of rule 9.01 does not apply to these tests. *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004); s*ee also State v. Hochstein*, 623 N.W.2d 617, 621 (Minn. App.

[3] For instance, at the *Rasmussen* hearing, the BCA forensic supervisor explained that, in one of the controlled studies which successfully retrieved partial DNA profiles from casings, the casings were from shotguns, which has larger bullets with a plastic, textured body that is not representative of the smaller bullets and casings for .25 and .45 caliber handguns.

2001) (concluding that rule 9.01 notice applied to BCA analysis of evidence conducted after the appellant made an appearance in court with his attorney).

There is also no merit to appellant's argument that the state violated the notice requirement under rule 9.01 relative to further testing of the casings by the BCA. There is no dispute that DNA testing of the casings, which likely would have been unsuccessful, was made virtually impossible by the prior handling and manipulation of the casings in conjunction with the state's fingerprint and ballistics analysis. But as early as December 16, 2010, prior to the ballistics testing by the BCA, appellant was given notice that the casings were sent to the BCA for testing. Appellant was advised on January 18, 2011, that DNA was found on "some casings of cartridges" and that it would take time to obtain the testing results from the BCA. During these pre-trial hearings, appellant did not make a request for his own expert testing of the casings or request that a qualified expert retained by him be present as an observer of the state's testing of the casings. Based upon this record, we conclude that the district court did not err in rejecting appellant's claim that the state violated the notice requirement under rule 9.01.

Even if there had been a violation of rule 9.01, appellant did not establish any resulting prejudice. "To remedy a discovery violation, a reviewing court ordinarily should not order a new trial if no reasonable probability exists that the outcome of the trial would have been different if the evidence had been available." *State v. Freeman*, 531 N.W.2d 190, 198 (Minn. 1995).

In support of his challenge to the district court's denial of his pre-trial motion to suppress the evidence from the casings, appellant cites three cases, *Freeman*, *Hochstein*,

and *State v. McGill*, 324 N.W.2d 378 (Minn. 1982). However, unlike this case, these cases involved discovery disputes relating to evidence that was readily identifiable and highly probative of guilt or innocence.

In *Freeman*, the defendant claimed that he had a malfunctioning vehicle with a bad battery and a loose alternator belt that prevented him from being at the scene of an alleged murder. 531 N.W.2d at 195−96. Defendant claimed that after the state's testing of the alleged malfunctioning vehicle, his automotive expert was unable to test the vehicle's battery and alternator belt. *Id.* at 196. On appeal from his conviction for murder, the supreme court rejected defendant's claim of a discovery violation under rule 9.01, subd. 1(4)(b), even though the state failed to provide notice before inspecting the vehicle. *Id.* at 196−97. The supreme court reasoned that the defendant's expert was provided with copies of the vehicle inspection reports and the narrated video produced by the state's expert during his inspection, which in turn permitted cross-examination of the state's expert and the opportunity to present rebuttal evidence. *Id.* at 198. Finally, the supreme court concluded that any error would have been harmless beyond a reasonable doubt because the state's evidence concerning the vehicle undermined the alibi defense, and "a great deal of properly admitted evidence linked [the defendant] to the killing." *Id.* at 199.

In *Hochstein*, this court, applying *Freeman*, reversed a conviction for first-degree possession of a methamphetamine mixture weighing 25 or more grams because of an unnoticed test that "eliminate[d] appellant's ability to weigh the substances accurately." 623 N.W.2d at 620–22. According to field tests conducted the day before the filing of

the complaint, the methamphetamine at issue weighed 25.4 grams. *Id.* at 621. Days later, the BCA determined that the substance weighed 25.7 grams, but thereafter removed an unweighed portion for testing and did not determine the amount used in the analysis. *Id.* The defendant claimed that because of the removal of an amount for testing by the BCA, he was unable to analyze whether "the amount seized was sufficient to establish the first-degree offense." *Id.* After determining that the failure to provide notice violated rule 9.01, this court determined that the district court abused its discretion by admitting evidence of the substance's weight after noting that the state and the BCA knew that the "analysis might reduce the amount of the substance to a level where a further test to determine its weight would not yield a valid result on a critical issue," and that the failure to notify "prevented appellant from having his own expert observe the test." *Id.* Unlike *Freeman*, the state did not explain why it failed to provide notice and did not provide "a videotape or any other procedure by which appellant could have his own expert cross-check the weight of the methamphetamine." *Id.* at 622.

In *McGill*, the supreme court affirmed a first-degree arson conviction for a fire that the state claimed started when "a lighted, but shadeless, electric lamp" covered with nylon fabric was placed on a ledge near a basement ceiling next to some firewood. 324 N.W.2d at 379. On appeal, the defendant claimed that his conviction should be reversed because the state's arson investigator "failed to collect and preserve for analysis fragments of the bulb, which broke" after the scene was photographed by the local fire department and that, as a result, he was unable to test the bulb for exculpatory evidence. *Id.* In affirming the conviction, the supreme court reasoned that the defendant had failed

to "establish that an analysis of the evidence would have helped disprove the state arson investigator's theory" and that the evidence supporting the state's theory was strong. *Id.*

In contrast to these cases, where there was a reasonable basis for testing by the defendant's experts, here the district court found that even had the casings not been subject to handling and manipulation, it was unlikely that defendant's DNA testing of the casings would have yielded any results. Appellant identifies no other individual who may have been involved in the shooting whose DNA might have been found on the casings. Even if a DNA profile from another individual was found on a casing, such a finding would not necessarily be exculpatory due to the substantial evidence connecting appellant to the shooting. Both N.M. and G.C. saw appellant running away in the alley after the shooting. Multiple persons saw appellant with the same type of gun as used in the shooting. Appellant was engaged in an ongoing feud with J.S. that escalated into a violent altercation with J.S. days before the shooting. Also, during his confinement, appellant told fellow inmates about his motives and participation in the shooting.

With this array of evidence corroborating the state's theory that appellant participated in the shooting, the district court did not abuse its discretion in rejecting appellant's claims that he was prejudiced by his inability to perform DNA testing of the casings. *See McGill*, 324 N.W.2d at 379 ("[D]efendant has not established that an analysis of the evidence would have helped disprove the state arson investigator's theory."); *see also State v. Crane*, 766 N.W.2d 68, 73 (Minn. App. 2009) (affirming DWI conviction under Minn. Stat. § 169A.20, subd. 1(1), despite erroneous denial of motion for disclosure of Intoxilyzer source code, in light of "a considerable amount of evidence

apart from the Intoxilyzer breath-test result to prove that Crane was under the influence of alcohol" (quotation omitted)), *review denied* (Minn. Aug. 26, 2009).

Any prejudice due to the inability of appellant to perform DNA testing on the casings was mitigated by the opportunity to cross-examine investigating BCA and law enforcement officials regarding the possibility of DNA testing on the casings and their decision not to perform DNA testing on the casings. During closing arguments, appellant stressed that no DNA testing was performed on the casings and referenced the science in support of the testing.

Because the evidence does not support appellant's claim that the state violated Minn. R. Crim. P. 9.01, subd. 1(4)(b), and because appellant is unable to show that he was prejudiced by the district court's denial of his motion to suppress, we conclude that the district court did not abuse its discretion in finding no violation of Minn. R. Crim. P. 9.01, subd. 1(4)(b), or prejudice resulting from any alleged violation. Accordingly, the district court did not err in denying appellant's motion to suppress evidence of the casings.

II.

Appellant also argues that his inability to perform DNA testing of the casings violated his due process right to present a defense. The state "has a duty to preserve evidence that it collects during the investigation of a crime." *State v. Nissalke*, 801 N.W.2d 82, 110 (Minn. 2011). "When the State loses, destroys, or otherwise fails to preserve material evidence, a defendant's due process rights are implicated." *Id.* (quotation omitted). Whether the destruction or withholding of evidence by the state

constitutes a due process violation depends upon whether the destroyed evidence had apparent and material exculpatory value and, if not, whether the potentially useful evidence was destroyed by the state in bad faith. *State v. Hawkinson*, 829 N.W.2d 367, 372 (Minn. 2013). "[E]vidence sought to be excluded must possess an exculpatory value that was *apparent* before the evidence was destroyed." *Id.* (quotation and alteration omitted).

Based upon this record, appellant failed to show that any possible DNA profiles on the casings constitute evidence with apparent and material exculpatory value. "The Supreme Court has held that evidence will not be considered to have apparent and material exculpatory value under *Brady* [*v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963)] when 'no more can be said than that [the evidence] could have been subjected to tests, the results of which might have exonerated the defendant.'" *Id.* (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337 (1988)). This is identical to appellant's argument that there may have been DNA evidence on the casings inconsistent with his guilt. "[T]here must be something beyond mere hope that the destroyed evidence could be exculpatory before it will be protected . . . ." *Id.* at 373 (quotation omitted). As in *Hawkinson*, appellant does "not assert and has not presented any evidence that the [DNA] sample was apparently exculpatory, or that the evidence had more than the mere potential to be useful to him." *Id.*

Even if appellant could show that DNA evidence could have been obtained from the casings, appellant has failed to show that the state acted in bad faith in its handling and testing of the casings. *See id.* (considering whether destruction of potentially useful

evidence was done in bad faith after concluding that evidence had no apparent and material exculpatory value). "[B]ad faith requires an intentional act and . . . in evaluating that act we consider whether there is any evidence that the State destroyed or released the evidence to avoid discovery of evidence beneficial to the defense." *Id.* (quotation omitted). "The defendant carries the burden of demonstrating bad faith." *Id.* *Hawkinson* considers "two indices of bad faith: (1) whether the State purposefully destroyed evidence favorable to a defendant so as to hide it, and (2) whether the State failed to follow standard procedures when it destroyed the evidence." *Id.* (citation omitted).

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 374 (quotation omitted). As noted, appellant has advanced no evidence establishing that DNA testing on the casings would have uncovered exculpatory evidence. The BCA experts testified that because of the unlikelihood that DNA testing of casings would yield results, it is the policy of the BCA to test casings for DNA evidence only when there is no other evidence in a case and investigating agencies request DNA testing. Otherwise, the BCA reasonably performs fingerprint analysis, which is more likely to yield results, in recognition that the process of testing casings for DNA and fingerprints is substantially mutually exclusive. The investigation in the instant case, with the St. Paul crime lab performing the fingerprint analysis, was consistent with these scientifically-based policies. *See State v. Jenkins*, 782 N.W.2d 211, 236–37 (Minn. 2010) (rejecting due process claim after medical examiner's office, pursuant to policy, cleaned bullets and bullet fragment to prevent deterioration and

conduct ballistic examination given lack of bad faith or evidence that bullets were cleaned to avoid discovery of exculpatory evidence).

The only apparent evidence of bad faith arises from the fact that the county attorney's office was unaware of the decision not to conduct DNA testing on the casings when it sought appellant's buccal swab at the pre-trial hearing on December 16, 2010. While the prosecution and the police should have communicated more effectively in order to avoid this situation, the mistake of the prosecutor in requesting what turned out to be an unnecessary buccal swab from appellant does not rise to the level of intentional destruction of evidence or the denial of access to exculpatory evidence. Under these circumstances, the district court did not err in finding that appellant's right to due process was not violated.

III.

Finally, appellant argues that the district court plainly erred by admitting into evidence the portion of a transcript of his custodial interview in which he states that he uses methamphetamine. On the last day of trial, during the state's direct examination of an investigating officer, the district court permitted into evidence a redacted transcript of a custodial interrogation of appellant on November 13, 2010. In the redacted transcript, after informing appellant that police had evidence connecting him to the incident, appellant was asked if he was "a meth user," to which appellant replied: "I smoke meth, yeah." Appellant argues that this last question and its admission bore no relevance to the case, and that the statement portrayed him as a person of bad character. Appellant objected to other portions of the interview, but not this particular admission.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The appealing party has the burden of establishing that the district court abused its discretion. *Id.* "A court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). "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). "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation and alteration omitted).

We conclude that regardless of whether there was plain error, the admission of appellant's comment did not affect his substantial rights. *See State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010) ("In addressing an alleged error under the plain-error rule, if a defendant fails to establish that the claimed error affected his substantial rights, we need not consider the other factors." (alteration and quotation omitted)). "An error affects substantial rights if the error is prejudicial—that is, if there is a reasonable likelihood that the error substantially affected the verdict." *Strommen*, 648 N.W.2d at 688. In consideration of whether plain error affected the substantial rights of a defendant, a court considers whether a bad act or character reference "was unintentionally elicited by the interrogating officer," "was of a passing nature," was "dwelled on . . . or highlighted . . . for the jury," and whether there was strong evidence of guilt. *State v. Hall*, 764 N.W.2d 837, 843 (Minn. 2009).

Appellant relies primarily upon *Strommen* in support of his argument that the admission of his comment admitting to use of methamphetamine affected his substantial rights. In that case, the prosecutor elicited questions from a witness about the defendant's past criminal activity, which led to the testimony from the witness that defendant had told her that he "kicked in doors and that he had once killed somebody during a fight." 648 N.W.2d at 684. The supreme court determined that admission of this testimony, which "was highly prejudicial and should have been excluded under Minn. R. Evid. 403," along with testimony from an arresting officer about prior incidents involving the defendant, constituted plain error and substantially affected the guilty verdict for attempted robbery. *Id.* at 687–88.

Appellant's brief admission is not reasonably analogous to the *Strommen* analysis. Here, considering the *Hall* factors, appellant's brief admission in response to a direct question by police during an interrogation was of a passing nature and constituted an insignificant part of the state's evidence. A review of the record indicates that the state did not dwell or highlight appellant's comment or mention the comment in its closing arguments. And, as set forth above, there was strong evidence of guilt. Based upon our review of the record, we conclude that appellant's substantial rights were not affected by this singular admission of evidence.

Affirmed.