STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1889

State of Minnesota,
Respondent,

vs.

Nathan Christopher Braun,
Appellant.

Filed September 4, 2018
Affirmed
Cleary, Chief Judge

Benton County District Court
File No. 05-CR-16-1323

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

Philip K. Miller, Benton County Attorney, Kathleen L. Reuter, Assistant County Attorney, Foley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Tracy M., Judge.

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

CLEARY, Chief Judge

In this appeal from a conviction of third-degree criminal sexual conduct, appellant argues that he is entitled to a new trial because the district court committed plain error by admitting irrelevant and inadmissible character evidence. We affirm.

FACTS

In March of 2016, City of Foley police officers received a report that appellant Nathan Christopher Braun engaged in sexual conduct with H.E., a minor female, from October of 2015 through February of 2016. Appellant was arrested and charged with one count of third-degree criminal sexual conduct shortly thereafter. A one-day jury trial was held in July of 2017 in Benton County.

At trial, H.E. testified that she and appellant met through a friend and that appellant informed her, when they first met, that he was 17 years old. At the time, H.E. was 14 years old and appellant was 24 years old. H.E. testified that appellant pressured her into a sexual relationship soon after the two began dating. Their sexual relationship involved oral sex, digital penetration, and eventually sexual intercourse. H.E. testified that appellant would pressure her into performing sexual acts any time they were together.

During her testimony, H.E. described two instances that her sister, P.E., observed H.E. and appellant shortly after they engaged in sexual contact. Each time P.E. walked in, she observed H.E. or appellant without clothing. Eventually, H.E. and members of her family discovered that appellant was living at an adult group home in St. Cloud and confronted appellant about his age. At that time, appellant informed the family that he was

19 years old. Appellant and H.E.'s relationship ended in February 2016. Shortly thereafter, H.E. was admitted to a mental-health facility and began receiving mental-health counseling. H.E. contacted law enforcement in March of 2016 and reported her sexual relationship with appellant. On cross-examination, H.E. admitted that she had previously denied that she and appellant had sexual intercourse due to her shame and the presence of her family members at the time she was asked, but she testified that she began telling the truth when she made a formal statement to police.

P.E. also testified about H.E. and appellant's relationship. She stated that the two spent a great deal of time together and described the two instances she observed H.E. and appellant in various stages of undress. After one of these instances, P.E. asked appellant how old he was, and in response appellant sent her an altered photo of a driver's license that showed him to be 17 years old. In that same conversation, she recalled that appellant stated that he was "sorry that [P.E.] had to walk in on that" in reference to the second time she observed the two without clothing.

The state presented additional testimony from two police officers and two of H.E.'s friends, A.K. and J.C. Chief McMillin of the Foley Police Department detailed her involvement in the investigation and explained that H.E. and her mother came to report appellant's conduct. She stated that they also turned over a hard drive that appellant left at their home when the relationship ended. Chief McMillin interviewed H.E. and H.E. described her relationship with appellant, initially denying the two had sex, but later providing a full description of the nature of their relationship. Chief McMillin also reviewed the files on the hard drive and discovered photographs of appellant and H.E. and

slideshows titled "Just For [H.E.]" that included photographs of appellant and H.E. and a photograph of appellant naked with a rooster covering his genitals.

The state called Officer Triplett, the officer who arrested appellant and took his statement. During Officer Triplett's testimony, a transcript of appellant's post-arrest statement was distributed to the jury and the jury listened to an audio recording of the statement. During his statement, appellant admitted that he and H.E. were dating for a period of five months. He claimed, however, that he informed H.E. of his real age and that H.E. manipulated him into the relationship. Appellant admitted that the two kissed, but stated that the two never went further and explained that the instances where they were observed without clothing were a result of H.E.'s advances. Appellant also stated that H.E. sent him naked photos on approximately 20 occasions.

Appellant's statement also extended to a discussion about A.K. In his statement, appellant acknowledged knowing A.K. and denied ever requesting naked photographs from her. When asked if he had any illicit photos on his laptop, appellant discussed his current relationship with another woman and stated they had made the pornographic video found on his hard drive. Appellant also discussed two additional relationships with other women over the age of 18.

In addition, the state called A.K. to testify about appellant's relationship with H.E. A.K. testified that she was a friend of H.E. and that at the time the offense occurred she was 16 years old. She explained that appellant told her he was 17 years old and that appellant discussed his sexual relationship with H.E. with her. She also testified that appellant sent her sexually explicit text messages using various messaging applications,

and that the communications included sexually explicit photos of himself. A.K. also described one incident where appellant attempted to sleep in a bed with her and attempted to kiss her in her sleep.

J.C. also offered testimony about H.E. and appellant's relationship. J.C. was a friend of H.E. and was a minor at the time the offense occurred. She stated that appellant told her that he was 17 years old and informed her that he and H.E. were sexually active. In addition, J.C. testified that appellant sent her three sexually explicit photos—the same photos sent to A.K. and found on appellant's hard drive.

The state rested and appellant did not present any evidence. Through cross-examination, defense counsel argued to the jury that the charges against appellant were false and stemmed from a bad break-up with a mentally unstable H.E. The jury found appellant guilty of criminal sexual conduct in the third degree. The district court imposed a sentence of 91 months. This appeal follows.

D E C I S I O N

Appellant argues that he is entitled to a new trial because the district court admitted irrelevant and inadmissible character evidence. Appellant points to three specific pieces of inadmissible evidence: (1) testimony about sexually explicit text messages with A.K. and J.C.; (2) testimony about appellant's conduct at a sleepover with A.K and J.C.; and (3) evidence that appellant made a pornographic video with another woman. Because appellant did not object to the evidence at trial, we review the admission of that evidence for plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (reviewing an unobjected-to-issue for plain error). To establish plain error, appellant must show that

there was: (1) an error; (2) that is plain; and (3) that the error affected substantial rights. *Id.*

A plain error is one that is "clear" or "obvious," and "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation marks omitted). An appellant "generally bears the burden of persuasion with respect to the third factor." *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). And if an appellant "fails to establish that the claimed error affected his substantial rights, we need not consider the other factors." *Id.* But if an appellant "satisfies the first three prongs of the plain-error doctrine, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (alteration in original) (quotation omitted). Appellant argues that the district court plainly erred in allowing testimony about each of the three challenged pieces of evidence because they were irrelevant and improper character evidence.

I. Relevance

Evidence must be relevant to be admissible. Minn. R. Evid. 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable." Minn. R. Evid. 401. The rules of evidence do not allow relevant evidence to be admitted if its probative value is substantially outweighed by the possibility of unfair prejudice to the accused. Minn. R. Evid. 403.

Here, appellant's conduct towards H.E.'s friends, including the photographs he sent them and his conduct at the sleepover, was relevant to establish appellant's ownership of

the photographs on the hard drive and to support H.E.'s testimony regarding appellant's conduct towards her and the other underage girls at the time of their relationship. The district court did not commit plain error in allowing the testimony on relevance grounds.

However, statements regarding the pornographic video that appellant created with another woman were not relevant evidence. Even though that evidence may have been irrelevant, appellant has failed to establish that its admission was plain error. The references to the video came before the jury when a recording of appellant's statement to police was played during Officer Triplett's testimony. Appellant did not object to any portion of the statement prior to trial. Appellant contends that it was plain error for the district court to play the full statement, without sua sponte redacting portions of the statement that were inadmissible. Only in rare circumstances have appellate courts imposed such a duty on district courts. *See State v. Pearson*, 775 N.W.2d 155, 161-62 (Minn. 2009) (concluding that a district court plainly erred by not removing references to a defendant's right to counsel from a recorded police interview); *State v. Winter*, 668 N.W.2d 222, 226 (Minn. App. 2003) (concluding that a district court plainly erred by not redacting references to a polygraph test from a recording and transcript of a police interview).

The substance of the statement complained of here is not akin to the categorically inadmissible information at issue in *Pearson* and *Winter*. References to the pornographic video did not run afoul of appellant's constitutionally protected rights and were confined to one sentence in his statement. Accordingly, the admission of his full recorded statement was not plain error. Because no rule or caselaw clearly imposes a duty on the district court

to sua sponte redact any and all inadmissible portions of an otherwise admissible recorded statement, the district court did not plainly err by allowing appellant's full statement to be presented to the jury.

II. Character Evidence

Appellant argues that the three challenged pieces of evidence qualify as inadmissible character evidence under Minnesota Rule of Evidence 404(a). In general, "[e]vidence of a person's character . . . is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a). Character evidence is generally prohibited to ensure that the jury does not return a conviction to penalize a defendant for "past misdeeds or simply because [the defendant] is an undesireable person." *State v. Loebach*, 310 N.W.2d 58, 63 (Minn. 1981).

As contemplated by rule 404(a), character evidence "is considered to be a generalized description of one's disposition, or of one's disposition in respect to a generalized trait." Minn. R. Evid. 406 cmt. (quotation omitted); *see State v. Yang*, 644 N.W.2d 808, 816 (Minn. 2002) (analyzing "gang affiliation" as a form of character evidence); *State v. Williams*, 525 N.W.2d 538, 547-48 (Minn. 1994) (evaluating "drug courier profile evidence" as character evidence).

The challenged pieces of evidence here are not generalized descriptions of appellant's character or traits but involved testimony surrounding distinct events. Unlike evidence of gang affiliation, profile evidence, or opinion testimony regarding personality traits, the distinct events described here do not constitute character evidence.

Alternatively, appellant argues that the prosecutor committed misconduct by introducing these three pieces of evidence without providing proper notice. When an appellant fails to object to alleged prosecutorial misconduct, we review the claim under a modified plain-error standard. *Ramey*, 721 N.W.2d at 302. Under this modified standard, "when the [appellant] demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* To demonstrate that the misconduct did not affect substantial rights, the state must show that that there is "no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted).

The first issue is whether the alleged misconduct qualifies as "plain or obvious error" or "conduct the prosecutor should know is improper." *Id.* at 300. Rule 404(b) provides that "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, [or] intent." Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 491 139 N.W.2d 167, 169 (1965). Bad-acts evidence, or *Spreigl* evidence, is admissible only if:

> (1) [N]otice is given that the state intends to use the evidence; (2) the state clearly indicates what the evidence is being offered to prove; (3) the evidence is clear and convincing that the defendant participated in the other [bad act]; (4) the *Spreigl* evidence is relevant and material to the state's case; and (5) the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice.

State v. Kennedy, 585 N.W.2d 385, 389 (Minn. 1998).

Here, the three challenged pieces of evidence constitute prior bad acts and therefore qualify as *Spreigl* evidence, requiring notice.[1] The state failed to provide formal *Spreigl* notice prior to the trial and the district court did not have the opportunity to evaluate whether the evidence was relevant and material nor whether its probative value outweighed the potential for unfair prejudice. The failure to provide formal notice was plain and obvious error.

In assessing whether there is a reasonable likelihood that providing formal *Spreigl* notice would have had a significant effect on the jury's verdict, we consider "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

The evidence against appellant was substantial. H.E.'s testimony strongly supports appellant's guilt, standing alone. She testified at length that appellant lied about his age and pressured her into engaging in sexual activity. She further revealed that the two engaged in oral sex and vaginal sex on numerous occasions while she was underage. P.E.'s testimony about observing H.E. and appellant without clothing on two occasions, combined with H.E.'s and appellant's acknowledgment of those events further support a conclusion that appellant and H.E. engaged in sexual activity. In addition, A.K.'s and

[1] The state does not argue, and therefore we do not address, whether the evidence related to appellant's conduct towards A.K. and J.C. may have been admitted under the immediate-episode exception to rule 404(b). *See State v. Riddley*, 776 N.W.2d 419, 424-27 (Minn. 2009); *State v. Wofford*, 262 Minn. 112, 117-18, 114 N.W.2d 267, 271 (1962).

J.C.'s testimony about appellant's age and appellant's admission to them that he and H.E. engaged in sexual activity support the jury's verdict.

Moreover, when A.K. and J.C. testified about the text messages and appellant's conduct at a sleepover, and when the recording of appellant's statement was played at trial, appellant had the opportunity to rebut any improper suggestions by objecting to portions of the recording, cross-examining the witnesses, or requesting a curative instruction. Appellant's counsel cross-examined both A.K. and J.C. about their own credibility and that of H.E. but appellant did not object to the recording at any point during or before trial. In fact, defense counsel referenced appellant's conversation with A.K. as a means of explaining why H.E. pursued charges against him and suggested that the fact that H.E. was not involved in the pornographic video was evidence that she was fabricating her story. And while the prosecutor referenced appellant's sexual advances towards A.K. and his "naughty" messages to A.K. and J.C., those references did not pervade or dominate her closing statement.

Even if appellant was provided with *Spreigl* notice related to the challenged pieces of evidence, and the district court had excluded the statements, the testimony of the other witnesses would have been sufficient to corroborate H.E.'s testimony about the sexual conduct. Based on our review of the record, we conclude that it is not reasonably likely that the absence of the testimony concerning appellant's pornographic video with another woman, his text messages to H.E.'s friends, and his conduct at the sleepover, would have changed the jury's evaluation of H.E.'s credibility and appellant's credibility. Based on the nature of the three pieces of challenged evidence and a review of the evidence as a

whole, we conclude that the state established that there is no reasonable likelihood that providing formal *Spreigl* notice would have had a significant effect on the jury's verdict.

III. Appellant's Pro Se Arguments

Appellant raises four additional claims in his supplemental brief and argues that: (1) his attorney failed to disclose the state's evidence to him directly and failed to subpoena appellant's mother and another woman to testify on his behalf; (2) the state failed to prove that his statement to police was false; (3) his statements to P.E. were taken out of context; and (4) the hard drive was provided to the police by a biased party and therefore lacked the proper chain of custody.

Appellant's arguments are without merit or support. And "[w]e will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority." *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008); *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (determining arguments in an appellant's pro se supplemental brief waived because the "brief contain[ed] no argument or citation to legal authority in support of the allegations."). Because appellant failed to support these arguments with citations to relevant facts before this court or legal authority, we deem them waived.

Affirmed.