STATE OF MINNESOTA
IN COURT OF APPEALS
A11-434

State of Minnesota,
Respondent,

vs.

Joshua Anthony Jones,
Appellant.

Filed April 2, 2012
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-10-18303

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

KALITOWSKI, Judge

Appellant Joshua Anthony Jones challenges his convictions of two counts of aiding and abetting second-degree assault, two counts of aiding and abetting second-

degree assault for the benefit of a gang, prohibited person in possession of a firearm, and prohibited person in possession of a firearm for the benefit of a gang. The convictions arose from an incident in the Little Earth area of Minneapolis, in which two individuals on a bicycle, one pedaling and the other sitting on the handlebars, approached two men. After exchanging words, the person on the handlebars jumped off the bike and fired two shots in the direction of the two men.

Appellant argues that the district court: (1) abused its discretion by allowing the state to amend the complaint; (2) erred in admitting witness statements under the forfeiture-by-wrongdoing exception to the Confrontation Clause; (3) erred by admitting prejudicial expert gang testimony that affected appellant's substantial rights; (4) erred by accepting appellant's stipulation to a prior conviction without obtaining a waiver of his right to a jury trial on that element; and (5) erred in sentencing appellant. Appellant also challenges the admission of evidence in a supplemental pro se brief. We affirm appellant's convictions but reverse and remand for resentencing.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion in permitting the state to amend the complaint after the trial began. A district court may "permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05. "The district court has broad discretion to grant or deny leave

to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

Initially, the state charged appellant with one count of second-degree assault and one count of second-degree assault for the benefit of a gang. As to both counts, the complaint referred to "the victims." Before trial, the state added two counts to the complaint: prohibited person in possession of a firearm, and prohibited person in possession of a firearm for the benefit of a gang. The state also added aiding and abetting in connection with the assault charges.

At issue here is the state's motion after trial commenced to amend the complaint to separate the assault counts as to the two victims. Over appellant's objection, the district court allowed the amendment. In making its ruling, the district court noted that both victims were referred to in the original complaint. The amendment resulted in the addition of two assault counts identical to those already in the complaint: second-degree assault and second-degree assault for the benefit of a gang.

Appellant asserts that the amended complaint charged an additional offense because "it required proof of additional elements." For purposes of rule 17.05, an additional or different offense is charged if the amendment affects an essential element of the charged offense. *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982). In the initial complaint, the state identified "victims" with respect to the two assault charges. At trial, appellant did not dispute that there were two victims to the shooting. The assault crimes to be proven pursuant to the amended complaint remained second-degree assault and second-degree assault for the benefit of a gang. And the additional counts were based on

the same alleged facts underlying the originally charged counts. *Cf. State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997) (holding that an amended complaint charged a different offense because the underlying facts, date, and object of the amended offense were all different from the original charge). Thus, the amended complaint neither required the state to prove any additional elements nor affected an essential element of the charged offenses.

Because the amendment did not affect an essential element of the charged offenses, the amendment did not "charge an additional offense." Therefore, appellant's substantial rights were not prejudiced. *See Gerdes*, 319 N.W.2d at 712 (stating that in order for a defendant's rights to be substantially prejudiced, "it must be shown that the amendment either added or charged a different offense"). We conclude that the district court did not abuse its discretion in permitting the state to amend the complaint.

II.

Appellant argues that the district court erred in admitting witness statements under the forfeiture-by-wrongdoing exception to the Confrontation Clause. The Sixth Amendment guarantees the accused the right to confront the witnesses against him. U.S. Const. amend. VI. In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause prohibits the admission of testimonial statements of a witness "who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). "There is a narrow exception to the confrontation right, referred to as forfeiture by wrongdoing, which extinguishes confrontation claims on essentially equitable

grounds." *State v. Cox*, 779 N.W.2d 844, 850 (Minn. 2010) (quotation omitted). "The forfeiture-by-wrongdoing exception is aimed at defendants who intentionally interfere with the judicial process." *Id.* Whether an evidentiary ruling violated a criminal defendant's right to confrontation is a question of law, which we review de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

Appellant challenges the district court's admission of an out-of-court statement made by George Ortley, who was identified by eyewitnesses as the individual with appellant on the bicycle at the time of the shooting. During the investigation, Ortley provided a recorded statement to a police officer. In the statement, Ortley said that when he and appellant arrived at the location of the shooting, he was seated on the bike seat pedaling, and appellant was on the handlebars. Ortley stated that he and appellant had words with a male, and appellant got off the bike and fired two shots. Although he was subpoenaed, Ortley did not appear for trial.

The state sought to introduce the recording of Ortley's statement under the forfeiture-by-wrongdoing exception to the Confrontation Clause, asserting that written gang bylaws were intended to prevent members from being available as witnesses at criminal trials. Over appellant's objection, the district court concluded that the exception was applicable. The court admitted Ortley's statement into evidence after redacting Ortley's identification of appellant as the person sitting on the handlebars.

It is undisputed that for purposes of the Confrontation Clause, Ortley's statement was testimonial and unconfronted. Thus, the issue is the applicability of the forfeiture-by-wrongdoing exception. Appellant argues that forfeiture by wrongdoing was

inapplicable and that the error in admitting Ortley's statement was not harmless beyond a reasonable doubt.

The Minnesota Supreme Court recently stated that "the forfeiture-by-wrongdoing exception requires the [s]tate to prove (1) that the declarant-witness is unavailable, (2) that the defendant engaged in wrongful conduct, (3) that the wrongful conduct procured the unavailability of the witness and (4) that the defendant intended to procure the unavailability of the witness." *Cox*, 779 N.W.2d at 851. The state's burden is to prove each factor by the preponderance of the evidence. *Id.* at 852.

But on this record, we need not determine whether the state satisfied the *Cox* requirements because any possible error in admitting Ortley's statement was harmless beyond a reasonable doubt. Violations of the confrontation clause "are subject to a constitutional harmless-error-impact analysis." *Id.* To be harmless, the error "must be harmless beyond a reasonable doubt." *State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005). An error is harmless beyond a reasonable doubt if the guilty verdict "actually rendered was surely unattributable to the error." *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). In considering the effect the error had on the verdict, we look to the record as a whole. *Id.* Overwhelming evidence of guilt is a very important factor in assessing whether an evidentiary error impacted the verdict, but is not the sole consideration of the reviewing court. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

Here, appellant argues that the admission of Ortley's statement was not harmless beyond a reasonable doubt because the "only issue in the case was the identity of the shooter," that is, the identification of "the person riding on the handlebars of the bike,"

and Ortley's statement identifying himself as the person pedaling the bike was highly persuasive. We disagree.

The state charged appellant with *aiding and abetting* second-degree assault and *aiding and abetting* second-degree assault for the benefit of a gang. To prove the assault charges, the state had to prove that appellant acted alone or intentionally aided, advised, hired, counseled, or conspired with another. *See* Minn. Stat. § 609.05, subd. 1 (2010). Accordingly, whether appellant was the shooter, and whether he was pedaling the bike or on the handlebars, were not determinative on the issue of his guilt.

Moreover, Ortley's statement was neither critical to the prosecution nor highly persuasive. Overwhelming evidence demonstrated that appellant was one of the two individuals on the bike. Appellant's cousin A.G., the victim who testified, identified appellant as the man on the handlebars. Frank Gerring, the director of youth services for Little Earth, obtained footage of the incident from ten security cameras located throughout Little Earth. Gerring testified that he is familiar with appellant, and identified the man on the handlebars of the bike as either appellant or appellant's brother. An eyewitness who knows appellant and Ortley testified that she saw appellant and Ortley approach the victims on the bicycle just before the shots were fired, and she identified appellant and Ortley in photo line-ups. Because overwhelming evidence identifies appellant as one of the individuals on the bicycle, we conclude beyond a reasonable doubt that the guilty verdicts were not attributable to Ortley's statement.

III.

Appellant challenges the district court's admission of gang expert testimony. Appellant concedes that because he did not object to the admission of the testimony at trial, the applicable standard of review is plain error. *See State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007) (stating that an appellate court "has discretion to consider an error not objected to at trial if it is plain error that affects substantial rights"). "In order to constitute plain error, there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* If any prong is not satisfied, the claim fails and will not be considered, but if all three prongs are satisfied, we assess "whether we should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 738-39.

To prove that appellant committed the crimes of assault and prohibited person in possession of a firearm for the benefit of a gang, the state needed to prove that appellant committed the crime "for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members." Minn. Stat. § 609.229, subd. 2 (2010).

The admissibility of gang expert testimony is well established in Minnesota. *See State v. Martinez*, 725 N.W.2d 733, 739 (Minn. 2007); *State v. Jackson*, 714 N.W.2d 681, 691-92 (Minn. 2006); *State v. Blanche*, 696 N.W.2d 351, 372-74 (Minn. 2005); *State v. DeShay*, 669 N.W.2d 878, 884-86 (Minn. 2003); *State v. Lopez-Rios*, 669 N.W.2d 603, 612-13 (Minn. 2003). "To be admissible, gang expert testimony 'must add precision or depth to the jury's ability to reach conclusions about matters that are not within its experience.'" *Jackson*, 714 N.W.2d at 691 (quoting *DeShay*, 669 N.W.2d at 888).

To address concerns about the prejudicial effect of gang expert testimony, the supreme court recommends that "firsthand-knowledge testimony be used to prove the 'for the benefit of a gang' element when feasible." *Id*. Courts must avoid admitting expert testimony that "is largely duplicative of firsthand knowledge testimony." *Id.* And the supreme court has "cautioned against the use of gang expert testimony that is based largely on hearsay." *Id.*

Jerome Wilhelmy, an investigator in the Office of Special Investigations of the Department of Corrections, testified on behalf of the state as a gang expert. Wilhelmy testified that he is familiar with Native American gangs, including the Native Mob. He described the establishment, location, operation, membership, and leadership structure of the Native Mob, and the gang's primary criminal activities. He stated that, in his opinion, the Native Mob is a criminal gang. Wilhelmy testified regarding the Native Mob's identifying colors, letters, and hand signs, and identified these letters, colors, and symbols on items from appellant's and Ortley's residences. Wilhelmy testified that the Native Gangster Disciples are a rival gang and identified its colors. He explained how violent crimes benefit the Native Mob and the member who commits the crime, and he described the role of respect within the gang. He stated that members must follow rules and bylaws and demand respect from each other and from other gangs, and if a member is disrespected by a rival gang member, they must retaliate, or face consequences from their own gang.

We conclude that the district court did not err by admitting Wilhelmy's testimony. Wilhelmy's testimony was relevant and helpful as to whether the Native Mob is a

criminal gang and whether appellant committed crimes for the benefit of a gang. The testimony would have assisted the jurors in making findings on these two issues. *See id.* at 692 (stating that "jurors are unlikely to be familiar with gang culture").

Appellant argues that Wilhelmy's testimony was neither necessary nor helpful and was duplicative in light of A.G.'s testimony. A.G. testified that he and the other victim are members of the Native Gangster Disciples, a rival gang of the Native Mob. He said that at the time of the shooting, the other victim was wearing blue, which is associated with the Native Gangster Disciples. He testified that appellant is his cousin and a member of the Native Mob, and the individuals on the bike wore red and white, which are Native Mob colors. A.G. said he does not have personal knowledge of the types of crimes the Native Mob members participate in, but knew of shootings between the gangs and that the Native Mob includes members who engage in a pattern of criminal activity. A.G. also talked about the role of respect within his gang.

We conclude that any overlap in the testimony of Wilhelmy and A.G. was immaterial. Wilhelmy's testimony provided more precise information than A.G.'s testimony and Wilhelmy offered testimony on topics not covered by A.G. Thus, Wilhelmy's testimony was not needlessly cumulative. *See id.* (stating gang expert's testimony was not needlessly cumulative when two other witnesses testified about gang activity).

Appellant asserts that Wilhelmy's testimony was based on hearsay. But appellant does not identify any hearsay statements, and the record indicates that Wilhelmy's testimony was based on personal knowledge acquired through his years of experience.

Appellant also asserts that Wilhelmy's testimony about the criminal activity of the Native Mob and the role of respect and retaliation in gang culture was unfairly prejudicial. He likens the testimony to that in *Blanche* where an expert testified about gang member credibility. 696 N.W.2d at 374. We disagree. In *Blanche*, the expert's testimony contained improper statements about gang culture not made in this record.

Moreover, even if the admission of some of Wilhelmy's testimony was improper, the error did not affect appellant's substantial rights. "An error affects substantial rights when there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Clark*, 755 N.W.2d 241, 252 (Minn. 2008) (quotations omitted). The supreme court has determined that when there is ample independent evidence establishing a defendant's links to a gang and supporting the conclusion of guilt as to the crimes charged, and the expert testimony corroborates other witnesses' testimony and likely is no more influential than the other evidence, any error does not affect substantial rights and reversal is not warranted. *Martinez*, 725 N.W.2d at 739.

We conclude that ample independent evidence in the record connects appellant with the Native Mob and supports a conclusion of guilt with respect to the offenses charged for the benefit of a gang. Multiple eyewitnesses identified appellant as one of the individuals on the bicycle, and testified that appellant is a member of the Native Mob and wore Native Mob colors at the time of the shooting. A.G. and another eyewitness testified that he and the other victim are members of a rival gang, and A.G. said the other victim wore blue, their gang's identifying color. Officers found clothing in the colors of

the Native Mob at the locations where they found appellant and Ortley. Moreover, Wilhelmy's testimony, like that in *Martinez*, corroborated the testimony of witnesses and "likely was no more influential than much of the other evidence presented linking [appellant] to the crime." *Id.* Because appellant's substantial rights were not affected, any possible error does not warrant reversal.

IV.

Appellant stipulated that he was prohibited from possessing a firearm in relation to the charged offense prohibited person in possession of a firearm for the benefit of a gang. Appellant argues that he did not waive his right to a jury trial on this element. Whether a criminal defendant waived his right to a jury trial is reviewed de novo. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

Our review of the transcript indicates that although appellant stated that he intended to stipulate to the prior conviction, his statement does not constitute a valid waiver of his right to a jury trial on the element that he is a person prohibited from possessing a firearm. *See State v. Kuhlmann*, 806 N.W.2d 844, 849-50 (Minn. 2011) (distinguishing a criminal defendant's stipulation to a previous-conviction element from a defendant's waiver of a right to a jury trial on that element).

Appellant asserts that the error requires automatic reversal. But following *Kuhlmann*, which was decided after appellant submitted his brief, this argument is unavailing. In *Kuhlmann*, the court held that a failure to obtain a personal waiver of a right to a jury trial on the previous-conviction element of the charged offenses is not structural error and therefore does not require automatic reversal. 806 N.W.2d at 851-52.

The court determined that the error fell "into the category of 'trial errors' occurring in the prosecution of the case," which are "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 851, 852. Because Kuhlmann never objected to the error at trial, the court applied a plain-error analysis. *Id.* at 852.

Like Kuhlmann, appellant did not object to the waiver error at trial. Because appellant did not object to the error, "we must determine whether there was error, that was plain, and that affected . . . substantial rights." *Id.* If each prong is satisfied, we address the error only if it seriously affects the fairness and integrity of the judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the error was prejudicial and affected the outcome of the case, then it affects substantial rights. *Id.* at 741.

We conclude that the error did not have a significant effect on appellant's substantial rights. Appellant agreed to the stipulation, which prevented the jury from hearing about appellant's prior conviction. The state could have readily proved that appellant was prohibited from possessing a firearm due to a prior conviction if appellant had not stipulated to the prior conviction. Thus, the error was not prejudicial and did not affect the outcome of the trial.

V.

Appellant argues that the district court made two sentencing errors, and the state concedes both errors. "We review a sentence imposed by a district court to determine whether the sentence is inconsistent with statutory requirements, unreasonable,

inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." *State v. Pugh*, 753 N.W.2d 308, 310 (Minn. App. 2008) (quotation omitted). This court reviews a district court's decision on sentencing for an abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000).

The jury found appellant guilty on all counts and also found the presence of two aggravating factors, which could support an upward durational departure. But at sentencing, the district court stated that it would not impose an upward departure but would impose a presumptive sentence under the guidelines. The court imposed consecutive sentences of 84 months' imprisonment each for the two convictions of second-degree assault for the benefit of a gang, and a concurrent sentence of 84 months' imprisonment for the conviction of prohibited person in possession of a firearm for the benefit of a gang. The court also ordered that appellant was not eligible for supervised release.

First, appellant asserts that the district court erred in imposing the three 84-month sentences as sentences falling within the presumptive range. We agree. Because the offenses involved a firearm and were committed for the benefit of a gang, a mandatory minimum sentence and an extended maximum sentence apply to each sentence pursuant to Minn. Stat. § 609.11, subd. 5 (2010), and Minn. Stat. § 609.229, subds. 3-4 (2010). *See* Minn. Sent. Guidelines 11.G (2010). But as the state concedes, there were errors on the sentencing worksheets relating to each of the offenses, and the district court appears to have relied on these erroneous worksheets in concluding that sentences 84 months in duration were within the presumptive range. Our review of the record and applicable law

does not support a conclusion that the 84-month sentences are within the presumptive range under the sentencing guidelines. Thus, we reverse and remand for resentencing.

Second, appellant alleges that the district court erred in pronouncing sentences that denied appellant the right to supervised release under Minn. Stat. § 609.229, subd. 4(b). The state agrees and both parties ask that this court remand the issue to the district court for resentencing in light of *State v. Leathers*, 799 N.W.2d 606 (Minn. 2011), which was decided after appellant was sentenced.

In *Leathers*, the court addressed whether the phrase "full term of imprisonment" in Minn. Stat. § 609.221, subd. 2(b) (2010), which establishes a minimum sentence for a person convicted of assaulting a peace officer, requires a defendant to serve his entire sentence with no eligibility for supervised release. 799 N.W.2d at 608-09. The court determined that "the definition of the phrase 'full term of imprisonment' . . . means two-thirds of a defendant's executed prison sentence," making Leathers possibly eligible for supervised release after he serves a full two-thirds of his sentence. *Id.* at 611.

If a defendant is convicted of a crime for the benefit of a gang and the underlying crime is a felony, the defendant is "not eligible for probation, parole, discharge, work release, or supervised release until that person has served the full term of imprisonment." Minn. Stat. § 609.229, subd. 4(b). Because the language in Minn. Stat. § 609.229, subd. 4(b), contains the phrase "full term of imprisonment," which is identical to the language the court interpreted in *Leathers*, we conclude that *Leathers* is applicable and the district court erred by imposing a sentence that prohibits appellant from being eligible for supervised release.

VI.

In a pro se supplemental brief, appellant asserts that the district court committed plain error in admitting into evidence web pages and photographs from web pages without establishing the proper foundation. We disagree. The state offered the evidence during an evidentiary hearing on whether the forfeiture-by-wrongdoing exception permitted the admission of Ortley's statement. Thus, the rules of evidence, including the foundation requirement, did not apply. Minn. R. Evid. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence . . . ."), 1101(b)(1) (providing that the rules of evidence do not apply to the determination of questions of fact preliminary to admissibility of evidence when determined by the court under rule 104(a)).

Affirmed in part, reversed in part, and remanded.