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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1108**

State of Minnesota,
Respondent,

vs.

Jacob Lee Brock,
Appellant.

**Filed May 15, 2017
Reversed and remanded
Cleary, Chief Judge**

St. Louis County District Court
File No. 69VI-CR-14-1468

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and Connolly, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

On appeal from the judgment of conviction, appellant Jacob Lee Brock argues that the admission of evidence of his accomplice's guilty plea at trial was prejudicial

plain error requiring a new trial. Because the admission of this evidence was plain error that affected substantial rights, and because a new trial is required to ensure the fairness, integrity, or public reputation of judicial proceedings, we reverse and remand.

FACTS

On October 12, 2014, J.P. was walking his dog near his home in Virginia, Minnesota when he saw two men. He noticed that one of the men casually looked back, and he sensed that something was not right. J.P. walked home, put his dog in his house, and continued to watch the men. He saw the men approach the property of the closed Momentive Specialty Chemicals (Momentive) plant. The Momentive property was fenced in, but a portion of the fence had been lying on the ground for a period of months. J.P. saw the men approach the area where the fence had fallen, look around, and enter the Momentive property.

J.P. was going to call the police to report the incident, but happened to see Officer Swenson driving nearby. He flagged down Officer Swenson and explained that two men walked into the Momentive property and that one of the men was wearing a backpack. Officer Swenson notified dispatch around 9:10 a.m., pulled his squad closer to the area where J.P. reported the men had gone, and waited for back up. Around 9:12 a.m., Officer Swenson received a call from dispatch that a burglary alarm had gone off at the Momentive property.

Although back up had not yet arrived, Officer Swenson got out of his patrol car and began to enter the Momentive property to get a better view. He entered where a

portion of fence was lying on the ground and saw two men on the property. Officer Swenson instructed the men to come to him, and the men complied. While the men were approaching him, Officer Swenson noticed that one was wearing a backpack. Officer Swenson detained both men, who were identified as Brock and M.M. He placed the men in handcuffs and patted them down for officer safety. While patting down Brock, Officer Swenson felt an item in Brock's pocket. When Officer Swenson inquired about the item, Brock identified it as a tool. While patting down M.M., Officer Swenson felt a cylindrical object, which M.M. identified as a flashlight.

Another officer and a lieutenant arrived, and Brock and M.M. were placed under arrest for trespass and burglary. Officer Swenson conducted a search incident to M.M.'s arrest and found a flashlight in his pocket. He also found gloves, a screwdriver, a wrench, slim-nosed vice grips, pliers, electrical tape, scissors, a pocket knife, a metal bar, and a propane tank in the backpack M.M. carried. The other officer conducted a search incident to Brock's arrest and found gloves, a screwdriver, and pliers on Brock's person.

Brock was charged with possession of burglary tools, third-degree burglary, attempted third-degree burglary, and attempted second-degree burglary while possessing burglary tools. On February 23, 2016, a jury trial commenced. At trial, the

state called several witnesses, including J.P., Officer Swenson, Momentive's key holder Jeffrey Hill,¹ and M.M.

J.P. testified about his knowledge of the Momentive plant, his observations of Brock and M.M., and his involvement in contacting the police. Officer Swenson testified that he observed Brock and M.M. on the Momentive property and described the arrest and search of the men. Hill testified that the Momentive plant was closed in April 2008 and that the plant contains a lot of copper and is secured with a silent alarm system that will go off only if someone attempts entry. Hill further testified that, on the date of the incident, he was called to the plant, inspected the property with police, and found a loading-dock door open about six inches when all of the doors should have been closed.

M.M. was the last witness called by the state. On direct examination, the state elicited testimony from M.M. that he was a codefendant in the case and pleaded guilty to possession of burglary tools in December 2014. The state asked if M.M. had discussed, at his plea hearing, whether he or Brock had an intent to burglarize the plant, and M.M. responded that he believed he had disclosed that he had such an intent. The state also asked M.M., "[D]uring your plea hearing, did you implicate the defendant in any way in this matter?" M.M. testified that he said that Brock knew that M.M. had tools in his possession.

¹ When the Momentive plant closed, Momentive asked the manager of a trucking company that hauled Momentive's products to hold a key to the plant. Although Momentive's key holder is not employed by Momentive, he is familiar with the Momentive property and assists Momentive by periodically checking on the plant and allowing others access to the plant when appropriate.

When asked how far he and Brock walked to get to the Momentive property, M.M. responded “[a] mile and a half, maybe” and agreed that they had to cross Highway 53 to get there. During his trial testimony, M.M. stated, for the first time, that M.M. borrowed a friend’s car and drove with Brock to an area near the Momentive plant on the date of the incident. M.M. testified that he had not previously disclosed that the men drove to an area near the plant because no one had ever asked. He explained that when he previously testified that he and Brock went to the Momentive property for a walk, he meant that they walked from where they parked the car.

M.M. also testified about his relationship with Brock and explained that personal problems had developed between them. M.M. testified that he broke up with his girlfriend, who then became romantically involved with Brock. M.M. explained that he tried to resume a relationship with the woman and that in June 2015 Brock argued with him and threatened him. M.M. testified that he and Brock did not have any personal issues when he pleaded guilty to possession of burglary tools in December 2014.

M.M. testified that he wrote a letter to the county attorney’s office in January 2016. In the letter, M.M. asked the county attorney’s office for compensation for his testimony. M.M. testified that he hoped to receive early parole and monetary compensation to help with moving expenses. M.M.’s letter also indicated that M.M. was willing to give full testimony on what happened and that this would likely guarantee a conviction.

M.M. testified that a detective contacted him and took an additional statement by telephone on February 18, 2016, about one week before Brock's trial. On cross examination, Brock's counsel asked M.M. how he responded when the detective asked about the alarm going off at the plant. M.M. testified that he "[p]robably told [the detective] that I didn't know at that point." Brock's counsel also asked M.M. whether he had a conversation with the county attorney on February 23, 2016, the day that Brock's trial commenced. M.M. responded affirmatively and stated that he provided additional information at that time. M.M. testified that this new information included that: (1) Brock was the one to initiate going to the Momentive property; (2) the purpose of going to the property was to look for scrap metal; and (3) he and Brock attempted to open a door to the plant, with M.M. trying to open the door and Brock kicking the door.

On redirect, the state again asked M.M., "[H]ad you implicated the defendant in your plea hearing?" and M.M. again testified affirmatively. After the state rested, the district court granted Brock's motion for judgment of acquittal on third-degree burglary because it concluded that there was insufficient evidence of entry into the building. The defense then introduced evidence, including a certified copy of M.M.'s conviction for possession of burglary tools.

The defense called Brock to testify. Brock explained that, on the date of the incident, he was working on his nephew's bicycle when he heard M.M. and his girlfriend fighting in the alley. Brock testified that he told M.M. that they should go for a walk and that he and M.M. walked to the Momentive plant. He denied that M.M. drove them

to an area near the Momentive property. Brock testified that M.M. did not tell him what was in his backpack and that he did not know that M.M. planned on taking any property. After Brock's testimony, the defense rested.

In its closing argument and rebuttal, the state repeatedly argued that M.M. had implicated Brock by his guilty plea. Specifically, the prosecutor asserted:

[M.M.] provided a factual basis at his plea that included an intent to commit a burglary as well as implicated his codefendant [Brock].

....
... [M.M.] pleads guilty to Possession of Burglary Tools in relation to this incident, and in that factual basis, he implicates his codefendant [Brock].

....
... Either [M.M.] ple[aded] guilty to a crime he didn't commit, and, at a time when [he] and defendant [Brock] were friends, implicated him in a crime he didn't commit. So to believe the defense's version of events, you'd either have to believe that someone ple[aded] guilty and implicated someone to something that they didn't do at a time that they were friends, or that [M.M.] did this all by himself.

....
... [T]here was no testimony from [M.M.] that the plea deal involved any requirement to implicate his codefendant.

....
... [M.M.] pleads guilty. And in that plea hearing, he implicates his defendant [Brock], but doesn't provide a whole lot of information, but does implicate his defendant [Brock].

The jury found Brock guilty of possession of burglary tools, attempted third-degree burglary, and attempted second-degree burglary while possessing burglary tools. In April 2016, the district court sentenced Brock for attempted second-degree burglary

while possessing burglary tools in violation of Minn. Stat. § 609.582, subd. 2(a)(4) (2014). The district court ordered a stay of imposition for a period of three years, during which Brock must serve 90 days in jail and comply with the requirements of his supervised probation. Brock now challenges the judgment of conviction.

D E C I S I O N

Brock argues that the district court erred by admitting evidence of M.M.'s guilty plea as substantive evidence of Brock's guilt. Brock did not object to the admission of evidence of M.M.'s guilty plea at trial. Where a defendant fails to object to the admission of evidence, an appellate court reviews the alleged erroneous admission under the plain-error standard. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002); see Minn. R. Crim. P. 31.02 (providing that plain error affecting a substantial right can be considered on appeal). Under the plain-error standard, the appellant must show: "(1) error; (2) that was plain; and (3) that affected substantial rights." *Strommen*, 648 N.W.2d at 686. If the three elements of the plain-error standard are met, an appellate court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (quotation omitted).

Brock argues that the admission of evidence of M.M.'s guilty plea constitutes plain error. "An error is plain if it was 'clear' or 'obvious.'" *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). Usually, plain error is shown where the error contravenes caselaw, a rule, or a standard of conduct. *Id.*

Generally, evidence of an accomplice's guilty plea is not admissible to prove the guilt of the accused. *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985); *State v. Dillon*, 529 N.W.2d 387, 391 (Minn. App. 1995), *remanded on other grounds*, 532 N.W.2d 558 (Minn. 1995). "Such evidence is not probative of the accused's guilt and may give rise to the prejudicial inference that, because the accomplice is guilty, so is the accused." *Dillon*, 529 N.W.2d at 391. However, the Minnesota Supreme Court has recognized limited exceptions to this general rule. Evidence of an accomplice's guilty plea may be admitted to provide a first-hand narrative of the events leading up to and after the crime where the accomplice does not testify. *State v. Caine*, 746 N.W.2d 339, 351 (Minn. 2008); *State v. Dukes*, 544 N.W.2d 13, 17-18 (Minn. 1996), *abrogated in part on other grounds by*, *State v. Dahlin*, 695 N.W.2d 588, 595-96 (Minn. 2005). Evidence of an accomplice's guilty plea may also be admitted where it is introduced in anticipation of a defense theory. *See Cermak*, 365 N.W.2d at 247 ("[T]he evidence was clearly introduced in anticipation of defendant's argument that the charges against her were questionable because they were not filed for over 1 year after the arrest of . . . the first of the defendants.").

Neither party challenges the district court's determination that M.M. is Brock's accomplice.² As a result, we must determine whether an exception to the general rule against the admission of an accomplice's guilty plea applies. M.M.'s guilty plea was

² An accomplice is a person who could have been indicted and convicted for the crime with which the accused is charged. *State v. Lee*, 683 N.W.2d 309, 314 (Minn. 2004).

not admissible for the purpose of providing a first-hand narrative of the relevant events because M.M. testified at Brock's trial. The state argues that evidence of M.M.'s guilty plea was admissible because it was helpful in evaluating M.M.'s credibility and that Brock's defense strategy included suggesting that M.M. falsely implicated Brock out of anger arising from the June 2015 argument. The state asserts that, because M.M. pleaded guilty months before the argument occurred, the admission of M.M.'s plea was used to rebut any suggestion that M.M.'s testimony at Brock's trial was untruthful.

In effect, the state asks us to conclude that evidence of an accomplice's guilty plea may be admitted in anticipation of a defense theory that calls into question the accomplice's credibility. However, the anticipation-of-a-defense-theory exception recognized in *Cermak* cannot be interpreted so broadly. The state can anticipate that most, if not all, defendants will attempt to call into question the credibility of the state's witnesses under some theory or another. If we were to accept the state's argument, evidence of an accomplice's guilty plea would be admissible in any case in which the state called an accomplice to testify because the state could always anticipate that the defense would suggest that the accomplice's testimony was not credible. As a result, the anticipation-of-a-defense-theory exception would swallow the general rule of inadmissibility. For this reason, we reject the state's argument.³ Because no recognized

³ The state also relies on two federal cases to support its argument that evidence of M.M.'s guilty plea was admissible to help the jury evaluate M.M.'s credibility. "Federal caselaw does not bind Minnesota courts," but may be persuasive. *Hinkley Square Assocs. v. Cervene*, 871 N.W.2d 426, 430 (Minn. App. 2015). Here, we are unpersuaded to follow the federal cases on which the state relies.

exception to the general rule against admitting evidence of an accomplice's guilty plea applies here, the admission of evidence of M.M.'s guilty plea was error. The error was plain because the caselaw on this point is settled.

We must next determine whether the plain error affected Brock's substantial rights. The defendant has the heavy burden to show that the plain error affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). "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. Brock argues that the admission of evidence of M.M.'s guilty plea was prejudicial because, absent evidence of M.M.'s plea, whether Brock had the intent to burglarize was factually unclear and legally complicated by inchoate liability concepts. He explains that the evidence of M.M.'s guilty plea substantially affected the verdict because it allowed the jury to infer Brock's guilt from M.M.'s guilty plea.

Brock cites *State v. Litzau*, 650 N.W.2d 177 (Minn. 2002), in support of his argument that the admission of evidence of M.M.'s guilty plea affected his substantial rights. In *Litzau*, the supreme court reviewed the admission of an informant's tip, which went to the critical issue of whether Litzau knowingly possessed the drugs found in his car. 650 N.W.2d at 184. The state used the informant's tip to tie Litzau to the crime, referred to the tip's substance in its opening remarks, elicited the substance of the tip on examination of two officers, and argued the credibility of the informant and the reliability of the information in its closing argument. *Id.* The supreme court held that

“[w]here the evidence was aimed at having an impact on the verdict, we cannot say that the verdict was surely unattributable to the error.” *Id.*

This case presents circumstances similar to *Litzau*. Evidence of M.M.’s guilty plea was erroneously admitted. This evidence went to the critical issue of Brock’s intent to burglarize because it established that M.M. testified, during his plea hearing, that M.M. had an intent to burglarize and that Brock knew that M.M. had tools in his possession. The state used the evidence of M.M.’s plea to establish Brock’s guilt, asked M.M. whether, during his plea hearing, he implicated Brock, and repeatedly stressed that M.M. implicated Brock by his guilty plea in its closing argument. Because the evidence of M.M.’s guilty plea was aimed at having an impact on the verdict, we cannot say that the verdict was surely unattributable to the error. Here, there is a reasonable likelihood that the erroneous admission of evidence of M.M.’s guilty plea substantially affected the verdict. For this reason, we conclude that the plain error affected substantial rights.

Finally, we must determine whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. The plain-error doctrine is discretionary and authorizes appellate courts to correct only particularly egregious errors. *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016). “A plain error that affects a defendant’s substantial rights, without more, does not entitle a defendant to a new trial.” *Id.* at 527. Rather, a new trial will only be granted where “the error ‘seriously

affect[ed] the fairness, integrity or public reputation of judicial proceedings.”⁴ *Griller*, 583 N.W.2d at 742 (alteration in original) (quoting *Johnson v. United States*, 520 U.S. 461, 469, 117 S. Ct. 1544, 1550 (1997)).

Granting a new trial where the defendant’s version of events is far-fetched or where there is overwhelming or uncontroverted evidence of the defendant’s guilt does not ensure the fairness, integrity, or public reputation of judicial proceedings. *Huber*, 877 N.W.2d at 527. The grant of a new trial under such circumstances would be futile, waste judicial resources, encourage litigants to abuse the judicial process, and cause public ridicule. *Id.* By contrast, granting a new trial ensures the fairness, integrity, or public reputation of judicial proceedings where the evidence of the defendant’s guilt is not overwhelming, and where the plain error prevented the jury from fully considering a defense theory that it might have believed. *Id.* at 528.

⁴ We note that Minnesota courts have used slightly different terms when describing the standard that is to be applied where an appellant shows plain error affecting substantial rights. For example, in *Griller*, the Minnesota Supreme Court, in one instance, stated that an appellate court must assess “whether it should address the error to ensure fairness *and* the integrity of *the* judicial proceedings,” but later considered whether the “error seriously affect[ed] the fairness, integrity *or* public reputation of judicial proceedings.” 583 N.W.2d at 740, 742 (alteration in original) (emphasis added) (quotation omitted). These different phrasings have continued to be advanced in subsequent cases. *See, e.g., Huber*, 877 N.W.2d at 527 (“[A] new trial will only be granted when it is necessary to ensure the fairness, integrity, or public reputation of judicial proceedings.”); *State v. Watkins*, 840 N.W.2d 21, 30-31 (Minn. 2013) (“[W]e must consider the fourth prong of the plain-error test: whether a new trial is required to ensure the fairness, integrity, and public reputation of judicial proceedings.”). Because the United States Supreme Court has stated that the fourth prong of the plain-error test requires a court to determine whether the “error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,” we apply this standard. *Johnson*, 520 U.S. at 469, 117 S. Ct. at 1550 (alteration in original).

Here, the evidence produced at trial called into question M.M.'s credibility. M.M. testified that he and Brock had personal problems after they dated the same woman. M.M. also testified that he wrote a letter to the county attorney's office in January 2016, in which he asked for compensation for his testimony and indicated that his testimony would likely guarantee Brock's conviction. M.M.'s testimony revealed that he had made inconsistent statements and that he had not shared some of the details to which he testified at Brock's trial until shortly before, or during, the trial. Absent the evidence of M.M.'s guilty plea, the jury might have believed Brock's defense theory. For this reason, a new trial is required to ensure the fairness, integrity, or public reputation of judicial proceedings.⁵

Reversed and remanded.

⁵ Brock additionally argues that the state elicited from M.M. a hearsay statement that M.M. said, at his plea hearing, that Brock knew that M.M. had the tools. Because we conclude that a new trial is required to ensure the fairness, integrity, or public reputation of judicial proceedings, we do not reach this hearsay issue.

Similarly, we do not resolve the issue of prosecutorial misconduct. Although Brock did not specifically raise the issue of prosecutorial misconduct, we note that the prosecutor was bound to follow the well-settled rule that evidence of an accomplice's guilty plea is generally not admissible to prove an accused's guilt. *Cermak*, 365 N.W.2d at 247; see *Dillon*, 529 N.W.2d at 391; see also *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (“[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or cite relevant authorities.” (quotation omitted)). By repeatedly stressing that M.M. implicated Brock by his guilty plea, the prosecutor improperly invited the jury to consider M.M.'s guilty plea as substantive evidence of Brock's guilt. But, because we reverse and remand on the plain-error issue, we do not determine whether Brock would be entitled to a new trial on the basis of prosecutorial misconduct.