STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0018

State of Minnesota,
Respondent,

vs.

Frank Lucellerson Tubbs,
Appellant.

Filed November 27, 2017
Affirmed
Florey, Judge

Steele County District Court
File No. 74-CR-16-40

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Daniel McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

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

FLOREY, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that the district court erred when it admitted testimony of an officer about

a witness's out-of-court statement and when it failed to exclude testimony referencing appellant's criminal history. Appellant makes additional pro se arguments. We affirm.

FACTS

Appellant Frank Tubbs was charged with possession of a firearm by a prohibited person after S.D. reported that her gun had been stolen. S.D. originally told the police that the gun was stolen by K.L., but later told the police that she threw the gun in a car occupied by appellant and K.L. The case proceeded to a jury trial.

At trial, S.D. testified that appellant went with her to purchase the gun and provided her with the money to purchase it. Several days later, appellant asked S.D. for the gun, saying that it belonged to him because he had paid for it. S.D. testified at trial that she did not give appellant the gun, admitting that she lied to the police when she told them that she had thrown it into the car.

K.L., the mother of appellant's children, testified that S.D. had a gun in her possession while she was in the car with appellant and K.L. She testified that she told S.D., "I'm a felon and my kids' dad is a felon too, so why would you have a gun with you." K.L. testified that S.D. threw the gun on the driver's seat of the car. K.L. testified that she yelled at S.D. to take the gun, "because we don't want to get caught with it, knowing that we have felonies in our background." K.L. testified that she sat on the gun. She testified that appellant attempted to get the gun from her, but that he was unable to touch it. She testified that she left the car with the gun.

An officer testified that he received a report of an assault from H.S., who "witnessed an assault on [K.L.]." The officer testified that it was alleged that a firearm was used during

the assault. H.S. testified at trial that she saw appellant in the car with the gun in his hand, waiving it around and fighting with K.L. H.S. testified that K.L. took the gun from appellant and left the car.

Appellant stipulated to his prior convictions for crimes of violence. He did not testify. The jury returned a guilty verdict to the sole charge of ineligible person in possession of a firearm.

This appeal followed.

D E C I S I O N

I. Appellant has not established that his substantial rights were affected by the admission of out-of-court statements made to a police officer.

Appellant argues that the district court erred by admitting the officer's testimony regarding H.S.'s report of an assault. He argues that the admission of any testimony concerning H.S.'s report of an assault affected his substantial rights because H.S. was the only witness to testify about seeing appellant with the gun and the admission of the report improperly bolstered her credibility. Appellant did not object to the officer's particular testimony that he challenges on appeal.

"Failure to object to the admission of evidence generally constitutes [forfeiture] of the right to appeal on that basis." *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). In the absence of an objection, we review the admission of evidence for plain error. Minn. R. Crim. P. 31.02. "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 the three prongs of the standard are satisfied, we will correct the

error "if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

Appellant argues that the officer's testimony about H.S.'s report was inadmissible hearsay. He particularly challenges the admission of the officer's testimony that "[H.S.] witnessed an assault on [K.L.]" and "[i]t was alleged it was a firearm that was used in the assault." The state argues that the officer's testimony about H.S.'s report was not offered for the truth of the matter asserted; rather, it was offered to provide context for the officer's subsequent investigation.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). An out-of-court statement is not admissible as substantive evidence unless it is nonhearsay or falls within an exception to the hearsay rule. *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). If a statement is offered for some other purpose, it is not hearsay. Minn. R. Evid. 801 1989 comm. cmt. For example, the supreme court has stated that "evidence that an arresting or investigating officer received a tip for purposes of explaining why the police conducted surveillance is not hearsay." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002).

However, the supreme court has also held that the substance of an informant's tip to law enforcement should not be admitted to provide context to an investigation where there is a risk that the contents of the tip would be considered by the jury as substantive evidence of the defendant's guilt rather than as an explanation of the officer's conduct. *Id.* ("[A] police officer testifying in a criminal case may not, under the guise of explaining

how the investigation focused on defendant, relate hearsay statements of others." (quotations omitted)); *State v. Williams*, 525 N.W.2d 538, 545 (Minn. 1994) (noting that "it is unlikely that the jury did not consider the evidence as substantive evidence of defendant's guilt" despite the prosecutor's explanation that it was presented only to provide context to the officer's actions). In those cases, the out-of-court statements should be excluded by the district court under Minn. R. Evid. 403. *State v. Hardy*, 354 N.W.2d 21, 24-25 (Minn. 1984) (indicating that "even a limited elicitation, for nonhearsay purposes, of general testimony that a tip had been received . . . would have been unjustified in this case because the potential of the evidence being used for an improper purpose outweighed its very limited probative value"); *State v. Ford*, 322 N.W.2d 611, 615 (Minn. 1982) (indicating that an informant's tip is not hearsay when it is offered to provide context to an investigation, but that it should nevertheless be excluded under Minn. R. Evid. 403 when there is a risk it would be used as substantive evidence of guilt).

Here, the officer's testimony about the report was clearly offered to provide context to his ensuing investigation. H.S.'s report of an assault and a gun provided context to the officer's testimony about his interviews of witnesses and search for the gun. The officer did not, at any point, refer to appellant during his testimony or indicate that appellant was involved in the reported assault. Unlike the cases referenced above, where the out-of-court statements were offered under the guise of explaining why the investigations focused on the defendants, here, they were offered solely to explain the officer's actions concerning his investigation into H.S.'s report. The officer's testimony about H.S.'s report was

properly admitted as nonhearsay context evidence. The district court did not plainly err by admitting the testimony.[1]

But even if appellant could establish that the district court plainly erred in admitting the officer's testimony, he cannot establish that the error affected his substantial rights. In evaluating whether an error affected substantial rights, we must consider whether there is a "reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010). Appellant "bears the heavy burden of proving prejudice." *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015) (quotation omitted). In determining whether erroneously admitted evidence affected the verdict, we consider "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002); *see also State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) ("The court's analysis under the third prong of the plain error test is the equivalent of a harmless error analysis.").

[1] The state also argues that the evidence was admissible under Minn. R. Evid. 801(d)(1)(B) as a prior consistent statement because appellant's counsel generally challenged H.S.'s credibility during the opening statement to the jury. Before a prior out-of-court statement may be admitted under Minn. R. Evid. 801(d)(1)(B), the witness's credibility must have been challenged. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997); *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). The record does not support the state's assertion that H.S.'s credibility had been challenged prior to her testimony. During the opening statement, counsel for appellant specifically challenged the credibility of S.D. and K.L. Counsel for appellant did not challenge H.S.'s credibility prior to her testimony. Therefore, H.S.'s report to the officer was inadmissible under Minn. R. Evid. 801(d)(1)(B) as a prior consistent statement.

The manner in which the state presented the report of an assault did not create a reasonable likelihood that the report substantially affected the verdict. As discussed above, the testimony about H.S.'s report provided context to the officer's subsequent investigation, but did not directly implicate appellant. Moreover, the testimony was overshadowed by the direct evidence of appellant's guilt. H.S. testified that she saw appellant holding the gun in his hand. Other witnesses testified that the gun was in the car and that appellant had expressed an ownership interest in the gun because he had supplied the purchase money. Moreover, the state did not mention the challenged testimony during closing arguments, only indicating that H.S. "called the police and reported what she had observed." Appellant had the opportunity to counter the testimony concerning H.S.'s report, and did so, indicating that H.S. was not credible because she had an ulterior motive for testifying against appellant and because she had consumed alcohol during the night of the incident. Appellant has not established his burden of demonstrating that there is a reasonable likelihood that the statements significantly affected the verdict.

II. Appellant was not prejudiced by K.L.'s testimony referencing appellant's criminal history.

Appellant argues that the district court plainly erred by not excluding K.L.'s testimony referencing appellant's felonious background when appellant had agreed to stipulate to his prior crimes.[2] Appellant did not object when K.L. referred to his criminal

[2] As an initial matter, the state argues that "appellant has no right to challenge [K.L.'s] testimony on appeal" because the language of the stipulation had not been finalized at the time of her testimony. The state cites *State v. Collins*, 580 N.W.2d 36, 42 (Minn. App. 1998), *review denied* (Minn. July 16, 1998), to support its position that appellant cannot challenge the admission of references to his prior crimes. We disagree. In *Collins*, the

past. We therefore review the admission of the evidence under the plain-error standard of review. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Appellant must establish plain error that affected his substantial rights. *Strommen*, 648 N.W.2d at 686.

References to a defendant's prior crimes are inadmissible except in certain delineated circumstances. Minn. R. Evid. 404(b); *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009). A prosecutor is responsible for preparing the state's witnesses so that they "will not blurt out anything that might be inadmissible and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). "[I]f the prosecutor intentionally elicits other-crime evidence knowing that it is inadmissible, we will reverse more readily." *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978). But when the evidence is inadvertently elicited by the prosecutor, reversal is not warranted unless the evidence was prejudicial. *Id.*

In *State v. Davidson*, the supreme court stated that a defendant in an ineligible-person-in-possession-of-a-firearm case "should be permitted to remove the issue of whether he is a convicted felon by stipulating to that fact. In the vast majority of such cases the potential of the evidence for unfair prejudice clearly outweighs its probative value." 351 N.W.2d 8, 11 (Minn. 1984). In *Davidson*, the district court denied the defendant's request for a stipulation to his prior conviction and instructed the jury that the defendant had previously been convicted of arson. *Id.* at 9. The supreme court held that the district court erred in denying the defendant's request without weighing the potential for unfair

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defendant failed to make clear that he intended the fact of his stipulation to a prior crime to be kept from the jury. 580 N.W.2d at 42. Here, it is clear from discussions on the record that appellant stipulated to the crimes in order to keep the fact of his convictions from the jury.

prejudice against the evidence's probative value, but that the error "was not so prejudicial as to require reversal." *Id.* at 12.

The state concedes that it was plain error for appellant's felon status to be revealed to the jury in light of *Davidson*. The state argues that the error did not affect appellant's substantial rights because there was strong evidence of appellant's guilt and because the prosecutor did not refer to appellant's felon status—or K.L.'s testimony to that effect—during closing arguments. We agree that the two references to appellant's felon status did not affect appellant's substantial rights. In *Haglund*, we concluded that an officer's reference to the defendant's criminal past was not prejudicial when "the reference was of a passing nature," the import of the reference may have been missed by the jury, and the evidence of guilt was overwhelming. 267 N.W.2d at 506. Here, there was strong evidence of appellant's guilt through eyewitness testimony. We conclude that there is no reasonable possibility that the two brief and passing references to appellant's felon status significantly affected the verdict.

III. Appellant's pro se arguments do not establish reversible error.

Appellant raises several arguments in his pro se supplemental brief to this court. He alleges that he was prejudiced by (1) the officer's testimony regarding H.S.'s report of an assault on K.L.; (2) the references to appellant's prior felonies; (3) the state's objected-to argument during summation concerning K.L. being pistol-whipped; and (4) K.L.'s objected-to testimony that H.S. kept yelling, "I know what [appellant] is capable of doing." The former two issues were raised by counsel in appellant's principal brief and discussed above. Because appellant provides no additional legal argument or authority regarding

those issues, we do not further address them. Appellant objected to the latter two issues during the trial, and the district court instructed the jury to disregard the statements. We presume the jury followed the district court's instructions to disregard the statements and therefore find no reversible error. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (noting that we presume a jury follows a district court's instructions).

Appellant also argues that the district court judge should have recused himself from the trial because he was presiding over a separate civil suit involving appellant. Appellant did not make this argument before the district court, nor does he offer argument or citation to legal authority in support of his allegation. We generally do not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Nor do we consider allegations outside of the record on appeal. *State v. Meldrum*, 724 N.W.2d 15, 23 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007); *see* Minn. R. Crim. P. 28.02, subd. 8 (stating that "[t]he record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcript of the proceeding, if any"). We therefore do not consider whether the district court judge should have recused himself.

Appellant also argues that the state was unable to establish his guilt beyond a reasonable doubt because it lacked physical evidence and credible testimony. We construe appellant's argument as a challenge to the sufficiency of the evidence supporting his conviction.

When considering a claim of insufficient evidence, this court carefully analyzes the record to determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach its verdict. *State v. Webb*, 440 N.W.2d

426, 430 (Minn. 1989). We assume that the jury was persuaded by the evidence supporting the conviction, especially "where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

When the evidence is viewed in the light most favorable to the conviction, it is sufficient to sustain the verdict. H.S. testified that she saw appellant holding the gun and waiving it around. "[A] conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted). The factfinder is the exclusive judge of witness credibility and the weight to be given a witness's testimony. *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). Appellant stipulated to his prior crimes of violence. The jury could reasonably conclude that appellant was guilty of being an ineligible person in possession of the gun.

Affirmed.