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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2024

State of Minnesota,
Respondent,

vs.

Ryan Richard Fenske,
Appellant.

Filed December 14, 2020
Affirmed
Connolly, Judge

Sibley County District Court
File No. 72-CR-19-138

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David E. Schauer, Sibley County Attorney, Donald E. Lannoye, Assistant County Attorney, Gaylord, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Gaïtas, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction for third-degree controlled-substance possession. He argues that the district court erred in three ways. First, the district court erred in denying his motion to suppress the evidence because the officers lacked reasonable suspicion to conduct a K-9 sniff and the dog was unreliable. Second, the district court committed reversible error by allowing five decayed convictions into evidence, which prevented appellant from testifying. Third, appellant argues the district court plainly erred by permitting the police officers to opine as to who possessed the drugs. We affirm.

FACTS

On April 22, 2019, at approximately 12:30 p.m., Arlington Police Officer Noxon responded to a call from a homeowner who reported a vehicle with two occupants sitting outside their home for three hours. When Officer Noxon arrived on the scene, he ran the license plate and it came back as not on file. He approached the vehicle on the driver's side. Officer Noxon identified the female driver as Josephine Powers. The passenger was appellant Ryan Richard Fenske. Both individuals had freshly lit cigarettes when Officer Noxon approached. Officer Noxon asked what they were doing sitting in the vehicle and Powers responded that they were playing Pokémon Go, a game played on mobile devices. Officer Noxon observed that Powers's face appeared gaunt and she was fidgety, which was "indicative of drug use." He also observed that appellant was trying to hide something under his seat. While checking appellant's driver's license, Officer Noxon learned that appellant was on probation for fifth-degree possession of a controlled substance. Officer

Noxon believed that there were indicators of current illegal drug activity and he requested an additional officer. According to Officer Noxon, based on his training and experience as a law enforcement officer, individuals sometimes light cigarettes when police approach to mask the smell of other drugs or alcohol in the vehicle. Additionally, Officer Noxon was familiar with the game Pokémon Go, and he understood it to be a game where people walk around, not a game that involved sitting in a stationary vehicle for three hours. Based on all of these circumstances, Officer Noxon believed that there were indicators of current illegal drug activity, and he requested an additional officer for a K-9 sniff of the car for possible narcotics.

Chief Petterson of the Arlington Police Department arrived with his USPCA certified K-9 partner. While sniffing the exterior of the car, the dog alerted on the driver's side and passenger's side. The officers then conducted a search of the vehicle's interior. During the search, Chief Petterson found crystal flakes on the driver's seat that field-tested positive for methamphetamine. There were 25 grams of marijuana on the passenger side floor, as well as a plastic bag from a Holiday gas station that contained a Tupperware container with three crystal chunks inside. The crystal chunks tested positive for methamphetamine and weighed approximately 18 grams. The officers also found a digital scale in the bag. At the scene, Officer Noxon searched appellant's person and found a five dollar bill containing white residue. Appellant told Officer Noxon that he had given the five dollar bill to Powers so she could "snort methamphetamine." Based on the location of the methamphetamine and the residue found on the five-dollar bill in appellant's pocket, Officer Noxon arrested appellant for possession of a controlled substance.

After the arrest, the officers seized Powers's and appellant's cell phones. Pursuant to a warranted search of the phones, police found several "notable" text messages. Appellant texted Powers: "Who needs weed or sh*t. I have a bunch I need to get rid of." Powers replied: "Well, yeah, LOL. Do you want to chill this morning then? Sh*t, I've been out. Might be able to buy some off you." Appellant replied "Of course" and "where you at?" The messages did not specify an exact location where the two would meet; however, the officers inferred Powers picked appellant up at a Holiday gas station based on: (1) a text message from Powers to appellant: "… Got a discount at Holiday. Could meet there or Kwik Trip." (2) a later text from appellant to Powers: "I'm at Holiday now" and (3) the bag "from a Holiday gas station" where the drugs were found.

Appellant was charged with first-degree possession with intent to sell a controlled substance in violation of Minn. Stat. § 152.021 subd. 1(1) (2019), and third-degree possession of a controlled substance in violation of Minn. Stat. § 152.023 subd. 2(a)(1) (2019). Appellant moved to suppress the drug evidence obtained from the vehicle. After a contested omnibus hearing, the district court denied appellant's motion to suppress the evidence. The district court concluded that "Officer Noxon had reasonable, articulable suspicion for expanding the scope of the stop…" and that because the K-9 sniff was reliable, there was probable cause to search the vehicle. Appellant then had a jury trial. The jury acquitted him of first-degree possession with intent to sell a controlled substance and found him guilty of third-degree possession of a controlled-substance. This appeal follows.

D E C I S I O N

I. District court's denial of appellant's motion to suppress

"When reviewing a district court's pretrial order on a motion to suppress evidence, 'we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo.'" *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)). A reviewing court defers to the district court's findings of fact unless they are clearly erroneous. *State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016). "A factual finding is clearly erroneous if it does not have evidentiary support in the record." *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016).

Appellant first challenges the constitutionality of the dog-sniff search. The Minnesota Supreme Court has determined that police only need reasonable articulable suspicion of drug activity, rather than probable cause, to conduct a K-9 search. *State v. Davis*, 732 N.W.2d 173, 181 (Minn. 2007). "Reasonable [articulable] suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion.'" *Id.* at 182. As appellant notes, the requisite showing for reasonable articulable suspicion "is not high." *Id.* The court considers the totality of the circumstances when determining whether reasonable articulable suspicion exists. *Id.*

Appellant argues that Officer Noxon lacked reasonable articulable suspicion to request a K-9 sniff and instead "acted on a hunch." The district court concluded that the dog-sniff search was constitutionally sound, relying on Officer Noxon's testimony,

photographs from the stop, and bodycam footage. As an initial matter, appellant argues that the district court's factual findings were clearly erroneous. We agree that the record does not support the entirety of the following finding:

> Officer Noxon observed that Ms. Powers was very fidgety. He testified that Ms. Powers went beyond the normal type of nervous behavior that most people exhibit when being stopped by a police officer. Ms. Powers can be seen on the squad video as being very fidgety. Officer Noxon testified that based on his training and experience, this type of fidgetiness was indicative of current drug use.

Officer Noxon did not testify to the fact that the fidgeting "went beyond the normal type of nervous behavior" nor did he testify that "this type of fidgetiness was indicative of current drug use." Instead, Officer Noxon testified that Powers was "fidgety," citing this as a basis for his suspicion of criminal drug activity. However, the remainder of the facts relied on by the district court are supported by the record, and are not clearly erroneous. Based on those facts, we conclude that the district court did not err in concluding that the dog-sniff search was supported by a reasonable, articulable suspicion of criminal activity. Officer Noxon testified to several specific and articulable facts that, based on his training and knowledge as a police officer, indicated possible criminal drug activity. Powers was fidgety and appellant attempted to hide something under his seat; both occupants had freshly lit cigarettes; both occupants had been sitting in the vehicle for approximately three hours, but told the officer that they were playing a mobile game; and appellant was on probation for a controlled-substance violation at the time of the stop. All of these circumstances supported a reasonable, articulable suspicion of drug activity that warranted a K-9 sniff of the vehicle.

Appellant further argues that, even if the K-9 sniff was legal, the specific K-9 used was "unreliable" and, therefore, the officers lacked probable cause to search the vehicle. We disagree.

A reliable dog sniff constitutes sufficient probable cause to search a motor vehicle. *Florida v. Harris*, 568 U.S. 237 (2013). Reliability is most commonly established simply by showing that the K-9 is certified. A defendant is allowed to challenge a K-9's reliability by cross-examining the testifying officer or introducing his own fact-witness. *Id.* at 247. The Supreme Court has held that under the totality of the circumstances, the question is whether "all the facts surrounding a dog's alert" would make a reasonable person suspect evidence of a crime. *Id.* at 248. The totality of the circumstances includes the K-9's training, certification, field history, and the circumstances of the sniff in question.

Chief Petterson testified about the K-9's training, certification, and field history. There were numerous activity logs entered into evidence that detailed each of the K-9's deployments. According to Chief Petterson, the K-9 had been his partner for "five and a half, six years" and is a certified "narcotics detection dog" and "patrol dog." The K-9 was trained to detect "marijuana, meth, cocaine, [and] heroin." Chief Petterson walked through the K-9 sniff procedure. This procedure was "consistent with" the officer's training.

Appellant argues that he established the K-9's unreliability through cross-examination of Chief Petterson; he elicited testimony that the K-9 had previously made "five to ten" false alerts out of 50 deployments. We disagree. Appellant did not produce any expert witnesses. Nor did appellant contest the certification of the K-9 or its training history. Rather, appellant focused on the number of "false positive alerts" that the K-9

previously made in the field. Appellant did not provide any caselaw to support his argument that false positive alerts make a K-9 presumptively unreliable. The record shows a lengthy history of training and field experience of both the K-9 and Chief Petterson. It is true that the K-9 "falsely" found narcotics when there were none present on multiple occasions; however, he correctly identified them the majority of the time. Further, Chief Petterson testified that he did not give any "improper body language or clues that would lead [the K-9] into alerting in this instance." The K-9 made a positive alert on the driver's side and the passenger side.

There are no circumstances surrounding the "sniff in question" that indicate unreliability. Based on the totality of the circumstances, the K-9 sniff was reliable and therefore provided Officer Noxon and Chief Petterson with sufficient probable cause to search the vehicle. The district court properly denied appellant's motion to suppress the drug evidence.

II. Admissibility of prior convictions under Minn. R. Evid. 609(b)

Appellant argues that the admissibility of his five previous convictions was erroneous because the court did not conduct the proper analysis. He also argues that the admissibility of the convictions "chilled" his testimony, and as such, he was denied the opportunity to defend himself. Appellant objected to the admissibility of the convictions before trial. Therefore, this court reviews the issue for harmless error.

A trial court's ruling under Rule 609 of the Minnesota Rules of Evidence is reviewed for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). "When an error implicates a constitutional right, we will award a new trial unless the error is harmless

beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) (citation and quotation omitted).

Rule 609 governs the admissibility of prior convictions for impeachment purposes. Prior convictions are admissible if they are (1) punishable by imprisonment in excess of one year or (2) involved dishonesty or false statement, regardless of the punishment. Minn. R. Evid. 609(a). As a general rule, a conviction that is more than ten years old is inadmissible. However, the district court has discretion to allow a "stale" conviction into evidence in the interests of justice if "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Minn. R. Evid. 609(b).

The trial occurred in July 2019. The district court ruled that five prior convictions would be admissible: a felony theft that decayed in 2004, a felony motor-vehicle theft that decayed in 2004, a felony motor-vehicle theft that decayed in 2006, a gross-misdemeanor check forgery that decayed in 2004, and a misdemeanor theft that decayed in 2003. The district court erred by finding the misdemeanor theft was an admissible prior conviction because it was not a felony or a crime involving dishonesty, and it was over ten years old. *See* Minn. R. Evid. 609(a). We conclude that the district court also erred by finding the remaining four crimes admissible because the district court failed to conduct *any* analysis as required under Rule 609(b). Caselaw is clear that due to their age, these convictions were not admissible unless the district court identified "specific facts and circumstances" that shows the conviction's probative value substantially outweighed its prejudicial effect

and that the interests of justice required the admission. Minn. R. Evid. 609(b). *See State v. Hofmann*, 549 N.W.2d 372, 376 (Minn. App. 1996) ("Because the specific facts and circumstances of the [decayed] crime were not shown, evidence of that conviction was not properly admissible under rule 609," and the court therefore erred in admitting the prior conviction for impeachment). The only analysis the district court conducted was to say that the convictions "go to the theme of truthfulness." This is insufficient. The district court must conduct the specific analysis required by Rule 609(b).

Because the district court erred by finding that these five convictions were admissible for impeachment, we must determine the impact of the error on appellant's convictions. An error is harmless beyond a reasonable doubt if the "verdict was surely unattributable to the erroneous admission." *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). We are convinced that the error was harmless beyond a reasonable doubt.

Appellant argues that the erroneous ruling prevented him from testifying. However, a district court's erroneous decision to allow impeachment by prior conviction does not implicate a defendant's right to testify if the defendant's proffered testimony was not critical to his defense. *See State v. Zornes*, 831 N.W.2d 609, 628 (Minn. 2013). If the district court's erroneous ruling does not implicate a defendant's right to testify, then the error is harmless "if there is no reasonable possibility that it substantially influence[d] the jury's decision." *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (alteration in original). Because appellant did not make an offer of proof as to what his testimony would have been had he testified, we are left to assume that the thrust of the testimony would have been to

deny possession of the methamphetamine and argue that it belonged to Powers. *Ihnot*, 575 N.W.2d at 587.

Appellant's defense strategy was to deny ownership of the drugs, suggesting they belonged to Powers. The defense also focused on the failure of the police officers to conduct forensic testing to determine who handled the drugs. While appellant did not testify, the thrust of his expected testimony was presented through his attorney by cross-examination of Powers and the police officers. The strategy was effective as appellant was acquitted of the first-degree possession with intent to sell a controlled-substance charge, indicating that appellant's testimony was not critical to his defense. Accordingly, appellant's constitutional right to testify was not implicated by the district court's impeachment ruling.

Furthermore, the remaining evidence presented by the state was overwhelming. It included video footage from the scene showing the location of the drugs, which were under appellant's seat. Officer Noxon also discovered a five dollar bill in appellant's pocket with a white substance on it, which appellant admitted was methamphetamine. Moreover, appellant explicitly stated in a text message that he had possession of drugs and that he was looking to get rid of them. While the text message did not explicitly say "methamphetamine," it did allude to drugs other than just marijuana: "who needs weed or sh*t." It is a reasonable inference that this message was referring to the drugs that were found at the scene. Because appellant's testimony was not critical to his defense and the evidence against him was overwhelming, there is "no reasonable possibility" that the impeachment decision "substantially influenced the jury's decision." *Taylor*, 869 N.W.2d

at 14. Any possible error that the district court made was harmless beyond a reasonable doubt.

III. Officer's testimony regarding who possessed the drugs

Appellant challenges the admissibility of certain testimony from two police officers. Appellant did not object to this testimony at trial. Therefore, this court reviews the issue using the plain-error standard. Minn. R. Crim. P. 31.02. The plain-error standard requires an appellant to show an error that was plain and affected substantial rights. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quoting *Johnson*, 520 U.S. at 467). The first prong of the plain-error doctrine is satisfied if appellant establishes an error – such as a deviation from a legal rule. *United States v. Olano*, 507 U.S. 725, 732 (1993). Witnesses are not permitted to testify as to their opinion on "ultimate issues" regarding legal analysis or mixed questions of law and fact because these types of opinions are not deemed to be of any use to the trier of fact. Minn. R. Evid. 704 1977 comm. cmt. However, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704.

Appellant argues that the officers "repeatedly testified to their personal beliefs" or, in other words, "they opined that Fenske was guilty." However, this characterization of Officer Noxon's and Chief Petterson's testimony is incorrect because it takes their testimony out of context. At trial, appellant made Powers's connection to the controlled

substances, in conjunction with law enforcement's failure to conduct forensic tests to determine who handled the drugs, a major focus. In response to the suggestion that "law enforcement did a shoddy investigation by not doing forensic testing," the officers explained why they did not perform any forensic tests.

Officer Noxon explained that he did not request fingerprint testing because the drugs "were found in the floorboard in front of the passenger [seat]," indicating "it's within reach of the passenger" and, therefore, "we would place the ownership of that item with the passenger." This was not an opinion on guilt, but rather an explanation as to why DNA testing was deemed unnecessary. Moreover, in response to the question "so do you believe that you found who actually possessed the methamphetamine?" Chief Petterson said "yes, we do" and stated that individual was appellant. He testified that he assumed ownership based on the location of the evidence. Additionally, he testified that he suspected the drugs belonged to appellant based on "information in the statements and the evidence from the vehicle" (referring to the text message exchanges). Like Officer Noxon, Chief Petterson's testimony explained why no forensic testing was conducted. He did not "opine[ ] that Fenske was guilty." The testimony of both officers falls within the parameters of Rule 704; it was not a deviation from a legal rule. Minn. R. Evid. 704. Therefore, it was not a plain error. *Olano*, 507 U.S. at 732.

Even if the district court erred, the error did not "affect [appellant's] substantial rights." *Johnson*, 520 U.S. at 467. "An error affects a defendant's substantial rights when there is a reasonable likelihood that the error substantially affected the verdict." *State v. Brown*, 792 N.W.2d 815, 824 (Minn. 2011). Even without the officers' testimony, the

evidence against appellant was overwhelming. Assuming the statements regarding ownership of the drugs were stricken from the record, it is not reasonably likely that the jury would have come to a different conclusion. The verdict would still be supported by the video footage of the drugs in the car, the five dollar bill, the text messages, and Powers's testimony.

Appellant claims that this case is similar to *State v. Hogetvedt*, and that this court should "revers[e] and remand[ ] this case for a new trial" as it did there. 623 N.W.2d 909, 916 (Minn. App. 2001). But this case is distinguishable. In *Hogetvedt*, the defendant was charged with assaulting his mother. The mother first identified the defendant as the assailant, but later recanted her statement over the phone to a police officer. The police officer testified to a personal opinion despite the district court's clear instructions not to: the district court stated "as to [the officer's] opinion as to [appellant's] guilt, that would be totally improper . . . such opinions are his alone and are to be kept to himself." *Id.* at 914. The officer took the stand, however, and testified that during the phone call with the victim, "…I told her that I believed it was appellant that assaulted her." *Id.* at 915. This testimony was clearly inappropriate. But it is much different than the testimony here. Officer Noxon and Chief Petterson never stated it was their opinion that the drugs belonged to appellant as opposed to Powers. Rather, in response to questions about the absence of forensic testing, the officers explained testing did not seem necessary because the circumstances indicated the drugs were appellant's.

Appellant also argues that the "error is plain" and that it is "confirmed" by *State v. Myrland*. 681 N.W.2d 415 (Minn. App. 2004). *Myrland* is also distinguishable from this

case. There, over defense objection, a school district's human resources director testified about the result of an internal investigation, and the employment actions taken against the defendant, who was charged with possession of child pornography. *Myrland*, 681 N.W.2d at 421. The testimony was deemed "irrelevant to the criminal charges" and was one of several errors that brought "the fairness of appellant's trial seriously into question." *Id.* But this court stated that "we need not address each of the claimed errors" because the case was reversed on other grounds. *Id.*

The district court did not plainly err in allowing Officer Noxon and Chief Petterson to testify about the ownership of the drugs. Even if the district court did plainly err, the error did not "affect[ ] [appellant's] substantial rights." *See Brown*, 792 N.W.2d at 824.

Affirmed.