STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1969

State of Minnesota,
Respondent,

vs.

Fuad Yassin Mohomoud,
Appellant.

Filed May 9, 2011
Affirmed in part, reversed in part, and remanded
Shumaker, Judge

Freeborn County District Court
File No. 24-CR-08-756

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

Craig S. Nelson, Freeborn County Attorney, David J. Walker, Assistant County Attorney, Albert Lea, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

SHUMAKER, Judge

Appellant Fuad Mohomoud was convicted of first-degree driving while impaired (DWI), second-degree test refusal, and driving after cancellation as inimical to public safety. This court affirmed the convictions in a published opinion. *State v. Mohomoud*, 788 N.W.2d 152 (Minn. App. 2010), *review granted and remanded* (Minn. Nov. 23, 2010). The supreme court granted review and remanded for reconsideration of the issue of whether Mohomoud waived any challenge to the admission of the recording of the implied-consent advisory. We affirm in part, reverse in part, and remand.

FACTS

The facts of the case are summarized in this court's prior opinion. After Mohomoud's vehicle was stopped for speeding, he admitted to a police officer that he had no driver's license. *Id.* at 154. The officer testified that he smelled the odor of alcohol and that Mohomoud admitted that he had had four drinks at a bar. *Id.* After Mohomoud failed field sobriety tests, the officer took him to the law-enforcement center and read the implied-consent advisory to him. *Id.* The reading of the advisory and Mohomoud's telephone call to an attorney in which he admitted that he had prior DWI convictions were recorded on a DVD. *Id.* at 154-55. Except for the dispatcher's initial references to Mohomoud's prior DWI convictions, the entire DVD, including Mohomoud's references to those priors, was played for the jury, despite Mohomoud's stipulation to his prior DWI convictions to keep that evidence from the jury. *See id.*

The prosecutor explained to the court that the recording could be cued up to play after the dispatcher's references, but could not be edited. *See id.* at 157. Defense counsel agreed that the DVD recording should be cued up so as to omit the dispatcher's references, and he acknowledged that the software for the recording prevented its being edited. *Id.* He then stated that, although he would prefer to have the additional references to the prior convictions removed, he understood the technical issue and was not going to object. *Id.*

On appeal, Mohomoud, who had stipulated to the existence of the three prior DWI convictions, argued that the admission of "the recording of his conversations with his attorneys" was plain error. *Id.* at 155, 157. After discussing the doctrines of forfeiture and waiver, this court concluded that Mohomoud had waived any claim of error in the admission of the mostly unredacted DVD that still contained references to his prior DWI convictions and portions of consultations with two attorneys. *Id.* at 159. The supreme court granted review "on the issue of whether [Mohomoud] waived any alleged error in the admission of the . . . recording." *State v. Mohomoud,* A09-1969 (Minn. Nov. 23, 2010) (order). It remanded for reconsideration in light of four opinions in which it had established and followed the rule that the invited-error doctrine does not apply to plain error.

D E C I S I O N

The supreme court has held in a line of cases that the invited-error doctrine does not apply to plain error. *See State v. Evans*, 756 N.W.2d 854, 867 (Minn. 2008); *State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008); *State v. Goelz*, 743 N.W.2d 249, 258

(Minn. 2007); *State v. Gisege*, 561 N.W.2d 152, 158 n.5 (Minn. 1997). Although we will consider the invited-error doctrine as it has been limited by the doctrine of plain error,[1] we question whether the invited-error doctrine would apply on these facts. Defense counsel was faced with a situation in which the DVD recording, for technical reasons, could not be edited. The recording could be cued up to eliminate the dispatcher's reference to Mohomoud's prior DWI convictions, but Mohomoud's own references to the same prior convictions could not be edited out. Defense counsel, therefore, did not "invite" the error of including those references except in the very limited sense that, faced with a technical limitation beyond his control, he agreed not to object to the DVD recording. In effect, counsel merely decided to forgo an objection, although this decision was made explicit and explained on the record, unlike the typical failure to object.

We have not found a case in which a defense attorney, faced with a similar dilemma, was held to have "invited" the resulting error. In *Everson*, 749 N.W.2d at 347, defense counsel agreed that the jury could review, during deliberations, tape-recorded statements that had been admitted as exhibits, and that it could review them with two non-jurors present in the courtroom. Defense counsel had objected to the taped statements being replayed, but there was no indication that the *manner* in which they

[1] This court's earlier opinion concluded that Mohomoud waived a challenge to admission of the only partially redacted DVD recording, citing the principle that waiver is the "intentional relinquishment or abandonment of a known right." *Mohomoud*, 788 N.W.2d at 158 (quotation omitted). The supreme court's remand shifts the focus of analysis to the invited-error doctrine, implicitly rejecting the holding that Mohomoud waived this claim of error.

were replayed, which was challenged on appeal, was because of technical or other reasons forced upon defense counsel. *See id.* at 344-45, 347. In *Goelz*, 743 N.W.2d at 258, the defendant offered testimony of a "faked suicide," as part of a voluntarily chosen "affirmative trial strategy," but he later claimed evidence should not have been admitted on the matter. In *State v. Helenbolt*, 334 N.W.2d 400, 407 (Minn. 1983), defense counsel "as part of his trial strategy . . . re-elicited" inadmissible evidence after the prosecutor had presented similar evidence without objection. The court did not discuss whether defense counsel's choice had been forced by the prosecutor's elicitation of the evidence, although certainly defense counsel might have obtained the exclusion of the state's evidence with a timely objection. *See id.* The supreme court noted that a defendant "cannot on appeal raise his own strategy as a basis for reversal." *Id.* Here, it was not part of the strategy of Mohomoud's trial counsel to introduce the mostly unredacted DVD recording with references to Mohomoud's prior DWI convictions.

The supreme court's remand requires this court to consider defense counsel's acquiescence to the admission of the unredacted DVD under the rubric of invited error. But if admission of the unredacted DVD was plain error, the invited-error doctrine does not apply. *See Goelz*, 743 N.W.2d at 258. We conclude that, even assuming the defense "invited" the admission of the mostly unredacted DVD, admission of that evidence was plain error as to the DWI count, and therefore the invited-error doctrine does not apply as to that count.

The plain-error doctrine applies if the district court's ruling is (1) error that is (2) plain, and (3) affects substantial rights. *State v. Reed*, 737 N.W.2d 572, 583 (Minn.

2007). If the defendant establishes these three factors, the court considers whether the error should be addressed "to ensure fairness and the integrity of the judicial proceedings." *Id.*

Mohomoud had a right to stipulate to his prior DWI convictions to keep that inherently prejudicial information from the jury. *See State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984) (holding that the district court erred by failing to accept stipulation and allow defendant to remove from jury the issue of whether he had a prior DWI conviction). The admission of the DVD with the references to those convictions negated the purpose and intended effect of the stipulation. And Mohomoud's prior convictions did not "bear[] upon other issues not covered by the stipulation." *State v. Matelski*, 622 N.W.2d 826, 832 (Minn. App. 2001) (stating that "[a] defendant may not be allowed to unilaterally control the need for relevant evidence by offering to stipulate" under these circumstances), *review denied* (Minn. May 15, 2001). Mohomoud's prior convictions did not make it more likely that he was driving, that he was under the influence, that he refused testing, or that he had reasonable grounds for refusal. Admission of the unredacted DVD recording, therefore, contravened the caselaw that has developed since *Berkelman* allowing defendants to stipulate to prior convictions to keep the evidence from the jury. *See, e.g.*, *State v. Davidson*, 351 N.W.2d 8, 8 (Minn. 1984) (holding that district court erred in refusing to accept defendant's stipulation to prior felony that made him ineligible to possess a gun). Admission of the DVD without redacting references to the prior convictions was error that was plain.

The third plain-error factor looks to whether the error affected the defendant's substantial rights. *Evans*, 756 N.W.2d at 867. An error affects substantial rights if it is prejudicial in the sense that there is a reasonable likelihood that the error had a significant effect on the verdict. *State v. Hollins*, 765 N.W.2d 125, 133 (Minn. App. 2009).

Mohomoud argues that admission of the DVD recording was prejudicial because the jury could have used the fact of Mohomoud's prior convictions as propensity evidence and because the prosecutor used Mohomoud's statements to impeach his testimony that he had not been drinking. As to the first-degree DWI count on which Mohomoud was convicted and sentenced, the evidence that Mohomoud had several DWI convictions could have been used by the jury as propensity evidence. We conclude that there is a reasonable likelihood that the error had a significant effect on the verdict, and, therefore, that it affected Mohomoud's substantial rights. And we conclude that, because Mohomoud had stipulated to his convictions precisely to prevent this effect, the error should be addressed to ensure the fairness and integrity of the proceeding.

As to the refusal count, Mohomoud acknowledged that he was twice asked if he would take the test and twice responded "no." He testified that he did not refuse the Intoxilyzer test, *Mohomoud*, 788 N.W.2d at 155, but the jury could have rejected that testimony based on what was shown in the DVD recording, which showed the entire implied-consent procedure, including Mohomoud's express refusal to take the test.

The references on the DVD to Mohomoud's prior convictions have little bearing on whether he refused the Intoxilyzer test. There is no indication that any of Mohomoud's prior DWI convictions were for refusal. Thus, it is unlikely the prior

convictions had any value as propensity evidence. Although the prior DWI convictions could possibly have been used by the jury to conclude that the officer had probable cause to request that Mohomoud take a test, Mohomoud's PBT reading of .15 and his failure of the field sobriety tests provided ample evidence to establish probable cause. Therefore, Mohomoud has not established the third plain-error prong with respect to the refusal count.

We conclude that Mohomoud has also failed to establish the third plain-error prong as to the count charging driving after cancellation. The police officer observed Mohomoud driving, and the state presented evidence that Mohomoud's driver's license had been cancelled as inimical to public safety. Defense counsel in closing argument virtually conceded Mohomoud's guilt of driving after cancellation, a crime unrelated to whether he was intoxicated. The references in the unredacted DVD recording to Mohomoud's prior DWI convictions did not indicate a propensity to drive after cancellation, and there was overwhelming evidence that Mohomoud had committed that offense. Therefore, the admission of the DVD did not affect Mohomoud's substantial rights as to the driving-after-cancellation charge.

Thus, under the plain-error exception to the invited-error doctrine, Mohomoud is entitled to reversal of his conviction on the DWI count, but not of his convictions on the other two counts. Because the DWI count is the count on which Mohomoud was sentenced, we must remand this matter to the district court for resentencing.

Affirmed in part, reversed in part, and remanded.