STATE OF MINNESOTA
IN COURT OF APPEALS
A11-260

State of Minnesota,
Respondent,

vs.

Bruce Rodney Jacobs, Jr.,
Appellant.

Filed January 30, 2012
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Scott County District Court
File No. 70-CR-10-2808

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

HALBROOKS, Judge

Appellant challenges his convictions of aggravated robbery and false imprisonment, claiming that the district court violated his constitutional rights by

admitting certain evidence. Appellant also challenges the no-contact order issued by the district court at sentencing. We affirm appellant's convictions, but we vacate the no-contact order and remand for the district court to modify appellant's sentence accordingly.

FACTS

On December 28, 2009, N.Z. wanted to unlawfully buy prescription pain medications. He contacted I.C., who contacted "Bruce," who agreed to sell N.Z. Percocet and Oxycontin. N.Z. and his girlfriend, J.E., met I.C. and K.W., I.C.'s girlfriend, at a Holiday station in Shakopee. The two couples then drove separately to a nearby apartment to meet Bruce for the buy. N.Z. and I.C. approached the building while their girlfriends waited in the cars.

Appellant Bruce Rodney Jacobs was standing outside of the apartment building. Appellant opened the door and directed N.Z. and I.C. downstairs to a laundry room. Appellant then pointed a handgun at N.Z. and I.C. and told them to get on the floor. When N.Z. hesitated, appellant "pulled" him "to the ground and stepped on [his] back." A fourth man came into the room and helped appellant rummage through N.Z.'s pockets. The fourth man stole "a hundred or so dollars," his wallet, gift cards, and a stick of beef jerky from N.Z. From I.C., he stole only a "really big wallet" that "looked like a checkbook." Appellant and the fourth man fled while N.Z. and I.C. were on the floor.

N.Z. and I.C. returned to the parking lot, got in their cars, and drove away. After hearing what transpired, J.E. called her mother and then the police. Shakopee Police Sergeant John Buetow responded to the call, which he received at 9:21 p.m. He met N.Z.

and J.E. two blocks from the apartment. N.Z. told Sergeant Buetow that he was robbed by Bruce and admitted that the robbery was a result of a drug deal that had "gone bad." I.C. and K.W. did not report the robbery but were stopped later that night by police in Prior Lake. They provided statements to the police but did not provide Bruce's telephone number. By the time of trial, N.Z. believed that I.C. had set him up and "masterminded the whole thing."

Detective Cory Schneck was in charge of investigating the case. He contacted the Mankato police department and asked if they knew of any "Bruces." They knew two, but only appellant matched the description that N.Z. had given the police.

Detective Schneck later discovered that another officer, who was involved in a separate investigation involving I.C. and K.W., had access to their cellular phones. When Detective Schneck searched the phones, he found a contact person named Bruce. He then found that the number for Bruce was registered to a woman, T.D. Based on this information and information that he received from the Mankato police department, Detective Shneck obtained a search warrant for T.D.'s residence.

Prior to executing that warrant, Detective Schneck arranged a photographic lineup that included appellant. He separated N.Z. and J.E. and showed them photographs one at a time. Neither of them conclusively identified appellant. When police executed the warrant on T.D.'s apartment, appellant was there. T.D. told the officer that she was appellant's girlfriend. Appellant was arrested and admitted that he knew I.C. and K.W.

In prepration for a second photo line-up, Detective Schneck called N.Z. and J.E. and told them that police had someone in custody. Before returning to the station for the

line-up, the couple uploaded the Scott County jail "roster" from the Internet and searched for the name "Bruce."[1] When they saw a picture of appellant—the only Bruce in jail at that time—they recognized him as the robber. They then went to the station and identified appellant as the person who committed the robbery. As a result, Detective Schneck did not conduct the second photo line-up. Detective Schneck also obtained T.D.'s cellular phone records, which showed approximately 65 text messages between K.W.'s phone and T.D.'s phone on the day of the robbery.

Appellant was charged with aggravated robbery and false imprisonment. His defense was that he was not the robber. I.C. did not testify at trial; although K.W. did testify that Bruce and I.C. had been friends for two years and that she had seen Bruce a couple of times, K.W. was unable to identify anyone in the courtroom as Bruce. According to K.W., she could not remember what Bruce looked like. N.Z. could not identify appellant in the courtroom as the robber, but J.E. did so unequivocally. Appellant was found guilty by the jury of both charges and was sentenced to 78 months in prison. This appeal follows.

D E C I S I O N

I.

In order to prove appellant's identity as the person who robbed N.Z. on December 28, 2009, the state sought to introduce evidence that appellant was convicted of first-degree aggravated robbery arising out of an incident that occurred on July 17, 2006, that

[1] It is undisputed that Detective Schneck was not aware of the Scott County jail website that depicted individuals in custody until N.Z. and J.E. informed him of it.

involved a similar modus operandi. The district court conducted a pretrial analysis under *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965), and granted the state's motion to admit the evidence.

A.

Appellant challenges the admission of a portion of the 2006 complaint based on its content. He argues that evidence of his involvement in a robbery in 2006 contained in the narrative portion of the complaint was improper evidence under Minn. R. Evid. 404(b).

Evidence of a defendant's other criminal acts, also called "*Spreigl* evidence" in Minnesota, is not admissible unless it is admitted for the limited purpose of showing motive, intent, absence of mistake, identity, or common scheme or plan. Minn. R. Evid. 404(b); *Spreigl*, 272 Minn. at 493, 139 N.W.2d at 170. The state argued that the 2006 complaint should be admitted to establish that appellant committed the crime against N.Z. because he committed the robbery in 2006 in a similar way. For this type of "identity" evidence to be admissible, identity must be at issue, which it is here, and there must be a "sufficient time, place, or modus operandi nexus between the charged offense and the *Spreigl* offense." *State v. Wright*, 719 N.W.2d 910, 917 (Minn. 2006) (quotation omitted). Although the past crime does not need to be a "signature crime," it cannot be "simply of the same generic type as the charged offense." *Id.* at 917-18.

The district court conducted a thorough *Spreigl* analysis, ultimately ruling that evidence of appellant's role in the 2006 robbery was admissible because there were marked similarities between the 2006 and 2009 crimes and because the probative value of

the 2006 crime was not outweighed by the potential prejudice to appellant. In addition, the district court limited the scope of the *Spreigl* evidence to the issue of identity, and the parties had agreed that only one portion of the 2006 complaint would be read to the jury.

We review the district court's decision whether to admit *Spreigl* evidence for abuse of discretion. *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004). We will reverse if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006).

The admitted portion of the complaint states:

> Officers were dispatched to . . . Minneapolis . . . on July 17, 2006 at approximately 9:50 p.m. on a robbery call. MDR told officers that he was walking home when an African-American male wearing a dark colored shirt pulled out a gun, pointed it at MDR's head and forced him to the ground. MDR dropped two gallon water jugs when forced down. He told officers that there were other African American males standing behind him as he was being robbed. Witnesses told officers that they saw the males walk behind MDR, force him to the ground and that a black handgun was pointed at MDR. After taking his wallet, the males fled. MDR told police that his wallet was worn and brown and had about $85 cash, identification, an ATM card, a Veterans Administration card and Medicare card inside of it.

Appellant was identified as one of the "other African American males" standing behind MDR—not as the gun holder.

We agree with the district court that there was a sufficient nexus of time, place, or modus operandi between the charged crime and the 2006 robbery. The incidents occurred within a three-year time period. Both occurred between 9:00 and 10:00 p.m., involved appellant working in association with others, the use of a gun, and forcing the

victim to lie on the ground. The modus operandi of both crimes was to steal money after nightfall by engaging in this similar conduct. We therefore conclude that the district court acted within its discretion by admitting evidence of the 2006 robbery under rule 404(b) as evidence of appellant's identity.

B.

Appellant also challenges the admission of the *Spreigl* evidence based on its form. The state proposed that Detective Schneck read into the record a passage from the 2006 criminal complaint. Appellant did not object at trial to the form of the evidence, but argues on appeal that the admission of the narrative portion of a criminal complaint against him violated his rights under the Confrontation Clause.

"Failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis." *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). "But we may consider an error not objected to at trial if there was (1) error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *Id.* "If these three prongs are met, we then assess whether we should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted). We review de novo whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). If it does, then its admission is plain error. *State v. McClenton*, 781 N.W.2d 181, 193 (Minn. App. 2010).

The Confrontation Clause provides a criminal defendant with the right to confront witnesses who testify against him. U.S. Const. amend VI; *see also* Minn. Const. art. I,

§ 6. In *Crawford v. Washington*, the Supreme Court held that testimonial hearsay statements may not be offered against a criminal defendant unless the declarant is available for cross-examination during trial, or if unavailable, was previously available for cross-examination by the defendant. 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004); *see also State v. Scacchetti*, 711 N.W.2d 508, 513 (Minn. 2006) (applying *Crawford*).

The supreme court has concluded that statements in a criminal complaint are testimonial hearsay implicating the Confrontation Clause. *State v. Wright*, 719 N.W.2d 910, 917 n.1 (Minn. 2006); *see also State v. Sailee*, 792 N.W.2d 90, 97 (Minn. App. 2010) (concluding that statements in criminal complaints are hearsay); *State v. McClenton*, 781 N.W.2d 181, 193 (Minn. App. 2010) (same). Because statements in a criminal complaint are testimonial hearsay, the admission of the 2006 complaint without an opportunity for appellant to cross-examine the complainant violated his rights and constituted plain error.

Because we conclude that the admission of statements in the complaint was plain error, we must address whether the error affected appellant's substantial rights. *See Tscheu*, 758 N.W.2d at 864. An error affects an appellant's substantial rights if it "was prejudicial and affected the outcome of the case." *Id.* Appellant bears the "heavy burden" of persuasion on this prong. *Id.* The supreme court has held that "plain error is prejudicial if there is a reasonable likelihood that the [error] would have had a significant effect on the verdict of the jury." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (quotation omitted).

We conclude that appellant did not satisfy his burden of establishing that the admission of the statements in the complaint significantly affected the jury's verdict. The statements in the complaint were admitted for the sole purpose of proving identity. But in addition to the statements in the complaint, the state presented substantial credible evidence that appellant was the robber, most notably J.E.'s eyewitness identification of appellant in the courtroom.

II.

Appellant also argues that the admission of J.E.'s identification was error because it was tainted by an out-of-court identification that was made under highly suggestive circumstances, rendering it unreliable and inadmissible under the Due Process Clause.

The Due Process Clause guarantees all criminal defendants due process of law. U.S. Const. amend. XIV, § 1. "The admission of pretrial identification evidence violates due process if the procedure 'was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968)). We review de novo whether a defendant has been denied due process by an improper admission of identification evidence. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

This court employs a two-part test to determine whether a defendant's due-process rights were violated by an allegedly irreparable, unnecessarily suggestive out-of-court identification. *Taylor*, 594 N.W.2d at 161-62. The first part of the test is whether the identification procedure was unnecessarily suggestive. *Id.* at 161. An identification

procedure is unnecessarily suggestive if the defendant is "unfairly singled out for identification." *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). If the procedure is determined to be unnecessarily suggestive, the second part of the test examines whether the identification is nevertheless reliable under the totality of the circumstances. *Id.* When the identification has an "adequate independent origin" under the totality of the circumstances, it is considered to be reliable. *Id.*

We conclude that even if the circumstances surrounding N.Z. and J.E.'s pretrial identification were in some ways suggestive, J.E.'s identification at trial was sufficiently reliable such that suppression of the identification is not required. J.E.'s courtroom identification of appellant was based on her observation of him on December 28, 2009, the day of the robbery, and her prior experience, meeting and talking with him at her birthday party in September 2009. J.E. testified:

> PROSECUTOR: Had you ever met this person named Bruce before?
> J.E.: I met him once, at my birthday.
> . . . .
> PROSECUTOR: Did you have occasion to speak with Bruce at your birthday party?
> J.E.: Yes. We talked for a[]while but I was talking to everybody, just making rounds, so it wasn't very long.
> PROSECUTOR: When you got to the apartment building and parked in the lot, did you see anybody standing around the apartment building?
> J.E.: Over by the door. Bruce was standing there.
> PROSECUTOR: When you say "Bruce," that was the same person that came to your party?
> J.E.: Yup.

The fact that J.E. had an independent basis to identify appellant—that she recognized him from her birthday party—makes it unlikely that her identification of him resulted from

the suggestive circumstances of the jail website that she and N.Z. viewed. *See Taylor*, 594 N.W.2d at 162 (noting that victim who identified defendant knew him from a party where they had been introduced and from seeing him in the neighborhood). It is therefore unnecessary to suppress the identification.

III.

Appellant argues that the district court committed reversible plain error by admitting testimony from the state's witnesses that he was "known" to two police departments, that he was jailed in connection with this crime, and that he had been previously incarcerated. Because his counsel did not object to the admission of any of this testimony, we review the admission of this evidence under a plain-error standard. *See Tscheu*, 758 N.W.2d at 863.

A.

Detective Schneck, while explaining how he came to believe that appellant was N.Z.'s robber, stated that the two police departments that he contacted knew appellant. The admission of these statements constitutes plain error. *See State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (observing that the admission of evidence of prior police contact that is not relevant to the identity of the defendant is plain error).

The state argues that *Strommen* does not apply here because appellant's identity was the central issue at trial. But the fact that officers from other police departments knew appellant does not tend to show that appellant robbed N.Z. The evidence is therefore not relevant to identity. *See* Minn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence.").

But we conclude that the admission of the testimony did not affect appellant's substantial rights. *See Tscheu*, 758 N.W.2d at 864. Detective Schneck did not testify as to how members of other police departments knew appellant. Moreover, the admission of the *Spreigl* evidence, by itself, establishes appellant had prior police contact, thereby diluting the prejudicial impact of the contested evidence.

B.

Detective Schneck testified that appellant was jailed after the warrant in this matter was executed. He also, in addition to N.Z. and J.E., testified that appellant's photograph was available on the Scott County jail website once he was in custody. These statements tend to show that appellant was jailed in connection with the charges. This evidence is generally inadmissible. *See State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (noting that a witness's reference to a defendant's incarceration "arguably damaged the presumption that [the defendant] was innocent until proven guilty"). Nevertheless, we conclude that appellant failed to show that admitting the evidence constituted plain error affecting his substantial rights. The supreme court has "not enunciated a general rule that it is prejudicial for the jury to learn that a defendant is in jail for the crime for which he or she is on trial." *Id.* Here, the jury likely understood that appellant would be jailed in connection with suspicion of armed robbery.

C.

Detective Schneck testified that appellant knew I.C. from prison and that appellant's photograph was on a database of previously arrested offenders. Although "references to prior incarceration of a defendant can be unfairly prejudicial," *id.*, we conclude that there was no prejudice here. Appellant's incarceration was connected to his 2006 robbery conviction, evidence of which was already admitted as *Spreigl* evidence. The jury therefore already knew of his prior conviction and likely suspected that it resulted in incarceration.

IV.

The final issue we address is whether the district court erred by including as a condition of appellant's sentence that he have no contact with N.Z., J.E., and their child. We conclude that it did. The power to impose "conditions" on executed sentences resides exclusively with the Commissioner of Corrections. *State v. Brist*, 799 N.W.2d 238, 242 (Minn. App. 2011).

Because we conclude that the erroneous admission of a paragraph of the 2006 criminal complaint and references to appellant's prior police contacts did not affect the verdict, we affirm appellant's convictions. But because the district court was not authorized by law to order that appellant not contact N.Z., J.E., or their child, we vacate that condition and remand for the district court to modify appellant's sentence in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.