STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2029

State of Minnesota,
Respondent,

vs.

Anthony Joseph Habisch,
Appellant.

Filed November 12, 2013
Affirmed
Connolly, Judge

Pine County District Court
File No. 58-CR-10-559

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

John Carlson, Pine County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

CONNOLLY, Judge

On appeal following his conviction of sale of a controlled substance in the first degree, possession of a controlled substance in the fifth degree, and prohibited possession of an explosive, appellant argues that he is entitled to a new trial based on (1) the state's intentional suppression of *Brady* material, (2) the ineffective assistance of his trial counsel, (3) the district court's improper assistance of the prosecution and improper disparagement of the defense in the presence of the jury, and (4) the admission of irrelevant and prejudicial testimony. We affirm.

FACTS

In May 2010, Investigator Andrew Abrahamson of the Pine County Sheriff's Office stopped a car leaving a suspected drug house for a traffic violation. K.C., J.L., and their infant were in the vehicle. After Investigator Abrahamson found methamphetamine in J.L.'s wallet, J.L. indicated that he was willing to work with law enforcement to avoid going to prison. Investigator Abrahamson set up a meeting with J.L. to see if he had any information that could assist law enforcement.

At that meeting, J.L. provided Investigator Abrahamson with information about drug activity in the Twin Cities and Pine County. In addition to working with the Pine County Sheriff's Office, J.L. worked with the Bureau of Criminal Apprehension (BCA) and the Drug Enforcement Administration (DEA). After working with the BCA and DEA, J.L. was federally indicted for conspiracy to distribute 500 or more grams of methamphetamine.

Thereafter, J.L. agreed to work with the Pine County Sheriff's Office to target drug activity. J.L. told Investigator Abrahamson that he had previously supplied drugs to appellant Anthony Habisch. He indicated that he could purchase methamphetamine from appellant at appellant's home. The Pine County Sheriff's Office already suspected that appellant was dealing methamphetamine. They decided to investigate him further with J.L. and K.C.'s assistance.

Between August 14, 2010 and September 10, 2010, J.L. purchased 11.2 grams of methamphetamine from appellant through four separate controlled buys organized by the Pine County Sheriff's Office. Prior to each controlled buy, Investigator Abrahamson met with J.L. and K.C., conducted a thorough search of their persons and vehicle, and gave them "buy money" with which to purchase methamphetamine. While K.C. and J.L. were at appellant's residence, they communicated with Investigator Abrahamson through text messages; they did not wear wires. They would notify him when they were leaving appellant's house in order to meet, be searched, and turn over any drugs and remaining buy money.

On September 16, J.L. told Investigator Abrahamson that there should be firearms and large amounts of methamphetamine at appellant's home. He also text messaged Investigator Abrahamson a picture of TNT that was taken inside appellant's residence.

Based on this information and the controlled buys, Investigator Abrahamson obtained a search warrant to search appellant's residence. During the search, officers found plastic bags similar to those given to J.L. during the four controlled buys, a bowl containing white residue, coffee filters that tested positive for .01 grams of

methamphetamine, a scale, two pipes commonly used for drug use, a plastic bag containing .2 grams of dimethyl sulfone,[1] and a home surveillance system. Officers also found a half-pound of TNT, handwritten instructions for detonating TNT, and a blasting cap. Officers did not find large quantities of methamphetamine or firearms.

Appellant was charged with first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2010), fifth-degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2(b)(1) (2010), and possession of explosives in violation of Minn. Stat. § 609.668, subd. 2(b) (2010).

Appellant's first trial began on November 16, 2011 and resulted in a mistrial. Before the first trial, in October 2011, appellant informed his trial counsel that his home surveillance system was connected to a recording device with a 14-day self-contained memory capacity. Thereafter, defense counsel, a defense investigator, and a sheriff's investigator reviewed the inventory seized from appellant's residence. They did not find any device that contained a recording.

Appellant's second trial began on May 15, 2012. At trial, J.L. testified that appellant sold him methamphetamine during the four separate controlled buys. J.L. admitted that he was using methamphetamine and that he continued to buy drugs from appellant while working with law enforcement. During appellant's trial, J.L. was awaiting sentencing in federal court. He testified that he hoped to be rewarded for his testimony.

[1] Dimethyl sulfone is commonly used as a cutting agent for methamphetamine.

K.C. also testified at appellant's trial. She testified that she and J.L. had been at appellant's home on numerous occasions other than during the controlled buys and that J.L. is known for hiding methamphetamine on his person while conducting controlled buys.

On May 17, 2012, appellant's trial counsel had his investigator take a photograph of the inventory that officers seized from appellant's residence. Appellant reviewed the photograph and identified the surveillance equipment that he claimed contained the recording. The next day, appellant's trial counsel informed the court and the state that a defense investigator and sheriff's investigator looked at the equipment and discovered that it had recording capabilities.

Following this discovery, and on the third day of trial, appellant's trial counsel moved to dismiss the case against appellant based on the state's failure to disclose the recording. Alternatively, he moved for a mistrial, arguing that he had been an ineffective counsel for his client because he had not investigated the recording despite his client's insistence that it existed. The district court denied the motion to dismiss because the state had not knowingly withheld exculpatory evidence. The district court ordered the BCA to examine the device and to provide a copy of any surveillance data stored in its memory. The court deferred ruling on the motion for mistrial pending the results of the BCA analysis.

After analyzing the recording, the BCA explained that it was unable to copy the data due to its delicate nature. Based on this information, defense counsel again moved for a mistrial because the information on the tape could not be retrieved before the end of

trial. The district court denied the motion and stated that it would proceed with trial. The district court stated that it would allow the parties to view the recording before sentencing if the jury found appellant guilty.

The jury found appellant guilty of all charges. Prior to sentencing, the parties reviewed the surveillance footage. The recording is not part of the record. The parties agreed at sentencing that "the video surveillance showed that the State's primary witness [J.L.] was at Mr. Habisch's residence for a little over three hours the late evening or the late night, early morning of the day that the search warrant was executed." The record does not contain any additional information about the contents of the recording. After viewing the recording, appellant moved for a new trial on the basis of newly discovered evidence. The district court denied the motion and sentenced appellant to 122 months in prison. This appeal follows.

D E C I S I O N

I.

In a well-written brief, appellant's counsel first argues that the state denied his client due process of law by failing to disclose the recording in a timely manner. The suppression of evidence that is favorable to a criminal defendant violates due process when the evidence is material to guilt or punishment, regardless of the good or bad faith of the state. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); Minn. R. Crim. P. 9.01 (2010). A *Brady* violation exists if (1) the evidence is favorable, being either exculpatory or impeaching; (2) the state suppressed the evidence; and (3) the defendant was prejudiced by the suppression. *Pederson v. State*, 692 N.W.2d 452, 459

(Minn. 2005). All three components must be met in order for a *Brady* violation to be found. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999). The duty to disclose such evidence exists even where there has been no request by the accused. *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000). The remedy for a *Brady* violation is a new trial. *Id.*

The *Brady* rule only applies to material evidence. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. "Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Hunt*, 615 N.W.2d at 299 (quotation omitted). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Pederson*, 692 N.W.2d at 460 (quotations omitted). Materiality is a mixed question of fact and law, which we review de novo. *Id.*

Under the first prong of the *Brady* analysis, appellant argues that the recording is favorable to his defense because it contains impeaching and exculpatory evidence. Evidence that casts doubt on the credibility of a prosecution witness satisfies the first element of a *Brady* violation. *Id.* Appellant suggests that by placing J.L. at appellant's residence, the recording shows that J.L. had ample opportunity to plant evidence. The parties agree that the footage shows J.L. at appellant's home for approximately three hours the night before the search. J.L. had previously told law enforcement that appellant's residence contained large quantities of methamphetamine and firearms. When officers searched appellant's residence, they did not find these items. Appellant argues that J.L.'s presence at his home the night before the search shows that J.L. lied

about the presence of methamphetamine and firearms. The parties' recitation of the contents of the recording indicates that the recording could impeach or exculpate appellant because it casts doubt on J.L.'s credibility and shows that J.L. had the opportunity to plant evidence at appellant's home. Therefore, this prong is satisfied.

Next, appellant claims that the second *Brady* prong is satisfied because the state was in possession of the recording but failed to disclose it to the defense. Although the state had the surveillance equipment in its possession, it claims that it did not know that the device stored recorded footage.

Appellant relies on *State v. Williams* to argue that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 593 N.W.2d 227, 235 (Minn. 1999) (quotation omitted). In *Williams*, the officers investigating the case had specific knowledge about the prior bad acts of a third party whom the defense accused of committing the crime. *Id.* In this case, there is no indication that anyone working for the state knew about the recording. The state gave the defense access to everything that it seized from appellant's residence in October 2011. At the time, neither the defense nor the state was able to ascertain that the device had recording capabilities. Unlike *Williams*, there is not sufficient evidence in the record to show that the investigating officers or the prosecutor had knowledge that the surveillance equipment had a self-contained recording feature. Therefore, this prong is not satisfied.

Under the third *Brady* prong, appellant argues that J.L.'s presence at his residence sufficiently undermines the outcome of the trial because it shows that J.L. had the

opportunity to plant evidence. We disagree. The parties agree that the recording shows J.L. at appellant's residence for approximately three hours on the night before the search. The parties' recitation of what the surveillance footage contains does not say where J.L. was while at appellant's home, what he did there, or identify who else was present.

Even without the recording, the jury heard appellant's argument that J.L. planted the evidence at appellant's residence. Appellant elicited testimony from K.C. that she and J.L. spent time at appellant's home on several occasions other than while conducting controlled buys. J.L. also testified that he had been at appellant's residence on other occasions. Appellant argued at trial that, based on this testimony, both witnesses had the opportunity to conceal evidence and plant it in appellant's home.

Appellant also explained to the jury that mistakes were made in the controlled buys and that these mistakes gave J.L. and K.C. the opportunity to plant evidence in appellant's home. Investigator Abrahamson testified that he conducted "pat-down" searches of J.L. and K.C. before controlled buys. Appellant argued that K.C. was never properly searched because there was no female officer present before or after the controlled buys. He also suggested that Investigator Abrahamson did not know what occurred during the controlled buys because neither J.L. nor K.C. wore a wire. Additionally, the money used for the controlled buys was not photographed, which indicates that officers did not know whether the buy money they gave J.L. was the same money that he used to pay appellant. Appellant argued at trial that based on the cursory inspections before and after controlled buys, both J.L. and K.C. had ample opportunity to

conceal methamphetamine, fabricate the controlled buys, and plant evidence in appellant's residence.

The jury also heard testimony from appellant's girlfriend, N.H., who lived with appellant at the time of the search. She testified that she did not see appellant or anyone else use or sell meth at appellant's home while she lived there. Appellant stated in closing argument that a lot of people had access to appellant's residence and had the opportunity to leave methamphetamine there. The jury did not accept this theory.

Alternatively, appellant argues that the recording sufficiently undermines the outcome of the trial because it impeaches J.L.'s credibility in ways that other evidence could not. Specifically, appellant argues that J.L.'s presence at his residence on the night before the search indicates that he lied to Investigator Abrahamson about the presence of large quantities of methamphetamine and firearms.

The additional evidence from the recording is not sufficient to undermine the outcome of the trial. Typically, nondisclosure of evidence that is merely impeaching is not sufficiently prejudicial to warrant a new trial. *Hunt*, 615 N.W.2d at 300-01. "[W]here testimony of the witness sought to be impeached by nondisclosed evidence 'was not the only damning evidence against defendant,' we have determined that the likelihood of prejudice is decreased." *Id.* at 301 (quoting *State v. Jackson*, 346 N.W.2d 634, 638 (Minn. 1984)). J.L.'s testimony was not the only unfavorable evidence against appellant, and therefore, the likelihood of prejudice is decreased. *Hunt*, 615 N.W.2d at 300-01. Investigator Abrahamson testified about the Pine County Sheriff's Office's investigation into appellant's drug activity. He also testified about the four controlled

buys between J.L. and appellant and that before each controlled buy, he searched J.L., K.C., and their vehicle. After the controlled buys, he repeated this procedure, collected the methamphetamine they purchased from appellant, and compared the amount they paid with the amount of methamphetamine purchased. Police recovered 11.2 grams of methamphetamine that appellant sold to J.L. during the four separate controlled buys.

J.L.'s credibility was also impeached multiple times during trial. J.L. admitted that he was a long-time drug user and seller and that he was using methamphetamine while working with law enforcement. J.L. initially began working with law enforcement to evade a controlled-substance charge. During appellant's trial, J.L. was awaiting sentencing in federal court and testified that he hoped that his testimony would result in a more lenient prison sentence. K.C. testified that both she and J.L. had used methamphetamine while at appellant's residence and that J.L. was known for hiding methamphetamine on his person before conducting controlled buys. Furthermore, the jury heard testimony that J.L. told Investigator Abrahamson that there "would be" or "should be" firearms and large amounts of methamphetamine at appellant's residence and that officers did not find these items at appellant's residence.

In his closing statement, appellant argued, "If you don't believe [J.L.], you don't find him to be a credible witness, there is no other evidence that can lead to the conclusion that these sales occurred." "It is the jury's prerogative to determine both the weight and the credibility of the evidence." *State v. Bakken*, 604 N.W.2d 106, 111 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). The jury received this evidence and determined that appellant was guilty of first-degree sale of a controlled

substance, fifth-degree possession of a controlled substance, and prohibited possession of explosives. We conclude that appellant has not shown that the recording contains information that is sufficiently prejudicial to undermine the outcome of the trial.

II.

Appellant argues that he was denied effective assistance of counsel based on his trial counsel's failure to discover the surveillance footage. He claims that he is entitled to a new trial based on this deficient performance. This court reviews a claim of ineffective assistance of counsel de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

"We analyze ineffective assistance of counsel claims under a two-prong test set forth in *Strickland*." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (discussing the United States Supreme Court case *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984)). To establish ineffective assistance of counsel, appellant has the burden of showing that "(1) his counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Nissalke*, 801 N.W.2d 82, 111 (Minn. 2011) (quoting *State v. Yang*, 774 N.W.2d 539, 564-65 (Minn. 2009)). "We 'need not address both the performance and prejudice prongs if one is determinative.'" *Id.* (quoting *Rhodes*, 657 N.W.2d at 842).

An attorney acts within an objective standard of reasonableness by exercising the customary skills and diligence of a reasonably competent attorney under similar circumstances. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). In analyzing an

ineffective-assistance-of-counsel claim, trial counsel's performance is presumed to be reasonable. *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010).

Trial strategy, which includes the extent of counsel's investigations, is generally not reviewable. *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). "We will examine trial strategy when it implicates fundamental rights, including the right to a fair trial." *Id.* (citations omitted). "When determining whether alleged failure to investigate constitutes ineffective assistance of counsel, we consider whether the decision was based on trial strategy or whether it demonstrated that counsel's performance fell below an objective standard of reasonableness." *Id.* (citing *Opsahl*, 677 N.W.2d at 421).

Appellant claims that his trial counsel did not make a proper investigation into his claim that there was a recording saved to his surveillance device. After appellant told his trial counsel that he had surveillance devices wired to his home, defense counsel went to investigate the property that officers seized from appellant's residence. He reviewed the inventory with investigators from the state and the defense. Nobody discovered the recording on the device's self-contained memory system. Appellant's trial counsel decided not to continue investigating the surveillance footage. He did not know what this recording showed; it could have contained inculpatory or exculpatory evidence. His ultimate decision to abandon any further investigation does not overcome the presumption that his performance was reasonable.

Under the second prong, "defendant must show that counsel's errors 'actually' had an adverse effect in that but for the errors the result of the proceeding probably would have been different." *Gates v. State*, 398 N.W.2d 558, 562 (Minn. 1987) (citing

Strickland, 466 U.S. at 693-94, 104 S. Ct. at 2067-68). The "analysis of prejudice must be made in the context of the totality of the evidence before the factfinder." *Id.* at 563.

The parties agree that the recording shows J.L. at appellant's residence for approximately three hours on the night before the search. Appellant claims that but for his trial counsel's failure to discover the recording, the result of his trial would have been different because the recording would have exposed "irrefutable proof that [J.L.] was a bold-face liar and . . . that he had ample opportunity to conceal drugs on Habisch's property."

The record contains ample evidence that impeaches J.L.'s credibility without the recording. J.L. admitted that he was a long-time drug user and seller. J.L. admitted that he had a strong motive for giving law enforcement information leading to appellant's conviction because he hoped to receive a more lenient prison sentence in the federal proceedings against him.

Even without the recording, appellant was still able to argue that J.L. planted evidence at appellant's property. J.L. and K.C. spent time at appellant's house on numerous occasions and had the opportunity to hide methamphetamine before the controlled buys because Investigator Abrahamson did not adequately search them, and Investigator Abrahamson had no way of knowing what happened during the controlled buys because J.L. and K.C. did not wear wires. Moreover, the jury heard testimony from N.H. who claimed that she never saw appellant or anyone else use or sell methamphetamine in appellant's home. Despite this evidence, the jury rejected appellant's theory. Even if counsel's representation was not objectively reasonable,

appellant has not shown that his trial counsel's failure to discover the recording actually had an adverse effect on the trial.

III.

In the brief and at oral argument, appellant's counsel claimed that the district court denied appellant his right to a fair trial by acting as a fact witness for the state and blaming the defense for the unavailability of the recording. The constitutional right to a fair trial includes the right to an impartial judge and trier of fact. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Whether a judge's conduct deprived the defendant of the right to a fair trial is a constitutional question, which we review de novo. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

"[A] criminal defendant has a fundamental right to a fair trial before an impartial judge beyond the requirement that a judge not have actual bias." *Id.* at 252. The judge "must maintain the integrity of the adversary system at all stages of the proceedings." *State v. Schlienz*, 774 N.W.2d 361, 367 (Minn. 2009). The judge must be "fair to both sides" and "refrain from remarks which might injure either of the parties to the litigation." *Id.* (quoting *Hansen v. St. Paul City Ry. Co.*, 231 Minn. 354, 360, 43 N.W.2d 260, 264 (1950)). The judge's impartiality must be beyond question. *Pederson v. State*, 649 N.W.2d 161, 164 (Minn. 2002). When reviewing judicial conduct, we presume that a judge has discharged his or her judicial duties properly. *McKenzie*, 583 N.W.2d at 747.

Appellant claims the district court's statement to the jury was a structural error that denied him his right to a fair trial before an impartial judge. Errors violating constitutional rights can be divided into two categories: "trial errors" and "structural

defects." *Dorsey*, 701 N.W.2d at 252 (citing *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 1264 (1991)). "[S]tructural errors are defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* (quotation omitted). Structural error necessitating automatic reversal is required when a criminal defendant has been deprived of an impartial judge. *Id.* at 253.

In this case, after the court sent the recording to the BCA for analysis, the state made a motion in limine, requesting that counsel not be allowed to reference the device's recording capabilities or whether officers investigated the video recording. The district court told both parties that it would allow inquiry into whether the Pine County Sheriff's Office did any type of analysis about the equipment's recording capability during their investigation. The district court further stated that if either party inquired about a witness's *current knowledge* about the device's recording capability, the court would advise the jury "that the Defense disclosed during the trial that the equipment was capable of recording and it wasn't until then that the State had that knowledge."

During the next recess, defense counsel asked the district court to clarify what it intended to say to the jury if the parties asked about the surveillance footage. Defense counsel explained to the district court, "I was just asking what the language was going to be so I could prepare."

While cross-examining Investigator Abrahamson, the following exchange occurred:

> Q: But as we sit here now we, in fact, know that there was recording capability, is that correct?
> A: Correct.

After this exchange, the court made the following statement to the jury:

> Ladies and Gentlemen, at this time I want to instruct you that if you recall last Thursday we recessed this trial. Last Thursday it was brought to the Court's attention that there was capacity to record the images from the surveillance equipment. Upon receiving that information last Thursday, I directed that that piece of equipment be transported to the Bureau of Criminal Apprehension for analysis, which did take place. It was brought there.
>
> An agent of the Bureau of Criminal Apprehension worked over the weekend on that device. The recording, the images that were recorded are not available for us in this trial due to the technology that was utilized. The information was brought to the Court's attention by the Defense last Thursday. That's when we became aware. That's why we recessed. But, unfortunately, the information is not available for use at this trial.

Appellant maintains that this statement advanced the state's case and prevented a fair trial by demonstrating judicial bias and relieving the state of its obligation to produce a witness. Appellant relies on *Dorsey* to argue that the district court committed reversible error by introducing material facts into the proceedings that were favorable to the state. 701 N.W.2d at 251-53. In *Dorsey*, the judge presiding over the defendant's bench trial questioned the veracity of a defense witness. *Id.* at 253. The judge independently investigated information of which neither party was aware. *Id.* After investigating the information herself, the judge announced the results of her independent investigation in open court. *Id.*

Dorsey is inapposite. Here, the district court did not conduct its own independent fact-finding. In fact, everything the district court said was true and was known to the parties. Finally, the district court did not introduce a *material fact* into the trial that was

favorable to the state. The district court was not commenting on the testimony of a witness nor was it using its own independent knowledge of a witness's background to influence the fact-finder. Although, in hindsight, the district court could have fashioned the instruction without referencing which lawyer discovered the recording, that one sentence fails to show unequivocal bias. We must always remember that the "[d]efendant is constitutionally guaranteed a fair trial, not a perfect one." *State v. Richards*, 495 N.W.2d 187, 197 (Minn. 1992). We conclude that the district court's comments to the jury do not overcome the presumption that the judge discharged his judicial duties properly. *McKenzie*, 583 N.W.2d at 747.

IV.

Appellant contends that he was deprived of his right to a fair trial based on the admission of irrelevant and prejudicial testimony. Appellant concedes that the evidence was not objected to at trial.

An appellate court may review an unobjected-to evidentiary ruling for plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). Under plain-error review, an appellant has the burden of proving (1) an error, (2) that the error is plain, and (3) that the plain error affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If all three prongs are met, this court "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 681 (quotations omitted).

During the trial, Investigator Abrahamson testified about the origins of methamphetamine as follows:

> [T]he crystal meth is coming out of Mexico through our cartels. If you see it on the news, the cartels are involved. All of that comes—eventually gets to us from Mexico, comes through our hub cities, Dallas, Arizona, Minneapolis, and gets spread out into our small communities and back to our schools.

When asked about his training and experience Investigator Abrahamson testified about his interest in narcotics investigations,

> It's something that has always kind of interested me from the way it networks to the way that it affects the people, from domestic violence calls, you go to our schools, to our kids selling weed to 14-year-olds on our playgrounds. I mean, that's—that's wrong.

When asked about the investigation into appellant's involvement with methamphetamine, Investigator Abrahamson testified, "Habisch was one of our targets of a distributor of large amounts of meth throughout the county, the state, the area."

Appellant argues that it was an error to admit Investigator Abrahamson's testimony because it was irrelevant to the ultimate issue of guilt and unduly prejudicial. "Relevant evidence" is "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." Minn. R. Evid. 401. Relevant evidence is generally admissible but "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. "Unfair prejudice under rule 403 is . . . evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Investigator Abrahamson's interest in narcotics work and the discussion about Mexican cartels were not directly relevant to the determination of appellant's guilt. Generally, background evidence is relevant and therefore, admissible. *State v. Olkon*, 299 N.W.2d 89, 101 (Minn. 1980). However, to the extent that this testimony contained background information, its probative value is substantially outweighed by the danger of unfair prejudice. We agree that this evidence was unfairly prejudicial due to its tendency to mislead the jury. It portrayed appellant as a major drug dealer with ties to Mexican cartels and as an individual responsible for drug problems in the community.

Having determined that the district court erred in admitting this testimony, the next inquiry is whether the error was plain. An error is plain if it was clear or obvious. *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). Error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Because this testimony should have been excluded under Minn. R. Evid. 403, the error was plain.

To prove that a plain error affected substantial rights, a party must show that there was a reasonable likelihood that the error substantially affected the verdict. *Strommen*, 648 N.W.2d at 688. The errors in this case are only a few lines in a transcript containing over 1,000 pages. The testimony at issue was not emphasized by either party and was not discussed in closing arguments. Furthermore, appellant was not convicted based solely on these statements. He was convicted based on the evidence admitted against him. He sold 11.2 grams of methamphetamine to J.L. in four separate controlled buys and

possessed methamphetamine and explosives at his residence. Because the error did not affect appellant's substantial rights, appellant was not denied his right to a fair trial.

Affirmed.