STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2103

State of Minnesota,
Respondent,

vs.

Zandria Louise Riser,
Appellant.

Filed November 4, 2013
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-11-21341

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Worke, Judge.

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

HUDSON, Judge

On appeal from her convictions of first-degree controlled substance crime and child endangerment, appellant argues that the district court erred by (1) imposing a

$300,000 fine without considering whether it would pose an undue hardship and (2) admitting evidence of uncharged crimes that constituted impermissible extrinsic character evidence. Appellant also argues that there was insufficient evidence to support the convictions of child endangerment. We affirm.

FACTS

On July 13, 2011, Minneapolis police executed a search warrant at appellant Zandria Louise Riser's apartment, acting on information that an individual was selling narcotics at the address. At the time, appellant was in the apartment with her twelve-year-old son, along with an acquaintance, R.T., and his two-year-old daughter. In the living room, police found a loaded semi-automatic .45 caliber handgun under a pillow on a mattress and seventeen baggies of crack cocaine inside a broom. Police discovered 34.5 grams of crack cocaine and an amount of heroin in a second broom in a bedroom that also contained children's toys. A coat in the apartment contained $685 in cash. Suspected ecstasy was found in a prescription bottle in a closet, and a digital scale and baggie of marijuana were found in the kitchen.

During the search, appellant was given a *Miranda* warning and interviewed. Appellant admitted to possessing all of the drugs and the firearm and selling crack cocaine out of the apartment to help pay bills. She stated that R.T. had nothing to do with the drug sales. Appellant claimed that she made approximately $200 to $300 per week selling crack cocaine. She also admitted that she used marijuana and ecstasy.

At trial, a jury found appellant guilty of four counts: (1) first-degree possession of a controlled substance (crack cocaine) while in possession of a firearm in violation of

Minn. Stat. §§ 152.021, subd. 2(a)(1) (Supp. 2011), 609.11 (2010); (2) first-degree sale of a controlled substance (crack cocaine) while in possession of a firearm in violation of Minn. Stat. §§ 152.021, subd. 1(1), 609.11 (2010); (3) endangerment of a child (exposure to the sale or possession of a controlled substance) in violation of Minn. Stat. § 609.378, subd. 1(b)(2) (2010); and (4) endangerment of a child (exposure to a firearm) in violation of Minn. Stat. § 609.378, subd. 1(c) (2010).

At sentencing, the district court denied appellant's motion for a downward dispositional and durational departure. The court sentenced appellant to 86 months' incarceration for the conviction of first-degree sale of a controlled substance (crack cocaine) while in possession of a firearm, the presumptive sentence under the Minnesota Sentencing Guidelines, and imposed a fine of $300,000 pursuant to Minn. Stat. §§ 152.021, subd. 3(a), 609.101, subd. 3(a) (2010). The district court also imposed a concurrent sentence for the conviction of child endangerment (exposure to sale or possession of controlled substance), of 365 days incarceration with a fine of $3,000. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court abused its discretion by imposing a $300,000 fine without considering her indigence or whether the fine would pose an undue hardship. There was no objection to the imposition of the fine at sentencing. When a defendant fails to object in the district court, we review the claim under the plain-error

standard.[1] *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011); Minn. R. Crim. P. 31.02. The plain-error standard places the burden on the complaining party to show: (1) error; (2) that was plain; and (3) that affected 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." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotations omitted).

Appellant argues that the district court was required to consider her indigence when imposing the fine, because if the district court has discretion to depart from a presumptive sentence, it must consider circumstances for and against departure. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). However, that rule has been applied only in the context of a district court's decision to depart from a length of incarceration imposed by the sentencing guidelines, not in the context of fines. *See, e.g.*, *State v. Curtiss*, 353 N.W.2d 262, 263–64 (Minn. App. 1984) (remanding for reconsideration of defendant's motion for departure when the district court failed to consider legitimate reasons for departure); *State v. Weaver*, 796 N.W.2d 561, 575–76 (Minn. App. 2011) (holding that the district court properly considered defendant's request for departure), *review denied* (Minn. July 19, 2011).

[1] Generally, the plain-error standard has been applied to permit appellate review of errors that were not objected to at trial. *State v. Thole*, 614 N.W.2d 231, 235 (Minn. App. 2000). We find no case where the plain-error standard has been applied to errors that occurred at sentencing. In *State v. Maurstad*, 733 N.W.2d 141, 147–48 (Minn. 2007), the supreme court concluded that the plain-error standard did not apply when a defendant failed to object to a sentencing error that rendered his sentence illegal pursuant to Minn. R. Crim. P. 27.03, subd. 9. But the court contemplated that the plain-error standard may apply to other unobjected-to errors at sentencing, thus we apply it here. *See id*. at 148 n.5.

The fine here was required, not by the sentencing guidelines, but by statute. Minn. Stat. §§ 152.021, subd. 3(a), 609.101, subd. 3(a). Pursuant to section 609.101, subdivision 5, the district court may choose to reduce a fine, but is not required to do so:

> If the defendant qualifies for the services of a public defender or the court finds on the record that the convicted person is indigent or that immediate payment of the fine would create undue hardship for the convicted person or that person's immediate family, the court may reduce the amount of the minimum fine to not less than $50. Additionally, the court may permit the defendant to perform community work service in lieu of a fine.

Minn. Stat. § 609.101, subd. 5(b) (2010).

This court has interpreted that subdivision as requiring findings regarding a defendant's ability to pay "*only* if the court decides to reduce the amount of the minimum fine." *State v. Patterson*, 511 N.W.2d 476, 479 (Minn. App. 1994) (emphasis in original), *review denied* (Minn. Mar. 31, 1994).[2]

Patterson held that there is no requirement to base statutory fines on an ability to pay. *Id*. Importantly, the supreme court later confirmed that rule, holding that the district court is not required to find a defendant has the ability to pay a fine before imposing one as part of a sentence. *Perkins v. State*, 559 N.W.2d 678, 693 (Minn. 1997); *see also State v. Lopez-Solis*, 589 N.W.2d 290, 293 (Minn. 1999) (extending *Perkins* to the imposition of prosecution costs); *State v. Kujak*, 639 N.W.2d 878, 885 (Minn. App. 2002)

[2] The court in *Patterson* was interpreting an older version of the statute, which is substantially similar to the current version. *See* Minn. Stat. § 609.101, subd. 5 (Supp. 1993).

(reaffirming that a sentencing judge is not required to find that a defendant has the ability to pay a fine), *review denied* (Minn. Mar. 25, 2002).

Accordingly, we conclude that the district court did not commit plain error by failing to consider appellant's indigence or whether the fine would impose an undue hardship before ordering the legislatively mandated fine of $300,000.

II

Appellant argues that the district court erred by admitting evidence of uncharged crimes at trial, including possession of marijuana and suspected ecstasy, her use of both of these substances, and the discovery of digital scales in her apartment. Appellant claims this evidence constituted impermissible character evidence under Minn. R. Evid. 404(b). Because this evidence was not objected to at the district court, we review its admission for plain error. *Strommen*, 648 N.W.2d at 686.

An error is plain if it is 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). 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.

Generally, "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). However, evidence of other crimes may be admitted to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. In addition, evidence of other crimes that are intrinsic to the charged

crime are admissible without regard to rule 404(b). *State v. Hollins*, 765 N.W.2d 125, 131 (Minn. App. 2009). Intrinsic crime evidence, also called immediate-episode evidence, is admissible "where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae." *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009) (quotation omitted). The other crimes must have a close connection in terms of time, location, and causation to the charged crime. *Id.*

In *Riddley*, the supreme court held that the district court abused its discretion when it admitted evidence that the defendant was involved in a robbery that occurred near the same location and within a short time of the charged offense of first-degree murder. *Id.* at 426–27. There, the supreme court concluded there was "not a close causal connection between the charged offenses and [the robbery]." *Id*. at 427. Similarly, in *State v. Fardan*, 773 N.W.2d 303, 316 (Minn. 2009), the supreme court held that the district court abused its discretion in admitting evidence of other criminal acts that were not necessary to prove the charged offense. Here, appellant was charged only with possession and sale of crack cocaine—not marijuana or ecstasy. The state argues that the marijuana and ecstasy evidence helps to "complete the picture" of appellant's plan to sell and possess drugs. Although all the drugs were found in the same apartment at the same time, there is no evidence that a causal connection exists between the possession of marijuana and ecstasy and the possession and sale of crack cocaine. The marijuana and ecstasy evidence was not so "linked together" with the crack cocaine charges "that one [could not] be fully shown without proving the other." *Riddley*, 776 N.W.2d at 425; *see also*

Hollins, 765 N.W.2d at 132 (concluding that evidence that the defendant possessed marijuana had no relevance to the charge of conspiracy to sell crack cocaine). Thus, the admission of the other drug evidence was plain error.[3]

But that does not end our analysis. Appellant must also show that the error affected her substantial rights such that there was a reasonable likelihood the evidence substantially contributed to the verdict. *Strommen*, 648 N.W.2d at 681. Considerations include what other evidence the state presented, whether the jury was given a limiting instruction on the other-crime evidence, whether the state emphasized the evidence in closing argument, and whether the evidence of guilt was overwhelming. *Riddley*, 776 N.W.2d at 428. The state's additional evidence was strong. Appellant's apartment contained large amounts of crack cocaine, some of which was packaged in small baggies. Appellant confessed to selling the crack cocaine out of her home, describing to officers how much the baggies of crack cocaine were worth and how much money she made from the sales. The state did mention the suspected ecstasy in closing argument but did not refer to the marijuana. And although the jury was not given a limiting instruction, defense counsel stated in closing: "[i]t is important to remember that Ms. Riser is not charged with the use or possession or sale of marijuana, of Ecstasy, or the scale." On this record, we conclude that because the other evidence of guilt was strong, appellant has not

[3] With respect to the digital scale, we note that possession of a digital scale alone is not a crime. Nevertheless, the trial testimony about the scale was relevant to the charge of sale of crack cocaine. Thus admission of its presence in appellant's apartment was not plain error.

shown that there was a "reasonable likelihood" that the marijuana and ecstasy evidence had a significant effect on the verdict. *Griller*, 583 N.W.2d at 741.

III

Appellant challenges the sufficiency of the evidence to support her convictions of child endangerment (exposure to sale or possession of a controlled substance) and child endangerment (exposure to a firearm). When the sufficiency of the evidence is challenged, this court reviews the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient" to support the jury's verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The verdict should not be disturbed "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004) (quotation omitted).

Appellant was convicted of violating Minn. Stat. § 609.378, subd. 1(b)(2), which states in relevant part: "[a] parent, legal guardian, or caretaker who endangers the child's person or health by: . . . knowingly causing or permitting the child to be present where any person is selling . . . or possessing a controlled substance . . . is guilty of child endangerment." Under this statute, it is not necessary that the state prove the children were actually in danger, but rather that (1) appellant knowingly permitted her children to be present at the time of an illegal sale or possession of a controlled substance;

(2) appellant was a legal guardian or caretaker of the children at the time of the sale or possession; and (3) the children were younger than 18. *State v. Perry*, 725 N.W.2d 761, 766 (Minn. App. 2007), *review denied* (Minn. Mar. 20, 2007).

Appellant contends that her conviction violates Minn. Stat. § 634.03 (2010), which provides that "[a] confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed." Section 634.03 requires "independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession." *State v. Heiges*, 806 N.W.2d 1, 13 (Minn. 2011) (quotations omitted). Appellant argues that the only evidence showing she knowingly permitted her children to be present at the time of sale or possession of illegal drugs was her confession to possessing and selling drugs out of her home. But the other evidence and circumstances here were more than sufficient to allow a jury to find appellant's confession trustworthy. The testimony showed that crack cocaine and other drugs were found in the apartment where appellant lived with her sons, ages twelve and five. Especially relevant is the crack cocaine that was found in a bedroom, which also contained children's toys. In addition, appellant's confession was lengthy; she explained how much money she made from selling drugs out of the apartment, the quantities she sold them in, and why she sold them.

Although appellant recanted her confession on the stand, courts recognize that the jury is in the best position to evaluate witness credibility and will assume the jury believed the state's witnesses and disbelieved the defendant's witnesses. *State v. Henderson*, 620 N.W.2d 688, 705 (Minn. 2001). Therefore, viewed in the light most

favorable to the conviction, the evidence was sufficient to support the jury's verdict. *Webb*, 440 N.W.2d at 430.

Appellant was also convicted of Minn. Stat. § 609.378, subd. 1(c), which provides that "[a] person who intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health or cause the child's death as a result of the child's access to a loaded firearm is guilty of child endangerment." Appellant argues that evidence was insufficient to show the children had access to the firearm. But the evidence showed that a loaded firearm was found in appellant's apartment where she lived with her sons, ages twelve and five, and where Turner's two-year-old daughter frequently spent the night. At the time the search warrant was executed, the loaded gun was on a mattress in the living room, easily accessible by the children. During her interview with police appellant stated that all it would take to fire a round off the gun would be to "take the safety off and pull the trigger . . . because [there] was already one in the chamber." She acknowledged that "bad things" could happen if the children found the gun. Appellant also testified at trial that it wasn't possible for the children to "stumble over" the gun because they did not know it existed.

Accordingly, appellant's argument that the state failed to prove the children had access to the firearm lacks merit; the evidence is sufficient to support the verdict.

Affirmed.