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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0241**

State of Minnesota,
Respondent,

vs.

Alvin Lee Fitzgerald, Jr.,
Appellant.

**Filed January 2, 2018
Affirmed
Schellhas, Judge**

Pennington County District Court
File No. 57-CR-15-184

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Alan G. Rogalla, Pennington County Attorney, Thief River Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant seeks reversal of his convictions of third-degree burglary, motor-vehicle theft, and theft and a new trial, arguing that the district court committed plain error affecting

appellant's substantial rights by not striking the testimony of the state's DNA analyst. Appellant also complains of additional errors in his pro se supplemental brief. We affirm.

FACTS

On the morning of July 9, 2014, M.S. discovered a broken window at his car-repair shop and that he was missing cash and a truck. Police from Thief River Falls responded, and Investigator Marissa Adam surveyed the scene and swabbed blood from the broken window. The owner of a gas station across the street allowed Investigator Adam and M.S. to view the station's surveillance-video footage, gave a copy of the video to M.S., and supplied the investigator and M.S. with still photos from the surveillance video.¹

The video-surveillance still photos depict a man buying a bottle of soda at the gas station on the night of July 8, 2014. From viewing the still photos, M.S.'s son spotted the man in town, and M.S. called the police. On July 10, Officer Vern Wittenberg approached appellant Alvin Fitzgerald and informed him that he was a suspect in a robbery case. Officer Wittenberg reviewed Fitzgerald's identification and noticed and commented about cuts on Fitzgerald's hand and arm. Fitzgerald said that he had punched a tree. Officer Wittenberg did not detain Fitzgerald.

On July 14, 2014, Investigator Adam swabbed blood on the recovered truck's steering wheel and delivered it, along with the bloodied broken window glass, to the Minnesota Bureau of Criminal Apprehension (BCA). The DNA profiles of the blood from the steering wheel and broken glass matched, and when run through the convicted-offender

¹ The state never possessed the surveillance video and did not offer it into evidence at trial because it could not be located.

DNA database, the DNA profiles from the blood swabs also matched Fitzgerald’s DNA profile.

In December 2014, South Carolina law-enforcement authorities arrested Fitzgerald on a Minnesota fugitive warrant, and he was returned to Minnesota.² Respondent State of Minnesota charged Fitzgerald with third-degree burglary, motor-vehicle theft, and theft.

Fitzgerald moved the district court to dismiss the charges on the grounds that the charges lacked probable cause, the state failed to preserve evidence, and his speedy-trial rights were violated. He also moved to suppress his statements made to Officer Wittenburg. The district court denied all of Fitzgerald’s motions. Fitzgerald waived his right to counsel and to a jury trial and proceeded to trial pro se with the appointment of advisory counsel. The district court found Fitzgerald guilty of all charges, denied his motion for a new trial, and imposed concurrent guidelines sentences for third-degree burglary, motor-vehicle theft, and theft.

This appeal follows.

D E C I S I O N

DNA analyst’s testimony

Appellate courts review admissibility of expert testimony for an abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). The fact-finder at trial—here, the district court—evaluates the strength of the DNA expert’s opinion based on the “confidence in the opinion and in part on the underlying statistical foundation for the opinion.” *State v. Bloom*,

² At the time, Fitzgerald was on supervised release from the Minnesota Department of Corrections in connection with a third-degree burglary conviction.

516 N.W.2d 159, 168 (Minn. 1994). Here, the DNA analyst testified that she used the STR/PCR testing method to analyze the various DNA samples. The supreme court views STR/PCR³ testing of DNA as foundationally reliable. *State v. Traylor*, 656 N.W.2d 885, 897–98 (Minn. 2003). The DNA analyst used the word “matched” during her testimony and provided foundation for her opinion after offering it.

Fitzgerald argues that the DNA analyst’s repeated use of the word “matched” and the admission of her opinion that the DNA samples from the steering wheel and broken-window glass matched Fitzgerald’s DNA *before* providing foundation for that opinion constituted plain error that affected Fitzgerald’s substantial rights to a fair trial. Fitzgerald also contends that the analyst’s “explanation of the probability of another profile resembling Fitzgerald’s did not use actual numbers or statistics, instead employing a confusing and nebulous basis for her opinion.”⁴ In *Bloom*, the supreme court stated that a “DNA expert should be allowed to express the opinion that there is a ‘match’ between [a] defendant’s DNA profile and that left by the assailant at the scene or on a victim.” 516 N.W.2d at 168. The supreme court explained that “this sort of verbal, qualitative, non-statistical presentation of the underlying statistical evidence will lead to more agreement among reputable experts at trials and may decrease the likelihood of there being a battle of experts.” *Id.*

³ The acronym stands for short tandem repeat/polymerase chain reaction.

⁴ At the omnibus hearing, the district court admitted the analyst’s reports that contained statistical foundation for her opinion, but for reasons not apparent in the record, the state did not offer those reports at trial.

Here, Fitzgerald failed to object to either the analyst's testimony or the district court's admission of the analyst's reports. Failure to object to the admission of evidence constitutes a forfeiture of the issue. *See State v. Lilienthal*, 889 N.W.2d 780, 784–85 (Minn. 2017) (concluding that forfeiture applied when defendant failed to object at trial to admission of testimony); *see also State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015) (“A constitutional right, or a right of any other sort, may be forfeited in criminal . . . cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” (quotation omitted)), *cert. denied*, 136 S. Ct. 92 (2015). A “[p]lain error affecting a substantial right can be considered by the court . . . on appeal even if it was not brought to the [district] court’s attention.” Minn. R. Crim. P. 31.02.

We do not excuse Fitzgerald’s failure to object merely because of his pro se status at trial. Minn. R. Gen. Pract. 1.04 (“Whenever these rules require that an act be done by a lawyer, the same duty is required of a self-represented litigant.”). We conclude that Fitzgerald has forfeited his arguments about the DNA analyst’s testimony and we therefore do not conduct a plain-error analysis of Fitzgerald’s claims on appeal.

Regarding the order in which the analyst offered her opinion, we note that Fitzgerald offers no legal authority to support his argument that the court’s admission of the analyst’s “DNA-match” testimony in advance of the statistical foundation was plain error, and we are aware of no such authority.

Pro se arguments

Fitzgerald raises several pro se arguments, claiming that the district court committed plain error that violated his right to a fair trial. As above noted, failure to object to the

admission of evidence constitutes a forfeiture of the issue. *See Lilienthal*, 889 N.W.2d at 784–85 (concluding that forfeiture applied when defendant failed to object at trial to admission of testimony). If an appellant’s pro se supplemental brief fails to include an argument or citation to legal authority, the pro se claims are forfeited. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). We address Fitzgerald’s arguments but not necessarily in the order in which they appear in his pro se brief, and, because we are not a fact-finding court, we do not consider any factual allegations advanced by Fitzgerald in his pro se supplemental brief that he did not advance at trial. *See Wright Elec., Inc. v. Ouellette*, 686 N.W.2d 313, 324 (Minn. App. 2004) (stating “this court cannot serve as the fact-finder”), *review denied* (Minn. Dec. 14, 2004). We describe Fitzgerald’s arguments to the best of our ability, noting that many of them are intertwined with his ongoing concern about the state not producing a copy of the gas-station surveillance video.

Fitzgerald argues that the district court erred by not dismissing the charges against him because the state committed *Brady*, due-process, and discovery violations by failing to obtain and provide him a copy of the gas-station surveillance video. “The State has a duty to preserve evidence that it collects during the investigation of a crime.” *State v. Nissalke*, 801 N.W.2d 82, 110 (Minn. 2011). “When the State loses, destroys, or otherwise fails to preserve material evidence, a defendant’s due process rights are implicated.” *Id.* (quotation omitted). But the state has no duty to preserve evidence that it does not collect during an investigation and that it does not possess. *See* Minn. R. Crim. P. 9.01, subd. 1(6) (requiring prosecutor to disclose “[m]aterial or information in the prosecutor’s possession and control that tends to negate or reduce the defendant’s guilt”). Fitzgerald’s argument

fails because the state neither collected, possessed, nor controlled the gas-station surveillance video.

Fitzgerald challenges probable cause for a search warrant that was executed at his tent residence. The state obtained no evidence as a result of executing the warrant.⁵ We therefore do not address the sufficiency of probable cause for the warrant. *Cf. State v. Horst*, 880 N.W.2d 24, 36 (Minn. 2016) (refusing to decide whether a search warrant was overly broad because “there would be nothing to suppress” because the challenged evidence was not admitted at trial).

Fitzgerald argues that the district court erred by concluding that he was not in custody for purposes of *Miranda* when Officer Wittenberg questioned him. We conclude that the district court correctly found that Fitzgerald was not in custody for purposes of *Miranda* when Officer Wittenberg questioned him. The questioning occurred on a public street; Officer Wittenberg never told Fitzgerald he was under arrest; Officer Wittenberg did not restrain Fitzgerald and only briefly questioned him; and Fitzgerald freely walked away after asking if he could leave. Based on these circumstances, no “reasonable person under the circumstances would believe that he or she was in police custody of the degree associated with formal arrest.” *See id.* at 30–31.

⁵ The district court stated in its findings of fact that “[Fitzgerald’s] claim that [Investigator Adam] obtained blood swabs from [Fitzgerald’s] tent at the time [Investigator Adam] searched it and that [Investigator Adam] sent these swabs to the [BCA] for testing instead of the swabs [Investigator Adam] obtained from the glass at [the car-repair shop] and the steering wheel of [the recovered truck] is not credible.”

Fitzgerald argues that the district court abused its discretion by allowing witnesses to testify about what they saw on the gas-station surveillance video, and that the prosecutor committed misconduct by referencing the gas-station surveillance video in its written closing argument. Fitzgerald did not object to this testimony or the prosecutor's closing argument at trial and therefore forfeited the issues. We therefore do not conduct a plain-error analysis of these issues on appeal.

Fitzgerald's pro se issues that we have analyzed are not persuasive. We affirm Fitzgerald's convictions.

Affirmed.