

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1159**

State of Minnesota,
Respondent,

vs.

Brock Dupree Lam Seawright,
Appellant.

**Filed May 29, 2018
Affirmed
Kirk, Judge**

Hennepin County District Court
File No. 27-CR-16-19030

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Stan Keillor, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Hooten, Judge; and Stauber, Judge.*

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

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges his conviction and sentence for third-degree sale of a narcotic, arguing that (1) his due-process rights were violated by the state's failure to collect additional evidence, (2) trial errors had a cumulative prejudicial effect and denied him a fair trial, (3) the district court abused its discretion by denying his motion for a downward durational departure, and (4) the district court committed a clerical error when it imposed a 51-month, rather than a 49-month, sentence. We affirm the conviction and sentence.

FACTS

Appellant Brock Dupree Lam Seawright was charged with third-degree sale of a narcotic in violation of Minn. Stat. § 152.023, subd. 1(1) (2014), after he sold crack cocaine to an undercover officer in May 2016. A jury trial was held.

At trial, an undercover officer with the Minneapolis Police Department's Community Response Team (CRT)-Narcotics Unit testified that an undercover drug-buying operation involves sending an undercover officer into a target area to purchase narcotics. An undercover operation also utilizes surveillance officers to surveil the dealer, as well as an undercover officer to ensure officer safety, a take-down officer to arrest the dealer if necessary and to serve as uniformed backup in case something goes awry, and a case agent who is in charge of directing the undercover operation.

During the operation, the undercover officer wears a recording device so that he can be heard by the other officers. After a drug purchase, the undercover officer provides a description of the dealer through the recording device so that the surveillance team can

monitor the dealer and so that the take-down officer can later stop and identify the dealer. The undercover officer uses “prerecorded buy money” to purchase the narcotics.

The undercover officer testified that between noon and 2:00 p.m. on May 5, 2016, he participated in an undercover drug-buying operation at Lake Street and Fifth Avenue in Minneapolis. The case agent provided him with a recording device and prerecorded buy money for the operation. During the operation, the undercover officer approached a man and asked him if he had any “work,” which is slang for crack cocaine. That man crossed Lake Street and approached a second man, a black male, who was wearing a red and blue Twin’s hat, a white muscle shirt, blue jeans, and tennis shoes.¹ The undercover officer identified appellant in the courtroom as the second man.

Appellant then approached the undercover officer on foot, and the undercover officer asked appellant if he had any “work.” Appellant said he did and agreed to sell the undercover officer \$40 of crack cocaine. They then walked into a parking lot, the undercover officer gave appellant the prerecorded buy money, and appellant handed the undercover officer a small amount of crack cocaine. During their interaction, appellant identified himself as “Brock” and pointed to a tattoo on his forearm that said “Brock.” Appellant also gave the undercover officer his telephone number so that the undercover officer could contact him to purchase more drugs.

Approximately 20 seconds after purchasing the cocaine, the undercover officer described appellant’s appearance into the recording device. The undercover officer then

¹ The undercover officer also testified that the Twins hat was dark blue but acknowledged that he described it as black in his report.

left the area, and the surveillance officers continued to monitor appellant. Later, the undercover officer viewed surveillance photographs and appellant's Department of Motor Vehicle Services (DVS) photograph and verified that they depicted the person who sold him the crack cocaine.

The undercover officer testified that the prerecorded buy money was not recovered, because recovering it could have compromised his safety and revealed his identity. When the CRT receives multiple complaints regarding an area, it conducts multiple undercover details in that area over a week or month using the same undercover officer.

The case agent testified at trial that he conducted surveillance and observed the undercover officer from an unmarked vehicle during the operation. The case agent observed the undercover officer's interaction with the first man, then with appellant, and listened to their conversations through the recording device. The case agent described appellant as a black male wearing a blue Minnesota Twins baseball cap, white tank top, blue jeans, and red shoes. The case agent did not observe the actual drug sale because the undercover officer and appellant went around the corner of a building out of his sight. The case agent identified appellant in the courtroom as the person who discussed the drug sale and disappeared around the corner with the undercover officer.

Immediately after the drug buy, the case agent took photographs of appellant. He also continued to surveil appellant for about 10-15 minutes after the undercover officer left the area before asking the take-down officer, in a marked squad car, to stop and identify appellant. The case agent observed the stop to ensure that the take-down officer identified the correct person.

The take-down officer testified that the case agent provided a description of appellant's appearance and location and directed him to stop and identify appellant. The take-down officer testified that his only purpose in stopping appellant was to identify him, and that he did so by viewing appellant's driver's license or state ID card. The take-down officer conducted a pat-down search of appellant for weapons, but did not seize anything and did not arrest him. The take-down officer provided appellant's identification information to the case agent.

The jury found appellant guilty of the charged offense. Appellant was later sentenced to 51 months in prison.

This appeal follows.

D E C I S I O N

I. The state did not violate appellant's right to due process by failing to collect additional evidence.

Appellant asserts that the state violated his due-process rights by failing to search him to recover the prerecorded buy money or additional drugs. But appellant does not develop this argument or assert what, if any, relief he is entitled to. And, under Minnesota law, a law enforcement officer does not violate a suspect's due-process rights by failing to collect evidence, even if the suspect believes that the additional evidence would have strengthened the state's case. *State v. Krosch*, 642 N.W.2d 713, 718-19 (Minn. 2002) (noting that due process is not implicated when the state fails to collect evidence). Appellant also acknowledges that the state is not generally sanctioned for failing to preserve evidence it did not seize. *See State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010)

(“The duty to preserve evidence only applies to evidence that is actually collected during the investigation of the crime because it would be illogical to require the [s]tate to preserve evidence it does not possess.” (quotation omitted)).

Ultimately, appellant asserts that the state’s witnesses were not credible because the state did not present sufficient corroborating evidence to support their testimony that he was the person who sold the crack cocaine to the undercover officer. Appellant argues that because the state’s witnesses did not recover the prerecorded buy money, they failed to conduct a sufficient undercover investigation, and the state could not prove that he was the seller. But the record contains ample evidence identifying appellant as the seller. And in order to find appellant guilty, the jury necessarily found that the state’s witnesses, and their undercover investigation indicating that appellant was the seller, were credible. We defer to the jury’s credibility determinations. *State v. Watkins*, 840 N.W.2d 21, 31 (Minn. 2013) (“[I]t is the function of the fact-finder, not this court, to make credibility determinations.”).

II. Appellant is not entitled to a new trial based on the state’s alleged trial errors.

Appellant alleges several errors by the state at trial, and argues that the cumulative effect of these errors was prejudicial, and that he was thus denied his right to a fair trial. The state argues that appellant has not proven any error, and that even if appellant proved the alleged errors, there is no evidence that appellant was prejudiced or denied a fair trial.

An appellant is entitled to a new trial if the cumulative effect of trial errors effectively denied the appellant a fair trial. *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006). “Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant’s

prejudice by producing a biased jury.” *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quoting *State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989)). A new trial is only awarded “in rare cases.” *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). A reviewing court is “more inclined to order a new trial for cumulative errors in very close factual cases.” *Id.* at 279. We consider each of appellant’s arguments in turn.

A. The district court did not abuse its discretion by sustaining the state’s objections to defense counsel’s cross-examination.

First, appellant argues that the district court abused its discretion by sustaining five objections made by the prosecutor during defense counsel’s cross-examination of the state’s witnesses, as the defense attempted to elicit responses that would indicate defects in the undercover investigation or in the state’s case. Appellant argues that by sustaining those objections the district court improperly limited cross-examination and prevented him from impeaching the state’s witnesses with inconsistencies in their testimony and weaknesses in the investigation.

“Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). “The scope of cross-examination is largely left to the discretion of the [district] court,” and is reviewed for a clear abuse of discretion. *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998).

A review of the record reveals that defense counsel's questions were appropriately objected to and that the district court did not abuse its discretion in sustaining those objections. On this record, we cannot conclude that the district court improperly limited cross-examination of the state's witnesses. Furthermore, even if the rulings were erroneous, appellant did not show that he was prejudiced by any of them because, in each instance, defense counsel was able to present the intended points and information to the jury through other means. Appellant sought to emphasize inconsistencies in the state's witnesses' testimony and was able to do so.

B. The district court did not err by admitting testimony related to appellant's state ID.

Appellant next argues that the district court committed plain error by admitting unobjected-to hearsay evidence. When evidence is not objected to at trial, appellate review is forfeited. *Fraga*, 898 N.W.2d at 276. However, an appellate court may exercise its discretion to review the alleged error under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain-error rule requires a defendant to establish (1) an error, (2) that is plain in that it violates or contradicts case law or a rule, and (3) that the error affects the defendant's substantial rights." *Fraga*, 898 N.W.2d at 277. "An error affects substantial rights if there is a reasonable likelihood that it substantially affected the verdict." *Id.*

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R.

Evid. 801(c). However, “a statement [by a party-opponent] of which the party has manifested an adoption or belief in its truth” is not hearsay. Minn. R. Evid. 801(d)(2)(B).

Although he did not object at trial, appellant now argues that it was error for the district court to allow the take-down and undercover officers to testify about appellant’s state ID and his DVS photograph because those items were out-of-court written statements offered for the truth of the matter asserted: that the man pictured was “Brock Seawright.” Appellant relies on Florida and Maryland caselaw to support his position that the identification information on a driver’s license is an out-of-court statement subject to the hearsay rule. *See Jones v. State*, 127 So. 3d 622, 624-25 (Fla. Dist. Ct. App. 2013); *Gordon v. State*, 66 A.3d 647, 658 (Md. 2013). In both cases, those state courts held that the identifying information on a driver’s license is an “admission by adoption,” which is not hearsay under Minn. R. Evid. 801(d)(2)(B). These cases are not precedential in Minnesota, nor do they support appellant’s argument that the identification testimony here is hearsay.

Appellant argues that the only evidence tying him to the conviction offense is the name on the state ID presented to the take-down officer. However, the record includes in-court identifications of appellant by the undercover officer and case agent, and the state submitted and published surveillance photographs of appellant taken immediately after the drug sale to the jury. Thus, even if the identification testimony was inadmissible hearsay, and its admission plain error, the state presented other strong evidence identifying appellant, and on this record, there is not a reasonable likelihood that the admission affected the jury’s verdict or appellant’s substantial rights so as to warrant plain-error review.

C. The prosecutor did not commit misconduct.

Appellant argues that the prosecutor committed misconduct during closing argument. “The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions.” *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Acts that “have the effect of materially undermining the fairness of a trial” may constitute prosecutorial misconduct. *Id.* Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If plain error is shown, the burden shifts to the state to prove that there is no reasonable likelihood that the misconduct had a significant effect on the verdict. *Id.* To determine whether the state has met its burden, this court considers “the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Although there was no objection at trial, appellant argues that the prosecutor committed misconduct by clarifying and misstating testimony during closing argument. Appellant points to three instances of alleged prosecutorial misconduct. First, appellant accuses the prosecutor of improperly “cleaning up” the undercover officer’s testimony by clarifying the street value of crack cocaine. A review of the record shows that this was not prosecutorial misconduct, and that even if it was, it did not significantly affect the verdict in the face of all the evidence presented so as to warrant modified plain-error review.

Second, appellant accuses the prosecutor of committing misconduct by attributing a description of the suspect's "red" shoes to the wrong officer. This misstatement is not significant enough to be prosecutorial misconduct constituting plain error.

Third, appellant takes issue with the prosecutor's characterization of the undercover officer and the case agent's descriptions of the suspect's clothing as "consistent." Appellant argues that the officers' different descriptions of the color of appellant's shoes and his Twins hat prohibited the prosecutor from characterizing the descriptions as consistent. This assertion by the prosecutor was argument, not a misstatement of the evidence. Appellant acknowledges himself that these distinctions are "subtle." Again, this was not prosecutorial misconduct constituting plain error, and even if it was, it was not significant enough to affect the jury's verdict so as to warrant modified plain-error review.

On this record, we conclude that: (1) the district court did not abuse its discretion in sustaining the prosecutor's objections during the defense's cross-examination; (2) the district court did not commit plain error in admitting testimony related to appellant's identification; and (3) the prosecutor did not commit prosecutorial misconduct. Further, even if we accept appellant's allegations of trial errors, appellant has failed to show that the cumulative effect of these alleged errors was prejudicial, or that he was denied a fair trial as a result. Appellant is not entitled to a new trial.

III. The district court did not abuse its discretion by denying appellant's motion for a downward durational departure.

Based on the severity level of this offense and on appellant's criminal-history score, this conviction carried a presumptive 57-month prison sentence (49-68 month range). A

presentence investigation (PSI) was conducted and recommended the presumptive guidelines sentence of 57 months. On April 27, 2017, the district court sentenced appellant to 51 months in prison.

At the sentencing hearing, appellant moved for a downward durational departure to the 24-month statutory minimum sentence because of the small amount of crack cocaine involved in this case. *See* Minn. Stat. § 152.023, subd. 3(b) (2014) (mandating a 24-month minimum sentence if the conviction is a subsequent controlled-substance conviction). Defense counsel argued that it can be inferred that appellant only intended to possess the drugs for personal use and would not have sold them absent the undercover officer's solicitation. Appellant also argued that he is innocent and that his criminal-history score is misleading because some of his offenses were committed when he was a juvenile. The state argued for the 57-month presumptive guideline sentence, noting appellant's lengthy criminal history and his active role in this offense.

The district court concluded that there were no grounds to support a departure because appellant was convicted of selling a controlled substance, not possessing it with intent to sell. The district court stated that it was "going toward the bottom of the box." In response to appellant's argument regarding the small amount of crack cocaine involved in this case, the district court noted:

I did think about that yesterday as I read through the [PSI]. It was a small amount that was sold but that's what a third-degree sale is and so it's not smaller than typical. . . . I'm not convinced that that's a substantial and compelling basis in this case.

So I am going to go to the bottom of the box which is 51 months. . . . It's 34 months served, 17-month parole, credit for 36 days you've already served.

“A sentencing court ‘must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances’ that distinguish a case and overcome the presumption in favor of the guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting Minn. Sent. Guidelines 2.D.1 (2011)); *see also State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989) (holding that “the [district] court has broad discretion to depart *only if* aggravating or mitigating circumstances are present”). The district court may order a departure from the presumptive guidelines sentence if the case involves “substantial and compelling circumstances” to warrant the departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Substantial and compelling circumstances are those that make a case atypical. *Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003). This court will only reverse a sentencing court’s refusal to depart in a “rare” case. *Kindem*, 313 N.W.2d at 7.

When considering a downward durational departure, a district court is limited to consideration of offense-related factors. *State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). But even if factors are present to support a downward departure, the district court is not required to depart. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (citing *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)).

Appellant argues that the district court abused its discretion when it denied his departure motion because he had a “minor or passive” role in this offense. Appellant also argues that “the nature of his criminal history score” mitigates his offense. Appellant

asserts that, although his criminal-history points are adult points, they should not be weighted so heavily against him because some of his offenses were committed when he was a juvenile.

After hearing the arguments and statements made at the hearing, and after reviewing the PSI, the district court denied appellant's departure motion. The district court concluded that there was not a substantial and compelling reason to depart in this case and sentenced appellant within the presumptive guideline sentencing range. Here, the district court properly considered the circumstances of the conviction offense and concluded that appellant was not less culpable than the typical person convicted of third-degree sale of a narcotic. The district court also relied on a properly calculated criminal-history score to determine the appropriate guideline sentencing range. The district court did not abuse its discretion by denying appellant's departure motion.

IV. The district court did not commit a clerical error when it sentenced appellant to 51 months in prison.

Appellant argues that the district court made a "clerical error" when it imposed a 51-month sentence rather than a 49-month sentence, which would have been the shortest sentence within the presumptive guideline sentencing range. Appellant asks this court to correct the alleged error. *See* Minn. R. Crim. P. 28.02, subd. 12 ("If the appellate court affirms the judgment, it must direct execution of the sentence as pronounced by the district court or as modified by the appellate court under Rule 28.05, subd. 2."); 28.05, subd. 2 ("The appellate court may review the sentence imposed . . ."). A "clerical error" is "a mistake that ordinarily is apparent upon the face of the record and capable of being

corrected by reference to the record only.” *State v. Verdon*, 727 N.W.2d 418, 420 (Minn. App. 2007) (quotation omitted); *see also* Minn. R. Crim. P. 27.03, subd. 10 (“Clerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court.”).

On this record, where the district court was aware of the presumptive guidelines sentencing range, where the court indicated that it would go “toward the bottom of the box,” and where the signed sentencing order and warrant of commitment also reflect the 51-month sentence imposed at the hearing, it is not possible to conclude that there was a “clerical error.”

Affirmed.