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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2049**

State of Minnesota,
Respondent,

vs.

Carlos Kendall Duncan,
Appellant.

**Filed March 4, 2019
Affirmed
Cochran, Judge**

Ramsey County District Court
File No. 62-CR-17-132

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Rodenberg, Judge; and
Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Carlos Kendall Duncan filed this direct appeal following the entry of judgment of
conviction on two counts of attempted murder. Duncan argues that (1) the district court

erred in admitting evidence of two phone calls he made from jail; and (2) it was plain error to admit testimony from three different police officers about prior contacts with Duncan. Duncan also raises several issues in his pro se supplemental brief. We conclude that the district court did not abuse its discretion in admitting evidence of the phone calls, the officers' testimony did not affect Duncan's substantial rights, and Duncan's pro se arguments do not entitle him to relief. Accordingly, we affirm.

FACTS

Two men, X.S. and D.M., were sitting in a red sedan in the Dorothy Day Center parking lot in St. Paul when a silver Mercedes SUV pulled up next to them. The driver of the SUV pointed a gun out of the window and fired five shots into the sedan before speeding off. Both men were hit, but managed to drive to the hospital where they received medical attention. Neither man died.

Two city sewer workers, who were working nearby, heard shots fired and witnessed the shooting. One called 911 to report the incident. He described the shooter as a stocky black male, with "a scar or tattoo on his left eye," driving a silver Mercedes. He was also able to give the 911 operator the Mercedes's license plate number.

Meanwhile, at the hospital, D.M. was interviewed by Officer Diaz. Initially D.M. was not forthcoming, stating that an unknown man in an unknown vehicle shot him. But as the conversation continued, D.M. gave more information, and eventually he described the shooter as a black male with tattoos on his face driving a silver vehicle. Officer Diaz was aware of a man known as "Los" who fit that description and had been seen around the Dorothy Day Center driving a silver vehicle. When Officer Diaz asked D.M. if the shooter

was “possibly someone name[d] Los,” D.M. indicated that it was. Later, the officer administered a photo lineup. In that lineup, D.M identified appellant Carlos Kendall Duncan (aka “Los”) as the shooter. A few days later, Duncan was arrested driving a silver Mercedes SUV with a license plate number matching the one given by the city worker. He was charged with assault and attempted murder.

During the course of the investigation, officers learned that this was not the first time that someone shot at D.M. Approximately a month before the Dorothy Day shooting, D.M. and W.I. were the victims of a shooting on Bates Avenue. D.M. was not hit but W.I. suffered a nonfatal wound. Unfortunately, at an unknown later date, W.I. was murdered in Minneapolis.

At a pretrial hearing, the state gave notice of its intent to introduce *Spreigl* evidence that Duncan was involved in the Bates Avenue shooting. The court ruled that the evidence was inadmissible because it found that the state could not prove by clear and convincing evidence that Duncan was involved.

Before trial, the state served D.M. with a subpoena to testify. On August 16, 2017, the first day of trial, D.M. failed to appear as ordered. D.M. indicated to the police that he did not wish to testify. In order to secure his testimony, a warrant was issued and D.M. was arrested. D.M. was placed in the Ramsey County jail until he testified. Duncan was also housed in the jail when he was not in the courtroom. During the lunch break on August 17, Duncan attempted to convince D.M. not to testify. He was not successful, and D.M. testified later that day.

After the court had adjourned for the day, Duncan was returned to jail where he made several phone calls. Inmates at the jail are informed that all calls are recorded. During two of the calls, Duncan discussed his communications with D.M. while in jail. The prosecutor learned of the calls that night and informed Duncan's attorney that the state intended to introduce portions of the call recordings into evidence.

The next morning the judge heard from counsel regarding the state's request to introduce evidence of the calls. The state sought to introduce a portion of the first call where Duncan recounted that he told D.M.: "Hey, man, you ain't got to do this sh-t, bro. I don't even have no problem with you. It wasn't personal. The [person] I had a problem with, he dead, bro." From the second phone call, the state sought to offer a clip where Duncan again expressed that he told D.M. "it wasn't personal." Finally, the state sought to introduce another portion of the second call where Duncan instructed the person whom he called to tell "TLo, to put on Facebook that [D.M.] just testified." The state provided a transcript of the portions of the two calls that it sought to introduce.

The state argued that the judge should allow these passages to be admitted because they are relevant to the issue of the identity of the shooter. The state maintained that Duncan was referring to the Dorothy Day shooting during both calls and that Duncan's statements demonstrate that he was the shooter. The state also argued that the probative value of the passages outweighed any prejudice.

Duncan objected to the admission of the recordings. He argued the statements made during the calls could not be about the Dorothy Day shooting because they reference a dead person and no one had died in the Dorothy Day shooting. Duncan maintained the

statements must instead be about some other event where someone eventually died such as the Bates Avenue shooting and thus are inadmissible under Minn. R. Evid. 404(b) as other-bad-act evidence. Duncan also argued the evidence was inadmissible under Minn. R. Evid. 403 as unfairly prejudicial and confusing to the jury.

The district court determined that Duncan was talking about the Dorothy Day shooting, not another incident, in both calls when he said “it wasn’t personal” and was attempting to intimidate the witness. The district court found that the statements by Duncan were relevant to the issues of identity and intent, and “may represent an admission by Mr. Duncan that he shot into the car that day, that he didn’t have a beef with [D.M.], that it was really about someone or something else.” The district court concluded that the probative value outweighed the potential prejudice under rule 403,¹ and ruled the clips could be introduced by the state if the proper foundation was laid.

The clips of the two phone calls were played during trial over Duncan’s objection. Prior to playing the clips, the judge provided a limiting instruction to the jury as requested by Duncan. At the request of the jurors, the clips were played again during jury deliberations. The jury returned a verdict of guilty on all counts.

¹ The district court also examined admissibility under rule 404(b), stating “even if I were to evaluate the admissibility of both of these calls under 404(b), I believe it would be admissible nonetheless.” The district court concluded that even assuming Duncan was referring to another act in the calls, not the Dorothy Day shooting, the evidence would be admissible under rule 404(b) for purposes of demonstrating intent and identity.

DECISION

I. The district court did not abuse its discretion in admitting evidence of Duncan's phone calls from jail.

On appeal, Duncan argues that the following portions of the recordings of the calls were improperly introduced into evidence.

Call 1

I get to hitting the door, I'm hitting the wall, like "Hey, [D.M.]. Hey, [D.M.]" The n-gg-r ignoring me, right? I'm like, "Hey man, you ain't got to do this sh-t, bro. I don't even have no problem with you. It wasn't personal. The n-gg-r I had a problem with, he dead, bro." I ain't, get off that sh-t fam. That n-gg-r came in there, looked at me mean as hell, and testified on me, man.

Call 2

I'm like "Hey, [D.M.]. Look, dude, it wasn't personal. I'm like man, whatever, dude is dead. I ain't got no problem with you, fam. Dude dead, you know, it wasn't personal."

Duncan offers two reasons as to why the court erred in admitting these statements. First, he asserts that these statements were inadmissible other-bad-acts evidence under rule 404(b). Next, Duncan argues that the probative value of the evidence is substantially outweighed by the potential for confusion or unfair prejudice under rule 403.

The district court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). To obtain relief, Duncan must show there was an abuse of discretion and he was prejudiced as a result. *Id.* A district court abuses its discretion "when its decision is based on an erroneous view of the law or is against logic

and facts in the record.” *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). We address Duncan’s two arguments in turn below.

A. Rule 404(b) analysis

Duncan argues that the statements were evidence of another crime or wrongful act. “Evidence 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). Such evidence is commonly referred to as “*Spreigl* evidence.”² *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). The district court disagreed and found that the statements were not evidence of another crime but instead evidence of the crime charged. In other words, the district court found that the statements were not *Spreigl* evidence. On appeal, Duncan argues this determination was an abuse of discretion.

We conclude that the district court did not abuse its discretion in finding that Duncan’s comments were referring to the Dorothy Day shooting. It is clear from the statements that Duncan was attempting to dissuade D.M. from testifying about the Dorothy Day shooting. In this context, it is reasonable to interpret “I don’t even have no problem with you. It wasn’t personal” as relating to the Dorothy Day shooting. This is true despite the comment that a person is dead and the fact that no one died in the Dorothy Day shooting.

The reference to a dead person alone is not evidence of a crime or wrong. The statements do not suggest that the person died of foul play. Nor do they suggest that

² *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

Duncan was involved in the death of this other person at all—they were simply statements that a person is dead. And the state did not present evidence or suggest that Duncan was somehow involved in the wrongful death of anyone. *Cf. State v. Taylor*, 910 N.W.2d 60, 67 (Minn. App. 2018) (“Because the evidence of the prior shooting related only to [the gang’s] prior actions, and not to a prior act committed by [the defendant], we conclude that the evidence was not improperly used by the state as *Spreigl* evidence.”), *review denied* (Minn. June 19, 2018). Based on the record, the district court’s interpretation of Duncan’s statements is a reasonable one. The district court did not abuse its discretion in determining that the statements were not *Spreigl* evidence.

B. Rule 403 analysis

Duncan argues that even if the statements were not *Spreigl* evidence, the district court abused its discretion by not excluding them under rule 403. Relevant evidence is generally admissible. Minn. R. Evid. 402. But under rule 403, relevant evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Minn. R. Evid. 403.

Here, the district court did not abuse its discretion in admitting the clips of the phone calls into evidence because the probative value was strong and was not substantially outweighed by the danger of unfair prejudice. As the district court correctly found, Duncan’s statements made during these calls help to show identity. Duncan’s defense was that he was not the shooter. But it is reasonable to infer from the statement “it wasn’t personal” that Duncan was admitting to shooting D.M. Additionally, the statement telling D.M. that he does not have “to do this” is probative of consciousness of guilt. *See State v.*

Harris, 521 N.W.2d 348, 353 (Minn. 1994) (stating that evidence of a defendant's witness tampering is relevant to show defendant's consciousness of guilt). Finally, Duncan had attacked the credibility of D.M. during cross-examination and pointed to inconsistencies in D.M.'s story. To counter this, the state tried to show that D.M. was reluctant to testify and had inconsistencies in his testimony because he was afraid of retaliation. Showing that Duncan had attempted to dissuade D.M. from testifying is an appropriate way to explain D.M.'s reluctance to testify and the inconsistencies in his story. *State v. McArthur*, 730 N.W.2d 44, 52 (Minn. 2007). For these reasons, the record demonstrates that the statements made by Duncan during the calls have substantial probative value.

Duncan argues that the potential prejudice outweighs any probative value. He maintains this evidence is unfairly prejudicial because there is a danger the jury would see him as a bad person. He also argues the statements are confusing because they reference a dead person, but this case did not involve a dead person. It appears that Duncan believes that the jury would assume that he was involved in the Bates Avenue shooting or W.I.'s eventual death. But the jury did not hear evidence of the Bates Avenue shooting and had no knowledge of W.I. or his death. Nor did the state present any evidence that Duncan was involved in the death of anyone else. Moreover, the district court properly gave the jury the limiting instruction that Duncan requested. That instruction informed the jury that the evidence of the calls was "being offered for the limited purpose of assisting [the jury] in determining whether the defendant committed those acts with which he is charged in the complaint" and further provided that the defendant was "not being tried for and may not be convicted of any offense other than the offense charged in the complaint." This

instruction reduced the risk of any potential prejudice as we presume jurors follow the court's instructions. *Zornes v. State*, 880 N.W.2d 363, 373 (Minn. 2016). Because the probative value of the evidence was high and the risk of unfair prejudice and confusion was low, the district court did not abuse its discretion in finding the evidence was not barred by rule 403.

II. The district court did not commit plain error when it allowed officers to testify about prior contacts with Duncan.

Duncan asserts that it was error for the district court to allow three officers to testify about prior contacts they had with Duncan and the vehicle in question. Officer Diaz testified that he knew of a man named “Los” who fit the description that D.M. had given. Officer Holte testified that he had contacts with a man named Carlos Duncan in a silver Mercedes. And finally, Sergeant Feroni testified that he “had received information from one of the officers that works Central District that he knows that vehicle, that vehicle is familiar to him, and he had stopped the defendant in that vehicle in the past.”³

Because Duncan did not object to this testimony at trial, this court reviews the admission of the testimony for plain error. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). “Under the plain-error doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) the error affected substantial rights.” *State v. Huber*, 877 N.W.2d

³ At a pretrial hearing, Duncan and the state agreed that an officer could testify that he recognized the license plate number of the SUV based on prior contacts with Duncan but the officer would not testify as to the reason for those prior contacts. The state asserts that due to this agreement any argument regarding the officers' prior contacts testimony is waived. Because some of the officers' testimony appears to go beyond the scope of the parties' agreement, we consider Duncan's argument on the merits.

519, 522 (Minn. 2016). If all three prongs are satisfied, the reviewing court corrects the error only if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quotation omitted).

We conclude that Duncan is not entitled to relief under the plain-error analysis. “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). “Eliciting an officer’s testimony that he knows the defendant from prior contacts is error if the defendant’s identity is *not* an issue in the case.” *State v. Valentine*, 787 N.W.2d 630, 641 (Minn. App. 2010) (emphasis added) (citing *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002)), *review denied* (Minn. Nov. 16, 2010).

In this case, the identity of the shooter was a disputed issue and the officers’ testimony was relevant to that issue. Officer Diaz testified that he knew someone named “Los” that fit D.M.’s description of the shooter in order to explain why he asked D.M. if “Los” was the shooter. Officer Holte testified that he had previous contacts with Duncan and a silver Mercedes to explain the connection between Duncan and the vehicle, and to explain how the investigation led to Duncan. And Sergeant Feroni’s testimony was necessary to explain the course of the investigation and why the sergeant issued a pick-up-and-hold for Duncan. Because the testimony of these three officers was offered for the purpose of showing identity, the admission of the testimony was not error that was plain.

But even assuming it was error that was plain, the error did not affect Duncan’s substantial rights. In order to show the error affected his substantial rights, Duncan bears the burden of showing that there is a reasonable likelihood that the error had a significant

effect on the jury's verdict. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016).⁴ When evaluating the likelihood that the erroneously admitted evidence significantly affected the verdict, the court considers the persuasiveness of the objectionable evidence and the manner in which it is presented. *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *review denied* (Minn. July 22, 2009).

Upon review of these factors, we conclude there is no substantial likelihood that any error had a significant effect on the verdict. The officers' testimony regarding their prior contacts with Duncan was not pervasive or persuasive. The testimony at issue was brief. And, the state did not emphasize or repeat the statements. Further, there are many non-criminal reasons why officers have contact with citizens. While Sergeant Feroni did testify that Duncan had been "stopped" before, he did not indicate that Duncan was ever arrested or charged with a crime in the past. Finally, the jury heard other compelling evidence of Duncan's guilt. *Cf. State v. Kelley*, 855 N.W.2d 269, 284 (Minn. 2014) (concluding that an erroneous jury instruction did not have an effect on the defendant's substantial rights when there was other considerable evidence of guilt). A city worker

⁴ In a footnote in his brief, Duncan asserts that elicitation of the officers' testimony "is also prosecutorial misconduct." We will not consider arguments that are not fully briefed. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Even assuming Duncan demonstrated prosecutorial misconduct that constitutes an error that is plain and, as a result, the burden shifts to the state on the third factor, we would reach the same result because the record fails to demonstrate that any error affected Duncan's substantial rights as discussed *infra* in the body of this opinion. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (stating "when the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights").

described the shooter as a black male with “a scar or tattoo on his left eye;” Duncan is a black male with a tattoo near his left eye. Duncan was arrested in an SUV matching the description and license plate number given by the witnesses. And, although D.M. was at times inconsistent and not forthcoming, he did identify Duncan as the shooter in a picture lineup and in court. Given that the state presented a strong case against Duncan and the officers’ testimony about prior contacts was not pervasive, the admission of the testimony did not affect Duncan’s substantial rights.

III. Duncan’s pro se arguments do not entitle him to relief.

Duncan makes several arguments in his pro se brief that are unpersuasive. First he argues that the district court committed plain error by allowing the state to introduce portions of the phone calls without introducing the full calls in violation of the rule of completeness. Neither recordings nor transcripts of the full phone calls were ever filed with the district court and therefore are not part of the record. See Minn. R. Civ. App. P. 110.01 (stating that the record on appeal consists of papers filed in the district court, exhibits, and transcripts of the proceeding). “[A]n appellate court may not base its decision on matters outside the record on appeal.” See *Holt v. State*, 772 N.W.2d 470, 481 n.5 (Minn. 2009) (quoting *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988)). Accordingly, this court cannot review the issue.⁵

Duncan also argues that: the prosecutor committed misconduct by improperly eliciting testimony; the telephone calls were admitted without proper authentication; the

⁵ It is this court’s opinion that Duncan is free to pursue this claim in postconviction proceedings.

admission of a video showing the street around the Dorothy Day center at the time of the shooting violated his right to confrontation; the district court erred when it admitted a Facebook video showing him threatening the victim; the district court failed to give a cautionary instruction on consciousness of guilt; and Officer Diaz's testimony regarding his interview with D.M. was prejudicial. Because these claims are not supported by legal argument or citations to appropriate legal authority, this court will not consider them. See *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (stating appellate courts "will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority").

Affirmed.