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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0250**

State of Minnesota,
Respondent,

vs.

Joseph Robert Clay,
Appellant.

**Filed December 30, 2019
Affirmed
Rodenberg, Judge**

Redwood County District Court
File No. 64-CR-18-183

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

Jenna M. Peterson, Redwood County Attorney, Joseph M. Sanow, Assistant County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Klaphake, Judge.*

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

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal from appellant Joseph Clay's conviction for third-degree sale of a controlled substance, appellant argues that the district court committed plain error by admitting into evidence an exhibit that identified appellant as a drug dealer and a gang member. Because we conclude that there was no plain error, we affirm.

FACTS

In January 2018, Agent Meyer of the Brown/Lyon/Redwood/Renville Drug Task Force arranged for a confidential informant (CI) to purchase methamphetamine from appellant. The CI arranged to meet appellant at appellant's home in Morgan to purchase 3.5 grams of methamphetamine for \$170. As part of the arrangement with the task force, the CI completed a cooperating individual agreement. The agreement called for disclosure of information. The CI disclosed on the written agreement that he sells "[a] couple [of] grams [of methamphetamine and heroin] every week" and that he uses "heroin, meth, weed, [and] coke." The CI also disclosed in the written agreement that he had been arrested multiple times and had a pending criminal charge at the time he entered into the agreement. Additionally, the written agreement and disclosure stated that the CI knew that appellant was a drug dealer and was affiliated with the Native Mob.

After the agreement was signed, police searched the CI, attached a recording and transmitting device to the CI's ankle, and gave him \$170 in cash to make the controlled-substance purchase. The CI entered appellant's residence while police surveilled. Appellant provided the CI with a bag containing 3.5 grams of methamphetamine, and the

CI paid appellant \$170. After leaving appellant's house, the CI returned to police and "handed them the dope."

The state charged appellant with third-degree sale of a controlled substance in violation of Minn. Stat. § 152.023, subd. 1(1) (2016). At appellant's jury trial, the state called four witnesses, including Agent Meyer and the CI. The state introduced six exhibits consisting of Facebook and text messages between the CI and appellant, excerpts from the audio surveillance of the controlled-substance buy, and the cooperating individual agreement which included the CI's factual disclosures identified above. The cooperating individual agreement was admitted into evidence with no objection.

Appellant was convicted of third-degree sale of a controlled substance, and the district court sentenced appellant to 60 months in prison.

This appeal followed.

D E C I S I O N

Appellant argues that the district court committed plain error by permitting the state to offer the cooperating individual agreement into evidence when the document contained references to appellant's gang affiliation and his history of selling drugs.

Because appellant did not object to the admission of the cooperating individual agreement at trial, we apply the plain-error standard of review. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error standard, a defendant must show "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "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). To meet the substantial-rights requirement, “[the defendant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). If all three elements of the plain-error test are met, “we should address the error to ensure fairness and the integrity of the judicial proceedings” and “will correct the error only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected.” *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotations omitted).

Because appellant did not object to the document in question, the district court was not called on to decide whether the cooperating individual agreement should have been excluded from evidence. We therefore address whether the district court should have excluded the document sua sponte. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). A district court does not err by failing to sua sponte exclude evidence when a defendant’s failure to object to the evidence may be part of his trial strategy. *See State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005) (stating that the supreme court “do[es] not agree that the district court must, or even should, interfere with the trial strategy of the defendant”); *see also State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012) (stating that “[t]he invited error doctrine does not apply . . . if an error meets the plain error test”).

Here, the cooperating individual agreement set forth the CI’s accusation that appellant was a drug dealer and gang member, and such accusations were likely objectionable. But appellant did not object, and for good reason. The very same document contained even more information reflecting poorly on the CI. Appellant’s attorney drew

the jury's attention to the cooperating individual agreement by questioning the CI on cross-examination about the document, including the portions of it containing incriminating information concerning the CI's frequent use and sale of illegal drugs, his multiple driving-while-impaired arrests, and his pending charges at the time of the agreement. Had appellant's counsel sought to have the two now-complained-of comments excised from the exhibit, this might well have invited the state to seek excising the arguably more-damaging information about the CI from the document. In his summation, appellant's attorney identified among the weaknesses in the state's case that the CI was not credible and that the state's case rested on the CI's veracity. It is evident to us that appellant's counsel not having objected was part of appellant's trial strategy. From the record, it appears that appellant deliberately refrained from objecting to the evidence because, when compared to the two lines regarding appellant, the cooperating individual agreement contained substantially more information helpful to appellant's defense concerning the state's primary witness. The district court did not plainly err by refusing to sua sponte exclude the evidence where the evidence in question was helpful to the defense and the lack of objection to it was evidently strategic. We see no error, much less error that is plain.

We also note that, even if there was an error and even if that error was plain, appellant cannot show on this record that the error affected appellant's substantial rights. *See State v. Mosley*, 853 N.W.2d 789, 801-03 (Minn. 2014) (holding that, even assuming that plain error occurred, relief is not warranted when the defendant's substantial rights are not violated). In determining whether the admission of the cooperating individual agreement affected appellant's substantial rights, we look to the strength of the state's

evidence. *Id.* at 801. Here, the state made a strong showing that appellant sold methamphetamine to the CI. Despite appellant's vigorous attacks on the CI's credibility, the jury accepted the CI's version of the transaction, which was monitored by law enforcement. At trial, the state provided the jury with Facebook and text exchanges in which appellant offers to sell methamphetamine and heroin to the CI. Additionally, police testified that they closely monitored the controlled buy, and that "at all times agents did have eyes on [the CI] during the purchase." Police indicated that, immediately after the purchase, the CI provided them with a small plastic bag "that contained a crystal-like substance," and that the substance tested positive as methamphetamine. The evidence strongly supports that appellant sold the CI methamphetamine. There is nothing to suggest that the outcome of the trial was affected in any material way by the two isolated references in one document to appellant's drug and gang history.

The district court did not commit plain error by admitting the cooperating individual agreement into evidence.

Affirmed.