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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0192**

State of Minnesota,
Respondent,

vs.

Raymon Freeman,
Appellant.

**Filed February 22, 2021
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge***

Hennepin County District Court
File No. 27-CR-19-1652

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

In this direct appeal from final judgment of conviction, appellant argues that (1) he is entitled to a new trial on the grounds of multiple evidentiary errors, (2) the district court abused its discretion by denying his motion to present alternative-perpetrator evidence, and (3) the district court erred in sentencing him. We affirm in part because the district court did not abuse its discretion in its evidentiary rulings or by denying appellant's motion to present alternative-perpetrator evidence. But we reverse in part and remand for resentencing because the district court erred in sentencing appellant.

FACTS

A concerned citizen contacted the police and informed them that someone standing outside appellant Raymon Freeman's¹ apartment door told the concerned citizen that they were waiting to buy a gram of heroin. The concerned citizen identified a picture of Freeman as the person selling heroin from the apartment. A detective began surveilling Freeman in early 2019 and observed activity that indicated that Freeman was selling narcotics in the parking lot of the apartment complex where he lived.

During the surveillance, the detective witnessed at least ten encounters involving hand-to-hand exchanges while Freeman shared a vehicle with another person. On several occasions, the detective saw Freeman grab something from under the hood of his car when

¹ Appellant's legal name is Bruce Terrain Solomon, but the proceedings in the district court were captioned "State v. Raymon Freeman" because he had previously given that name in jail. Appellant's counsel continued to use the name Raymon Freeman in this appeal for the sake of clarity.

he was not working on it. The detective testified at trial that the frequent trips to remove items from beneath the hood of his car and short visits with other persons inside cars indicated narcotic exchanges.

The detective applied for a warrant to search Freeman's apartment for evidence of drug activity. The police executed the warrant on January 16, 2019. Freeman was alone inside the apartment and initially attempted to barricade the apartment door. After gaining entry, the officers recovered a "drug ledger,"² scales, packaging materials, \$13,000 in cash, a box of 9-mm ammunition, 4.5 grams of heroin, and 0.6 grams of cocaine. The cash and the box of ammunition were recovered from a digital safe, the code to which Freeman provided to the officers. The officers recovered a DNA sample from the box of ammunition that matched Freeman. In the bathroom, the officers also found a plastic bag with residue that tested positive for heroin and powder on the toilet seat that tested positive for heroin, which were consistent with someone flushing heroin down the toilet.

The police also seized Freeman's phone and applied for a second warrant to search its contents. That search revealed "several messages that were indicative of narcotic activity."³ In addition, some of the names and numbers in the text messages were identical to the names and numbers appearing in the drug ledger. The state presented a list of text messages recovered from Freeman's phone at trial.

² The "drug ledger" was a piece of notebook paper with a list of names and corresponding numbers that police, based on their training and experience, concluded referenced amounts owed to Freeman by various persons for drug sales.

³ The detective testified that Freeman received text messages at 10:00 p.m., 12:00 a.m., 1:00 a.m., 2:00 a.m., 3:00 a.m. and 4:00 a.m. with short messages like "Are you around?", "Got a ten?", and "Stop by."

Freeman was charged with four counts: (1) possession of ammunition by an ineligible person under Minn. Stat. § 624.713, subd. 1(2) (2020); (2) second-degree sale of heroin under Minn. Stat. § 152.022, subd. 1(3) (2020); (3) fifth-degree possession of heroin under Minn. Stat. § 152.025, subd. 2(1) (2020);⁴ and (4) fifth-degree possession of cocaine under Minn. Stat. § 152.025, subd. 2(1). Prior to trial, Freeman moved the district court to allow him to present an alternative-perpetrator defense. In support of his motion, Freeman submitted an affidavit prepared by his girlfriend. In her affidavit, Freeman’s girlfriend—who lived with Freeman—averred that the cash found in the safe was hers and that the box of ammunition had been left by an ex-boyfriend. The district court denied Freeman’s motion on the ground that his girlfriend’s affidavit did not establish that she was an alternative perpetrator because, at most, the affidavit established that she jointly possessed the ammunition with Freeman.

At trial, the state called to testify the detective who surveilled Freeman and the officers who executed the search warrants. The state played surveillance footage of Freeman’s parking lot activities for the jury, and the officers testified about discovering the drugs, drug ledger, cash, ammunition, plastic bag with residue, and Freeman’s phone in the apartment. An officer testified that the quantity of heroin recovered from Freeman’s apartment—4.5 grams—is a much greater quantity than would typically be possessed for personal use. The district court instructed the jury that a person is guilty of second-degree sale of heroin if he “on one or more occasions within a 90-day period, sold one or more

⁴ Prior to trial, the state amended the possession-of-heroin charge from a fifth-degree to a third-degree charge.

mixtures of a total weight of 3 grams or more containing heroin.” The jury found Freeman guilty of all counts.

The district court adjudicated Freeman guilty of count one, being an ineligible person in possession of ammunition, and count two, second-degree sale of heroin. The district court sentenced Freeman first on the possession-of-ammunition conviction and second on the second-degree sale conviction. This appeal follows.

DECISION

Freeman argues that he is entitled to reversal of his second-degree sale conviction because the district court abused its discretion in its evidentiary rulings and the prosecutor committed misconduct in the closing argument. He further contends that the district court sentenced him in the wrong chronological order. In a pro se supplemental brief, Freeman asserts that the district court abused its discretion by denying his motion to present alternative-perpetrator evidence. We address each argument in turn.

I. Freeman is not entitled to a new trial on his second-degree sale-of-heroin conviction based on his claim of evidentiary errors.

Freeman was convicted of second-degree sale of heroin under Minn. Stat. § 152.022, subd. 1(3), which provides: “A person is guilty of controlled substance crime in the second degree if on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of three grams or more containing heroin.” “Sell” is defined as “to sell, give away, barter, deliver, exchange, distribute or

dispose of to another, or to manufacture,” or “to possess with intent to perform” any of the previously identified acts. Minn. Stat. § 152.01, subd. 15a(1), (3) (2020).

A. *Spreigl* Evidence

For the first time on appeal, Freeman argues that the state introduced copious evidence of his prior bad acts in violation of the notice requirement of Minn. R. Evid. 404(b)(2).⁵ Freeman contends that the district court erred by admitting “extensive testimony, surveillance footage, and text message evidence of Freeman’s alleged pre-January 16, 2019 drug trafficking.” The state contends that the evidence that Freeman alleges was introduced in violation of *Spreigl* was not *Spreigl* evidence but instead was direct evidence to prove the statutory elements that he sold one or more mixtures of a total weight of three grams or more containing heroin within 90 days of the search of his apartment. We agree.

Evidence of past crimes or other bad acts is generally not admissible to prove the character of a person or that the person acted in accordance with that character at a particular time. Minn. R. Evid. 404(b)(1); *Spreigl*, 139 N.W.2d at 169. When the state seeks to introduce evidence of a defendant’s past crimes or other bad acts, it must “furnish[] defendant in writing a statement of the offenses it intends to show he has committed” within a reasonable time before trial. *Spreigl*, 139 N.W.2d at 173. Such evidence “shall not . . . be received” unless the state complies with this notice requirement. *Id.*

⁵ Evidence of prior crimes or other bad acts is commonly referred to as *Spreigl* evidence following the supreme court’s decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

Because Freeman did not object at trial to the admission of the evidence of his prior activities, we review the district court's admission of the evidence for plain error. *State v. Ezeka*, 946 N.W.2d 393, 407 (Minn. 2020). Under this standard, Freeman must demonstrate "(1) an error, (2) that is plain, and (3) that affect[ed] his substantial rights." *Id.* An error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013) (quotation omitted). A defendant's substantial rights are affected if "there is a reasonable likelihood that [the admission of evidence] in question had a significant effect on the jury verdict." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). If Freeman establishes all three of the prongs, we will reverse only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Mouelle*, 922 N.W.2d 706, 718 (Minn. 2019).

In determining whether Freeman has shown that the district court plainly erred, "[w]e review a district court's admission of *Spreigl* evidence for an abuse of discretion." *State v. Smith*, 940 N.W.2d 497, 503 (Minn. 2020). *Spreigl* evidence is generally excluded to protect defendants from the risk that the jury could use the evidence for "an improper purpose." *Id.* (quotation omitted). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

Freeman argues the detective's testimony about the text messages and his activities in the parking lot was "classic propensity evidence" because the evidence invited the jury to conclude that "because he sold drugs before, he must have been acting in conform[ity] with that prior conduct" on January 16, 2019. We disagree.

The district court instructed the jury, both at the beginning of trial and in its closing instructions, that Freeman was guilty of second-degree sale of heroin if the jury found that he sold “one or more mixtures” containing heroin on one or more occasions “within a 90-day period.”⁶ This instruction tracks exactly with the language of Minn. Stat. § 152.022, subd. 1(3).

The state analogizes the 90-day period in Minn. Stat. § 152.022, subd. 1(3), to the six-month period in Minn. Stat. § 609.52, subd. 3(5) (2020) (providing that “the value of the money or property or services received by the defendant in violation of any one or more of the above provisions within any six-month period may be aggregated and the defendant charged accordingly”). In construing § 609.52, the supreme court concluded that the inclusion of a period of time in a statute permits considering the defendant’s conduct within that period as a “continuous act,” in which each individual act becomes an element of the offense. *State v. Mathiasen*, 141 N.W.2d 805, 810-11 (Minn. 1966). Here, the inclusion of a period of time in § 152.022, subd. 1(3), permits the state to introduce evidence of the defendant’s conduct within the 90 days preceding the date of offense for the second-degree sale-of-heroin charge. Based on *Mathiasen*, we conclude that the district court did not plainly err by permitting the state to offer Freeman’s messages and parking lot activities to prove a necessary element of the second-degree sale-of-heroin offense.

But even if we were to conclude, without deciding, that the evidence of Freeman’s prior activities was improper *Spreigl* evidence, the plain-error analysis does not end there.

⁶ Freeman raised no objection to the jury instructions at trial.

Freeman must show that “there is a reasonable possibility that [the wrongfully admitted evidence] had a significant effect on the jury verdict” to show that his substantial rights were affected. *Ezeka*, 946 N.W.2d at 407 (quotation omitted). He has not done so.

When determining whether an appellant has shown a reasonable possibility that the allegedly wrongfully admitted evidence had a significant effect on the jury verdict, we consider the strength of the evidence against the defendant. *State v. Robinette*, 944 N.W.2d 242, 248 (Minn. App. 2020), *review granted in part* (Minn. June 30, 2020).⁷ Where the state has produced other evidence that would support the conviction even if the alleged bad-act evidence had been excluded, the defendant cannot show that his substantial rights have been affected. *See State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006) (holding that defendant did not show a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict because other evidence in the record attested to the same element as the *Spreigl* evidence). Here, the state presented overwhelming evidence of Freeman’s guilt that was recovered from his apartment during execution of the search warrant.

The state introduced the following evidence obtained from Freeman’s apartment: 4.5 grams of heroin, multiple scales, packaging materials, a drug ledger containing a list of names and dollar amounts presumably owed to Freeman, and a safe—to which Freeman knew the code—containing \$13,000 separated into \$1,000 bundles. In addition, the jury

⁷ The Minnesota Supreme Court granted review of only part III of the *Robinette* opinion, which is not relied upon here. *State v. Robinette*, No. A19-0679 (Minn. June 30, 2020) (order).

could have reasonably inferred that Freeman was in possession of more than 4.5 grams of heroin, because the state introduced evidence—the plastic bag and powder from the toilet seat—indicating that he had flushed heroin down the toilet just before the police entered the apartment.

The statutory definition of “sell” includes possession of the contraband with intent to sell it. Minn. Stat. § 152.01, subd. 15a(1), (3). Because the jury could have reasonably concluded that, based on the evidence seized from his apartment, Freeman intended to sell the heroin in his possession he has not shown a reasonable possibility that the allegedly wrongfully admitted evidence significantly affected the verdict.

B. Text Messages

Freeman asserts that the district court abused its discretion by admitting evidence of text messages that he characterizes as inadmissible hearsay. Again, Freeman did not object to the introduction of the text messages at trial. We therefore review the district court’s admission of the text messages for plain error. *Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996). Freeman must demonstrate a plain error that affected his substantial rights. *Ezeka*, 946 N.W.2d at 407. To show that the district court abused its discretion by admitting the text messages, Freeman must show that the district court’s decision was “based on an erroneous view of the law or is against logic and the facts in the record.” *Guzman*, 892 N.W.2d at 810.

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). Hearsay is inadmissible, unless an exception applies. Minn. R. Evid. 802.

Hearsay is excluded to protect the defendant's right to cross-examine the declarant. *State v. Ferguson*, 804 N.W.2d 586, 594 (Minn. 2011). But a statement made out of court is not hearsay if it is admitted into evidence for a purpose other than to prove the truth of the matter asserted in the statement. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004).

Freeman has not shown that the district court plainly erred by admitting the text messages. He concedes that his outgoing text messages were not hearsay because they were statements of a party-opponent as defined by Minn. R. Evid. 801(d)(2) (excluding statements made by party-opponents from the definition of hearsay). But Freeman asserts that the incoming messages admitted by the district court were hearsay statements not falling within any recognized exception. The state contends that the incoming text messages were not admitted to prove the truth of their contents, but instead to contextualize Freeman's messages under *State v. Tovar*, 605 N.W.2d 717, 724-26 (Minn. 2000).

In *Tovar*, the district court admitted a tape-recorded interview between Tovar and the police. *Id.* at 724. On appeal from his conviction, Tovar argued that the district court abused its discretion by permitting the jury to hear the interview, which contained statements from third parties relayed to Tovar by the police. *Id.* at 724. The supreme court held that the statements were not hearsay because they were admitted not "for their truth, but rather to give context to Tovar's responses and admissions on the tape." *Id.* at 726. The supreme court concluded that Tovar—who, like Freeman, had not objected to the statements at trial—had not demonstrated plain error. *Id.*

Here, the state did not introduce the text messages to prove that the statements asserted in the messages were true. As in *Tovar*, the state introduced the messages to

contextualize Freemans's outgoing text messages for the jury. Because Freeman has not demonstrated that the district court plainly erred by permitting the state to introduce the text messages in order to contextualize his own messages, we need not reach the remaining prongs of the plain-error analysis. *See State v. Lilienthal*, 889 N.W.2d 780, 786 (Minn. 2017) (declining to consider whether appellant's substantial rights were affected because appellant did not show plain error).

C. Closing Argument

Freeman contends that he is entitled to a new trial because the prosecutor committed misconduct in her closing argument by inviting the jury to convict him based on his pre-January 16, 2019 conduct. Because Freeman did not object to the prosecutor's alleged misconduct at trial, we apply a modified plain-error standard of review. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, if Freeman demonstrates plain error, the burden shifts to the state to show that the error did not affect Freeman's substantial rights. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). If the state does not meet its burden, this court will order a new trial only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 804 (quotation omitted).

Prosecutors are required to ensure that each defendant receives a fair trial, despite strong evidence of guilt. *State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001). A prosecutor violates that duty by engaging in improper conduct, such as "eliciting inadmissible evidence." *Ramey*, 721 N.W.2d at 300. The violation of a defendant's right

to a fair trial is a violation of the defendant's right to due process. *State v. Hanke*, 712 N.W.2d 211, 214 (Minn. App. 2006).

Freeman's allegation of error here is based upon the claims of error we just addressed. Because we have concluded that the district court did not plainly err by admitting the evidence of Freeman's prior activities or the text messages, Freeman has not demonstrated plain error with respect to the prosecutor's closing argument. Therefore, we need not determine whether the state has met its burden to show that Freeman's substantial rights were not affected. *See Lilienthal*, 889 N.W.2d at 786 (declining to consider whether appellant's substantial rights were affected because appellant did not show plain error).

Finally, Freeman argues that even if any individual error would not require reversal, the cumulative weight of the alleged errors entitles him to a new trial. Freeman's argument that he was prejudiced by the alleged errors focuses heavily on his argument that the state introduced improper character evidence. The state contends that Freeman was not prejudiced because police "recovered a substantial amount of evidence of drug trafficking from [Freeman's] apartment." We conclude that Freeman has not shown a reasonable possibility that the evidence alleged to be wrongfully admitted significantly affected the verdict because the jury could have convicted him solely on the basis of the drugs, money, scales, packaging materials, and drug ledger recovered from his apartment. Accordingly, Freeman is not entitled to a new trial on his second-degree sale conviction.

II. The district court improperly sentenced Freeman.

Freeman argues that his case must be remanded for resentencing irrespective of whether his second-degree sale conviction is reversed because the district court sentenced

him in the wrong sequence. The sentencing guidelines mandate that “[m]ultiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred.” Minn. Sent. Guidelines 2.B.1.e (2018). Freeman asserts that the district court erred by sentencing him first on the offense of being an ineligible person in possession of a firearm because that offense occurred on January 16, 2019, while the second-degree sale charge occurred during the 90-day period preceding January 16. The state agrees. Because the district court sentenced Freeman in the wrong order for his convictions, we reverse and remand to the district court for resentencing consistent with the sentencing guidelines.

III. The district court did not abuse its discretion by denying Freeman’s motion to present alternative-perpetrator evidence.

In a pro se supplemental brief, Freeman argues that the district court abused its discretion by denying his motion to present alternative-perpetrator evidence with respect to who owned the items found in the safe. Prior to trial, Freeman submitted an affidavit from his girlfriend in which she claimed that the cash was hers and that the ammunition had been left in the safe by an ex-boyfriend. The state contends that the district court correctly concluded that Freeman’s girlfriend’s affidavit did not satisfy the requirements of an alternative-perpetrator defense.

This court reviews a district court’s denial of a defendant’s motion to admit alternative-perpetrator evidence for an abuse of discretion. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). “A district court abuses its discretion when its decision is based

on an erroneous view of the law or is against logic and the facts in the record.” *Guzman*, 892 N.W.2d at 810.

In determining whether alternative-perpetrator evidence is admissible, the district court “must determine whether the defendant laid a proper foundation for admission of such evidence by offering evidence that has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime.” *Atkinson*, 774 N.W.2d at 590 (citing *Huff v. State*, 698 N.W.2d 430, 436 (Minn. 2005)). If the defendant fails to lay a proper foundation, the defendant cannot present alternative-perpetrator evidence. *Id.* (citing *State v. Hawkins*, 260 N.W.2d 150, 159 (Minn. 1977)).

Here, the district court concluded that Freeman failed to lay a proper foundation because his girlfriend’s affidavit did not establish that she had “exclusive and sole possession” of the contraband. The district court ruled that Freeman’s girlfriend’s affidavit did not eliminate the possibility of Freeman’s joint possession of the ammunition, particularly in light of the fact that Freeman knew the code to the safe and his DNA was found on the ammunition. *See State v. Lee*, 683 N.W.2d 309, 316 n.7 (Minn. 2004) (holding that a defendant may be convicted of constructively possessing contraband that is jointly possessed with another person). Because Freeman did not lay the required foundation for the alternative-perpetrator evidence, the district court properly exercised its discretion by denying his motion.

In sum, we conclude that Freeman has not shown that he is entitled to a new trial on his second-degree sale charge because he has not shown that the district court plainly erred or that his substantial rights were affected by the evidence that he alleges was erroneously

admitted. We further conclude that the district court properly exercised its discretion by denying Freeman's motion to admit his alternative-perpetrator evidence. But because we conclude that the district court sentenced Freeman for his two convictions in the wrong order, we reverse and remand for resentencing consistent with the sentencing guidelines.

Affirmed in part, reversed in part, and remanded.