STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0349

State of Minnesota,
Respondent,

vs.

Abdullahi Abdiqadir Noor,
Appellant.

Filed February 12, 2018
Affirmed
Jesson, Judge

Steele County District Court
File No. 74-CR-16-1380

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Dan McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Connolly, Judge; and Florey, Judge.

S Y L L A B U S

The admission of a Certificate of Order Sent, a document attesting to the accuracy of public records and their mailing date, does not violate a criminal defendant's Sixth Amendment right to confrontation when the underlying records are nontestimonial.

O P I N I O N

JESSON, Judge

This court has previously concluded that the introduction of Minnesota Department of Public Safety records kept in the regular course of business does not violate a defendant's Sixth Amendment right to confrontation. The same legal question is at issue in this case, not with an actual record, but with the Certificate of Order Sent attached to the record and attesting to its accuracy as a copy. Appellant Abdullahi Noor argues that the district court committed plain error when it admitted the certificate into evidence without a testifying witness, during his trial for DWI-related charges, because its admission violated the Confrontation Clause. He further contends the court erred when it admitted documents into evidence that contained unredacted prejudicial information. We affirm.

FACTS

Late at night on July 1, 2016, a high-school student was driving home when he noticed a SUV frequently swerving. He followed the car, got its license plate number, and called 9-1-1. Law enforcement received a call from dispatch about the reckless driver and located the car. An Owatonna police officer soon arrived at the scene and spoke with the driver of the vehicle, appellant Abdullahi Noor. The officer noticed a smell of alcohol coming from the car and that Noor slurred his speech. The officer had Noor perform several field sobriety tests. He failed these tests. Noor refused to submit to a preliminary breath test and was arrested and transported to the Steele County Detention Center. At the detention center, the officer read Noor the implied consent advisory. Noor was unresponsive during the reading, and the officer deemed this a test refusal.

The state charged Noor with three counts: (1) first-degree DWI – refusal to submit to chemical test; (2) first-degree DWI – operate motor vehicle under influence of alcohol; and (3) driving after cancellation – inimical to public safety. Minn. Stat. §§ 169A.20, subds. 2, 1(1), 171.24, subd. 5 (2014). A jury trial was held on September 12, 2016. Noor stipulated that he had three prior DWI convictions on his record. As the district court explained, this was so "the jury doesn't hear about those." Noor did not however stipulate to his license being revoked.

At trial, the officer and the student testified. Dash-camera video showing the arrest was played for the jury, in addition to audio from the detention center. An acquaintance of Noor also testified, explaining that Noor and his friends drank "a lot" at her house hours before the arrest. Before going to sleep, she told them that it would be unsafe to drive home. When she woke up, Noor was no longer there.

Central to this appeal, the state offered a three-page exhibit into evidence during trial.[1] The first page is a Certificate of Order Sent, dated September 2, 2016. It states:

> The undersigned, being a duly appointed agent of the Commissioner of Public Safety and now in charge of the driver's license records of the Driver and Vehicle Services Division of the Department of Public Safety, hereby certifies that:
>
> . . . .
>
> 1. The attached is a true and correct copy of an order in the records of the Department of Public Safety, and that this copy

[1] While Noor's stipulation to prior convictions eliminated the need for the state to offer evidence of past convictions, the state still needed to prove that his license was revoked, which was the purpose served by this document.

> has been compared with the copy of the original on file and is identical;
>
> 2. The original of the attached order was deposited as first class mail in the United States Post Office in the city of St. Paul on [February 9, 2016]. The original was properly enveloped, sealed, postage paid thereon and directed to the person named thereon at the address which was last known of said person shown by the permanent address on record.

The second and third page of the document is an order from the Department of Public Safety, informing Noor that his license is revoked effective February 16, 2016, because of "DRIVING UNDER THE INFLUENCE." This order also states that it was mailed on February 9, 2016. This unredacted exhibit was admitted without objection. No witnesses testified for purposes of laying foundation or authenticating the exhibit. After the evidence was admitted, the state moved to amend the third count to driving after revocation under Minnesota Statutes section 171.24, subdivision 2 (2014).[2] The defense did not object, and the district court allowed the state to amend the charge.

The jury found Noor guilty of all three counts. The district court sentenced Noor only for the conviction of first-degree DWI – refusal to submit to chemical test, to a stayed 48-month sentence.[3] This appeal follows.

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[2] This amendment was made because the Department of Public Safety Records establish that the license was revoked, not cancelled.

[3] The district court also adjudicated Noor guilty of operating a motor vehicle while under the influence and driving after revocation. Thus, Noor's challenge to the admission of the Certificate of Order Sent regarding the driving-after-revocation charge is properly before this court.

ISSUES

I. Did the district court's admission of the Certificate of Order Sent violate Noor's Sixth Amendment right to confrontation?

II. Did the district court's admission of the unredacted Department of Public Safety order constitute plain error?

ANALYSIS

Noor argues the district court committed plain error by: (1) depriving him of his Sixth Amendment right to confront witnesses when it admitted the Certificate of Order Sent; and (2) admitting the Department of Public Safety order with unredacted references to prior DWI convictions.[4] Because Noor failed to object to the exhibit at trial, this court analyzes his arguments for plain error. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). This analysis requires reversal only if "(1) an error occurred in the district court, (2) the

[4] The state contends that, under *State v. Mohomoud*, 788 N.W.2d 152 (Minn. App. 2010), *review granted and remanded* (Minn. Nov. 23, 2010), Noor waived any arguments concerning the Certificate of Order Sent exhibit because he did not object to the exhibit and because his defense attorney stated that she was aware of the exhibit prior to trial. Generally, when appellants fail to object to the admission of evidence, this court still reviews the issue on appeal under the plain-error standard. *State v. Drew*, 889 N.W.2d 323, 330 (Minn. App. 2017). *Mohomoud* does not represent an exception to this general rule. In *Mohomoud*, the state requested to play a DVD that included references to the defendant's DWI convictions, even though the convictions were stipulated to. *Mohomoud*, 788 N.W.2d at 155. In not objecting to the DVD, the defense attorney stated he was aware of the references. *Id.* at 157. This court determined that the defendant's attorney waived the defendant's right to appeal the issue, but the Minnesota Supreme Court granted review and remanded the case for reconsideration of the issue of whether the defendant waived any challenge to the admission of the evidence in light of the general "rule that the invited-error doctrine does not apply to plain error." *State v. Mohomoud*, No. A09-1969, 2011 WL 1743733, at *1 (Minn. App. May 9, 2011). On remand, this court recognized that the remand implicitly rejected the determination that the defendant waived his claim of error. *Id.* at *2, n.1. Here, as in *Mohomoud*, the defense attorney's acceptance of the exhibit does not prevent this court from reviewing for plain error.

error was plain, and (3) the error affects the defendant's substantial rights." *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010). If the appellant satisfies his burden for all three prongs, then the court assesses whether the burden "affects the fairness, integrity, or public reputation of the judicial proceeding before granting relief." *Id.* (internal quotations omitted). We address Noor's two arguments in turn.

I. The district court's admission of the Certificate of Order Sent did not violate Noor's Sixth Amendment right to confrontation.

Noor contends that the admission of the Certificate of Order Sent, not the actual Department of Public Safety record, violated his Sixth Amendment right to confrontation, and the district court committed plain error by admitting it. He argues that a witness should have testified to lay foundation for and authenticate the certificate, although a witness for the underlying records was not required. Because this issue involves determining whether the Confrontation Clause was violated, it is a question of law we review de novo. *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007). We start with the first prong on the plain-error analysis: whether an error occurred at the district court. *Hull*, 788 N.W.2d at 100. And because the admission of evidence that violates the Confrontation Clause constitutes an error, *Tscheu*, 758 N.W.2d at 864, the issue turns on whether the Certificate of Order Sent violates the Confrontation Clause.

To analyze this issue, we first examine the landscape of the law prior to the United States Supreme Court's landmark Confrontation Clause decision, *Crawford v. Washington*, in order to properly set forth the law from *Crawford* and subsequent caselaw. 541 U.S. 36,

124 S. Ct. 1354 (2004). We then apply the Confrontation Clause analysis to the Certificate of Order Sent.

The Confrontation Clause Leading up to Crawford

The right of the criminally accused to face their accuser is ancient. While this right can be observed dating back to the Roman Empire 1,500 years ago, the Confrontation Clause's roots are more likely traced to late sixteenth century England. *Crawford*, 541 U.S. at 43-44, 124 S. Ct. at 1359-60. There, a common-law right of confrontation was developing. *Id.*; *see also White v. Illinois*, 502 U.S. 346, 361, 112 S. Ct. 736, 745 (1992) (Thomas, J., concurring). Many point to the trial of Sir Walter Raleigh of England as the primary inspiration for the Sixth Amendment's Confrontation Clause, while others point to it as solely a prime illustration of the need for the right to confront.[5] Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481, 482-83 (1994); *see also Coy v. Iowa*, 487 U.S. 1012, 1015, 108 S. Ct. 2798, 2800 (1988). Accused of treason, Raleigh demanded the accuser speak before him in court. *Id.* at 545. Expressing surprise, the judge rejected this demand citing no basis in common law of any such right and worrying that the accuser may change his story once in court. *Id.* Because of this type of abuse at trials, a reaction

[5] The origins of the Confrontation Clause are often debated. Outside of the trial of Raleigh and sixteenth century England, some contend the Confrontation Clause was merely a codification of criminal procedure in the American states prior to the Bill of Rights. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 81 (1995). Others, perhaps wisely, conclude that tracing the development is an impossible task. *See id.* at 77.

occurred—and the criminally accused were given a right to confront their accusers. *See California v. Green*, 399 U.S. 149, 157, 90 S. Ct. 1930, 1934 (1970).

Whether Raleigh's trial served as the key inspiration or was merely an example of the dangers of not allowing the accused to confront their accuser, this right became a cornerstone in our judicial system. The Sixth Amendment's Confrontation Clause guarantees that, in all criminal prosecutions, the accused shall enjoy the right "to be confronted with the witnesses against him."[6] U.S. Const. amend. VI; *see also* Minn. Const. art. 1, § 6. The primary purpose of the right is "to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110 (1974). But this right is not without limits and does not broadly prohibit all out-of-court statements made by witnesses not present at trial.[7]

Through the twentieth century, courts focused on reliability of evidence as the critical factor in determining whether statements violate the Confrontation Clause. In the now overruled *Ohio v. Roberts*, the United States Supreme Court required that if a hearsay declarant was unavailable for trial, the Confrontation Clause was satisfied when the out-of-court statement exhibited adequate "indicia of reliability." 448 U.S. 56, 66, 100 S. Ct.

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[6] Prior to the Sixth Amendment, the right to face witnesses was a common-law right with numerous exceptions. *Salinger v. United States*, 272 U.S. 542, 548, 47 S. Ct. 173, 175 (1926).

[7] It is important to note the overlap between the Confrontation Clause and the evidentiary rules on hearsay. 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. Generally hearsay is prohibited, but there are numerous exceptions. Minn. R. Evid. 803, 804. However, the Confrontation Clause adds a wrinkle in that it may bar the admission of otherwise admissible hearsay. *State v. Fichtner*, 867 N.W.2d 242, 251 (Minn. App. 2015), *review denied* (Minn. Sept. 29, 2015).

2531, 2539 (1980), *abrogated by Crawford*, 541 U.S. 36, 124 S. Ct. 1354.[8] But how courts approached the Confrontation Clause soon changed.

Crawford and the Post-Crawford Analysis

The United States Supreme Court in *Crawford* held that a showing of reliability was not sufficient on its own to satisfy the Confrontation Clause, and instead it shifted the focus to whether the statements in question are testimonial. 541 U.S. at 61, 124 S. Ct. at 1370. The court highlighted that the "principal evil at which the Confrontation Clause was directed" was the "use of *ex parte* examinations as evidence against the accused," like those used in Sir Walter Raleigh's trial. *Id.* at 50, 124 S. Ct. at 1363 (emphasis in original). It rejected the prior focus on reliability as the Confrontation Clause is a procedural guarantee—not a substantive guarantee of reliability—that accords the ability to the defendant to cross-examine certain witnesses. *Id.* at 61, 124 S. Ct. at 1370. The court determined that *testimonial* hearsay statements, absent a prior opportunity to cross-examine, are barred by the Confrontation Clause. *Id.* at 68-69, 124 S. Ct. at 1374.

While declining to set forth a comprehensive definition of testimonial, the Supreme Court did shed light on what makes a statement testimonial. It explained that statements are likely testimonial in situations that the Confrontation Clause was most directed at: police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at a former trial. *Id.* at 68, 124 S. Ct. at 1374. The court put forth three formulations of

[8] Similarly, through the 1990s, Minnesota only admitted hearsay statements when the declarant did not testify at trial, after examining two factors: necessity and reliability. *State v. Roby*, 463 N.W.2d 506, 509 (Minn. 1990).

"core" testimonial hearsay: ex parte in-court testimony or its functional equivalent; extrajudicial statements; and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52, 124 S. Ct. at 1364. Through *Crawford*, the United States Supreme Court made it clear that it carefully distinguished testimonial and nontestimonial statements and that the Confrontation Clause was concerned "with a specific type of out-of-court statement." *Id.* at 51, 124 S. Ct. at 1364.

A subsequent United States Supreme Court decision addressed documents prepared for trial and provides further guidance. In *Melendez-Diaz v. Massachusetts*, the state sought to introduce into evidence affidavits reporting the results of forensic analysis establishing the material seized by police was cocaine. 557 U.S. 305, 308-10, 129 S. Ct. 2527, 2530-2532 (2009). Over the appellant's objection, the district court admitted the evidence, without a testifying witness, as prima facie evidence of "composition, quality, and net weight" of the narcotic seized. *Id.* at 309, 129 S. Ct. at 2531. The Supreme Court reversed and stated there was little doubt these documents were testimonial and the analysts were "witnesses" under the Sixth Amendment, as not only were the documents introduced for the purpose of "proving some fact," but their sole purpose was an evidentiary purpose—to establish the substance was cocaine. *Id.* at 310-11, 129 S. Ct. at 2532.

With this understanding of the United States Supreme Court's analysis concerning the Confrontation Clause, we transition to Minnesota caselaw. Minnesota courts look to the three formulations of "core" testimonial hearsay mentioned in *Crawford*, as well as the critical factor of whether the statement was prepared for trial. *State v. Caulfield*, 722

N.W.2d 304, 308-09 (Minn. 2006). But courts do not exclusively look to the timing of documents in relation to the trial date, but also at the nature of statements and their substance. *State v. Andersen*, 900 N.W.2d 438, 444 (Minn. App. 2017). And the state has the burden to prove the evidence was nontestimonial. *Caulfield*, 722 N.W.2d at 308.

While most Minnesota cases focus on out-of-court oral statements,[9] some, like this one, involve documents. We observe that documents in these cases that were prepared for trial have generally been determined to be testimonial. *See, e.g.*, *Caulfield*, 722 N.W.2d at 306, 310 (holding a Bureau of Criminal Apprehension lab report identifying substance found on defendant as cocaine was testimonial); *State v. Weaver*, 733 N.W.2d 793, 799-800 (Minn. App. 2007) (holding that lab results created in the course of a homicide investigation were testimonial), *review denied* (Minn. Sept. 18, 2007). Documents that were maintained in the normal course of business, on the other hand, have not been held testimonial. *See State v. Jackson*, 764 N.W.2d 612, 617, 619 (Minn. App. 2009) (holding a firearm trace report normally maintained by the Bureau of Alcohol, Tobacco, and Firearms was nontestimonial), *review denied* (Minn. Jul. 22, 2009). In *Andersen*, this court held a radiologist's report, that was created contemporaneously with the moment law enforcement received a report of assault, was nontestimonial. 900 N.W.2d at 444. This court reached its decision not by looking solely at the timing of the statement, but by

[9] Many Confrontation Clause cases in Minnesota have examined out-of-court oral statements. *See, e.g., Tscheu*, 758 N.W.2d at 863-64 (holding that a witness's statement to police that the witness saw a car that matched the defendant's vehicle near the home of a murder victim on the day of a murder was testimonial); *Warsame*, 735 N.W.2d at 692 (holding that volunteered statements to police for the purpose of seeking help were nontestimonial).

looking at its nature and purpose to determine if it was prepared for trial. *Id.* The court concluded that the report was not prepared for trial because it was created as part of a standard practice, "not for providing evidence in litigation." *Id.* These cases illustrate that, while Minnesota courts primarily look through the lens of whether the document was prepared for trial, they have only done so with documents that are introduced to prove a fact.

Outside of an isolated unpublished opinion, Minnesota caselaw is silent on documents similar to the Certificate of Order Sent, where it is less clear if the document was introduced for the evidentiary purpose of proving a fact and constituted the "specific type" of document the Confrontation Clause is concerned with. But it is noteworthy that we have previously addressed the underlying Department of Public Safety records. In *State v. Vonderharr*, the defendant was charged with driving in violation of a restricted driver's license. 733 N.W.2d 847, 850 (Minn. App. 2007). Prior to trial, the state filed a motion requesting it be allowed to introduce certified Department of Public Safety records that established the defendant had a restricted driver's license, without calling a records custodian as a witness. *Id.* The district court denied the motion on the grounds that the records, without a witness to authenticate them, would violate the defendant's Sixth Amendment right to confrontation. *Id.* at 850-51. This court reversed and held that the certified Department of Public Safety records were nontestimonial because they were business records not prepared for litigation. *Id.* at 852.

Finally, we note that most other jurisdictions that have reached the issue of certificates of authenticity have held that documents that authenticate nontestimonial

statements are nontestimonial themselves. *See, e.g.*, *United States v. Johnson*, 688 F.3d 494, 504 (8th Cir. 2012) (holding that certificates of authenticity are nontestimonial); *United States v. Yeley-Davis*, 632 F.3d 673, 680 (10th Cir. 2011) (holding that the certification and affidavit of a telephone company record custodian was nontestimonial); *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007) (holding that foundational evidence authenticating business records at a preliminary hearing is nontestimonial); *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006) (holding that certificates of authenticity are nontestimonial); *State v. Murphy*, 991 A.2d 35, 42, 44 (Me. 2010) (holding that a certificate authenticating business records is nontestimonial when it communicates no facts or information outside of those records). However, the Massachusetts Supreme Court held that a certificate was testimonial when it not only attested to the authenticity of nontestimonial records, but the certificate also stated the records were mailed to the defendant, when the underlying records did not constitute proof the record was ever mailed. *Commonwealth v. Parenteau*, 948 N.E.2d 883, 890-91 (Mass. 2011). Similarly, the Iowa Supreme Court held certificates attesting to the authenticity of nontestimonial public records were nontestimonial, but a certificate of mailing was testimonial. *State v. Kennedy*, 846 N.W.2d 517, 525-27 (Iowa 2014).

With the background and purpose of the Confrontation Clause addressed, and the current status of the law examined, we turn to applying the law to the facts of this case and the Certificate of Order Sent.

Applying the Confrontation Clause Analysis to the Certificate of Order Sent

The Confrontation Clause "reflects an especially acute concern with a specific type of out-of-court statement." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. A Certificate of Order Sent—essentially a cover sheet—is not that type of specific statement. We reach this determination because (1) United States Supreme Court precedent suggests documents introduced for authentication purposes, instead of to prove a fact, are nontestimonial; (2) an examination of Minnesota caselaw reaches the same result; and (3) the certificate is duplicative of nontestimonial documents.

We start by applying United States Supreme Court precedent. Examining the three formulations of testimonial hearsay from *Crawford* shows that a certificate, which repeats information contained in a business record, does not fit into what the Supreme Court held as "core" testimonial statements. 541 U.S. at 51-52, 124 S. Ct. at 1364. The first category, ex parte in-court testimony, concerns material such as "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* While this certificate was made out of court to be used at trial, a certificate about a business record is not testimony that a reasonable witness would expect to be used in a prosecutorial fashion to prove a fact. The second category is inapplicable as it concerns extrajudicial statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," which is not representative of the certificate. *Id.* The third category is the broadest: statements that would lead a reasonable witness to believe it would later be used at trial. *Id.* While the certificate may share some characteristics with this

category, it does not fit cleanly within it, as a reasonable person would not believe the certificate would be used against Noor; instead it would be used only for authentication purposes. Under the formulations set forth in *Crawford*, the Certificate of Order Sent is nontestimonial in nature.

Post-*Crawford* United States Supreme Court decisions bolster our determination. In *Melendez-Diaz*, the court determined that affidavits reporting the results of forensic analysis were testimonial. 557 U.S. at 310, 129 S. Ct. at 2532. In doing so, it explained that the documents were introduced to prove a fact and specifically for the "evidentiary purpose" of proving a substance was cocaine. *Id.* at 310-11, 129 S. Ct. 2532. This is materially different from the Certificate of Order Sent, which was created to certify and authenticate nontestimonial documents, not for the evidentiary purpose of proving a fact against Noor or to accuse him of anything. *See* Minn. R. Evid. 902(4) (stating that certified copies of public records are self-authenticating). Rather, it is the underlying Department of Public Safety record that contains information relevant to the driving-after-revocation charge, and we have previously held that is nontestimonial. *Vonderharr*, 733 N.W.2d at 852. If the Certificate of Order Sent went beyond the scope of the Department of Public Safety record and contained additional information, then we may reach a different result, but that issue is not before us. *See Parenteau*, 948 N.E.2d at 890-91.

Noor suggests that the Certificate of Order Sent is probative of the driving-after-revocation offense. But this certificate, in the absence of the underlying record, is not probative of any element of the offense. This crime requires the state to show Noor had notice of the revocation. *State v. Larson*, 502 N.W.2d 60, 63 (Minn. App. 1993) (footnote

omitted), *reversed on other grounds*, 503 N.W.2d 779 (Minn. 1993). The contested certificate states that a "person" was mailed a record, but it does not mention it was concerning revocation nor does it mention Noor's name. It is the underlying record that states Noor had his license revoked and that it was mailed to him. The fact that the certificate is only probative in conjunction with the underlying records reinforces our determination that it was introduced for authentication, not evidentiary, purposes.

Minnesota caselaw is consistent with this determination. While Minnesota courts generally concentrate on whether the document was prepared for trial, the documents in these cases had an evidentiary purpose of proving a fact. *See, e.g.*, *Jackson*, 764 N.W.2d at 617-18 (a firearm trace report offered to determine firearm ownership); *Weaver*, 733 N.W.2d at 799-800 (a lab report offered to prove the cause of death in a murder trial). In *Caulfield* for example, the statement at issue was a lab report offered to prove the substance found on the defendant was cocaine in the context of a sale-of-a-controlled-substance trial. 722 N.W.2d at 307, 309. The court held, "[t]he report functioned as the equivalent of testimony on the identification of the substance seized from Caulfield." *Id.* at 309. These cases stand in sharp contrast to the Certificate of Order Sent. Like the radiologist's report in *Andersen*, the certificate was not created "for providing evidence in litigation." 900 N.W.2d at 444. It was created for authentication purposes.

Noor contends that the Certificate of Order Sent was prepared for trial because it was created days before the trial. But whether the certificate was prepared for trial is not the only factor in a Confrontation Clause analysis. And it is not decisive here as the certificate is not the type of specific statement giving rise to Confrontation Clause

concerns. *See Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364 (stating the Confrontation Clause is concerned "with a specific type of out-of-court statement"); *Melendez-Diaz*, 557 U.S. at 310-11, 129 S. Ct. at 2532 (stating documents were testimonial when introduced solely for an evidentiary purpose). It simply attests to the accuracy of underlying business records. This is unlike caselaw where a document was prepared for trial for the evidentiary purpose of providing testimony against the defendant. *See Weaver*, 733 N.W.2d at 799-800 (holding that the laboratory test results in question were the basis of an expert's testimony of the cause of death in a murder trial).

We also reach our determination that the certificate is nontestimonial because it is duplicative of the underlying record. The underlying Department of Public Safety record was nontestimonial, and the certificate did not add any new information that could be interpreted to be testimonial. The certificate stated the underlying record was mailed to the "person" listed in the record on February 9, 2016, at the address listed in the record. The underlying record itself states the mailing date was February 9, 2016, and it actually states Noor's name and address. In short, the only substantive information on the certificate is the mailing date of the record, which is included in the underlying record as well. We do not discern a reason why the cover sheet to a nontestimonial record, which merely attests that it is an accurate copy for authentication purposes and does not add any new information, is testimonial when the underlying record is not. The act of certifying this record does not alter its properties from nontestimonial to testimonial.

Finally, we also note the impractical result Noor requests. Certified copies of public records are self-authenticating under Minnesota Rules of Evidence 902(4). And if certified

copies of public records require in-court testimony to avoid Confrontation Clause concerns, then the self-authentication purpose is defeated. And this highlights our determination that documents introduced to certify public records are not for testimonial purposes, but rather for self-authentication.

In conclusion, we discern that the admission of the Certificate of Order Sent is distinguishable from the abuse and concerns stemming from the primary evil—ex parte examinations—with which the Confrontation Clause is concerned. *See Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. The right of the criminally accused to face their accusers is a critical part of our judicial system, but it does not reach documents such as Certificates of Orders Sent where their purpose is to authenticate nontestimonial statements. And because the certificate does not violate the Confrontation Clause, the district court did not commit plain error by admitting it.[10]

II. The district court's admission of the unredacted Department of Public Safety order did not constitute plain error.

Noor further contends the district court committed a separate error by admitting the actual records in the exhibit because it included unredacted prejudicial information. On the second page of the Certificate of Order Sent document, the document states that Noor's license was revoked because of "DRIVING UNDER THE INFLUENCE." Noor argues that the district court erred by admitting the unredacted exhibit because he stipulated to his prior DWI convictions. Similar to the first issue, because Noor did not object to this

[10] The state also argues that, even if an error was made, it was not plain and Noor's substantial rights were not affected. Because Noor has failed to establish there was an error, we do not reach these additional arguments.

evidence, this court uses the plain-error analysis. *Hull*, 788 N.W.2d at 100. However, unlike the Confrontation Clause issue, which is constitutional in nature and calls for de novo review, here we review for abuse of discretion. *State v. Wright*, 726 N.W.2d 464, 472 (Minn. 2007). We first address whether this was a plain error, and if so, whether it affected Noor's substantial rights.

The district court committed plain error by admitting the unredacted exhibit. The state does not argue otherwise. In *State v. Pearson*, the Minnesota Supreme Court concluded it was an error for the district court to admit an unredacted DVD into evidence without objection, when the DVD contained a statement of the defendant exercising his right to counsel, and this could be improperly used against him. 775 N.W.2d 155, 162 (Minn. 2009) ("Based on [appellant]'s numerous references to getting an attorney, the jury may have inferred that he was somehow concealing his guilt. Thus, the trial court erred in admitting the statement without first redacting [appellant]'s statements about obtaining an attorney."). Similarly, here the exhibit contained information that Noor had a right to exclude from the jury. Minnesota courts have held that "where any criminal statute requires proof of a prior DWI conviction in order to prove the offense, the trial court must accept an unequivocal judicial admission of a prior DWI by the defendant." *State v. Clark*, 375 N.W.2d 59, 62 (Minn. App. 1985). But the district court here accepted the stipulation that Noor had prior DWI convictions and then admitted an exhibit into evidence that contained a reference to a prior DWI conviction. This was a plain error. But our analysis does not stop there; Noor must also establish his substantial rights were violated.

Appellants have a "heavy burden of persuasion" on this prong. *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (internal quotations omitted). Substantial rights are affected only if the error has a significant effect on the jury's verdict. *Matthews*, 800 N.W.2d at 634. To determine whether an error had a significant effect on the jury, courts review the strength of the state's case, the pervasiveness of the error, and whether the defendant had an opportunity to respond. *Sontoya*, 788 N.W.2d at 873.

Because the improper reference to the past convictions was not pervasive and the state put forth a strong case with overwhelming evidence, Noor's substantial rights were not affected. In *Sontoya*, the Minnesota Supreme Court determined that improper expert testimony was not pervasive when it was referenced three times during closing arguments and constituted only a small part of the testimony. 788 N.W.2d at 873-74. Here, the pervasiveness of the unredacted reference to Noor's past convictions was even more slight. The exhibit contained one line referencing a DWI as the reason for revocation. But neither this line, nor any reference to a prior conviction, was emphasized or discussed by the state during trial. The state referenced the exhibit as a whole in its closing argument but not the DWI reference.

Additionally, appellants fail to meet their heavy burden to prove their substantial rights were affected when there is an overwhelming amount of evidence establishing the guilt, which is the case here. *State v. Vang*, 847 N.W.2d 248, 262 (Minn. 2014). The police officer testified that Noor appeared to be intoxicated when he arrived on the scene; the student testified that the vehicle was being driven recklessly; and Noor's acquaintance

testified that Noor drank a lot of alcohol prior to leaving her home. Dashcam video and detention center audio supported this testimony.

Noor argues that *Clark* establishes that his substantial rights were affected. We disagree. There, the defendant was charged with both aggravated DWI and simple DWI, and he stipulated to a prior DWI conviction. 375 N.W.2d at 61. The defendant offered to stipulate to his license being revoked, but the state objected, and the district court allowed the state to introduce evidence of both his prior DWI convictions and the resulting revocation of his license for purposes of the aggravated DWI charge. *Id.* This court held it was an error to reject the stipulation and to allow evidence of the prior conviction because it was contrary to existing caselaw and, relevant to Noor's argument, it can be prejudicial for the jury to learn about past prior convictions or that the defendant's license was revoked. *Id.* at 62. But *Clark* is distinguishable from the current case. While stipulating to his prior convictions, Noor did not offer to stipulate to the revoked license, and the *Clark* decision focused on the negative effects stemming from the district court's failure to accept such a stipulation to a revoked license. *Id.* at 62-63. This difference sets this case apart, and *Clark* does not instruct us to determine Noor's substantial rights were affected.

Given the slight reference to the unredacted information and the strength of the evidence of guilt, Noor failed to meet the heavy burden of showing his substantial rights were affected. As a result, he fails to meet the plain error standard.

D E C I S I O N

The trial of Sir Walter Raleigh showed the dangers of not allowing the criminally accused the opportunity to confront their accusers. And centuries later, the United States

Supreme Court established the modern approach to the right to confront and determined that only testimonial statements give rise to potential Confrontation Clause violations. We determine that Certificates of Order Sent that merely authenticate nontestimonial records, without adding any additional substantive information, are nontestimonial. And the Confrontation Clause does not demand that the criminally accused have a right to confront the individual attesting that the copies of the records used at trial match the original. Nor does the admission of unredacted underlying records provide relief for Noor. While it was plain error for the district court to admit information about Noor's prior convictions, his substantial rights were not affected because of the lack of pervasiveness of the error and the strength of the prosecution's case.

Affirmed.