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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0092**

State of Minnesota,
Respondent,

vs.

Jamere Gene Reese,
Appellant.

**Filed December 17, 2018
Affirmed
Reyes, Judge**

Ramsey County District Court
File No. 62-CR-17-2080

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that the district court plainly erred by providing a no-adverse-inference

instruction to the jury regarding his decision not to testify without first obtaining his on-the-record consent to giving such an instruction. We affirm.

FACTS

On February 22, 2017, appellant Jamere Gene Reese visited his friend, K.V., at K.V.'s apartment in St. Paul. The two men talked for a short time, then K.V. told appellant that he was going to take a nap in the bedroom. Appellant remained in the living room. After a few minutes, K.V. heard a gunshot sound. Upon returning to the living room, he discovered a shattered window and the smell of gun smoke. He found appellant standing by the apartment door, in a state of shock. Appellant fled but, before he did, K.V. witnessed something resembling a small black gun in appellant's hand.

S.M. lived down the hall from K.V.'s apartment. He also heard the gunshot that day and described it as "unmistakable." After hearing the sound, S.M. looked out of his window, which faced the area behind the apartment complex, and witnessed a man exit the building and run towards a chain-link fence. S.M. described the man as a black male, in his mid-twenties, between 5'10- 6'0 tall, wearing a black dress shirt and black pants. S.M. observed the man attempt to climb the chain-link fence and drop what S.M. perceived to be a black .45 handgun. The man retrieved the gun and hastily walked away. S.M. called 911.

When the police arrived, they knocked on the door of the apartment they believed the gunshot came from. K.V. opened the door and recounted his version of the events to the police. He provided to police a description of appellant which matched S.M.'s

description of the man he saw from his apartment window. The police eventually arrested appellant, and the state charged him with possession of a firearm by an ineligible person.

The district court held a two-day jury trial. Before voir dire, the district court presented appellant and his counsel with draft jury instructions for their review. Appellant's counsel told the district court that he reviewed the draft jury instructions a second time and had nothing to add. At no time did the district court ask appellant on the record whether he wanted to have the no-adverse-inference instruction read to the jury.

During trial, S.M., K.V., and several officers testified on behalf of the state. The state played for the jury footage from a surveillance video that corroborated what S.M. saw from his apartment window. Appellant did not testify, present any evidence, or call any witnesses. Appellant and his counsel reviewed on the record the formal waiver of appellant's right not to testify. When asked by his counsel whether all of his questions about the waiver had been answered, appellant responded affirmatively.

After both parties rested, the district court instructed the jury. In regard to appellant's right to remain silent, the district court instructed the jury that, "The defendant has a right not to testify. This right is guaranteed by federal and the state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case." Appellant did not object to the giving of this instruction. The jury found appellant guilty. This appeal follows.

DECISION

Appellant seeks reversal of his conviction and remand for a new trial because the district court erroneously gave a no-adverse-inference instruction without his personal consent on the record.

Because appellant did not object when the district court gave the no-adverse-inference instruction, this court reviews appellant's argument for plain error. *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). Under the plain-error analysis, we must determine whether (1) there was error; (2) that was plain; and (3) that affected appellant's substantial rights. *State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011). Error is "plain" if it is clear or obvious. *Id.* The third prong is satisfied if the error was prejudicial and affected the outcome of the case. *Gomez*, 721 N.W.2d at 880. If all three prongs are met, then this court assesses whether it should address the error to ensure the fairness and integrity of the judicial proceedings. *Kuhlmann*, 806 N.W.2d at 852-853. If one prong of the plain-error test is not met, there is no need to consider the other prongs. *Id.* at 853.

A defendant's failure to testify shall not be alluded to by the district court. Minn. Stat. § 611.11 (2018). The district court may instruct the jury not to draw any inferences from the fact that defendant did not testify *only* if defendant requests that the district court do so. *Gomez*, 721 N.W.2d at 880 (emphasis added). The parties agree, as do we, that the district court plainly erred in giving a no-adverse-inference instruction without appellant's on-the-record consent. However, the state argues that appellant nevertheless fails to meet the "heavy burden" of showing that the error affected his substantial rights. *See State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). Appellant presents two arguments in support

of his position that the district court's error affected his substantial rights. Each argument will be addressed in turn.

Appellant first argues that, because the state failed to present sufficient evidence to support his conviction, the no-adverse-inference instruction had a significant effect on the outcome of the case. We disagree.

Appellant relies on *Gomez* for the proposition that a district court's error has no effect on the outcome of a case if the state produces an overwhelming amount of evidence. 721 N.W.2d at 881-82. Appellant contends here that the state's evidence was lacking because it failed to submit an actual firearm into evidence, it lacked forensic evidence connecting him to the crime scene, the state found a bullet casing at the scene but DNA evidence could not connect it to appellant, the surveillance-video footage did not show a clear view of the suspect's face and did not feature sufficient detail to affirmatively identify appellant, S.M. could not identify appellant as the man he observed from his window, and K.V.'s testimony was inconsistent and not credible.

The state produced sufficient evidence which, observed in its totality, supported appellant's conviction. The evidence included a bullet casing found in the living room where appellant was at the time K.V. heard the gunshot. It also included S.M.'s testimony that, after hearing the gunshot, he first observed the flash of a person running down the hall through the peephole of his front door, then he observed the suspect from his window. The surveillance-video footage corroborated S.M.'s testimony. Both appellant and the man in the surveillance-video footage were dressed in all black and appeared to have the same

length of hair. S.M.'s experience with firearms reinforced his identification of the object dropped by the man as a black .45 caliber handgun.

K.V.'s testimony, although somewhat inconsistent, also provided support for the state's case. K.V. maintained that he observed something small and black in appellant's hand before appellant fled his apartment, even though K.V. could not confirm that what he saw was a firearm. On the day of the incident, K.V. told police that appellant was dressed in all black clothing, consistent with what S.M. saw from his window.

Second, appellant argues that the no-adverse-inference instruction exacerbated the jury's natural inclination to connect appellant's silence with guilt. We are not persuaded.

Appellant argues that K.V.'s inconsistent testimony left many unanswered questions in the minds of jurors and that this increased the jury's need to hear appellant's version of events to assist in clarifying those questions. He contends that the no-adverse-inference instruction impermissibly reminded the jury that he was not going to provide a valid explanation of the incident.¹

By its terms, a no-adverse-inference instruction calls a defendant's silence to the jury's attention. *McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002). However, this court presumes that jurors follow instructions. *State v. Griffin*, 887 N.W.2d 257, 262

¹ Appellant relies on Justice Stevens's dissent in *Lakeside v. Oregon* for the proposition that, while jurors have a natural inclination to associate a defendant's silence with guilt, *in circumstances where the jury has in fact overlooked the silence*, giving a no-adverse-inference instruction is like "telling [the jury] not to think of a white bear." *Lakeside v. Oregon*, 435 U.S. 333, 345 (1978) (Stevens, J., dissenting) (emphasis added). Justice Stevens stated that a jury might overlook the defendant's failure to testify when the whole story has been told by several other witnesses or when the prosecutor's case is especially weak. *Id.* Neither of these circumstances exist in appellant's case.

(Minn. 2016). Speculation as to prejudice caused by a no-adverse-inference instruction is insufficient on plain-error review. *State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018).

Here, appellant's speculation as to the alleged prejudice he suffered is insufficient to overcome the presumption that jurors follow instructions given by the district court. And, as we have already discussed, the state produced substantial evidence against appellant. Therefore, we conclude that the jury would not have reached a different verdict but for the no-adverse-inference instruction.

Since appellant has failed to prove that the no-adverse-inference instruction caused him prejudice or affected the outcome of the verdict, this court need not assess whether it should address the error to ensure the fairness and integrity of the judicial proceedings.

Affirmed.