STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1758

State of Minnesota,
Respondent,

vs.

Christian Dulue Flah,
Appellant

Filed September 9, 2019
Affirmed
Schellhas, Judge

Benton County District Court
File No. 05-CR-17-6

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Philip K. Miller, Benton County Attorney, Foley, Minnesota (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

S Y L L A B U S

If a defendant is voluntarily absent from his or her jury trial and has not personally consented to or requested a no-adverse-inference jury instruction, a district court does not err by denying defense counsel's request for a no-adverse-inference jury instruction.

O P I N I O N

SCHELLHAS, Judge

Appellant argues that he is entitled to reversal of his conviction of first-degree criminal sexual conduct because, after he voluntarily absented himself from his jury trial without personally consenting to or requesting a no-adverse-inference jury instruction, the district court denied his counsel's request for the instruction. We affirm.

FACTS

Respondent State of Minnesota charged appellant Christian Flah with two counts of first-degree criminal sexual conduct (CSC) and one count of second-degree CSC against an 11-year-old child. The district court conducted a jury trial on the charges, and Flah rested without calling any witnesses or offering any evidence. On the second day of trial, Flah failed to appear. To afford Flah time to appear or otherwise communicate with his counsel, the court excused the jury and recessed to discuss jury instructions. The court subsequently noted on the record that Flah's counsel would prefer that the no-adverse-inference jury instruction "remain in the instructions" and expressed its concern that it did not know whether Flah wanted the instruction and whether including it would create a potential issue for appellate review. Flah's counsel offered no additional argument, and the court declined to give a no-adverse-inference jury instruction.

The jury found Flah guilty of one count of first-degree CSC and one count of second-degree CSC. After officers found Flah and arrested him, the district court adjudicated him guilty of first-degree CSC and sentenced him to 144 months' imprisonment.

This appeal follows.

ISSUES

I. Did Flah waive his right to challenge the district court's denial of his counsel's request for a no-adverse-inference jury instruction?

II. Did the district court abuse its discretion by denying defense counsel's request for a no-adverse-inference jury instruction after Flah voluntarily absented himself from trial without personally consenting to or requesting the instruction?

ANALYSIS

The Minnesota and United States Constitutions guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; Minn. Const. art. I, § 7. Implicated within this right is the right of a defendant who does not testify at trial to "not have anyone in the courtroom use his silence against him." *McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002); *see also* Minn. Stat. § 611.11 (2014) (stating that defendant at trial "shall" at his or her "own request . . . be allowed to testify; but failure to testify shall not create any presumption against the defendant, nor shall it be alluded to by the prosecuting attorney or by the court"). "When an error implicates a constitutional right, we will award a new trial unless the error is harmless beyond a reasonable doubt." *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012).

I.

As an initial matter, the state argues that, through his voluntary absence from trial, Flah waived his right to challenge the district court's denial of his counsel's request for a no-adverse-inference jury instruction**.** *See State v. Stout*, 273 N.W.2d 621, 623 (Minn.

1978) (rejecting defendant's "contention that his voluntary absence after the start of trial could not be construed as an effective waiver unless there was something specific on the record indicating that he knew the trial could continue if he left"); *Finnegan v. State*, 764 N.W.2d 856, 861 (Minn. App. 2009) ("A voluntary absence after clear and unequivocal notice of the commencement of trial is a knowing waiver of constitutional rights." (quotation omitted)), *aff'd*, 784 N.W.2d 243 (Minn. 2010); *see also* Minn. R. Crim. P. 26.03, subd. 1(2)(1) (stating that a "trial may proceed to verdict without the defendant's presence if . . . [t]he defendant is absent without justification after the trial starts").

The state cites to two cases in which the Minnesota Supreme Court has recognized that a waiver of a right results from a defendant's voluntary actions. *See State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) (recognizing that defendant waives right to counsel by "engag[ing] in dilatory tactics after he has been warned that he will lose his right to counsel"); *State v. Wright*, 726 N.W.2d 464, 479 (Minn. 2007) (recognizing that "criminal defendant may not exploit the Confrontation Clause to bar the statements of a witness whom the defendant himself has caused to be unavailable"). But neither case addresses the alleged trial error in this case, and the state identifies no case in which a court has held that a defendant's trial absence waives a challenge to jury instructions, particularly when counsel timely requests an instruction. We therefore conclude that Flah did not waive his challenge to the jury instructions through his voluntary absence at trial.

II.

"We review a district court's jury instructions for an abuse of discretion." *State v. Hallmark*, 927 N.W.2d 281, 304 (Minn. 2019). "A district court enjoys considerable

latitude in selecting jury instructions and the language of those instructions such that a court does not abuse its discretion so long as the instructions fairly and adequately explain the law of the case and do not materially misstate the law." *Id*. (quotations 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." *Id.* at 291 (quotation omitted).

"When requested by a criminal defendant who did not testify at trial, a state [district court] judge must give a no-adverse-inference instruction to the jury." *McCollum*, 640 N.W.2d at 616. The standard no-adverse-inference jury instruction states:

> The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.

10 *Minnesota Practice*, CRIMJIG 3.17 (2015). "A [district] court ordinarily should not give a no-adverse-inference instruction unless the defense requests it," and because the instruction "calls the defendant's silence to the jury's attention," the instruction "ordinarily should not be done without the defendant's personal consent." *McCollum*, 640 N.W.2d at 616–17; *see also State v. Clifton*, 701 N.W.2d 793, 798 (Minn. 2005) ("We have made clear that CRIMJIG 3.17 should not be given without the personal and clear consent of the defendant."). In this case, the district court did not give a no-adverse-inference instruction because of its concern that Flah was unavailable to request or consent to the instruction. Flah argues that the "caselaw as a whole" compels a conclusion that "the district court [wa]s required to give the instruction." (Emphasis omitted.) We disagree.

In *State v. Thompson*, the supreme court rejected this court's opinion that the district court need only ask the defendant's attorney, not the defendant himself, if he wanted a no-adverse-inference jury instruction. 430 N.W.2d 151, 153 (Minn. 1988). The court stated that "a record should be made, either by defense counsel on his own or at the [district] court's insistence, regarding the defendant's preference in the matter." *Id*. The practice of requiring a defendant's consent before giving such an instruction complies with the comment to CRIMJIG 3.17, which states that "[i]f such an instruction is requested by the defendant, the judge should also require the defendant to state on the record the desire to have such an instruction given." CRIMJIG 3.17, cmt.; *see State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006) ("If the defendant requests the instruction, the court or the defendant's counsel *must* make a record of the defendant's clear consent and insistence that the instruction be given." (emphasis added) (quotation omitted)); *see also State v. Duncan*, 608 N.W.2d 551, 558 (Minn. App. 2000) (reversing and remanding for new trial because defendant was deprived of right to fair trial, in part, when district court gave no-adverse-inference instruction without defendant's consent, which "may have had the deleterious effect of emphasizing [defendant]'s failure to take the witness stand and deny the allegations" when central issue was witness credibility), *review denied* (Minn. May 16, 2000).

Here, in compliance with *Thompson*, the district court denied Flah's counsel's request to include a no-adverse-inference jury instruction because Flah was not present to consent and counsel did not inform the court that Flah personally wanted the instruction. Flah nonetheless argues that this court's opinion in *State v. Sam*, 904 N.W.2d 463 (Minn.

App. 2017), mandates a decision in his favor. In *Sam*, noting that the issue was one of first impression, this court decided that a "district court did not plainly err in giving the no-adverse-inference instruction without appellant's personal consent on the record where the instruction was requested and agreed to by appellant's attorney and appellant was voluntarily absent from trial." *Id*. at 468. This court said:

> We see no error in the district court's giving the no-adverse-inference instruction at the request of appellant's attorney when appellant was voluntarily absent from trial. Any other holding would enable a defendant either to obtain a mistrial by refusing to attend trial when jury instructions are being considered, or to challenge on appeal the district court's refusal to instruct the jury as his attorney requested. Minn. R. Crim. P. 26.03 allows the district court to proceed with the trial in these circumstances. In this limited circumstance, with appellant not even present for final argument, it is evident why counsel desired the jury to be so instructed.

Id. at 467.

Flah argues that, in *Sam*, this court implicitly held that when counsel deems the no-adverse-inference instruction necessary for an absent defendant, the requirement that the defendant personally consent to the instruction requirement does not eclipse the defendant's right to the instruction. But, in *Sam*, this court did not conclude that a district court *must* give a no-adverse-inference instruction when requested by an absent defendant's counsel; we concluded only that the district court did not plainly err when it gave the instruction in the "limited circumstance" present in *Sam*. *Id*.

In *McCollum*, the supreme court recognized that in "limited circumstances," a district court "*may be justified* in giving the instruction in the absence of the defendant's request, even over the defendant's objection." 640 N.W.2d at 616 (emphasis added); *see*

Clifton, 701 N.W.2d at 798 (record indicated that defendant and defense counsel conferred and defendant agreed to no-adverse-inference instruction). But the supreme court has never mandated that the instruction be given in the absence of a personal request by a defendant. Here, unlike in *Clifton*, in which the defendant's consent to a no-adverse-inference instruction was apparent from the record, the record does not reflect that Flah and his counsel conferred about the no-adverse-inference instruction or that Flah agreed to it, and Flah makes no such argument.

We conclude that the district court did not err by denying the request of Flah's counsel for a no-adverse-inference instruction. And we embrace the reasoning in *Sam* that to hold otherwise "would enable a defendant either to obtain a mistrial by refusing to attend trial when jury instructions are being considered, or to challenge on appeal the district court's refusal to instruct the jury as his attorney requested." *See Sam*, 904 N.W.2d at 467.

D E C I S I O N

Because Flah did not give his consent for the district court to give a no-adverse-inference jury instruction and was voluntarily absent from trial when his counsel asked for the instruction, the court did not err by denying defense counsel's request for a no-adverse-inference jury instruction.

Affirmed.