STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1962

State of Minnesota,
Respondent,

vs.

Brian Joseph Andvik,
Appellant.

Filed November 30, 2020
Affirmed
Hooten, Judge

Traverse County District Court
File No. 78-CR-18-81

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

Matthew P. Franzese, Traverse County Attorney, Wheaton, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Smith, T., Judge; and Frisch, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

In this direct appeal from final judgment of a conviction for violating a domestic abuse no contact order (DANCO), appellant argues that his conviction should be reversed and the matter remanded for a new trial because the district court committed plain error

affecting his substantial rights by giving a no-adverse-inference instruction absent appellant's personal and clear consent. While the district court plainly erred in giving the no-adverse-inference instruction without obtaining appellant's personal consent on the record, we nonetheless affirm on the basis that there is no reasonable likelihood that the instruction had a significant effect on the jury's verdict.

FACTS

On October 31, 2017, a DANCO was issued against appellant Brian Andvik. A jury trial for the events that led to the issuance of the DANCO occurred on April 17–18, 2018. On April 25, 2018, Andvik was charged with three counts of violating the DANCO for his actions in the courtroom on April 18, 2018.

The jury trial for the DANCO violations occurred April 4–5, 2019. At trial, D.S., the party protected by the DANCO, testified that while she was in the courtroom on April 18, 2018, Andvik had contact with her three times. D.S. stated that during the first contact, Andvik turned around to look at her and said or mouthed: "It's okay." The second time, Andvik turned around, looked at her, and said: "I'm sorry." The third time, Andvik turned around and said: "I love you." D.S. also testified that Andvik looked directly at her multiple times throughout the trial.

A friend of D.S., who sat next to her during the April 18, 2018 hearing, also testified. The friend testified that she saw Andvik communicate with D.S. twice during the hearing. The friend stated that the first time, Andvik stood up, "turned his head to the right and made direct eye contact with [D.S.] and mouthed it's okay," but she did not think that D.S. saw this communication. She testified that the second time, Andvik turned around, "looked

directly at [D.S.], and mouthed the words I love you." The friend stated that after that communication, she tapped D.S. on the knee and asked if she saw Andvik say "I love you," and D.S. "nodded her head yes." The friend indicated that after the court hearing was over, she spoke with Traverse County Sheriff's Chief Deputy Greg Forcier and told him that Andvik turned around and said, "I love you," to D.S. The friend also testified that she saw Andvik looking at D.S. "at least 20" times throughout the hearing.

Deputy Forcier was also in the courtroom during the trial on April 17–18, 2018. At the April 4–5, 2019 trial, Deputy Forcier testified that he saw Andvik turn around twice and look at D.S. Deputy Forcier testified that he told Andvik to turn back around and stop doing that when he believed Andvik was looking at D.S. Deputy Forcier testified that "you couldn't really clearly see him mouthing anything to [D.S.]." Later that day, Deputy Forcier testified that he reviewed a courtroom surveillance video from April 18, 2018, and downloaded a ten-second soundless clip from that day. The video clip was admitted at Andvik's trial and played for the jury. Deputy Forcier testified that the video shows Andvik "turning around and mouthing something to [D.S.]."

The video clip, which was shown to the jury on a wall in the courtroom, shows Andvik sitting at the defense counsel table with D.S. sitting in the third row directly behind the table, next to a woman. The video shows Andvik, the woman sitting next to D.S., and a man across the aisle from D.S. turning at the same time as a police officer enters. Andvik's mouth appears to move after he turns his head.

Andvik chose not to testify. A jury found Andvik guilty on April 4, 2019. When giving instructions to the jury, the district court stated: "You should not draw any inference

from the fact the defendant has not testified in this case." This was done without Andvik's request for the instruction. There is nothing in the record to reflect that Andvik requested or personally consented to the giving of the instruction. When discussing the proposed instructions, the district court stated: "Defendant's right to testify obviously we're not supposed to include that in instructions until it's asked for but i[f] you want that one that one will remain in." Before printing off the final jury instructions, the district court asked both attorneys if they were comfortable with the final instructions. Defense attorney did not respond with any objections. Nothing else in the record suggests that defense counsel objected to the giving of the instruction.

When deliberating, the jury requested to be shown the video clip again on a smaller screen. Due to limited technology in the courtroom, the video was shown a second time on the courtroom wall. Jurors were allowed to stand in front of the bench to get a better view of the video. After viewing the video a second time, one juror asked "that [the video] be played one more time and then slow[ed] down when [Andvik] starts to speak or pause[d] when he starts to speak." The video was played a third time on the courtroom wall. Following the third viewing, one juror asked, "One more time please?" The video was played a fourth and final time.

Andvik appeals.

D E C I S I O N

Andvik argues that the district court prejudicially erred by instructing the jury to draw no adverse inferences from his choice not to testify without first obtaining Andvik's personal and clear consent.

When a defendant chooses not to testify, a no-adverse-inference instruction may only be given "if the defendant requests the court to do so." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). This means that the district court must obtain the defendant's "personal and clear consent" before giving the instruction. *State v. Clifton*, 701 N.W.2d 793, 798 (Minn. 2005). When a defendant does not consent, but also does not object, to the jury instruction, this court applies the plain-error test to a no-adverse-inference instruction: (1) there must have been error, (2) that was plain, and (3) that affected substantial rights. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002).

The first and second prongs of the plain-error test are met when a no-adverse-inference instruction is given without a defendant's consent. *Gomez*, 721 N.W.2d at 881. Here, both parties agree that the first two prongs have been met because Andvik did not give his clear and personal consent before the district court gave the no-adverse-inference instruction. Thus, we turn our analysis to the third prong.

Andvik argues that the third prong of the test has also been met because the district court's plain error affected his substantial rights. An error affects a defendant's substantial rights if the error was prejudicial. *State v. Kuhlman*, 806 N.W.2d 844, 853 (Minn. 2011). An error is prejudicial "when there is a reasonable likelihood that the giving of the instruction would have had a significant effect on the jury's verdict." *Darris*, 648 N.W.2d at 240. When reviewing prejudicial error, courts are to examine the totality of the evidence. *See Gomez*, 721 N.W.2d at 881. Defendants who do not object to a jury instruction when it is given bear a heavier burden of showing that an error is prejudicial and that their substantial rights have been affected. *Darris*, 648 N.W.2d at 240; *State v. Griller*, 583

N.W.2d 736, 740 (Minn. 1998). Unless the facts of the case suggest otherwise, we have held that "the giving of [the no-adverse-inference] jury instruction [is] harmless." *Darris*, 648 N.W.2d at 240.

Andvik argues that the no-adverse-inference instruction affected his substantial rights by significantly impacting the jury's verdict, because (1) only he could definitively say why he turned, and (2) the giving of the instruction emphasized his failure to testify and deny the allegations. Andvik argues that "[u]nder these circumstances, 'the connection between silence and guilt' was 'too natural to be resisted.'"

The state argues that it seems unlikely that the jury would have reached a different verdict without the erroneous instruction, given the totality of the evidence. To support its argument, the state points to the following evidence produced at trial: a ten-second video clip showing Andvik turning around and opening his mouth, testimony from D.S. that Andvik turned around and mouthed to her three times, testimony from D.S.'s friend who witnessed Andvik turn around and mouth two things to D.S., and testimony from Deputy Forcier about the video and instructing Andvik to turn around during the trial.

The state also argues that the jury focused on the ten-second video—not Andvik's lack of testimony—in their deliberation. To support this argument, the states cites the following evidence from the record: (1) during deliberation, the jury asked to watch the videotape again on a smaller surface rather than on the courtroom wall; (2) after viewing the video a second time on the courtroom wall, a juror asked that the video "be played one more time and then slow[ed] down when [Andvik] starts to speak or pause[ed] when he

starts to speak"; and (3) following a third viewing, a juror asked to view the video, "[o]ne more time please[.]"

We conclude that there is no reasonable likelihood the instruction had a significant effect on the jury's verdict. The transcript shows that in addition to its consideration of the testimony of D.S., her friend, and Deputy Forcier, the jury focused on the ten-second video clip in reaching its decision. There is nothing in the record to suggest that the jury considered Andvik's failure to testify. Because there is no reasonable likelihood that the no-adverse-inference instruction significantly affected the jury's verdict, we conclude that the district court's error in giving the instruction was not prejudicial and therefore did not affect Andvik's substantial rights.

Affirmed.