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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1351**

State of Minnesota,
Respondent,

vs.

Kao Vang,
Appellant.

**Filed July 23, 2018
Affirmed in part, reversed in part, and remanded
Klaphake, Judge***

Hennepin County District Court
File No. 27-CR-16-17275

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hooten, Judge; and Klaphake, Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Kao Vang challenges his conviction of first-degree possession of a controlled substance based upon an improper jury instruction and his sentence. Because the district court's jury instruction about Vang's right not to testify did not prejudice him, we affirm his conviction. But we reverse and remand for resentencing in accordance with the Drug Sentencing Reform Act (DSRA), as interpreted in *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017).

DECISION

Vang argues that the district court erred by instructing the jury not to draw an adverse inference from his exercising his right not to testify without first obtaining Vang's personal consent on the record. Although a district court must obtain a defendant's personal on-the-record consent before giving the no-adverse-inference instruction, Vang did not object, so we review his claim under the plain-error standard. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). This standard requires Vang to demonstrate a plain error that affected his substantial rights. *Id.* The state concedes that the district court plainly erred, but argues that Vang is not entitled to relief because the instruction was harmless. *See State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006) (stating that an erroneous no-adverse-inference instruction is harmless without a showing of prejudice). Prejudice is demonstrated when there is a reasonable likelihood that the erroneous instruction had a significant effect on the jury verdict, but a defendant bears "a heavy burden of showing that substantial rights have been affected." *Id.*

Vang argues that the instruction prejudiced him because his credibility was central to the case. When credibility is the central issue, the no-adverse-inference instruction may prejudice a defendant by improperly emphasizing the defendant's failure to testify. *State v. Duncan*, 608 N.W.2d 551, 558 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). But in *Duncan*, we determined that the no-adverse-inference instruction was harmless and did not require reversal. *Id.* Vang offers no case where a Minnesota court has reversed a conviction solely because of an erroneous no-adverse-inference instruction, and the premise of Vang's argument—that his credibility was the dispositive factor in his case—is contradicted by the record. Vang had confessed to and was convicted of first-degree possession of 25 or more grams of methamphetamine after methamphetamine and drug paraphernalia were found in his bedroom. Because of the strong evidence of his guilt on the possession offense, his credibility was not central to his case, and so, the error in the jury instruction had no significant effect on the verdict.

Vang next argues, and the state agrees, that he is entitled to resentencing under the DSRA. Even with the state's concession, we must decide cases in accordance with the law. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). We conclude that *Kirby*, which was decided less than two months after the district court sentenced Vang, entitles Vang to resentencing. 899 N.W.2d at 487. In *Kirby*, the supreme court ruled that the “amelioration doctrine requires the resentencing of a person whose conviction was not yet final on the effective date of section 18(b) of the Drug Sentencing Reform Act.” *Id.* *Kirby* instructs that a defendant is entitled to resentencing under the DSRA if the legislature did not clearly demonstrate its intent to abrogate the amelioration doctrine in enacting a

particular section of the DSRA, the ameliorated section of the DSRA mitigates the defendant's punishment by reducing the presumptive sentences from those in the sentencing grid under which the defendant was punished, and the defendant has not had final judgment entered in his case. *Id.* at 190. Vang meets each of these requirements.

Section 18 of the DSRA mitigates Vang's punishment by reducing his presumptive sentence from the sentencing grid under which he was punished. A defendant's presumptive sentence is typically determined by the Sentencing Guidelines in effect on the date of the offense. *See id.* at 493 (discussing the Minnesota Sentencing Guidelines). Vang's offense occurred on April 21, 2016, more than three months before the DSRA went into effect. *Id.* at 488 (explaining that section 18 of the DSRA became effective on May 22, 2016); Minn. Sent. Guidelines 4.C (2016) ("Eff. August 1, 2016"). Under the 2015 sentencing guidelines, Vang's first-degree controlled-substance crime was a severity-level-nine offense. Minn. Sent. Guidelines 4.A (2015). After factoring in Vang's criminal-history score of one, the pre-DSRA guidelines gave him a presumptive sentence of 84 to 117 months. *Id.* The district court sentenced Vang to 84 months in prison, explaining that it was "willing to give [Vang] the bottom of the box." But under the DSRA, Vang's first-degree controlled-substance crime is a severity-level-eight offense. Minn. Sent. Guidelines 4.C. Factoring in Vang's criminal-history score of one, the DSRA guidelines provide for him to receive a presumptive sentence of 64 to 90 months. *Id.* The DSRA thus reduces Vang's punishment by reducing his presumptive sentence.

Second, section 18's effective date was May 22, 2016. *Kirby*, 899 N.W.2d at 488. The district court sentenced Vang on June 5, 2017, so his conviction was not final when the DSRA became effective.

Because section 18 of the DSRA reduced Vang's presumptive sentence and because no final judgment had been entered in Vang's case at the time section 18 went into effect, Vang is entitled to resentencing under the DSRA.

Affirmed in part, reversed in part, and remanded.