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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1458**

State of Minnesota,  
Respondent,

vs.

Benjamin Lee Harris,  
Appellant.

**Filed September 4, 2018  
Affirmed; motion granted  
Kalitowski, Judge\***

Ramsey County District Court  
File No. 62-CR-16-6443

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Halbrooks, Judge; and  
Kalitowski, Judge.

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

## **UNPUBLISHED OPINION**

**KALITOWSKI**, Judge

Appellant Benjamin Lee Harris challenges his convictions and sentences for second-degree murder and first-degree attempted aggravated robbery, arguing that the district court violated his constitutional due-process rights by allowing the Bureau of Criminal Apprehension (BCA) to consume swabs from the decedent's car door handle for DNA testing. We affirm.

## **DECISION**

Appellant was charged with two counts of second-degree murder and one count of first-degree attempted aggravated robbery. The complaint alleged that appellant approached a male and female sitting in a car parked on the street and demanded the couple's money. The male and female got out of the car, and the male attempted to disarm appellant. Appellant shot the male twice and then ran away. Police collected two swabs of DNA from the driver side door handle of the victim's car.

The state notified defense counsel pursuant to Minn. R. Crim. P. 9.01 that it intended to consume the entire DNA sample of evidence collected from the driver side door of the victim's car. The BCA, responsible for testing the swabs, concluded that one of the swabs had a low amount of DNA and requested to consume the second swab in an attempt to increase the chances of having enough DNA to extract a profile. Defense counsel objected to the consumption. The district court denied appellant's motion objecting to the consumption of the DNA evidence from the driver side door. The BCA consumed both

DNA samples, but the test produced no interpretable result “[d]ue to insufficient genetic information.”

Subsequently, the district court found appellant guilty of all three counts. It sentenced appellant to 480 months in prison for count I and 44 months, concurrent, for count III. It did not enter a conviction for count II, finding it was a lesser-included offense of count I.

Appellant argues that his constitutional due-process rights were violated when the district court denied his motion objecting to the consumption of both DNA samples. This court applies the de novo standard of review when determining whether a constitutional violation has occurred. *State v. Burkland*, 775 N.W.2d 372, 374 (Minn. App. 2009). “[E]rrors violating constitutional rights can be divided into two categories: ‘trial errors’ and ‘structural defects.’” *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005) (citation omitted). In cases involving trial errors, appellate courts apply a “harmless error” test. *Id.* “An error is harmless beyond a reasonable doubt if the jury’s verdict was surely unattributable to the error.” *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) (citation and quotation omitted). If there is a reasonable possibility that the verdict might have been different without the error, that error is prejudicial and reversal is warranted. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). On the other hand, “[s]tructural errors require reversal” without a showing of prejudice because they cannot be classified as harmless error. *Dorsey*, 701 N.W.2d at 253. “[S]tructural errors are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.” *Id.* at 252 (quotation omitted).

In his main brief, appellant raises no argument that the denial of his motion objecting to the consumption of the DNA evidence was prejudicial. And he further fails to make an argument concerning structural error in his main brief. Appellant addresses the issues of prejudice and structural error for the first time in his reply brief, stating that “[a] standard prejudice analysis simply cannot apply” and acknowledging he cannot show prejudice or what impact, if any, the error he alleges had on the verdict. Because appellant acknowledges he cannot show prejudice, which is necessary for reversal due to a trial error, we only consider appellant’s attempted structural-error argument.

Generally, we may decline to review issues raised for the first time in an appellant’s reply brief because they are “not proper subject matter” for the reply brief. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). We review forfeited issues for plain error. *State v. Vasquez*, 912 N.W.2d 642, 650 (Minn. 2018). “A defendant is entitled to relief from plain error if (1) there was an error (2) the error was plain, and (3) the error affected [his] substantial rights.” *Id.* An error affects a defendant’s substantial rights “if it significantly influences the verdict by going to a critical issue at the trial or is central to the prosecution’s case.” *Id.*

We conclude that appellant forfeited his arguments concerning structural error because he failed to raise a structural-error argument in his main brief. And the district court’s denial of appellant’s motion objecting to the consumption of DNA swabs is not plain error because appellant’s substantial rights were not affected by the consumption of the evidence. The DNA evidence was not central to the prosecution’s case or critical to a determination of appellant’s guilt because the results of the testing were inconclusive.

Further, appellant acknowledges that he cannot demonstrate what impact the consumption of both swabs had on the verdict.

Appellant also raises an argument for the first time on appeal that a balancing test should be applied to the proposed consumption of DNA evidence. The supreme court has stated that “[a] defendant’s objection to the admission of evidence preserves review only for the stated basis for the objection or a basis apparent from the context of the objection.” *Vasquez*, 912 N.W.2d at 649. In the district court, appellant objected to the state’s consumption of both swabs, arguing consumption would violate his right to due process and would destroy evidence that must be preserved. He did not argue for a balancing test in his motion objecting to the consumption of the DNA evidence. We conclude that this issue is also forfeited.

We note that appellant received proper notice of the BCA’s intent to consume the entire DNA sample and of his right to have an expert present at the testing. Minn. R. Crim. P. 9.01, subd. 1(4)(b) provides that

the prosecutor must allow the defendant to conduct reasonable tests. If a test or experiment, other than those conducted under Minn. Stat. ch. 169A, might preclude any further tests or experiments, the prosecutor must give reasonable notice and opportunity to the defense so that a qualified expert may observe the test or experiment.

In interpreting this rule, the supreme court has held that

[i]deally, a defendant should be provided with the actual DNA sample(s) in order to reproduce the tests. As a practical matter, this may not be possible because forensic samples are often so small that the entire sample is used in testing. Consequently, access to the data, methodology, and actual results is crucial so

a defendant has at least an opportunity for independent expert review.

*State v. Schwartz*, 447 N.W.2d 422, 427 (Minn. 1989). We conclude that the district court did not err in denying appellant's motion objecting to the consumption of both DNA samples.

The state filed a motion to strike new arguments in appellant's reply brief concerning structural error. Because we conclude these arguments are forfeited for the reasons discussed here, the state's motion to strike is granted.

**Affirmed; motion granted.**