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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0612**

State of Minnesota,
Respondent,

vs.

Antonio Albert Schally,
Appellant.

**Filed March 4, 2019
Affirmed
Hooten, Judge**

Dakota County District Court
File No. 19HA-CR-15-1122

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

James Backstrom, Dakota County Attorney, Tori K. Stewart, Assistant County Attorney,
Hastings, 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; Reyes, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from the judgment of conviction, appellant argues (1) that the
evidence was insufficient to prove his guilt of unlawful possession of a firearm when the

gun was found concealed in a drawer under his seat when he was a passenger in another person's car; and (2) that the district court erred by refusing to permit an incarcerated defense witness to change into street clothes for his testimony at trial and by, without his consent, giving a no-adverse-inference jury instruction regarding his right to remain silent. We affirm.

FACTS

In May 2014, appellant Antonio Schally was in the front passenger seat of a van that was driving in West St. Paul. Around three in the morning, a West St. Paul police officer stopped the van when it failed to activate a turn signal after stopping at a stop sign. As the officer approached the van, he smelled cigarette smoke, marijuana, and alcohol. Four other people were in the van at the time including Daniel Hillmer, who was sitting in the rear center seat. The van belonged to Hillmer's father.

After finding marijuana on one of the passengers, the officer had all the occupants exit the van and sit on the curb. The officer saw in plain view the butt of what appeared to be a pistol in the backseat pocket of the front passenger's seat, and upon picking it up, discovered it was a Hopkins & Allens Arms .38 caliber pistol with four .38 cartridges. The officer searched the remainder of the van and found a Taurus .38 revolver loaded with five .38 hollow point cartridges under the front passenger's seat in a "drawer that pulled out from under the seat."

The Bureau of Criminal Apprehension (BCA) tested the firearms for DNA. Schally's DNA was found on the cylinder release and hammer of the revolver. Additionally, Schally's DNA could not be excluded from a sample found on the trigger of

the revolver whereas 99.997% of the general population could be excluded. Hillmer's DNA was found on the grips of the revolver and his DNA could not be excluded from the pistol, whereas 98.6% of the general population could be excluded.

Because Schally has a 2007 Dakota County conviction of third-degree controlled-substance crime, which qualifies as a crime of violence under Minn. Stat. § 624.712, subd. 5 (2012), the state charged Schally with felon in possession of a firearm under Minn. Stat. § 609.165, subd. 1b(a) (2012).

At the jury trial, Schally stipulated that he was a felon ineligible to possess a firearm. The jury found Schally guilty, and the district court sentenced him to 60 months in prison. This appeal follows.

D E C I S I O N

I. The evidence was sufficient to convict Schally of possession of a firearm.

Schally argues that the evidence was insufficient to convict him of constructive possession of a firearm because the revolver was found under his seat as a passenger in someone else's vehicle. Schally concedes that he was ineligible to possess a firearm under Minn. Stat. § 609.165, subd. 1b(a), but argues that he did not actually or constructively possess the firearm.

When reviewing the sufficiency of the evidence, we undertake a “painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state's witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803

N.W.2d 373, 384 (Minn. 2011) (quotation omitted). “[W]e will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

Possession of a firearm may be actual or constructive. *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). To establish constructive possession, the state must show either (1) that the item was found where defendant had exclusive control to which other people normally did not have access, or (2) if the item was found where others had access, there is a strong probability inferred from other evidence that the defendant was consciously exercising dominion and control over it at the time. *Id.* At trial, the state argued that the jury could convict Schally based on actual possession of the firearm or constructive possession of the firearm. On appeal, the state argues that at the very least, Schally had constructive possession of the firearm.

When the conviction is based on circumstantial evidence, we apply a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). The first step is to identify the circumstances proved by resolving all questions of fact in favor of the jury’s verdict and in deference to the jury’s credibility determinations. *Id.* at 600. Second, we “independently consider the reasonable inferences that can be drawn from the circumstances proved.” *Id.* at 601. At the second step, we give no deference to the jury’s reasonable inferences. *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015). If the circumstances proved when viewed as a whole are “consistent with a reasonable inference

that the accused is guilty and inconsistent with any rational hypothesis except that of guilt,” then we sustain the conviction. *Harris*, 895 N.W.2d at 601.

When viewed in the light most favorable to the conviction, the state proved the following circumstances: Schally was in the passenger seat of the van with four other occupants, including Daniel Hillmer; the van belonged to Hillmer’s father; the pistol and four cartridges were found in the seat back pocket of Schally’s seat; the revolver loaded with five .38 cartridges was found under Schally’s seat in a compartment; Schally’s DNA was found on the cylinder and release of the revolver; Schally’s DNA could not be excluded from the trigger of the revolver whereas 99.997% of the population could be excluded; Hillmer’s DNA was found on the revolver; and Hillmer could not be excluded from DNA collected on the pistol whereas 98.6% of the population could be excluded.

Schally argues that, from the circumstances proved, two reasonable inferences other than guilt can be inferred: (1) that Schally did not exercise dominion and control over the revolver found in the passenger seat compartment, and (2) his DNA was present on the revolver due to secondary transfers of DNA or from possessing it previously. Neither inference is reasonable.

Schally first argues that it is reasonable to infer that he did not exercise dominion and control over the revolver found under his seat, or that he did not consciously exercise dominion and control over it because proximity itself is insufficient to establish constructive possession. Schally argues that our decision in *State v. Sam* controls here. 859 N.W.2d 825, 829 (Minn. App. 2015). In *Sam*, the defendant was driving a car that belonged to someone else with another passenger inside. *Id.* at 829. We reversed the

defendant's conviction for drug possession because other reasonable inferences could be drawn that the owner of the car or the other passenger put the drugs in the glove compartment. *Id.* at 835–36. We reasoned that the circumstances in *Sam* precluded a conviction because there was nothing to tie the defendant directly to the drugs, and because driving a vehicle with illegal items inside, without more, was insufficient to convict the defendant. *Id.*

This case is clearly distinguishable from *Sam*. First, Schally's DNA was found on the revolver's cylinder release and hammer. And his DNA could not be excluded from the sample on the trigger. Second, the revolver was found in the compartment directly underneath Schally's seat, which was inaccessible from the backseat. Although Hillmer testified that both firearms belonged to him, on review we assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Caldwell*, 803 N.W.2d at 384. Additionally, we defer to the jury's credibility determinations. *State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016). Therefore, an inference that Schally did not constructively possess the revolver, when his DNA was found on the revolver that was underneath his seat in a compartment only accessible from that seat, is unreasonable. Schally's DNA on the revolver is what ties him directly to the revolver, which was the factual basis missing in *Sam*. This inference is therefore unreasonable.

Schally also argues that it is reasonable to infer that the DNA found on the revolver was from a secondary transfer. Schally asserts that Hillmer could have transferred Schally's DNA to the revolver after shaking hands with or high-fiving him. But the BCA expert testified that while secondary transfer is possible, it is "unlikely." He stated this

four times and indicated that the “results are mixed” in the research literature on secondary transfer. The expert also testified that “as things come in contact with other items that some of [the DNA] is lost in that transfer or contact between items. And so you would transfer less down the line than you had to start.” Because the BCA expert testified that secondary transfer is possible but unlikely, we are unpersuaded that there is a reasonable inference to be drawn that Schally’s DNA on the revolver occurred by secondary transfer.

Alternatively, Schally argues that his DNA on the revolver supports a reasonable inference that he did not possess the gun on the day that he was charged with possessing it. This argument lacks merit because the state did not have to prove that Schally had contact with the revolver, therefore leaving his DNA on it, on the *same* day it was found in Schally’s constructive possession. Instead, the presence of Schally’s DNA on the revolver supports the reasonable inference that Schally constructively possessed the revolver hidden under his seat when the van was stopped by police. We conclude that based on the circumstances proved, only one reasonable inference can be drawn—Schally constructively possessed the revolver.

II. Refusing to allow the defense’s witness to testify in street clothes was harmless error.

Schally argues that the district court committed reversible error by refusing to order the jail staff to allow Hillmer, the defense’s sole witness, to testify wearing street clothes. The Minnesota Rules of Criminal Procedure state that, “an incarcerated defendant or witness must not appear in court in the distinctive attire of a prisoner.” Minn. R. Crim. P. 26.03, subd. 2(b).

According to *State v. Lehman*, a defendant's due-process rights are violated when a *defendant* is required to wear jail clothes in open court. 749 N.W.2d 76, 84–85 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008). But this is the first time Minnesota appellate courts have analyzed whether a defense witness testifying in prison attire constitutes reversible error.¹ Because a constitutional right is implicated when a *defendant* is required to appear in prison attire, a new trial is required unless the state can show beyond a reasonable doubt that the error was harmless. *Id.* at 85. If the verdict was “surely unattributable to the error, the error is harmless beyond a reasonable doubt.” *Id.* (quotation omitted).

The district court's refusal to order the defense witness to be dressed in street clothes was error under Minn. R. Crim. P. 26.03, subd. 2(b). Because there is an error, the next step is to determine which standard to apply on review. Schally asserts that we review to determine whether the error significantly affected the verdict. Meanwhile, the state advocates a more favorable standard for the defendant, the harmless-beyond-a-reasonable-doubt standard. But we need not determine if the error implicates Schally's constitutional rights because we conclude that the error was harmless beyond a reasonable doubt, the more stringent standard.

A jury's deliberations may be influenced by seeing a defendant or witness in prison attire. *Lehman*, 749 N.W.2d at 85. In *Lehman*, the district court required that the defendant

¹ This issue has come before this court but has not been analyzed. See, e.g., *State v. Houston*, No. A13-1358 (Minn. App. Oct. 20, 2014), *review denied* (Minn. Dec. 30, 2014) (finding the defendant's argument factually unsupported because the record did not establish that the witness appeared in prison attire).

wear prison attire and we held that the district court's error was harmless beyond a reasonable doubt because the jury already knew that the defendant was in custody. *Id.* Similarly here, the jury already knew that Hillmer was in custody. Hillmer testified that he pleaded guilty to illegally possessing both guns. He testified that he currently or had already served time for illegally possessing the guns. And he testified that he had served time for other felonies. During opening arguments, Schally's counsel also referenced that Hillmer was currently incarcerated. The jury therefore was fully aware that Hillmer was incarcerated, and his appearance in prison attire would only affirm this. For this reason, the error was harmless beyond a reasonable doubt.

III. The district court did not plainly err by giving the no-adverse-inference instruction to the jury.

Schally 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 Schally's consent. When a defendant does not object to a no-adverse-inference instruction, this court applies the plain-error test: (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 defendant bears the heavy burden of showing that his substantial rights have been affected. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). “[P]lain 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.

The state agrees that the district court erred because a defendant must consent before a district court can give the no-adverse-inference jury instruction. *See id.* Because

the record does not contain Schally's consent to the instruction, the district court erred by giving the instruction, and that error was plain, satisfying the first two prongs of the plain-error test. See *State v. Gomez*, 721 N.W.2d 871, 881 (Minn. 2006) (finding the first and second prong satisfied because the defendant did not consent to the instruction).

Turning to the third prong, the state argues that Schally did not meet his burden of proving that his substantial rights were affected and that the instruction had a significant effect on the jury's verdict. We agree. The supreme court has frequently held this plain error to be harmless. See *id.* (finding the defendant did not meet his burden that the instruction had a significant effect on the jury because of the totality of evidence against him); *Darris*, 648 N.W.2d at 240 (finding the error not prejudicial); *State v. Thompson*, 430 N.W.2d 151, 153 (Minn. 1988) (upholding conviction because defendant was not entitled to a new trial based on the error); *State v. Rosen*, 158 N.W.2d 202, 202 (Minn. 1968) (affirming conviction despite error in light of the evidence in the record). Similarly in *Larson*, the supreme court held that defense counsel opened the door to the giving of the no-adverse-inference instruction by referring to the defendant's silence as part of his closing argument. *State v. Larson*, 358 N.W.2d 668, 671 (Minn. 1984).

Here, Schally's counsel stated in his opening argument:

He has a right also the right to remain silent. Because you are accused of a crime, you can't be dragged into court to tell what happened. You have the right to not say anything. He does have that right.

And I ask you to follow the law and not to fault him for not -- if he chooses to not testify, to blame him for not, because he has that right. It's guaranteed by the Constitution.

Schally's counsel essentially gave the no-adverse inference instruction to the jury in his opening. In light of the weight of evidence against Schally and his counsel's request of the jury "not to fault him" for remaining silent at trial, the district court's error in no way affected Schally's substantial rights.

Schally additionally argues that he chose not to testify because he understood that the prosecutor and the district court were prohibited from commenting on his choice to remain silent, and that the jury's verdict was significantly affected by the district court's emphasis on his silence. 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, we presume that jurors follow instructions. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). And 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, Schally's speculation as to the alleged prejudice suffered is insufficient to overcome the presumption that jurors follow instructions given by the district court. And, as already discussed, his own counsel emphasized his silence at trial. We therefore conclude that the district court's jury instructions did not constitute prejudicial error that warrants a new trial.

Affirmed.