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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1568**

State of Minnesota,
Respondent,

vs.

Eli Jovanny Masani,
Appellant.

**Filed August 26, 2019
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-17-4528

Keith Ellison, 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, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and
Kalitowski, Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction for offering a forged check, arguing that the district court plainly erred by instructing the jury not to draw any adverse inference from his failure to testify. We affirm.

FACTS

Respondent State of Minnesota charged appellant Eli Jovanny Masani with offering or intending to offer, with intent to defraud, 16 forged checks in an aggregate amount of more than \$35,000. The case was tried to a jury. The evidence at trial showed that in the summer of 2016, L.L. discovered that several checks had been cashed on her bank account without her knowledge. Masani's name appeared on 14 checks that were drawn from L.L.'s bank account and notations on the checks indicated that L.L. had paid Masani approximately \$56,100 for "[h]ome repair" and "supplies." The checks appeared to have L.L.'s signature. But L.L. had not written the checks and did not recognize the handwriting on them. And neither she nor her son, R.L., knew Masani.

On September 27, 2016, L.L. and R.L. spoke with an employee at L.L.'s bank and filled out a forgery report. That same day, R.L. and L.L. spoke to the police and provided an officer a copy of that report. A fraud investigator at the bank determined that the "vast number of checks issued and the dollar amounts" of those checks were unusual for L.L., particularly the frequency and the type of payments being made. The investigator discovered that the checks were cashed in reference to a bank account held by Masani using

Masani's driver's license number. Surveillance video showed a man who resembled the photograph on Masani's driver's license cashing the checks.

Masani's name also appeared on two checks drawn from the bank account of A.M. The checks appeared to have A.M.'s signature and contained notations indicating that A.M. had paid Masani for "Car Payment[s]." A.M. had not written the checks, A.M. did not know Masani, and A.M. did not authorize anyone to write checks from his account. A fraud investigator at A.M.'s bank determined that Masani opened a bank account on July 30, 2016, and subsequently cashed two checks totaling \$5,000, which were drawn from A.M.'s account. The checks were cashed using a debit card number and personal identification number (PIN) linked to Masani. Surveillance video showed a man who appeared to be Masani cashing the checks.

A deputy with the Ramsey County Sheriff's Office investigated the checks drawn on L.L.'s account and determined that Masani had forged L.L.'s signature on checks that belonged to L.L., rather than creating counterfeit checks from loose leaf or computer paper. The deputy did not determine how Masani acquired L.L.'s checks.

Masani waived his right to testify at trial, and he did not call any witnesses or present any evidence. In closing argument, Masani's attorney admitted that Masani cashed the checks belonging to L.L. and A.M., but he argued that they were not forgeries and that Masani did not offer them with intent to defraud.

The district court instructed the jury, in relevant part, as follows:

So 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.

Masani did not object to that instruction.

The jury found Masani guilty as charged and returned a special verdict indicating that the aggregate amount of the forged checks was more than \$35,000. Masani appeals from the resulting judgment of conviction.

DECISION

Masani argues that “[t]he district court committed plain error affecting [his] substantial rights when it gave a no-adverse-inference instruction without first obtaining [his] consent.”

“[A]t the defendant’s own request and not otherwise, [he shall] 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.” Minn. Stat. § 611.11 (2018). A district court ordinarily should not give a no-adverse-inference jury instruction unless the defense requests it and the defendant consents to it. *McCollum v. State*, 640 N.W.2d 610, 616 (Minn. 2002). The no-adverse-inference instruction “should not be given without the personal and clear consent of the defendant.” *State v. Clifton*, 701 N.W.2d 793, 798 (Minn. 2005).

Masani did not object to the jury instructions at trial. An unobjected-to jury instruction is reviewed for plain error. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Under the plain-error standard of review, a defendant must establish (1) an error, (2) that

is plain, and (3) that affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “If the first three prongs are satisfied, the appellate court considers whether reversal is required to ensure the fairness, integrity, or public reputation of judicial proceedings.” *State v. Zinski*, 927 N.W.2d 272, 275 n.5 (Minn. 2019) (quotation omitted).

An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The parties agree that the district court plainly erred by including a no-adverse-inference instruction in its final instructions to the jury without first obtaining Masani’s consent. See *State v. Gomez*, 721 N.W.2d 871, 881 (Minn. 2006) (“Because the record does not contain [the defendant’s] consent to the giving of the no-adverse-inference instruction, . . . giving the instruction was error and that . . . error was plain.”); *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002) (holding that it was plain error to give no-adverse-inference instruction without obtaining defendant’s consent). We therefore consider whether that plain error affected Masani’s substantial rights.

The third plain-error prong is satisfied “if the error was prejudicial and affected the outcome of the case.” *Gomez*, 721 N.W.2d at 880. “An error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict.” *Id.* A defendant who fails to object to the no-adverse-inference instruction “bears a heavy burden of showing that substantial rights have been affected.” *Id.* Giving the no-adverse-inference instruction without consent, absent a showing of prejudice, is harmless. *Id.*

Masani argues that “[t]he unconsented-to instruction focused the jury’s attention on [his] decision to remain silent” and “fueled the jury’s natural inclination to assume that [he] did not testify because he did not have a valid explanation to counter the evidence presented.” Masani also argues that he was prejudiced by the district court’s error because L.L.’s testimony was “concerning” and her memory was “far from perfect.” He argues that “[g]iven these weaknesses, the jury doubtlessly would have wanted to hear [him] explain his version of events.”

By its terms, a no-adverse-inference instruction calls a defendant’s silence to the jury’s attention. *McCollum*, 640 N.W.2d at 617. But it also instructs the jury not to draw any negative inference based on the defendant’s failure to testify. We presume that the jury followed that instruction. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). Moreover, Masani’s arguments are speculative, and speculation regarding prejudice caused by a no-adverse-inference instruction is insufficient to establish reversible plain error. *State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018).

Lastly, Masani argues that “[a]lthough there was ample evidence that [he] offered the checks, the State was required to also prove the checks were forged and that [he] intended to defraud someone when he offered them.” To that end, the state presented evidence that L.L. and A.M. did not know Masani, that L.L. and A.M. did not write the checks in question, that L.L. did not recognize the handwriting on the checks that she allegedly wrote, and that a bank employee found the frequency and type of payments made on L.L.’s account unusual. Given that strong evidence of guilt, Masani has not met his

heavy burden to show that his substantial rights were affected by the no-adverse-inference instruction.

In sum, it is not reasonably likely that the no-adverse-inference instruction had a significant effect on the jury verdict. Masani therefore is not entitled to relief under the plain-error standard.

Affirmed.