

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0530**

State of Minnesota,
Respondent,

vs.

Larry Jonnell Gilbert,
Appellant.

**Filed February 22, 2021
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-19-24192

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

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this direct appeal from a conviction for unlawful possession of a firearm, appellant argues that his conviction must be reversed because the district court plainly and prejudicially erred by accepting a stipulation that appellant was prohibited from possessing

a firearm without having appellant personally waive his right to a jury trial on that element of the offense. Appellant also argues that the district court plainly and prejudicially erred by giving a no-adverse-inference jury instruction without obtaining appellant's personal consent, unfairly emphasizing his failure to testify. We affirm.

FACTS

Background

In September 2019, Minneapolis police officers stopped a car without a rear license-plate light. Appellant Larry Jonell Gilbert, who was riding in the front passenger seat, was the car's registered owner. In addition to Gilbert, there were three other people in the car. The backseats of the car folded down to allow trunk access, but because they were occupied, they were in the seated position when police stopped the car.

Officers detected the "distinct odor of marijuana coming from inside the vehicle as well as a strong odor of Lysol," and observed a can of Lysol near Gilbert.¹ After the driver of the car admitted to possessing multiple bags of marijuana, police located a backpack in the car's trunk. Inside the backpack, police found a loaded handgun and a form with Gilbert's name on it. Based on these facts, and because Gilbert had multiple prior felony convictions, the state charged Gilbert with possession of a firearm by a prohibited person in violation of Minn. Stat. § 624.713, subd. 1(2) (2018).

¹ At trial, one officer testified that it is not uncommon for individuals to spray Lysol in order to cover the smell of marijuana inside a vehicle.

The jury trial

Before the trial started, the district court addressed Gilbert's ineligibility to possess a firearm, which is an element of the offense for which he was charged under Minn. Stat. § 624.713, subd. 1(2):

THE COURT: Oh, you previously, but it was before we were on the record—obviously there will be a stipulation that Mr. Gilbert is a prohibited person. Are you both comfortable or all three of you comfortable with me simply listing the charge as “prohibited in possession of any firearm”?

DEFENSE COUNSEL: I'm fine with that, Your Honor.

THE COURT: Okay. [Prosecutor]?

PROSECUTOR: I'm fine with that, Your Honor.

During the trial, a forensic scientist for the Minneapolis Police Department's crime lab unit testified that she swabbed the handgun and the live cartridges for DNA; she also processed the handgun and magazine for latent prints. After the scientist found no latent prints, the DNA swabs were analyzed by a forensic scientist at the Bureau of Criminal Apprehension (BCA). The BCA scientist testified that she received known DNA samples from Gilbert and one of the other passengers in the car. The swab from the handgun contained a DNA mixture of four or more individuals. The major profile matched Gilbert's sample and did not match the other passenger's sample.

The BCA scientist testified that it is “very common” to obtain a DNA mixture. However, she also testified that, since the major contributor is the individual who contributes more DNA than other individuals, “there's a lot more of [the major contributor's] DNA present than anyone else's.” The BCA scientist stated that she “would

expect to see [the] major profile [she] obtained from the gun [one] time out of 7.2 billion people.” She also explained that the “only amount of DNA that was sufficient for comparison” to the major profile was the amount of DNA matching Gilbert’s known DNA sample. She testified that other DNA types present on the gun were in an amount so low that there was “not really enough” for her to make a comparison, so she deemed them “insufficient.”

Gilbert did not testify, and he did not call any witnesses. However, he did introduce certified convictions for two of the other passengers in the car. The state moved the district court to allow three certified copies of Gilbert’s convictions as rebuttal, arguing that the admission of the convictions of other occupants opened the door to the admission of Gilbert’s convictions. Defense counsel objected:

“[I]t’s not true that they don’t know that he’s been convicted of a crime. We’ve stipulated to that. He’s a person who is not allowed to have a gun, and numerous times on the body-worn camera, the officer said, ‘Who are the felons who cannot have guns?’ It’s no secret in this case that all of these people have felonies.”

The prosecutor noted, “[W]e stipulated the defendant is a prohibited person. We have not stipulated that he has any prior convictions. At this point in time, the jury doesn’t know that.” The prosecutor pointed out that while jurors would learn the specific convictions for the alternative perpetrators, all they knew regarding Gilbert’s convictions was that he was a prohibited person. The prosecutor noted that Gilbert was aware of the three specific certified copies of convictions the state was seeking to admit on rebuttal “because those [were] the three specific offenses for which the [s]tate ha[d] filed a notice

of motion on impeachment.” The prosecutor said that the convictions “would not be offered to show that [Gilbert was] a prohibited person, as [Gilbert had] stipulated to that,” and they would not be offered for impeachment because Gilbert did not testify.

The district court denied the state’s motion, expressing concern that Gilbert’s prior convictions could improperly be used as character evidence “or as a way to sort of get around the fact that there is a stipulation to him being prohibited and that it would be used improperly by the jury.”

When discussing the jury instructions, the prosecutor noted that the proposed instruction defined the crime as follows: “Under Minnesota law an eligible [sic] person has been convicted of a crime of violence.” The prosecutor also said, “I’m assuming that the defense wants that altered.” The district court replied that it would remove that entire definition “since it’s part of the —” before defense counsel interrupted regarding another edit.

While instructing the jury on the elements of the offense, the district court stated, “[T]he defendant is prohibited from possessing a firearm. The parties have agreed, and therefore you must accept, that the defendant was, on all relevant dates, prohibited from possessing a firearm.” Gilbert never objected to this instruction. The district court also instructed the jury: “The defendant has the right not to testify. This right is guaranteed by the [f]ederal and [s]tate [c]onstitutions. You should not draw any inference from the fact that the defendant has not testified in this case.” Gilbert did not object.

In his closing argument, the prosecutor told the jury, “[Y]ou’ve also heard about the second element, that [Gilbert] is a prohibited person. The parties have agreed, as the judge

stated in her instructions, the defendant is a prohibited person, and therefore, you must accept that the defendant was a prohibited person throughout the course of this case”

Again, Gilbert did not object.

The jury found Gilbert guilty, and the district court sentenced Gilbert to 60 months, the mandatory minimum sentence. Gilbert appeals.

DECISION

- I. Although the district court plainly erred by accepting Gilbert’s stipulation that he was prohibited from possessing a firearm when he did not personally waive his right to a jury trial on that element, the error did not affect Gilbert’s substantial rights.**

Gilbert argues that the district court plainly and prejudicially erred by accepting his stipulation that he was prohibited from possessing a firearm when he did not personally waive his right to a jury trial on that element. A defendant’s right to a jury trial includes “the right to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *State v. Kuhlmann*, 806 N.W.2d 844, 848 (Minn. 2011) (quotation omitted). This is true even if the evidence relating to these elements is uncontradicted. *State v. Carlson*, 268 N.W.2d 553, 560 (Minn. 1978). But a defendant may waive the right to a jury trial on an element of the charged offense by stipulating to that element. *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

To stipulate to an element of an offense, a defendant must, either orally or in writing, acknowledge and personally waive the rights: “(1) to testify at trial; (2) to have the prosecution witnesses testify in open court in the defendant’s presence; (3) to question

those prosecution witnesses; and (4) to require any favorable witnesses to testify for the defense in court.” Minn. R. Crim. P. 26.01, subd. 3(b); *Wright*, 679 N.W.2d at 191. It is error for the district court to accept a stipulation to an essential element of an offense in the absence of a defendant’s personal waiver. *Kuhlmann*, 806 N.W.2d at 850.

When a district court accepts a defendant’s stipulation to an essential element of an offense without obtaining the defendant’s personal waiver and the defendant does not object to that omission, we review for plain error. See Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To establish plain error, an appellant must demonstrate error, that was plain, and that affected his substantial rights. *Griller*, 583 N.W.2d at 740. We will only correct plain error if it “seriously affects the fairness and integrity of the judicial proceedings.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014).

To convict Gilbert of the crime charged, the state was required to prove that Gilbert: (1) was previously convicted of a “crime of violence” and (2) possessed a firearm. Minn. Stat. § 624.713, subd. 1(2). Gilbert argues that the district court’s acceptance of the parties’ stipulation to the prior-conviction element without obtaining his personal waiver of a jury trial on that element was error, and plainly so under *Kuhlmann*. The state concedes, and we conclude, that the district court committed plain error. Accordingly, our principal inquiry is whether the error affected Gilbert’s substantial rights.

“An error affects substantial rights if the error was prejudicial and affected the outcome of the case.” *Little*, 851 N.W.2d at 884 (quotation omitted). An error in giving a jury instruction 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.” *State v. Darris*, 648

N.W.2d 232, 240 (2002). In *Kuhlmann*, the Minnesota Supreme Court noted that the defendant benefited from a stipulation and that the lack of a personal waiver did not affect the outcome of the case, rejecting the defendant's argument on appeal that the district court's failure to obtain his personal jury-trial waiver impaired his substantial rights. *Kuhlmann*, 806 N.W.2d at 853.

The same factors are present here. First, Gilbert benefitted from the stipulation to the prior-conviction element because the stipulation kept evidence of Gilbert's previous violent conduct away from the jury. *See id.* Gilbert's stipulation also protected him from the possibility that the jury would improperly use his previous convictions as improper character evidence. Because the state could have readily proven the conviction-based element of the charged offense by introducing certified copies of those convictions, it was in Gilbert's best interest to stipulate to his previous convictions and remove the previous-conviction element from the jury's consideration.

Second, as in *Kuhlmann*, there is no indication that the district court's failure to obtain Gilbert's personal jury-trial waiver affected the outcome of the case. Gilbert does not challenge the existence of his prior convictions or the validity of his stipulations, nor does he dispute that the state could have "readily proven the conviction-based element." *See id.* Gilbert identifies no possible scenario that would have yielded a result other than the conviction he now challenges. Based on the record, we conclude that the district court's error in accepting Gilbert's stipulation without obtaining his personal waiver of a jury determination on the prior-conviction element did not impair his substantial rights.

II. Although the district court plainly erred by giving a no-adverse-inference jury instruction without obtaining Gilbert’s personal consent, the error did not affect Gilbert’s substantial rights.

Gilbert 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 his personal and clear consent. When a defendant chooses not to testify, a no-adverse-inference instruction may be given “only 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 a no-adverse-inference jury instruction, this court again applies the plain-error test. *Darris*, 648 N.W.2d at 240.

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, and we conclude, that the first two prongs have been met because Gilbert 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.

Gilbert argues that the third prong of the test has also been met because the district court’s plain error affected his substantial rights. When reviewing prejudicial error, courts 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; *Griller*, 583 N.W.2d at 740. Unless “there is a reasonable likelihood that giving

the instruction had a significant effect on the jury's verdict," we have held that "the giving of [a no-adverse-inference] jury instruction [is] harmless." *Darris*, 648 N.W.2d at 240.

Gilbert argues that the no-adverse-inference instruction affected his substantial rights by significantly impacting the jury verdict because "[t]he instruction fueled the jury's natural inclination to assume that [Gilbert] did not testify because he did not have a valid explanation to counter the evidence presented." Gilbert contends that the instruction "focused the jury's attention on [Gilbert's] decision to remain silent" and made "the connection between silence and guilt . . . too direct and too natural to be resisted" by the jury.

The state counters that Gilbert was not prejudiced by the no-adverse-inference instruction, given the totality of the evidence against him. To support its argument, the state points to the following evidence produced at trial: (1) the loaded firearm in the trunk of Gilbert's car, which was found in a backpack with a form containing Gilbert's name; (2) the fact that Gilbert's known DNA sample matched that of the major contributor to the DNA found on the gun; (3) the absence of additional DNA on the gun in amounts sufficient to compare to the major DNA profile; and (4) the other passengers' lack of access to the trunk due to the upright positions of the car's back seats.

The fact that Gilbert's DNA matched that of the major contributor to the DNA found on the gun is strong evidence of guilt, particularly when considering the gun's location in the trunk of Gilbert's car. Also, there is nothing in the record to suggest that the jury considered Gilbert's failure to testify in reaching its verdict. 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 Gilbert's substantial rights.

Affirmed.