

*This opinion is nonprecedential except as provided by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
A23-1236**

State of Minnesota,
Respondent,

vs.

Amy Lynn Monson,
Appellant.

**Filed July 8, 2024
Affirmed
Kirk, Judge***

Douglas County District Court
File No. 21-CR-22-1770

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

Thomas A. Jacobson, Alexandria City Attorney, Gregory F. Donahue, Assistant City Attorney, Swenson Lervick Syverson Trosvig Jacobson Cass Donahue, P.A., Alexandria, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Kirk, Judge.

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

NONPRECEDENTIAL OPINION

KIRK, Judge

Appellant challenges her third-degree driving under the influence (DWI) conviction arguing that she is entitled to a new trial because she was not present at a critical stage in the proceedings and the district court gave the jury a no-adverse-inference instruction without her personal consent. We affirm.

FACTS

On March 10, 2022, appellant Amy Lynn Monson hit a retaining wall with her vehicle after missing a turn. A responding officer arrested Monson for suspicion of DWI after the results of two field sobriety tests indicated she was impaired. A drug recognition evaluator (DRE) conducted further tests, the results of which also indicated Monson's impairment. During the interview with the DRE, Monson stated she was taking medications, including alprazolam, which she took at least twice that day. The DRE concluded that Monson was under the influence of a central-nervous-system depressant and alcohol. Analysis of a blood test taken after the DRE evaluation indicated a positive result for amphetamine and alprazolam.

Respondent State of Minnesota charged Monson with three counts of third-degree DWI: (1) operating a vehicle while her body contained any amount of a schedule I or II controlled substance pursuant to Minn. Stat. §§ 169A.20, subd. 1(7), .26 (2020) (count one); (2) operating a vehicle while under the influence of a controlled substance pursuant to Minn. Stat. §§ 169A.20, subd. 1(2), .26 (2020) (count two); and (3) operating a vehicle while under the influence of a combination of any two or more elements of alcohol, a

controlled substance, or an intoxicating substance that a person knows or should know has the capacity to cause impairment pursuant to Minn. Stat. §§ 169A.20, subd. 1(4), .26 (2020) (count three).

The state moved in limine to preclude Monson from testifying that a prescribed medication caused a false-positive result in her blood test. Monson sought “to argue the presence of amphetamine [was] consistent with [her] prescribed medication.”

A few days later, the district court held a hearing on the prescription-medication defense. Monson was not present because she was in custody in another county. The district court noted Monson’s absence and stated it was “not trying to deliberately exclude” Monson from the hearing but had no way to get her there. During the hearing, Monson’s counsel conveyed that her testimony would be offered to argue the defense to the jury. The district court concluded that the notice of the affirmative defense was untimely, and that Monson could not sustain her burden under the defense through her testimony alone. The district court concluded that a prescription would be hearsay if offered during Monson’s testimony and that Monson would need an expert to assert that the amphetamine in her system was consistent with her prescription for alprazolam, more commonly known as Xanax. The district court concluded that Monson could not argue a prescription-medication affirmative defense but could testify about her prescribed medications.

At trial, the state presented testimony from the arresting officer and the DRE. Monson did not testify or present further information. During trial, the district court discussed the jury instructions with counsel. The final jury instructions included that the

jury “should not draw any inference from the fact [Monson] has not testified in this case.” Monson’s counsel confirmed that she wished for this instruction to be included.

The jury found Monson guilty of counts one and two—body contains a schedule I or II controlled substance and being under the influence of a controlled substance—and not guilty of count three. The district court convicted and sentenced Monson on count two. Monson appeals.

DECISION

Monson argues that she is entitled to a new trial on two grounds. First, that the district court violated her right to be present at all critical stages of the criminal proceeding when it decided the prescription-drug motion in limine in her absence. Second, that the district court plainly erred by including a no-adverse-inference jury instruction without Monson’s personal consent. We address each argument in turn.

Criminal defendants have a due process “right to be present at all critical stages of trial.” *State v. Martin*, 773 N.W.2d 613, 619 (Minn. 2006) (quotation omitted); *see also State v. Grey*, 256 N.W.2d 74, 77 (Minn. 1977) (holding that a criminal defendant’s right to be present applied to a pretrial suppression hearing). In Minnesota, this right is codified in Minn. R. Crim. P. 26.03, subd. 1(1), which provides that “[t]he defendant must be present at arraignment, plea, and for every stage of the trial.”

Monson argues that her absence from the pretrial motion hearing violated her constitutional rights such that she is entitled to a new trial. Assuming without deciding that the district court erred by conducting the pretrial motion hearing in Monson’s absence, we conclude that she is not entitled to any relief because any error was harmless.

See State v. Ware, 498 N.W.2d 454, 457-58 (Minn. 1993) (“[E]ven if a defendant is wrongly denied the right to be present, the defendant is not entitled to relief if it can be said that the error was harmless error beyond a reasonable doubt.”).

“To determine whether the denial of a defendant’s right to be present was harmless, an appellate court examines the strength of the evidence, the substance of the district court’s response, and what the defendant would have contributed to his defense if he had been present.” *State v. Booker*, 770 N.W.2d 161, 167 (Minn. App. 2009), *rev. denied* (Minn. Oct. 20, 2009). The evidence of Monson’s intoxication was strong and included law-enforcement testimony, body-worn camera footage, and blood-test results. And we are not persuaded that Monson’s presence at the pretrial motion hearing would have compelled a different outcome. The district court denied the motion on two grounds—timeliness and foundation. Neither issue would have been remedied through Monson’s presence. Even if Monson had been present and made an offer of proof of her testimony about her prescription for alprazolam, the district court’s analysis of the evidence needed to sustain her burden would have been unchanged. Thus, Monson was not prejudiced by her absence at the pretrial motion hearing.

Monson next argues that the district court plainly erred in giving the jury a no-adverse-inference instruction without her personal consent. Because Monson’s trial counsel assented on the record to the no-adverse-inference jury instruction, this is an invited error. “The invited error doctrine prevents a party from asserting an error on appeal that [they] invited or could have prevented in the court below.” *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). But the invited error doctrine does not apply “if an error meets the

plain error test.” *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012) (reviewing a requested jury instruction for plain error). Thus, we may review the invited error here if: “(1) there is error, (2) the error is plain, and (3) the error affects substantial rights.” *Id.* Regarding the third factor: “An erroneous jury instruction is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict.” *Id.* at 143 (quotation omitted). If Monson establishes these three factors, we then consider “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Goelz*, 743 N.W.2d at 258 (quotation omitted).

Monson argues that the district court’s no-adverse-inference instruction was plain error that affected her substantial rights. We disagree. Although we conclude that the jury instruction was plainly erroneous, Monson has failed to establish that the instruction affected her substantial rights.

Within a criminal defendant’s constitutional right not testify against themselves is their right not to have this silence held against them. U.S. Const. amend. V; Minn. Const. art. I, § 7; *McCullum v. State*, 640 N.W.2d 610, 617 (Minn. 2002). A district court “should not give a no-adverse-inference instruction unless the defense requests it and then, the better practice is for the [district] court to inquire of the defendant himself whether he wishes to have such an instruction.” *McCullum*, 640 N.W.2d at 616; *see also State v. Clifton*, 701 N.W.2d 793, 798 (Minn. 2005) (“We have made clear that [the no-adverse-inference instruction] should not be given without the personal and clear consent of the defendant.”). Such consent is favored because the no-adverse-inference instruction “calls the defendant’s silence to the jury’s attention.” *McCullum*, 640 N.W.2d at 617.

The district court gave a no-adverse-inference instruction to the jury. While the record contains Monson's counsel's assent to the instruction, it does not contain Monson's consent on the record as contemplated by *McCollum*. *Id.* at 616-17. Nor does the record reflect conduct that sufficiently demonstrates Monson's implicit consent. *See Clifton*, 701 N.W.2d at 798 (noting indicators of defendant's consent in the record including his decision not to testify, acknowledgment that no adverse inferences could be drawn, understanding that "he could request or decline a no-adverse-inference instruction," and a private discussion between defendant and counsel about the instruction). The record lacks Monson's waiver of her right to testify, acknowledgment that no adverse inferences could be drawn, or any indication that she could request or decline a no-adverse-inference instruction. Nor does the record reflect that Monson reviewed the jury instructions or discussed them with counsel. Because Monson did not consent to the no-adverse-inference instruction, it was plain error for the district court to give this jury instruction.

Although the no-adverse-inference instruction was given in error, Monson fails to meet her burden to show that her substantial rights were affected by this instruction. Monson makes no argument about how this jury instruction affected the jury verdict. Even so, the state's evidence was strong, and the jury returned a mixed verdict, indicating that they were not unduly influenced by attention the instruction may have drawn to Monson's decision not to testify. We conclude that the no-adverse-inference instruction did not affect the outcome of Monson's case and therefore did not affect her substantial rights. *See Carridine*, 812 N.W.2d at 142-43.

Affirmed.