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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-52**

State of Minnesota,  
Respondent,

vs.

Tyrel Lamar Patterson,  
Appellant.

**Filed December 12, 2011  
Affirmed  
Klaphake, Judge**

Hennepin County District Court  
File No. 27-CR-09-20780

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Klaphake, Judge; and Stauber, Judge.

**UNPUBLISHED OPINION**

**KLAPHAKE**, Judge

Appellant Tyrel Lamar Patterson challenges his conviction, following a jury trial, of possession of a firearm by an ineligible person. Appellant argues that he is entitled to a

new trial because (1) the district court erroneously failed to obtain a personal waiver of his jury-trial right before accepting his stipulation to an element of the offense; (2) the prosecutor committed misconduct by asking appellant whether a police officer lied during the officer's testimony; and (3) the district court erroneously permitted testimony that an eyewitness was afraid and erroneously failed to issue a cautionary instruction. We affirm because (1) under either the plain- or harmless-error tests, the error in the failure to obtain appellant's personal waiver of his right to a jury trial did not affect appellant's substantial rights; (2) the prosecutor did not commit misconduct by asking appellant whether a police officer lied while testifying, when the credibility of the two witnesses was central to an issue to be decided at trial; and (3) the district court did not abuse its discretion by admitting evidence of an eyewitness's fear and did not plainly err by failing to give a cautionary instruction after admission of that evidence.

## **DECISION**

### *Waiver of Jury-Trial Right*

Appellant asserts that he is entitled to a new trial because the district court failed to obtain his personal waiver of his right to a jury trial before accepting appellant's stipulation that he was prohibited from possessing a firearm.

A criminal defendant has the right to a jury trial for any offense that is punishable by incarceration. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010). "A defendant's right to a jury trial includes the right to be tried on each and every element of the charged offense." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). "But a

defendant may waive the right to a jury trial on any particular element by stipulation.” *Fluker*, 781 N.W.2d at 400. A defendant must waive the right to a jury trial “personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel.” Minn. R. Crim. P. 26.01, subd. 1(2)(a).

Here, it is undisputed that the district court failed to secure an oral or written waiver of appellant’s right to a jury trial on the stipulated element of the offense, appellant’s ineligibility to possess a firearm because of his juvenile adjudication of a crime of violence. *See* Minn. Stat. § 624.713, subd. 1(2) (2010) (prohibiting possession of firearm by certain ineligible persons, including “a person who has been . . . adjudicated delinquent . . . or convicted of a crime of violence”). Therefore, the district court erred by accepting the stipulation without appellant’s personal waiver.

Whether this court applies a harmless-error or plain-error analysis to the improper waiver of the right to a jury trial involving stipulated elements appears to be an open question. *See, e.g., Fluker*, 781 N.W.2d at 403 (harmless error); *State v. Kuhlmann*, 780 N.W.2d 401, 404-06 (Minn. App. 2010), *review granted* (Minn. June 15, 2010) (plain error); *Wright*, 679 N.W.2d at 190-91 (harmless error). Under a harmless-error review, a district court’s error affecting constitutional rights will be reversed unless the error is harmless beyond a reasonable doubt. *State v. Vance*, 734 N.W.2d 650, 660 n.8 (Minn. 2007). An error is harmless beyond a reasonable doubt if the verdict is “surely unattributable to the error.” *Id.* (quotation omitted). The plain-error standard requires consideration of whether an error occurred, whether the error was plain, and whether it

affected the defendant's substantial rights. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). When these three prongs are satisfied, the appellate court determines whether it should consider the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

Under the circumstances presented here, the error in failing to obtain a personal waiver of appellant's jury-trial right did not violate the harmless-error or plain-error standards. Although appellant did not waive the jury-trial right, he personally stipulated to the foundation for the charge—that he was ineligible to possess a firearm. He argues that “the manner in which the stipulation was handled” by the court, which referred to the fact that he was a person “prohibited” from possessing a firearm rather than a person “ineligible” to possess a firearm, was prejudicial. *See* Minn. Stat. § 624.713, subd. 1(2) (referring to the “ineligibility” of a person adjudicated delinquent for a crime of violence to possess a firearm). There is only a slight difference in the words “prohibited” and “ineligible,” and the essential meaning of both words is that appellant could not possess a firearm.

Further, defense counsel did not object to the stipulation as worded nor to the prosecutor's use of the word “prohibited” in referencing appellant's right to possess a firearm. In addition, appellant's counsel also referenced appellant's status as a “prohibited” person rather than as an “ineligible” person. Finally, appellant did not suffer substantial harm because the verdict was not affected by the error—appellant benefitted from the stipulation, which prevented the jury from learning of the substance of his prior convictions. We conclude that the district court's error in failing to obtain appellant's

waiver of his jury-trial rights here was harmless and did not affect appellant's substantial rights. *See Fluker*, 781 N.W.2d at 403 (ruling that a district court's failure to obtain a defendant's personal jury-trial waiver to two stipulated elements of an offense was harmless error because the defendant was present when the stipulation was read into the record, defendant's counsel did not object to the stipulation when it was referenced at trial, the underlying facts of the stipulation were undisputed, and "appellant benefitted from the stipulation by keeping evidence regarding his [prior] conviction . . . from being heard by the jury"); *Kuhlmann*, 780 N.W.2d at 406 (ruling that a district court's failure to obtain a defendant's waiver on the conviction-based elements of felony domestic assault and second-degree DWI during a jury trial did not require plain-error reversal because "[t]he waiver error . . . did not likely have a significant effect on the jury's verdict because the stipulation kept the jury from knowing about [the defendant's] prior convictions").

#### *Alleged Prosecutorial Misconduct*

The firearm involved in appellant's crime was not found on his person, and his possession of the weapon was an element of the charged offense. Appellant testified that he did not run from police, as others had done, but Officer Ross Hansberger testified that he chased appellant down an alley where both appellant and the gun were found, leading to the permissible inference that the gun was in appellant's possession. During cross-examination, the prosecutor asked appellant, "When Officer Hansberger testified that he chased you down the alley, he was lying?" and appellant answered, "Yes." Defense counsel did not object to this question.

For unobjected-to trial errors involving alleged prosecutorial misconduct, we review the record to determine whether there was error that was plain, and whether such error affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). *Ramey* defines plain error as one that contravenes case law, a rule, or a standard of conduct. *Id.* The prosecution bears the burden to show lack of prejudice. *Id.*

Questioning a witness about the credibility of another witness, as a general rule, elicits testimony that has no probative value, is improper and argumentative, and does not assist the jury in assessing witness credibility. *State v. Pilot*, 595 N.W.2d 511, 516 (Minn. 1999); *see State v. Leutschafft*, 759 N.W.2d 414, 421 (Minn. App. 2009) (examining other jurisdictions' prohibitions about prosecutorial use of "were they lying" questions and noting that the reasons for the prohibitions include "that such questions invade the province of the jury, are argumentative, are misleading, distort the government's burden of proof, tend to shift the burden of proof, are improper opinion evidence, invite mere speculation, constitute an unfair litigation tactic, and seek evidence beyond the witness's competence"), *review denied* (Minn. Mar. 17, 2009). There is no blanket prohibition against the use of "were they lying" questions, however, and in Minnesota such questions may be probative "in clarifying a particular line of testimony, in evaluating the credibility of a witness claiming that everyone but the witness lied, or . . . [when] the witness flatly denies the occurrence of events." *Pilot*, 595 N.W.2d at 516. The supreme court has reaffirmed the *Pilot* analysis in *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2006), stating that "were they lying" questions "are permissible when the defendant [puts] the

issue of the credibility of the state's witnesses in central focus.” *Id.* (quoting *Pilot*, 595 N.W.2d at 518).

Here, the focus of the trial testimony was the identity of appellant and whether he possessed a firearm. The testimony of Officer Hansberger and appellant were key to the second issue, because appellant could be tied to the gun found in the alley only if he was in the alley, which he denied.<sup>1</sup> Thus, posing a question to appellant about whether Officer Hansberger lied, as in *Pilot*, could have “assisted the jury in weighing [the defendant’s] own veracity and in evaluating his . . . theory [of the case].” 595 N.W.2d at 518. Therefore, the prosecutor did not err in posing a “was he lying” question to appellant because appellant’s presence in the alley was an essential issue to be decided at trial.

#### *Admission of Fear Evidence*

At trial, the prosecutor elicited testimony from Officer Hansberger and from M.S., the witness who observed appellant with a gun and called police, that M.S. was afraid about making the emergency call to police. Officer Hansberger explained M.S.’s refusal to attempt to identify appellant through a show-up by stating that she was “fearful that she would be identified and just fearful in general that she made that call.” During her testimony, when the prosecutor asked M.S. if she gave a false name to police during the emergency call because she was “scared,” M.S. answered, “Yeah. I guess. Yeah.”

Appellant argues that elicitation of this testimony was improper, and that the district court abused its discretion by admitting the evidence and by failing to give a

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<sup>1</sup> As noted by appellant, his fingerprints were not found on the weapon.

cautionary instruction. Appellant argues that this evidence unfairly prejudiced the jury against him, requiring reversal and a new trial.

Evidentiary rulings are within a district court's discretion and are reviewed for abuse of that discretion. *State v. McArthur*, 730 N.W.2d 44, 51 (Minn. 2007). Although relevant evidence is generally admissible under Minn. R. Evid. 402, under Minn. R. Evid. 403, "even relevant evidence may be excluded if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *McArthur*, 730 N.W.2d at 51. "Bias, which may be induced by self-interest or by fear of testifying for any reason, is almost always relevant because it is probative of witness credibility." *Id.* Evidence regarding witnesses' fear, used improperly, can cause the jury to infer that a defendant is a bad person or likely to commit a crime. *State v. Harris*, 521 N.W.2d 348, 352 (Minn. 1994). When such evidence is admitted, it should be accompanied by a cautionary instruction "to prevent the evidence from being misused." *McArthur*, 730 N.W.2d at 51.

Here, the district court was not asked to rule on this evidence before it was offered at trial, and appellant did not object to the evidence or seek a curative instruction. Under these circumstances, this court reviews under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The plain-error standard requires appellant to show error that was plain and affected his substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If appellant satisfies that test, this court will correct the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*



Here, the evidence of M.S.'s fear was relevant to explain why she gave a false name to police and to explain her reluctance to identify appellant in a show-up. As noted by respondent, it was clear from the trial testimony that the context of M.S.'s and Officer Hansberger's statements about M.S.'s fear did not show that she was particularly afraid of appellant. In *McArthur*, the supreme court ruled that the district court did not abuse its discretion by admitting evidence of witnesses' fears, in part because their testimony did not "appear to be even an implicit reference to fear of [the defendant.]" 730 N.W.2d at 52. However, M.S.'s credibility was not put in issue by appellant, as the prosecution solicited the evidence during her direct examination, which occurred even before the defense had the opportunity to challenge M.S.'s credibility. *McArthur* also states that "evidence of witness fears is most prejudicial when it is an important focus of the state's case," *id.* at 51, but it approves the solicitation of evidence of witness fear in anticipating an attack on witness credibility. *Id.* Given that the district court's admission of the fear evidence was consistent with the parameters of *McArthur*, we conclude that the district court did not abuse its discretion by admitting the evidence of M.S.'s fear. *See id.* at 52 (approving district court's admission of evidence of witnesses' fears).

Further, even if the district court erred by failing to give a curative instruction, which it was not asked to do, it appears that any error did not violate the plain-error rule because it did not affect appellant's substantial rights. The evidence of M.S.'s fear did not show that M.S. was afraid of appellant, and the evidence was used in a very limited fashion on direct examination to explain the atypical show-up used by police and to explain M.S.'s motivation for giving police a false name during her emergency call. The

prosecutor did not refer to the fear evidence again during trial, including during closing argument.

**Affirmed.**