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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2319**

State of Minnesota,
Respondent,

vs.

Antoine Rumel Little,
Appellant.

**Filed February 19, 2013
Affirmed
Larkin, Judge**

Olmsted County District Court
File No. 55-CR-10-5053

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County
Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and
Crippen, 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UNPUBLISHED OPINION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 of first-degree criminal sexual conduct. He argues that the district court erred by failing to obtain a renewed waiver of his right to trial by jury after the state amended the underlying complaint, which originally charged criminal sexual conduct in the third and fourth degrees, to add a first-degree criminal-sexual-conduct charge. Because appellant did not raise the waiver issue in the district court, we apply plain-error analysis. And because precedent does not require a district court to obtain a renewed jury waiver if the underlying complaint is amended, we conclude that the district court did not err. We further conclude that even if the district court did err, such error does not require reversal because the error is not clear or obvious and it did not affect appellant's substantial rights. Lastly, we conclude that the particular facts and circumstances of this case show that appellant's jury waiver was knowing and intelligent. We therefore affirm.

FACTS

Respondent State of Minnesota charged appellant Antoine Rumel Little by complaint with criminal sexual conduct in the third and fourth degrees. On January 20, 2011, Little waived his right to a trial by jury and agreed to a court trial. The district court questioned Little regarding his right to a trial by jury as follows:

THE COURT: Mr. Little, your attorney has indicated that you want to waive your right to have a trial by jury, is that correct?

LITTLE: Yes, sir.

THE COURT: And you understand that if you have a trial by jury that—that under the law you're presumed innocent and that the state has the burden of proving you guilty beyond a reasonable doubt?

LITTLE: Yes, sir.

THE COURT: And that they have to convince twelve jurors that you are guilty beyond a reasonable doubt and they have to convince them of that with respect to each and every element of the offense?

LITTLE: Yes, sir.

THE COURT: And that if you waive that right to have a jury trial, the—the presumption of innocence and the burden of proof of beyond a reasonable doubt remain in place but then the—the state only has to convince one person, that is the judge who will hear the case, that you're guilty, you understand that?

LITTLE: Yes, sir.

THE COURT: And it is your right to waive that and to have this tried to the court, do you understand that?

LITTLE: Yes, sir.

THE COURT: And is that what you've decided to do?

LITTLE: Yes, sir.

THE COURT: And you've consulted with your attorney about the wisdom of that and the consequences of doing it?

LITTLE: Yeah.

THE COURT: And you've weighed your options in terms of having the jury trial versus having a court trial?

LITTLE: Yes, sir.

THE COURT: And—and it's your own free and voluntary decision then to waive your right to a jury trial and ask that this be tried to the court?

LITTLE: Yes, sir.

THE COURT: And no one's threatened you or coerced you or forced you to do that, have they?

LITTLE: No, sir.

THE COURT: And you're not doing this just because you're in custody and you think it might make things go faster, are you?

LITTLE: Yeah, in a way.

THE COURT: You're doing it because of that or you're not?

LITTLE: No, no, no.

THE COURT: All right. You just decided it's in your best interest to try this to the court rather than to a jury, is that correct?

LITTLE: Yeah.

On February 1, the state amended the underlying criminal complaint to add a first-degree criminal-sexual-conduct charge. The next day, which was the day before the scheduled court trial, the district court held a hearing and invited the parties to make a record of the status of a possible plea agreement. The state warned that its offer “[would] not be open in the morning” and that “[i]f the defendant rejects it now, then he’ll be going to trial on the first-degree charge at 9:30 in the morning, facing 234 months in prison.” The district court concluded the hearing by asking if a record had been made regarding Little’s jury waiver. Both attorneys agreed that a waiver had been made at a previous hearing. The district court adjourned the hearing, without further inquiry regarding Little’s waiver of his right to a trial by jury.

The case was tried to the district court on February 3-4. The district court found Little guilty of all three offenses, entered a judgment of conviction for criminal sexual conduct in the first degree, and sentenced Little to serve 153 months in prison on that offense. Little appeals.

DECISION

I.

Little seeks reversal of his first-degree criminal-sexual-conduct conviction, arguing that his jury waiver was not knowing, intelligent, and voluntary with respect to

that charge because “the [district] court did not obtain [his] personal waiver of his right to a jury trial on the different greater offense that was charged in the amended complaint.”

Under both the United States and Minnesota Constitutions, a defendant is entitled to trial by jury. U.S. Const. art. III, § 2, cl. 3; amend. VI; Minn. Const. art. 1, §§ 4, 6. “This right includes the right to be tried before a jury on every element of the charged offense.” *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010). “In Minnesota, the right to a jury trial attaches whenever the defendant is charged with an offense that has an authorized penalty of incarceration.” *State v. Kuhlmann*, 806 N.W.2d 844, 848 (Minn. 2011). However, a

defendant, with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so 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).

Caselaw requires the

waiver of a jury trial to be knowing, intelligent and voluntary. The [district] court must be satisfied that the defendant was informed of his rights and that the waiver was voluntary. . . . The purpose of the [district] court’s colloquy with the defendant is to learn whether the defendant’s waiver is knowingly and voluntarily made. *The focus of the inquiry is on whether the defendant understands the basic elements of a jury trial.*

State v. Ross, 472 N.W.2d 651, 653-54 (Minn. 1991) (emphasis added) (quotation and citation omitted).

“When the facts are undisputed . . . the question of whether a [waiver of a constitutional right] was knowing and intelligent is a constitutional one that is reviewed de novo.” *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). A district court’s unobjected-to failure to obtain a defendant’s personal waiver of the right to trial by jury is reviewed for plain error. *See Kuhlmann*, 806 N.W.2d at 850-52 (concluding that a district court’s failure to obtain a defendant’s personal waiver of the right to a jury trial on the previous-conviction elements of the charged offenses did not comport with the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a), but rejecting an argument that the error was structural, and reviewing for plain error). Because Little did not object to the district court’s failure to obtain a post-amendment jury waiver, we apply the plain-error standard of review.

Plain-Error Analysis

Under the plain-error doctrine, we must determine whether there was error, whether the error was plain, and whether the error affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If each of these factors is satisfied, we will address the error only if it affects the fairness and integrity of the judicial proceedings. *Id.* An error is “plain” if it is clear or obvious at the time of appeal. *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008); *State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006). “Usually clear or obvious error is shown if the error contravenes case law, a rule, or a standard of conduct.” *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted). As to the third factor, an error affects substantial rights “if the error was prejudicial and affected the outcome of the case.” *Griller*, 583 N.W.2d at 741.

In arguing that his jury waiver was invalid as to the amended charge, Little emphasizes that the amended complaint added a new charge with new elements and that it exposed him to a considerably higher penalty under the sentencing guidelines. Little argues that his waiver was therefore “valid only to the original charges and not subject to the moving target of the State later amending the complaint to add a more serious different charge.” Little also argues that “a jury trial waiver cannot be applied to preclude a jury trial on issues unknown or not contemplated by the parties at the time of the waiver.” He cites *State v. Dettman*, 719 N.W.2d 644 (Minn. 2006) and *State v. Zulu*, 706 N.W.2d 919 (Minn. App. 2005) as support. Neither case is directly on point.

In *Dettman*, the supreme court held that the defendant’s “waiver of his right to a jury trial on the issue of guilt cannot be interpreted as a waiver of his right to a jury determination of aggravating sentencing factors.” 719 N.W.2d at 654. *Dettman* requires two different waivers because two different rights were at stake: (1) the right to a jury trial on the issue of guilt and (2) the right to a jury trial on aggravating sentencing factors. That distinction is now reflected in the Minnesota Rules of Criminal Procedure. Compare Minn. R. Crim. P. 26.01, subd. 1(2)(a) (stating that a defendant “may waive a jury trial on the issue of guilt”), with Minn. R. Crim. P. 26.01, subd. 1(2)(b) (stating that a defendant “may waive a jury trial on the facts in support of an aggravated sentence”). *Dettman* is distinguishable because only one right is at stake in this case—the right to a jury trial on the issue of guilt.

Zulu is also distinguishable. In *Zulu*, the defendant waived his right to a jury determination on the issue of an aggravated sentence. 706 N.W.2d at 926. At the time of

the waiver, the state had identified five aggravating factors that it sought to prove to support an upward sentencing departure. *Id.* However, on the day of sentencing, the state requested, and the district court made, a factual finding regarding an aggravating factor that the state had not identified prior to the defendant's waiver, namely, that the defendant had committed the offense both before and after the date of a statutory amendment that increased the presumptive sentence for the crime. *Id.* at 923. This court stated that

because the state did not raise the issue of the application of the increased penalty until after appellant had waived a jury determination on the identified aggravating factors, we conclude that appellant did not make a knowing, intelligent, and voluntary waiver of the right to have a jury determine whether he committed [the offense] after the effective date of the amendment to the statute.

Id. at 927.

The holding in *Zulu* is consistent with the current rules governing waiver of the right to trial by jury on the existence of facts that would support an aggravated sentence. Under the rules, the prosecutor must provide written notice of intent to seek an aggravated sentence at least seven days before the omnibus hearing. Minn. R. Crim. P. 7.03. The notice “must include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.” *Id.* The defendant then “may waive a jury trial *on the facts* in support of an aggravated sentence provided the defendant does so personally . . . after being advised by the court of the right to a trial by jury.” Minn. R. Crim. P. 26.01, subd. 1(2)(b) (emphasis added).

Thus, a jury waiver regarding an aggravated sentence is based on the specific facts alleged by the prosecutor in support of the aggravated sentence, and such a waiver is therefore invalid as to any facts that were not identified as a basis for enhancement when the waiver was provided. *See Zulu*, 706 N.W.2d at 927. By contrast, rule 26.01 does not require a waiver of specific factual determinations when a defendant waives a jury on the general “issue of guilt.” Minn. R. Crim. P. 26.01, subd. 1(2)(a). Because *Zulu* addresses the validity of an aggravated-sentencing jury waiver, which is currently governed by a different rule with more specific requirements, its holding is not applicable here.

We also consider the potential application of *State v. Rhoads*, in which the Minnesota Supreme Court recently held: “When the State files an amended charge that doubles the maximum possible punishment after a hearing at which the defendant waived his right to counsel, a defendant must renew his waiver of his right to counsel in a manner that demonstrates an understanding of the increased maximum possible punishment.” 813 N.W.2d at 882. Although a renewed waiver is required under *Rhoads*, the holding is specific to the waiver of the right to counsel. In deciding that a renewed waiver of the right to counsel was necessary, the supreme court emphasized the increased potential punishment that resulted from the amendment. *Id.* at 888 (explaining that to establish a knowing and intelligent waiver of the right to counsel, the record must demonstrate that the defendant understands the possible punishment). This emphasis is consistent with the requirement that a district court “must advise [a] defendant” of the “range of allowable punishments” associated with a charged felony offense before accepting the defendant’s waiver of the right to counsel. Minn. R. Crim. P. 5.04, subd. 1(4)(c). The district court

must also advise the defendant of the “nature of the charges,” “all offenses included within the charges,” that “there may be defenses,” that “mitigating circumstances may exist,” and “all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel.” *Id.*, subd. 1(4)(a),(b),(d)-(f).

Unlike the requirements attendant to a waiver of the right to counsel, the district court’s obligation is not defined as broadly or as specifically when it comes to jury waivers: the district court need only advise the defendant of the “right to trial by jury.” Minn. R. Crim. P. 26.01, subd. 1(2)(a). “The focus of the inquiry is on whether the defendant understands the basic elements of a jury trial.” *Ross*, 472 N.W.2d at 654. Because *Rhoads* involved waiver of the right to counsel, which is governed by more specific requirements than a waiver of the right to trial by jury, it is not appropriate to apply the rule from *Rhoads* in this case. *See Rhoads*, 813 N.W.2d at 888 (stating, “[o]ur holding is limited to the facts of this case”).

In sum, we are not aware of any precedent that requires a district court to obtain a renewed jury waiver if the state amends the underlying complaint. We therefore conclude that the district court did not err by failing to obtain a renewed waiver in this case. And even if we assume that the district court erred in this regard, because there is no precedent requiring post-amendment renewal, such error is not clear or obvious. So, the first and second factors of the plain-error test are not satisfied.

Moreover, there is no showing that the purported error affected Little’s substantial rights. Little does not claim the alleged error was prejudicial or that it affected the outcome of his case. For example, Little does not argue that he did not know that he was

entitled to a jury trial on the amended charge. In fact, Little does not even argue that he wanted a jury trial on the amended charge. Nor does he argue that his defense theory changed as a result of the amendment or that the evidence or arguments would have been different if the case had been tried to a jury. Lastly, there is no indication that Little would not have affirmed his pre-amendment waiver if the district court had solicited a renewed waiver. Thus, the third plain-error factor is not satisfied.

In sum, we conclude that the district court did not err by failing to obtain a renewed waiver of Little's right to trial by jury after the state amended the complaint. We further conclude that even if the district court erred by failing to obtain a renewed waiver, such error does not require reversal because it was not plain and it did not affect Little's substantial rights.

II.

Having concluded that the district court was not required to obtain a renewed, post-amendment waiver of Little's right to trial by jury, we next consider whether Little's pre-amendment jury waiver was knowing and intelligent as to the amended charge.

In *Ross*, the supreme court offered "helpful guidelines" to ensure that a defendant understands the basic elements of a jury trial:

[T]he defendant should be told that a jury trial is composed of 12 members of the community, that the defendant may participate in the selection of the jurors, that the verdict of the jury must be unanimous, and that, if the defendant waives a jury, the judge alone will decide guilt or innocence.

472 N.W.2d at 654.

These guidelines are not mandatory and the “nature and extent of the inquiry may vary with the circumstances of a particular case.” *Id.* But, contrary to the premise that is implicit in Little’s arguments, neither the guidelines nor the procedural rules require a defendant to acknowledge the pending charges, the included elements, or the potential punishment when waiving the right to a trial by jury. *Compare* Minn. R. Crim. P. 26.01, subd. 1(2)(a) (allowing the district court to approve a defendant’s waiver of a jury trial on the issue of guilt so long as the waiver is in writing or on the record, the court has advised the defendant of the right to trial by jury, and the defendant has had an opportunity to consult with counsel, without mandating any particular inquiry), *with* Minn. R. Crim. P. 15.01, subd. 1 (setting forth a specific, detailed inquiry that a district court must make before accepting a guilty plea and trial waiver from a defendant, which addresses, among other things, whether the defendant understands the crime charged and the maximum penalty that could be imposed).

“[W]hether a waiver of a constitutional right is valid depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Rhoads*, 813 N.W.2d at 889 (quotations omitted). In this case, the district court told Little that he had a right to a trial by jury, that the state would have to convince 12 jurors that he was guilty beyond a reasonable doubt with respect to each and every element of the offense, and that if he waived a jury, “the state only has to convince one person, that is the judge who will hear the case, that [he is] guilty.” Little indicated that he understood his right to a trial by jury. He also stated that his jury waiver

was made freely, voluntarily, and after consultation with his attorney. Little does not challenge the validity of that waiver as to the original charges.

When Little appeared before the district court with his attorney on the day before trial, the prosecutor stated that the state's settlement offer "[would] not be open in the morning" and that if Little rejected the offer, he would "be going to trial on the first-degree charge at 9:30 in the morning, facing 234 months in prison." And when the district court asked if a record had been made regarding Little's jury waiver, both attorneys agreed that a waiver had been provided at a previous hearing.

In sum, the record shows that Little (1) was represented by counsel, (2) validly waived his right to trial by jury before the state amended the complaint, (3) was aware of the amendment and the resulting first-degree criminal-sexual-conduct charge, (4) was aware of the potential penalty,¹ and (5) was aware that his right to a trial by jury—and his previous waiver—extended to the amended charge. There is no basis to conclude that Little did not understand that he had a right to a jury trial on the first-degree offense or that he did not want to go forward with a court trial, instead of a jury trial, on that offense. On the particular facts and circumstances of this case, we conclude that Little's jury waiver was knowing and intelligent as to the amended charge. We therefore affirm.

Affirmed.

¹ In fact, the prosecutor's reference to "234 months in prison" overstated the presumptive sentence.