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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0284**

State of Minnesota,
Respondent,

vs.

Miles Marten Conrad,
Appellant.

**Filed April 14, 2009
Affirmed
Toussaint, Chief Judge**

Stearns County District Court
File No. 73-CR-07-7064

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle P. Kendall, Stearns County Attorney, 448 Administration Center, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Schellhas, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

At a hearing on stipulated facts, the district court found appellant Miles Martin Conrad guilty of theft of more than \$2,500 and that he is a career offender. Appellant now argues that he entitled to a new trial because the district court misapplied Minn. R. Crim. P. 26.01, subds. 3 and 4, in accepting his waiver of his right to a jury trial on his guilt and on the aggravating factors used to sentence him. Because the record shows that appellant clearly understood and waived his rights to a jury trial, we affirm.

DECISION

“The interpretation of the rules of criminal procedure is a question of law subject to de novo review.” *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

Evidence of a defendant’s guilt and the factors to support an aggravated sentence may be submitted to and tried by a district court on stipulated facts, and a defendant may appeal as from any other judgment. Minn. R. Crim. P. 26.01, subd. 3. When the parties agree that a ruling on a pretrial issue may be dispositive, the defendant may stipulate to the evidence and to the court’s ability to find him guilty based on that evidence and appellate review is restricted to the pretrial issue. Minn. R. Crim. P. 26.01, subd. 4, *superseding State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). Both subdivisions require the defendant to waive a jury trial on the issue of guilt and the rights to testify at trial, to have prosecution witnesses testify in the defendant’s presence, to question those witnesses, and to require favorable witnesses to testify for the defense. *See* Minn. R. Crim. P. 26.01, subd. 1(2)(a), subd. 3, and subd. 4.

Before his hearing, appellant challenged the timeliness of respondent State of Minnesota's motion to seek a sentencing departure based on appellant's career-offender status. The state concedes that the "present record is ambiguous concerning whether the parties were proceeding under Subdivision 3 or under Subdivision 4 [of Minn. R. Crim. P. 26.01]." We agree.

At the hearing, appellant's counsel told the court: "We've agreed – [appellant]'s going to enter a *Lothenbach* plea [i.e., proceed under subdivision 4] with regards to both the facts of the case . . . and also to the sentencing portion of the trial." The state's counsel replied:

Technically, however, it's not going to be a *Lothenbach* plea today. However, [appellant] would be stipulating to the State's case under a *Lothenbach* proceeding. The State would present the Court with a packet including the criminal history as well as police reports . . . it would be akin to a court trial based on stipulated facts [i.e., a proceeding under subdivision 3].

But the state's counsel then identified the timeliness of its motion to seek a sentencing departure as "the only issue that's being preserved by these proceedings," indicating that the proceeding was under subdivision 4. Appellant's counsel stated that, although there was only one pretrial issue, he was "not specifically limiting what the Court of Appeals can look at," indicating the proceeding was under subdivision 3.

On appeal, appellant argues that his waiver of a jury trial was neither voluntary nor intelligent because his counsel did not identify a pretrial issue and "was wrong" in stating that his "research into *Lothenbach* doesn't indicate that [appellant] needs to

specifically enunciate what he's planning on appealing."¹ But the record reflects that appellant specifically understood that he waived all the rights to a jury trial on both his guilt and the aggravating factors. Because the waiver requirements are the same for a trial on stipulated facts and on a *Lothenbach* proceeding, any inaccuracy in the classification of the proceeding is irrelevant to the validity of the waiver.

Affirmed.

¹ In his pro se brief, appellant also argues that he is entitled to a new trial because the contested omnibus hearing was cancelled and because he was not provided with a copy of a surveillance tape used as evidence. These issues were not raised to the district court; therefore, this court may address them only if they meet the plain-error test. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (“[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights.”). Appellant provides no support for the position that either cancelling the hearing or not providing a copy of the surveillance tape was an error, much less a plain error, or that any substantial right was affected.