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

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-845

State of Minnesota,
Respondent,

vs.

Gary Lee Hanson,
Appellant.

Filed April 13, 2010
Affirmed
Randall, Judge*

Cottonwood County District Court
File No. 17-CR-08-439

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

L. Douglas Storey, Cottonwood County Attorney, Windom, Minnesota (for respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and Randall, Judge.

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

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

Gary Lee Hanson appeals from his conviction of felony domestic assault. A domestic assault conviction is enhanced to a felony if the defendant has been convicted of two or more qualified domestic-violence-related offenses in the previous ten years. Before trial, Hanson stipulated to his prior domestic violence convictions so that they would not be presented to the jury. Hanson argues that he did not personally and explicitly waive his right to a jury trial on the element of previous domestic-violence-related convictions and that his purported stipulation to this element was invalid because there was no documentary evidence of the convictions introduced. Hanson made a valid stipulation that he had previous domestic-violence-related convictions. He waived his right to have a jury determine that element of the offense. Affirmed.

FACTS

In July 2008, Gary Hanson got into a fight with his brother at their grandmother's home. A sheriff's deputy arrived and observed that the garage had things "scattered all over"; it was obvious to him that "there had been some sort of struggle." The deputy also observed that Hanson's brother had an oblong welt on his forehead that was three to four inches long. The brother told the deputy that Hanson had hit him in the head with a bat. Hanson claimed that he and his brother had wrestled in the garage after his brother "bull rushed" him, and that his brother had hit him in the back with a rake. Police arrested both Hanson and his brother.

A jury found Hanson guilty of felony domestic assault and disorderly conduct. Hanson was sentenced to the presumptive sentence of 27 months' imprisonment for the felony domestic assault conviction. This appeal follows.

D E C I S I O N

I

Hanson first argues that the district court committed reversible error by failing to obtain his personal and explicit waiver to a jury trial on the prior-offense element of his felony domestic assault conviction. We disagree.

Criminal defendants have the right to a jury trial on every element of the charged offense. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). "An exception to the right to a jury trial is stipulations and waivers." *State v. Hinton*, 702 N.W.2d 278, 281 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005). This court reviews a waiver of the right to a jury trial de novo. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

Hanson was convicted of felony domestic assault. An element of this offense is having committed it "within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 609.2242, subd. 4 (2006). A defendant may stipulate that he has prior qualifying convictions to establish a felony-level offense. *Hinton*, 702 N.W.2d at 281–82. Such stipulations are usually made by knowledgeable defense attorneys to keep prejudicial evidence from the jury. Because Hanson had a constitutional right to have a jury

determine the issue, he was required to personally waive his jury-trial right when stipulating to the prior-offense element. *See Wright*, 679 N.W.2d at 191. The defendant's waiver must be made "personally in writing or orally upon 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).

The following exchange occurred between Hanson and the district court regarding Hanson's prior domestic-violence-related convictions:

> THE COURT: [O]ne of the issues that's presented to the Court is whether or not there would be a stipulation regarding prior enhancing factors or qualified domestic violence related offense convictions that would enhance Count 1, domestic assault, to a felony. And if that were stipulated to, then that would not be presented to the Jury; the State would not have the burden of proving that. It would be accepted and agreed to by the Defendant, and no such evidence would be presented to the Jury.
>
> Has the Court stated accurately . . . the request of the defense?
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> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: And, Mr. Hanson, do you understand that if the Court grants that, then you would be waiving the right to the requiring the burden of the State to present such evidence of other convictions; but by waiving that and accepting that, then this Court would, if you were convicted by the Jury of domestic assault without those enhancing factors, add those back in later as far as how the case would be dealt with as to the level of conviction? Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you willing to stipulate to those elements of the charged offense and not have those presented to the Jury?
>
> THE DEFENDANT: Yes, sir.

The district court accepted the stipulation, and evidence of Hanson's prior convictions was not presented to the jury. *See Hinton*, 702 N.W.2d at 282 n.1 (noting that because of the prejudicial nature of prior convictions, district courts should accept a defendant's stipulation to prior convictions unless they are relevant to a disputed issue). In other words, the stipulation to prior convictions is a sound defense tactic, and not a ploy.

Hanson argues that his purported jury-trial waiver was invalid because "no one—not appellant, not his attorney, not the prosecutor, and not the district court—explicitly mentioned appellant's right to a jury trial on whether the aggravating element was present."

Hanson argues that the district court should have followed the procedure for obtaining a defendant's waiver of a jury trial and submitting the trial to the district court on stipulated facts. That procedure is provided for in rule 26.01, subdivision 3 and requires that the defendant "acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court." Minn. R. Crim. P. 26.01, subd. 3. Hanson cites no cases holding that a defendant taking advantage of the "*Hinton* option" has to be instructed on the record pursuant to rule 26.01, subdivision 3.[1] We conclude that the waiver (provided for the defendant's benefit) can be properly handled under rule 26.01, subdivision 1(2)(a).

[1] Hanson cites the unpublished cases *State v. Kessler*, No. A08-1275 (Minn. App. July 28, 2009) and *State v. Wheeler*, No. A08-165 (Minn. App. Apr. 21, 2009), in which the district courts erred by accepting stipulations to the aggravating element of the charged offenses from defense counsel without obtaining on the record the defendants' personal

Hanson's assertion that a district court should use the words "right to a jury trial" when obtaining a jury-trial waiver has merit. It would have been prudent for the district court, in advising Hanson of his right to a jury trial, to have actually used the words "right to a jury trial" or even to have incorporated the jury-waiver language provided by rule 26.01, subdivision 3 to afford a more complete line of questioning. But this is not the classic case of a defendant trying a contested essential element of a charged crime to a jury or a judge. Hanson, his attorney, and the prosecutor agreed on the record (and the court accepted the agreement) that there was no need to contest the issue of prior convictions. Hanson benefitted by not having that evidence go before the jury. Hanson acknowledged that he understood that he was waiving the requirement to have the state present such evidence of prior convictions to the jury. He agreed, with counsel, not to have the issue presented to the jury. Hanson's waiver complied with requirements of rule 26.01, subdivision 1(2)(a). The record supports a finding that there was a counsel-assisted, knowledgeable waiver.

II

Hanson next argues that his stipulation to the prior convictions was invalid because the stipulation did not include documentary evidence of the convictions and the district court did not make any findings of fact as to the existence of the convictions. Rule 26.01, subdivision 1 does not have a documentary-evidence requirement, and Hanson's reliance on *State v. Washington*, No. A08-1137, 2009 WL 1586933 (Minn.

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waivers of their trial rights. In this case, the district court did not rely solely on Hanson's attorney's stipulation. The court obtained Hanson's personal waiver on the record.

App. June 9, 2009), for his argument that the district court was required to make a finding of fact is wrong.

Washington involved a stipulated-facts trial conducted under rule 26.01, subdivision 4. 2009 WL 1586933, at *1. In such a trial, the defendant waives his right to a jury trial and agrees to allow the district court to determine his guilt or innocence on a stipulated record, preserving his right to appeal pretrial issues. Minn. R. Crim. P. 26.01, subd. 4. The rule explicitly requires that the defendant stipulate to the prosecutor's evidence and that the district court make findings of fact. *Id.* In *Washington*, neither occurred, and therefore this court reversed the conviction. 2009 WL 1586933, at *1-2.

Hanson's stipulation to his prior domestic-violence-related convictions under rule 26.01, subdivision 1(2)(a) was knowledgeable, counsel-assisted, and to his benefit. Hanson's reliance on *Washington* is misplaced.

Affirmed.