STATE OF MINNESOTA
IN COURT OF APPEALS
A10-522

State of Minnesota,
Respondent,

vs.

Franklin Clyde Jones,
Appellant.

Filed March 1, 2011
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-09-45127

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Ross, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of felony domestic assault, arguing that (1) the evidence was insufficient to support his conviction because neither the parties' stipulation

nor the state's other evidence proved the previous-convictions element of the offense and (2) he did not personally waive his right to a jury trial on the previous-convictions element of the offense. We affirm.

FACTS

The state charged appellant Franklin Jones with felony domestic assault in connection with his conduct on the night of September 5, 2009. Felony domestic assault includes previous convictions as an element of the offense. Minn. Stat. § 609.2242, subd. 4 (2008). Before trial, Jones stipulated to his five previous qualified domestic-violence-related convictions. The district court informed Jones that "the case will be presented to the jury as a straight domestic assault. . . . If they find you guilty of domestic assault, it would be of a felony level offense rather than a misdemeanor." Accordingly, at the close of the evidence, the court instructed the jury on the elements of misdemeanor domestic assault. The jury returned a verdict of guilty. The district court sentenced Jones to a 36-month term of imprisonment.

This appeal follows.

D E C I S I O N

Sufficiency of the Evidence

Jones first argues that the evidence is insufficient to support his conviction of felony domestic assault. "In considering a claim of insufficient evidence, our review is limited to a careful analysis of the evidence to determine whether the jury, giving due regard to the presumption of innocence and the state's burden of proof, could reasonably find the defendant guilty." *State v. Wright*, 679 N.W.2d 186, 189 (Minn. App. 2004),

review denied (Minn. June 29, 2004). "We view the evidence in the light most favorable to the conviction, assuming the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Id.*

To establish a defendant's guilt of felony domestic assault, the state must prove that the defendant committed a misdemeanor domestic assault or fifth-degree assault "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. Jones does not challenge the sufficiency of the evidence regarding the current misdemeanor domestic assault. Instead, he argues that his in-court stipulation was insufficient to prove the previous-convictions element of felony domestic assault beyond a reasonable doubt; that is, that he has at least two previous qualified domestic-violence-related convictions within ten years of the date of the current misdemeanor domestic assault.

In this case, the only record evidence of Jones's previous convictions is his stipulation. Before commencement of trial, the following colloquy occurred:

> THE STATE: . . . The other factors that we've got on to address are whether or not the defendant wishes to stipulate to his prior domestic assault convictions that form the basis of his enhanced felony.
> . . . .
> THE COURT: Thank you. [Defense counsel].
> DEFENSE COUNSEL: . . . I've discussed with Mr. Jones whether or not to stipulate to the priors. I also discussed with Mr. Jones that's a call that he makes, not one that I make. I just want to say, Mr. Jones, do you understand one of the elements of the case, the thing that makes the felony is not so much the conduct itself, but the fact that there were two or more what are called qualified domestic-related offenses within the last ten years? If we stipulate to it—well, if we don't stipulate to it, that would be an element that the State

> would have to prove beyond a reasonable doubt. They would probably do that by introduction of certified copies of those convictions. Do you wish to stipulate to those and thus they will not be addressed at least in that matter?
> THE DEFENDANT: Sure, yes.
> THE COURT: Let me just talk to you briefly on that. There's certain elements that the State has to prove in a case such as this. Because yours is a felony level offense, they would have to prove, number one, you committed the assault, but, number two, they would have to prove that you had these prior offenses. You can make them—you can say, 'I want them to prove every single one of them,' and you can make them prove all of them. I'm sure you've talked about this with [defense counsel], but the presumed advantage of your stipulating to it is then the jury doesn't have to hear about all these earlier ones, so that's why a defendant would typically stipulate to the prior incidents if a defendant chooses to do so, so the jury doesn't hear about all of these cases. On the other hand, if you do stipulate to that, you are essentially telling the State that is one part of their case they don't have to prove, so there's sort of a trade off. Do you feel you understand that?
> THE DEFENDANT: Yes.
> THE COURT: And are you stipulating then that you've had these prior domestic offenses, apparently there's a conviction—two convictions from January 4, 2006, another one from February 24, 2003, one from June 26, 2002, and one from January 4, 2001, are you agreeing that you were convicted from those different offenses?
> THE DEFENDANT: Yes.
> THE COURT: Okay. Then that stipulation is accepted by the Court, and the case will be presented to the jury as a straight domestic assault. If they find you not guilty, you are not guilty. If they find you guilty of domestic assault, it would be of a felony level offense rather than a misdemeanor.

Jones does not challenge the existence of his previous convictions. He argues that he stipulated to having previous *domestic-related* offenses, not to having previous *domestic-violence-related* offenses. He argues that many domestic offenses do not have a violent component, including bigamy, adultery, nonsupport of a spouse or child, neglect

or endangerment of a child, and disorderly conduct. He argues that his stipulation is insufficient because it did not specify that the *domestic-related* offenses were qualified *domestic-violence-related* offenses. We disagree.

On this record, the stipulation is sufficient to prove the previous-convictions element beyond a reasonable doubt. The prosecutor initiated the in-court discussion by referencing Jones's "prior domestic assault convictions that form the basis of his enhanced felony." By definition, domestic-assault convictions are qualified domestic-violence-related offenses. Minn. Stat. § 609.02, subd. 16 (2008). Defense counsel then informed Jones that he was charged with a felony because he has two or more "qualified domestic-related offenses" within the previous ten years. The district court listed on the record the specific dates of Jones's five previous convictions all of which are within ten years of the current charged offense.

Jones acknowledged his previous convictions and expressed his desire to stipulate to their existence so that the evidence would not be submitted to the jury. Jones stipulated that the previous-convictions element was proved. On this record, we perceive no misunderstanding by Jones that the district court, prosecutor, or defense counsel was speaking of convictions of bigamy, adultery, nonsupport of a spouse or child, neglect or endangerment of a child, or disorderly conduct rather than previous qualified domestic-violence-related convictions. We conclude therefore that Jones's stipulation was sufficient to prove the existence of the previous qualified domestic-violence-related convictions, i.e., the previous-convictions element, beyond a reasonable doubt.

Jury Trial Waiver

Jones also argues that his conviction for felony domestic assault must be reversed because he did not personally waive his right to a jury trial on the previous-convictions element. Jones did not raise this issue in district court, but we may nonetheless review it if it affects his substantial rights. *See State v. Kuhlmann*, 780 N.W.2d 401, 404 (Minn. App. 2010) (noting that the "Minnesota Rules of Criminal Procedure allow for review of errors not brought to the district court's attention during trial only if they affect substantial rights"), *review granted* (Minn. Jun. 15, 2010). We agree that the district court erred by failing to elicit a valid jury-trial waiver from Jones before proceeding with the trial, but conclude that the error is not reversible.

A criminal defendant has the right to a jury trial for any offense punishable by incarceration. *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010); *see also* U.S. Const. amend. VI; Minn. Const. art. I, § 6; Minn. R. Crim. P. 26.01, subd. 1(1)(a). "A defendant's right to a jury trial includes the right to be tried on each and every element of the charged offense." *Wright*, 679 N.W.2d at 191. The right to a jury trial cannot be waived by silence. *State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006). A defendant may waive his right to a jury trial with respect to an element of a charged offense and stipulate that the element has been proved. *Wright*, 679 N.W.2d at 191; *see also Old Chief v. United States*, 519 U.S. 172, 191–92, 117 S. Ct. 644, 655–56 (1997) (holding that a district court abuses its discretion when it spurns defendant's offer to admit to evidence of previous-conviction element of offense and instead admits full record of previous judgment of conviction when name or nature of previous offense raises risk of

unfair prejudice); *State v. Hinton*, 702 N.W.2d 278, 282 n.1 (Minn. App. 2005) (noting that because of the prejudicial nature of previous convictions, district courts should accept a defendant's stipulation to previous convictions unless they are relevant to a disputed issue), *review denied* (Minn. Oct. 26, 2005).

The Minnesota Rules of Criminal Procedure provide that:

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

Jones argues that his purported jury-trial waiver on the previous-convictions element was invalid because "he was never told that he had the right to a jury trial" on the previous-convictions element. After stipulating to the previous-convictions element of the domestic-assault charge, Jones proceeded to a jury trial. We agree that, because the district court did not explicitly advise Jones of his right to a jury trial on the previous-convictions element, Jones's jury-trial waiver did not meet the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a). By not obtaining a complete waiver from Jones in compliance with the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a), the district court erred.

Under similar circumstances, we have analyzed waiver errors by applying either a plain-error test or a harmless-error test. *See, e.g.*, *Fluker*, 781 N.W.2d at 400–03 (applying harmless-error test to defendant's personal waiver of right to jury trial on previous-convictions element when defendant stipulated to having previous qualifying

convictions for enhancement); *Kuhlmann*, 780 N.W.2d at 404–05 (applying plain-error test); *Hinton*, 702 N.W.2d at 281–82 (applying harmless-error test); *Wright*, 679 N.W.2d at 190–91 (applying harmless-error test to district court's erroneous acceptance of a stipulation to one element of the charged offense without obtaining the defendant's personal waiver of the right to a jury trial). We conclude that Jones cannot meet the requirements for reversal under either the plain-error test or the harmless-error test.

Plain Error

The plain-error analysis "involves four steps." *State v. Jenkins*, 782 N.W.2d 211, 229 (Minn. 2010). "First, we ask (1) whether there was error, (2) whether the error was plain, and (3) whether the error affected the defendant's substantial rights . . . ." *Id.* at 230. Only if the first three steps are met do we assess whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted). An error is plain if it is "clear" or "obvious," which is shown "if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). When assessing whether substantial rights are affected, we look to "whether the error was prejudicial and affected the outcome of the case." *State v. Vance*, 734 N.W.2d 650, 659 (Minn. 2007).

Here, the district court plainly erred under Minn. R. Crim. P. 26.01, subd. 1(2)(a). Although the court informed Jones that because of the court's acceptance of his stipulation on the previous-convictions element, the case would "be presented to the jury as a straight domestic assault," the court did not explicitly advise Jones of his right to a jury trial on that element. But we conclude that the error did not affect Jones's

substantial rights because it did not have a significant effect on the jury's verdict. And even if Jones could demonstrate that the error affected his substantial rights, he could not establish that the district court's error impaired the fairness or integrity of his trial. Jones received a fair trial. As in *Kuhlmann*, Jones was protected against the jury's speculation about his criminal history because the jury was unaware of his past convictions. *See* 780 N.W.2d at 406. A new trial would likely result in either an identical trial after a complete jury-trial waiver or a potentially more prejudicial trial in which the jury is presented with evidence of the previous convictions. *See id.* Under a plain-error analysis, we conclude that Jones's conviction should be affirmed.

Harmless Error

"When the error implicates a constitutional right, a new trial is required unless the State can show beyond a reasonable doubt that the error was harmless." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). "An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *Id.* The state bears the burden of establishing beyond a reasonable doubt that the error was harmless. *Wright*, 679 N.W.2d at 191. The state has met its burden. Jones stipulated to the existence of the previous convictions that satisfy an element of his current felony offense. He does not challenge the existence of his previous convictions or contend that they fail to form the requisite basis for his elevated charges and subsequent convictions. Jones suffered no prejudice due to the form of his waiver. Indeed, by stipulating to the previous offenses, he benefitted because the jury heard nothing about his previous convictions. We

conclude that the district court's erroneous acceptance of Jones's stipulation was harmless.

Jones argues that the district court's error is not subject to a plain-error or harmless-error analysis because the error is structural error that requires reversal. We disagree. This court has reversed and remanded based on an invalid waiver. *See, e.g.*, *State v. Antrim*, 764 N.W.2d 67, 71 (Minn. App. 2009) (reversing based on an invalid waiver in a *Lothenbach* trial, holding that the waiver requirements of rule 26.01 are to be strictly construed); *State v. Ehmke*, 752 N.W.2d 117, 123 (Minn. App. 2008) ("[W]hen the record fails to establish a valid waiver of the rights specified in rule 26.01, subd. 3, . . . a new trial is necessary."); *State v. Knoll*, 739 N.W.2d 919, 920–22 (Minn. App. 2007) (holding that a defendant who agrees to a *Lothenbach* trial under rule 26.01, subdivision 4, must expressly waive the fundamental rights listed in subdivision 3, and failure to do so requires reversal); *State v. Bunce*, 669 N.W.2d 394, 398 (Minn. App. 2003) (involving a *Lothenbach* trial), *review denied* (Minn. Dec. 16, 2003); *State v. Tlapa*, 642 N.W.2d 72, 74–75 (Minn. App. 2002) (involving a court trial), *review denied* (Minn. June 18, 2002).

But the cited cases involved full stipulated-facts trials, *Lothenbach* trials, and court trials, and are distinguishable from cases where the defendant stipulates only to an element of the offense. *See Fluker*, 781 N.W.2d at 402 (discussing differences between stipulating to elements of charged offense and waivers incident to entire stipulated-facts trial or *Lothenbach* trial); *Kuhlmann*, 780 N.W.2d at 405–06 (discussing the "deeply significant differences between the rights given up by foregoing a jury and agreeing to a

court trial or stipulated-facts trial and the rights given up when exercising the right to a jury trial and stipulating only to an offense element").

Accordingly, Jones's challenge to his conviction fails.

Affirmed.