**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-1654**

State of Minnesota,
Respondent,

vs.

Paul Richard Hagen,
Appellant.

**Filed August 15, 2011**
**Affirmed**
**Peterson, Judge**

Benton County District Court
File No. 05-CR-09-1591

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Robert J. Raupp, Benton County Attorney, Foley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Kathryn Lockwood (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

**PETERSON**, Judge

In this appeal from a conviction of felony violation of a no-contact order, appellant challenges the district court's refusal to read his proposed jury instruction, the sufficiency of the evidence to support his conviction, and the adequacy of his waiver of the right to a jury trial on the issue of his prior convictions. We affirm.

## FACTS

On January 20, 2009, the district court issued a pre-trial domestic-assault no-contact order prohibiting appellant Paul Richard Hagen from making any contact with his ex-girlfriend, S.D. Hagen was present at the hearing when the district court issued the no-contact order; he signed the order and was served with a copy of it. In July 2009, the state charged Hagen with one count of felony violation of a no-contact order within ten years of two or more previous qualified domestic-violence-related-offense convictions. Minn. Stat. § 518B.01, subd. 22(a)(1), (d)(1) (2008). The complaint alleged that the police discovered Hagen in a motel room with S.D. on June 27, 2009. The complaint also alleged that Hagen was convicted of two misdemeanor domestic-assault offenses that occurred in 2002 and one gross-misdemeanor domestic-assault offense that occurred in 2007.

In anticipation of a jury trial, Hagen submitted a proposed jury instruction stating that the state needed to prove both that Hagen knew of the no-contact order's existence and that he knew the order remained in effect on the day he was discovered with S.D. The district court denied his proposed jury instruction.

At a jury trial in April 2010, Hagen's counsel informed the district court that Hagen offered to stipulate to his three prior convictions for domestic-violence-related offenses. Both Hagen and S.D. testified that they believed the no-contact order had been lifted before Hagen's arrest on June 27, 2009. The court administrator testified that the no-contact order from January 2009 was in effect on June 27, 2009.

The jury found Hagen guilty of a felony violation of the no-contact order. The district court sentenced Hagen to 18 months of imprisonment, stayed execution of the sentence, placed Hagen on probation for five years, and imposed a number of conditions, including no contact with S.D. Hagen appeals.

## D E C I S I O N

### I.

District courts are allowed "considerable latitude" when selecting the language of jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). A jury instruction is erroneous "if it materially misstates the law." *State v. Vance*, 765 N.W.2d 390, 393 (Minn. 2009). Hagen argues that the district court abused its discretion by refusing to read his proposed jury instruction on the elements of felony violation of a no-contact order. The district court read the standard instruction regarding the four elements of the offense: "First, there was an existing court no-contact order. Second, the defendant violated a term or condition of the order. Third, the defendant knew of the existence of the order. And fourth, the defendant's act took place on June 27, 2009, in Benton County." *See* 10 *Minnesota Practice*, CRIMJIG 13.54 (2006). Hagen's proposed jury instruction sought to modify the third element of the instruction by stating that "the

defendant knew of the existence of the order *and that the order was in force at the time he committed the act constituting the violation of the order*." (Emphasis added.) Hagen argues that the standard jury instruction is incorrect because it does not require the state to prove that Hagen knew that the order remained in effect on the date of the alleged violation. He contends that the standard instruction could permit the jury to convict him for knowing that a no-contact order existed in the past and then unknowingly violating the order at a later date.

Hagen's interpretation is contrary to the language of the instruction. Reading the instruction as a whole, it required the jury to determine whether, on June 27, 2009, in Benton County, a no-contact order existed and Hagen violated the no-contact order that he knew existed. The jury was directed to determine Hagen's knowledge that the no-contact order existed on a specific date: June 27, 2009. To convict Hagen, the jury needed to find that he knew of the existence of the order on June 27, 2009, not on a date before or after June 27, 2009. Also, the phrase "existing court no-contact order" in the first element indicated to the jury that a no-contact order can cease to exist, or, in other words, no longer be in force. The jury could not reasonably convict Hagen unless it found that Hagen knew that the no-contact order remained in "existence" on the date of the alleged violation.

Hagen argues that he was denied an opportunity to instruct the jury on his theory of the case. A defendant is entitled to an instruction if there is evidence to support it. *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002) (citing *State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1994)). But the court need not give the defendant's requested

instruction on his theory of the case if the substance of the defendant's instruction is contained in the court's charge. *Id.*; *see also State v. Anderson*, 789 N.W.2d 227, 240 (Minn. 2010) (affirming district court's rejection of defendant's proposed instruction because district court's instruction "included the substance of [the defendant's] theory of the case"). Hagen presented his theory that he did not know the no-contact order was in force when he was with S.D. on June 27, 2009. In other words, he argued that the state could not meet its burden with respect to the third element of the charged offense—the defendant knew of the existence of the no-contact order. The substance of Hagen's theory about his knowledge of the no-contact order is contained in the district court's instruction on the elements of the charged offense. Thus, the district court did not abuse its discretion by rejecting Hagen's proposed instruction.

Hagen argues that the district court erred by declining to read his proposed instruction in response to a jury question. The district court may, in its discretion "give additional instructions in response to a jury's question on any point of law, and may expand previous instructions, reread the instructions, or give no response." *Anderson*, 789 N.W.2d at 240; *see also* Minn. R. Crim. P. 26.03, subd. 20(3). The jury asked whether it must find, "A, the defendant knew the existence of the order as stated in jury instructions III, page 5; or B, the defendant knew the existence of the order on June 27th, 2009." The district court informed the jury that the jury instructions were complete and would not be supplemented.

We have already determined that the jury instruction provided by the district court adequately states the law regarding the defendant's knowledge of the existence of the no-

contact order. The jury could not have convicted Hagen without finding that he knew that the no-contact order existed on June 27, 2009. Expanding the instruction may have caused the jury more confusion or overemphasized the knowledge element of the crime. The district court acted within its discretion by declining to respond to the jury's question.

**II.**

Hagen argues that the evidence is insufficient to support his conviction for violating the no-contact order. When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "We will not disturb the verdict 'if the jury, acting with due regard for the presumption of innocence'" and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quoting *State v. McCullum*, 289 N.W.2d 89, 91 (Minn. 1979)).

To prove a felony violation of a no-contact order, the state must prove that a no-contact order existed; that the defendant knew the order existed and violated the order; and that the defendant's violation occurred within ten years of the first of two or more previous qualified domestic-violence-related-offense convictions. Minn. Stat. § 518B.01,

subd. 22(a)(1), (d)(1).[1] The word "know" means "that the actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2) (2008). Hagen does not contest that he had contact with S.D. or that the no-contact order was in effect on the date of his arrest. Hagen argues that the evidence was insufficient to prove that he knew of the existence of the no-contact order on the date of the alleged violation.

"The proof of knowledge may be by circumstantial evidence." *State v. Al-Naseer*, 734 N.W.2d 679, 688 (Minn. 2007). Although a conviction based on circumstantial evidence warrants stricter scrutiny, circumstantial evidence merits the same weight as direct evidence. *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). This court must determine whether the circumstances proved are "consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009).

The record indicates that both Hagen and S.D. testified that they believed the no-contact order was lifted in February or March 2009. But both Hagen and S.D. conceded that they knew that only a judge could lift a no-contact order. Hagen testified that he signed the no-contact order and that the order stated that it would remain in effect until further order, modification, or acquittal or dismissal of the charges against him. Hagen testified that he did not receive any notice from the court or contact from his attorney regarding a change in the status of the order. S.D. also testified that she had received no notice from the court that the order was no longer in effect.

[1] Last year, the Minnesota legislature repealed subdivision 22 of section 518B.01. 2010 Minn. Laws ch. 299, § 15, at 747. The repeal took effect on August 1, 2010, and does not apply to Hagen's case. *See id.*; Minn. Stat. § 645.02 (2010).

Based on this testimony, the jury was free to reject Hagen's and S.D.'s assertions that Hagen believed that the no-contact order was no longer in effect on the date they were found together. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989) (stating that the "jury normally is in the best position to evaluate circumstantial evidence, and that their verdict is entitled to due deference"). The evidence suggests no rational inference other than that Hagen knew that he was violating the no-contact order when he had contact with S.D. on June 27, 2009. The evidence is sufficient to support Hagen's conviction for felony violation of a no-contact order.

**III.**

Hagen argues that the district court erred by accepting his counsel's stipulation that he had three prior convictions for domestic-violence-related offenses without securing Hagen's personal waiver of his right to a jury trial on the issue. 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. Kuhlmann*, 780 N.W.2d 401, 404 (Minn. App. 2010) (citing *State v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977)), *review granted* (Minn. June 15, 2010). A defendant may stipulate to an element of the charged offense, and thus waive the right to a jury trial on that element. *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). But such waiver must be made personally by the defendant, and not the defendant's counsel. *Id.*; *see also* Minn. R. Crim. P. 26.01, subd. 3(a). We agree that the district court failed to obtain Hagen's personal waiver of his right to a jury trial on the issue of his prior convictions. However, because Hagen did not bring this error to the district court's attention, the error requires reversal of Hagen's

conviction only if it affected Hagen's substantial rights. Minn. R. Crim. P. 31.02; *see Kuhlmann*, 780 N.W.2d at 404.

This case is indistinguishable from *Kuhlmann*, in which this court concluded that the absence of the defendant's waiver to a jury trial on the issue of his prior convictions did not affect his substantial rights. 780 N.W.2d at 406. As in *Kuhlmann*, the error did not prejudice Hagen. *See id.* The state could have easily offered evidence of Hagen's prior convictions, and the stipulation avoided any speculation by the jury about his criminal history. Also as in *Kuhlmann*, the error does not require a new trial to ensure fairness and the integrity of the judicial process. *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 742 (Minn. 1998)). Hagen received a fair trial, during which he was present, represented by counsel, and given the opportunity to call his own witnesses and cross-examine the state's witnesses. And Hagen does not challenge the existence of his three prior convictions, so a remand would result in either a valid waiver of Hagen's jury-trial right and a trial with the same evidence as in the first trial or a trial in which the jury is informed about Hagen's prior convictions. *See id.* (characterizing similar options as either "the same trial or a potentially more prejudicial one"). The district court's failure to obtain Hagen's personal waiver of his right to a jury trial on the issue of his prior convictions does not require reversal or a new trial.

**Affirmed.**