STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1819

State of Minnesota,
Respondent,

vs.

Chad Thomas Keeler,
Appellant.

Filed October 3, 2011
Affirmed as modified
Stauber, Judge

Ramsey County District Court
File No. 62CR10761

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

John Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, 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 Hudson, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

On appeal from his conviction of aggravated harassment and other counts charging him with violating an order for protection (OFP) and a domestic-abuse no-contact order,

appellant argues that (1) the district court committed reversible error by accepting stipulations to elements of the charged offenses without first securing appellant's personal and express jury-trial waiver on the stipulated-to elements and (2) imposition of the public defender co-payment must be reversed because the district court did not order it as part of the orally pronounced sentence and also did not determine whether appellant had the ability to pay as required by Minn. Stat. § 611.20, subd. 2 (2008). We affirm as modified.

FACTS

In November 2007, appellant Chad Thomas Keeler and D.H. began a romantic relationship. Shortly thereafter, D.H. became pregnant with the parties' child, and appellant moved in with D.H. Because D.H. ran a licensed daycare at her home, D.H. was required to submit a background check for anyone living at her residence. D.H. complied with this requirement and submitted an application for appellant.

After the parties' child was born, D.H. received a call from her licensing authority informing her that appellant was "an imminent risk and could no longer live there." D.H. then asked appellant to move out, which upset appellant. Appellant told D.H. that he was not going to leave unless he was physically removed and threatened to take the parties' son away. D.H. eventually obtained an OFP against appellant, but soon rescinded the order so that appellant could help parent the parties' son. D.H. obtained subsequent OFP's in December 2008 and May 2009, but again rescinded those orders shortly after they were imposed so that appellant could maintain a relationship with the parties' son.

Although appellant was not living with D.H., he used her address to file court documents. He also contacted her licensing authority and was belligerent. As a result,

D.H.'s daycare license was revoked. D.H. further claimed that appellant continued to call, text, and email her, and, on one afternoon, followed her to a store and harassed her throughout the store.

According to D.H., appellant's conduct prompted her to seek a fourth OFP in October 2009. No-contact orders were also issued in December 2009 and January 2010. D.H., however, claimed that appellant continued to contact and harass her. Consequently, appellant was charged with two counts of aggravated harassment, three counts of violation of an OFP, and three counts of violation of domestic-abuse no-contact orders.

Before trial began, appellant stipulated that he had two prior qualified domestic-violence-related convictions within the previous ten years. Appellant also stipulated that he had been served with the no-contact order. Although appellant acknowledged that he had stipulated to elements of the charged offenses, he did not expressly waive his right to a jury trial on the stipulated-to elements.

At trial, the state introduced over 40 text messages appellant sent D.H. in November 2009. Some contained crude language, references to body parts, and implied that D.H. was involved in another relationship. The state also introduced an email appellant sent to D.H. on November 3, 2009, a voice message he left for D.H. on November 15, 2009, a Christmas gift for the parties' son that appellant sent to D.H.'s house on December 24, 2009, and voice and text messages appellant sent D.H. on February 1, 2010. In addition, D.H. testified that appellant's conduct made her feel

"scared," and that she feared for her safety after she discovered that appellant had changed his Facebook relationship status from "single to widowed."

A jury found appellant guilty of one count of aggravated harassment, three counts of violation of an OFP, and three counts of violation of a no-contact order. The district court then sentenced appellant to 39 months in prison and the "mandatory minimum fine of $50, plus the fees." The warrant of commitment also imposed public defender fees. This appeal followed.

D E C I S I O N

I.

"A criminal defendant has the constitutional right to a jury trial for any offense punishable by incarceration." *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010); 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." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). "But a defendant may waive the right to a jury trial on any particular element by stipulation." *Fluker*, 781 N.W.2d at 400. Because stipulating to an element of the charged offense effectively waives the defendant's right to a jury trial on that particular element, the defendant must personally waive this right "orally or in writing after being advised by the court and having an opportunity to consult with counsel" in accordance with Minn. R. Crim. P. 26.01, subd. 1. *State v. Kuhlmann*, 780 N.W.2d 401, 404 (Minn. App. 2010), *review granted* (Minn. June 15, 2010).

Here, appellant was found guilty of one count of aggravated harassment under Minn. Stat. § 609.749, subds. 2(a), 4(b) (2008); three counts of violation of an OFP under Minn. Stat. § 518B.01, subd. 14(a), (d)(1) (2008); and three counts of violation of a no-contact order under Minn. Stat. § 518B.01, subd. 22(a), (d)(1) (2008). An essential element of these offenses is that appellant had two prior qualified domestic-violence-related convictions within a ten-year time period. *See* Minn. Stat. § 609.749, subd. 4(b) (harassment); Minn. Stat. § 518B.01, subds. 14(d)(1) (OFP), 22(d)(1) (no-contact order). In addition, an essential element of the violation of a no-contact order is that appellant knew of the existence of the order. *See* Minn. Stat. § 501B.01, subd. 22(b). The record reflects, and the parties agree, that the district court failed to secure an express oral or written waiver of appellant's right to a jury trial on the stipulated-to elements. The parties also agree that this was error. However, the parties disagree as to whether the error is a structural error requiring automatic reversal, or subject to harmless-error review.

Appellant relies on *State v. Antrim*, 764 N.W.2d 67, 70 (Minn. App. 2009), to argue that the district court's failure to strictly comply with the waiver requirements of Minn. R. Civ. P. 26.01 requires automatic reversal. But this strict compliance is limited to bench trials, stipulated-facts trials, and *Lothenbach* proceedings, in which the defendant stipulates to the state's entire case to obtain review of a pretrial ruling. *Fluker*, 781 N.W.2d at 402-03; *Kuhlmann*, 780 N.W.2d at 405-06. As this court pointed out in *Kuhlmann*, the argument raised by appellant "overlooks deeply significant differences between the rights given up by foregoing a jury and agreeing to a bench 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." 780 N.W.2d at 405-06. Thus, this court concluded that a defendant's failure to personally waive his or her jury-trial right on an element of a charged offense is not structural error when a jury trial occurs. *Id.*; *Fluker*, 781 N.W.2d at 402-03.

Notably, in *Fluker*, this court applied a harmless-error analysis in reviewing the district court's failure, preceding a jury trial, to elicit a defendant's personal waiver of his jury-trial right on an element of the charged offense. *Fluker*, 781 N.W.2d at 403. In contrast, the court in *Kuhlmann* reviewed for plain error the district court's unobjected-to error of failing to instruct a jury on conviction-based elements of charged offenses when the defendant stipulated to the conviction but did not personally waive his right to a jury trial on the conviction-based elements. *Kuhlmann*, 780 N.W.2d at 405-06. Although we acknowledge that the two standards are different, the result in this case is the same under either standard.[1] It is undisputed that the district court erred by accepting appellant's stipulation without a personal waiver on the elements of his prior convictions and his

[1] Under a harmless-error review, a lower-court error affecting constitutional rights will be reversed unless the error is harmless beyond a reasonable doubt. *State v. Vance*, 734 N.W.2d 650, 660 n.8 (Minn. 2007). An error is harmless beyond a reasonable doubt if the verdict is "surely unattributable to the error." *Id.* (quotation omitted). The plain-error standard involves consideration of whether an error occurred, whether the error was plain, and whether it affected the defendant's substantial rights. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). If these three factors have been satisfied, an appellate court then determines "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted). But under both the harmless-error test and the plain-error test, an error must affect a defendant's substantial rights to warrant reversal. *See* Minn. R. Crim. P. 31.01, 31.02.

awareness of the existence of the no-contact order. Moreover, because the lack of a personal waiver contravened procedural and statutory requirements, the error was plain. *Id.*; Minn. R. Crim. P. 26.01, subd. 1. Therefore, we must determine whether the error affected appellant's substantial rights, an analysis that is required under either a harmless-error or a plain-error analysis. *See* Minn. R. Crim. P. 31.01, 31.02.

Appellant's first stipulation acknowledged that he had been convicted of two prior qualified offenses. In fact, appellant has six prior domestic-violence-related convictions since 2004. These convictions include: (1) a misdemeanor domestic-assault conviction in October 2004; (2) a gross-misdemeanor domestic-assault conviction in December 2004; (3) a misdemeanor violation of an OFP conviction in December 2004; (4) a gross misdemeanor violation of an OFP conviction in November 2005; (5) a second gross misdemeanor violation of an OFP conviction in November 2005; and (6) a misdemeanor violation of an OFP conviction in December 2007. As the state points out, these convictions would be easily verifiable from public records. Moreover, the admission of these six prior convictions would certainly be prejudicial in light of the charges against appellant. The primary issue at trial was whether D.H. felt terrorized and in fear of bodily harm. Appellant received a benefit by stipulating to the two qualified priors because the prior convictions could cast appellant as a violent person. *See Fluker*, 781 N.W.2d at 403 (noting that defendant "benefited from the stipulation by keeping evidence regarding his 1994 conviction of criminal sexual conduct from being heard by the jury"); *see also State v. Hinton*, 702 N.W.2d 278, 282 n.1 (Minn. App. 2005) (stating "it is typically to the defendant's advantage to avoid presenting the question of prior

convictions to the jury"), *review denied* (Minn. Oct. 26, 2005). Thus, the lack of a jury-trial waiver regarding the first stipulation did not affect appellant's substantial rights because it did not contribute to appellant's conviction.

Appellant's second stipulation acknowledged that he knew of the existence of the no-contact order. The stipulation was in writing, and signed by appellant, his attorney, and the prosecutor. Again, we conclude that the lack of a jury-trial waiver on this element of the offense did not affect appellant's substantial rights. A certified copy of the no-contact order that was "signed and served" in January 2010 was shown to the jury. Moreover, appellant admitted violating the no-contact order during his testimony and in an audio-recorded interview with the police officer that was played to the jury. As discussed above, the primary issue at trial was whether D.H. felt terrorized or in fear for her safety, and D.H. testified repeatedly that appellant's conduct made her feel "scared" and that she was concerned for her safety. This evidence easily supports the jury's finding of guilt, and the lack of a jury-trial waiver on the element of appellant's knowledge of the existence of the no-contact order did not contribute to appellant's conviction.

II.

Appellant also challenges the district court's imposition of the public defender co-payment. Statutory construction is a question of law subject to de novo review. *State v. Coauette*, 601 N.W.2d 443, 445 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999).

In Minnesota, persons who are unable to afford counsel are entitled to have a public defender appointed. Minn. Stat. § 611.14 (2008); Minn. R. Crim. P. 5.04, subd. 1. A district court has a duty to conduct a financial inquiry to determine the financial eligibility of a defendant for the appointment of a public defender. Minn. R. Crim. P. 5.04, subd. 4. "Upon disposition of the case, an individual who has received public defender services *shall* pay to the court a $75 co-payment for representation provided by a public defender, unless the co-payment is, or has been, waived by the court." Minn. Stat. § 611.17(c) (Supp. 2009) (emphasis added). The Minnesota Statutes further provide that "[i]f the court determines that the defendant is able to make partial payment [for counsel], the court shall direct the partial payments to the state general fund." Minn. Stat. § 611.20, subd. 2.

Appellant argues that imposition of the public defender co-payment must be reversed because the district court did not order it as part of the orally pronounced sentence and also did not determine whether appellant had the ability to pay as required by Minn. Stat. § 611.20, subd. 2. We disagree. Appellant's argument misinterprets section 611.20, subdivision 2, and ignores section 611.17(c). Under Minn. Stat. § 611.17(c), a defendant is required to pay $75 for public-defender services unless a waiver is granted by the district court. *See* Minn. Stat. § 645.44, subd. 16 (2010) ("'Shall' is mandatory."). The co-payment "is a civil obligation and must not be made a condition of a criminal sentence." Minn. Stat. § 611.17(c). The statute also does not require specific findings regarding the defendant's financial circumstances. *Id.* In contrast, Minn. Stat. § 611.20, which is entitled "Subsequent Ability to Pay Counsel,"

provides that a partial payment in an unspecified amount to be determined may be imposed if the district court determines that the defendant is financially able to make a partial payment for a public defender. This partial payment is separate from, and in addition to, the $75 "co-payment." Only if a partial payment is ordered under section 611.20, subdivision 2, is a district court required to make specific findings as to the defendant's financial circumstances.

Here, appellant was deemed eligible for a public defender and the district court did not waive of the $75 public-defender co-payment. Thus, appellant was required to pay the $75 public defender co-payment under section 611.17(c). Because appellant was not ordered to make a partial payment under section 611.20, subdivision 2, no findings as to his financial circumstances were required.

Also, the fact that the specific imposition of the public-defender co-payment was not made on the record does not constitute error. Minnesota law provides that a written sentencing order may be used to clarify an ambiguous sentencing transcript. *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002). The district court here orally sentenced appellant to 39 months in prison and "the mandatory minimum fine of $50, plus the fees." Although the term "fees" is ambiguous, the written sentencing order clarified that the "fees" included the public defender co-payment. *See Staloch*, 643 N.W.2d at 331 (allowing for clarification). The fee is mandatory under section 611.17(c). However, the sentencing order does not specify the amount of the public defender fee.

Therefore, to ensure compliance with Minn. Stat. § 611.17(c), we modify the sentencing order to require appellant to pay the mandatory $75 public defender co-payment.

Affirmed as modified.