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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-104**

Larry Joe Foster, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

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

Hennepin County District Court
File No. 27-CR-08-54744

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

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the district court's denial of appellant's petition for postconviction relief, arguing that his conviction of terroristic threats following a

stipulated-facts trial must be reversed on the ground that his jury-trial waiver was not knowing, voluntary, and intelligent. We affirm.

FACTS

On October 28, 2008, appellant Larry Joe Foster's estranged wife reported to police that Foster threatened to kill her if she did not give him \$15,000 and took the telephone from her when she attempted to call 911. Foster subsequently was arrested and charged with one count of terroristic threats, a violation of Minn. Stat. § 609.713, subd. 1 (2008), and one count of interference with an emergency call, a violation of Minn. Stat. § 609.78, subd. 2 (2008).

On the first day of trial, Foster waived his rights to a jury trial, to testify, and to question and cross-examine witnesses, and he agreed to submit the case to the district court on stipulated facts pursuant to Minn. R. Crim. P. 26.01. Foster and the state provided the district court with a stipulated record that comprised 19 pages of police reports concerning the October 28, 2008 altercation. Foster responded affirmatively when asked if he understood that the district court would decide the case "solely on the police reports that [he and his counsel] had agreed to that have been submitted[,] . . . the 2008 police reports related to the October 28th incident."

The district court found Foster guilty of one count of terroristic threats and one count of interference with an emergency call. At the sentencing hearing, the district court vacated the conviction of interference with an emergency call, imposed a sentence of 21 months' imprisonment, stayed the execution of the sentence for three years, and placed Foster on probation subject to certain conditions. After Foster violated the terms of his

probation by assaulting a female acquaintance, the district court revoked Foster's probation and executed the sentence.

Foster petitioned the district court for postconviction relief, seeking vacation of his conviction of terroristic threats on the ground that his jury-trial waiver was not knowing, voluntary, or intelligent because "he did not know the [district] court would be considering a 2000 conviction as part of the stipulated facts trial record." The basis for this contention is that one of the police reports regarding the October 28, 2008 altercation that was submitted as part of the stipulated evidence included the following recollection of a detective who investigated the October 28, 2008 offense and recalled prior police contact with Foster:

I remembered a swat call out involving Mr. Foster in the past. I looked it up and it was from 3/26/00. In that case, Mr. Foster and [a] different female companion had a disagreement over his use of drugs. She told him she was leaving and he became threatening. He put a gun to her temple and said he would just kill her. He threatened her and the kids if she reported it. He at one point asked her to take him to Fairview Riverside Mental Health. That case is 00-011825. A copy of that case narrative will be attached.

The case narrative of the March 2000 incident, however, was not submitted to the district court. In an affidavit accompanying his postconviction petition for relief, Foster asserted that, because his jury-trial waiver was premised on his belief that this reference to the March 2000 allegations would not be considered by the district court, his jury-trial waiver was invalid. The district court denied the petition for postconviction relief, reasoning that "[t]his Court did not consider the incident from 2000. It is clear from the [February 12, 2009 Findings of Fact and Order] that this Court determined that all of the elements of

the terroristic threats [offense] were met based on the 2008 incident alone.” Foster appealed.

D E C I S I O N

We review the district court’s decision in a postconviction proceeding to determine whether there is sufficient evidence to support the district court’s findings, and we generally will reverse only for an abuse of discretion. *Brown v. State*, 746 N.W.2d 640, 641-42 (Minn. 2008). An appellant seeking postconviction relief has the burden of establishing by a fair preponderance of the evidence facts that warrant such relief. Minn. Stat. § 590.04, subd. 3 (2008). To meet this burden, the postconviction petitioner’s allegations “must be supported by more than mere argumentative assertions that lack factual support.” *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

A criminal defendant has the constitutional rights to a jury trial, to testify at trial, to confront adverse witnesses, and to subpoena favorable witnesses. U.S. Const. amend. VI; Minn. Const. art. I, § 6. When a defendant waives a jury trial or agrees to a trial on stipulated facts, the defendant must expressly waive these trial rights, and the waiver must be voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970); *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991); *State v. Roberts*, 651 N.W.2d 198, 201 (Minn. App. 2002); *see* Minn. R. Crim. P. 26.01, subds. 1, 3 (requiring express waiver on the record).

To ensure that the defendant’s waiver of these rights is knowingly and intelligently made, a defendant must personally and expressly waive the rights in writing or orally on the record. *State v. Halseth*, 653 N.W.2d 782, 785 (Minn. App. 2002); *State v.*

Sandmoen, 390 N.W.2d 419, 423 (Minn. App. 1986); *see* Minn. R. Crim. P. 26.01, subd. 1(2)(a) (“The defendant, with the approval of the court, may waive a 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.”). Likewise, before proceeding on a stipulated-facts trial, a defendant must acknowledge and waive, in writing or orally on the record, the rights to testify at trial, to confront adverse witnesses, and to subpoena favorable witnesses. *Halseth*, 653 N.W.2d at 785; *see* Minn. R. Crim. P. 26.01, subd. 3 (requiring that before proceeding in stipulated-facts trial, defendant waive “the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant’s presence, to question prosecution witnesses, and to require any favorable witnesses to testify for the defense in court”). If the district court does not strictly comply with these requirements, the subsequent conviction must be reversed. *State v. Knoll*, 739 N.W.2d 919, 922 (Minn. App. 2007); *see also State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002) (stating that strict compliance with Minn. R. Crim. P. 26.01 is required to assure that waiver is voluntary and intelligent). We review the waiver of these trial rights *de novo*. *See Halseth*, 653 N.W.2d at 784 (stating that Minn. R. Crim. P. 26.01 is reviewed *de novo*).

After consulting with counsel, Foster orally acknowledged on the record his understanding of the rights to a jury trial, to testify, to require the state’s witnesses to testify, to cross-examine the state’s witnesses, and to require favorable witnesses to testify. The district court advised Foster that, if he agreed to a stipulated-facts trial

pursuant to Minn. R. Crim. P. 26.01, he would waive these constitutional rights. Foster responded by affirming his agreement to waive his right to a jury trial and to proceed with a trial on stipulated facts. Foster's waiver and agreement to a trial on stipulated facts, therefore, complied with state and federal constitutional requirements, as well as Minn. R. Crim. P. 26.01, subs. 1(2)(a), 3. *See Brady*, 397 U.S. at 748, 905 S. Ct. at 1469; *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006) (holding that a waiver that complies with rule 26.01, subdivision 1(2)(a), "meets the knowing, voluntary, and intelligent requirement"); *Ross*, 472 N.W.2d at 653.

Foster argues that he did not knowingly and intelligently waive his Sixth Amendment right to a jury trial because his jury-trial waiver was premised on his understanding that the allegations concerning the March 2000 incident were excluded from the police reports to which he stipulated and, therefore, would not be considered by the district court. But the record does not support this assertion. Rather, the record reflects that Foster discussed the police reports with his attorney before waiving his right to a jury trial, he knew that one of the police reports referred to the March 2000 allegations, he was present in court and did not object when the police reports were introduced and received in the record, and he expressly affirmed his understanding that the district court would consider the police reports as the sole evidence in the case.

Foster contends by affidavit that he told his counsel that he would not stipulate to evidence of the March 2000 incident and that his counsel advised him that the March 2000 allegations "would not be considered in the stipulated facts trial." Foster does not assert, however, that he either believed, or requested, the reference to the March 2000

incident to be redacted from the police reports to which he stipulated. And neither Foster nor his counsel objected to the admission of the police reports in their entirety. Nor did they advise the district court of an intent to exclude any reference to the March 2000 allegations from the stipulation or to limit the stipulation. Indeed, Foster's affirmation on the record that he understood that the district court would decide the case "solely on the police reports that [he and his counsel] had agreed to that have been submitted" belies his claim that he believed a portion of the police reports would be redacted.

The record reflects that Foster stipulated to submitting the police reports in evidence without qualification, and it demonstrates that Foster's waiver and stipulation were knowing, voluntary, and intelligent. Accordingly, the district court did not abuse its discretion by denying Foster's petition for postconviction relief.

Affirmed.