STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1314

State of Minnesota,
Respondent,

vs.

Ronald Dean Davis,
Appellant.

Filed May 23, 2011
Affirmed
Connolly, Judge

Pine County District Court
File No. 58-CR-09-591

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

John Carlson, Pine County Attorney, Nathan E. Sosinski, Assistant County Attorney, Pine City, 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 Klaphake, Presiding Judge; Toussaint, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Following his convictions of felony fleeing a peace officer in a motor vehicle, gross-misdemeanor driving after cancellation, misdemeanor fleeing a peace officer on

foot, and misdemeanor reckless driving, appellant argues that the district court committed reversible error by (1) accepting a stipulation to certain elements of the driving-after-cancellation charge prior to obtaining a proper waiver of his right to a jury trial on those elements and (2) failing to instruct the jury on the specific-intent element of fleeing a peace officer in a motor vehicle. We conclude that, although the district court erred in accepting the stipulation prior to obtaining a proper waiver, the error was harmless, and appellant waived any objection to the absence of a specific-intent instruction. We therefore affirm.

FACTS

Around 11:30 p.m. on May 23, 2009, a deputy sheriff observed a brown van stopped at an intersection in Hinckley. After viewing the driver's face for three to four seconds, the deputy recognized the driver as appellant Ronald Dean Davis. The deputy knew appellant's driver's license had been cancelled as inimical to public safety. As the deputy made a u-turn and positioned himself to stop the van, the van turned and quickly drove away. The deputy activated his squad car's lights and siren and pursued the van.

Approximately two blocks away, the van made a left turn at a high speed, fishtailing around the corner. The van continued at that speed and went through two stop signs; at one point, all four of its tires left the pavement. The van then attempted to make a right turn, but went out of control, left the pavement, and came to a stop in a yard. As the deputy pulled into the driveway, the driver exited the van, looked at the deputy, and ran between the residence and the garage and through the backyard. Law enforcement was not able to apprehend the driver that night.

Appellant was subsequently charged with fleeing a peace officer in a motor vehicle in violation of Minn. Stat. § 609.487, subd. 3 (2008); operating a motor vehicle after cancellation of his driver's license in violation of Minn. Stat. § 171.24, subd. 5 (2008); fleeing a peace officer by means other than a motor vehicle in violation of Minn. Stat. § 609.487, subd. 6 (2008); and reckless driving in violation of Minn. Stat. § 169.13, subd. 1 (2008). Appellant pleaded not guilty and proceeded to a jury trial. Prior to trial, appellant stipulated that his driver's license was cancelled and that he was aware of the cancellation:

> DISTRICT COURT: Mr. Davis you understand the stipulation is that on May 23, 2009, your driver's license was cancelled inimical to public safety, that is what you're agreeing?
> APPELLANT: Yes.
> DISTRICT COURT: You're not admitting that you were the driver?
> APPELLANT: Right, okay.
> DISTRICT COURT: You're just saying that your—on the date you were aware that your driver's license was cancelled inimical to public safety?
> APPELLANT: Okay.
> DISTRICT COURT: That's your—
> DEFENSE COUNSEL: Otherwise they have to bring it in and make testimony of that, so.
> APPELLANT: Yes, okay.
> DISTRICT COURT: So you understand that?
> APPELLANT: Yes.
> DEFENSE COUNSEL: So you're agreeing to that, right?
> APPELLANT: True.

At trial, appellant testified that May 23 was his birthday; he and his wife went to a local flea market; he watched the news; he went to bed between 10:00 p.m. and 10:30 p.m.; he did not leave his home that night; and no one came to his house.

The jury convicted appellant on all four counts. On the conviction of fleeing a peace officer in a motor vehicle, the district court stayed imposition of appellant's sentence, placed him on probation for three years, and ordered him to serve 60 days in jail, among other conditions. As for the driving-after-cancellation conviction, the district court sentenced appellant to serve a concurrent 60 days in jail, along with other conditions. No sentences were imposed on the other counts. This appeal of his convictions follows.

D E C I S I O N

I. Although the district court erred in accepting appellant's stipulation prior to obtaining a waiver of appellant's right to a jury trial on these elements, the error was harmless.

To convict appellant of gross-misdemeanor driving after cancellation, the state had to prove that (1) appellant operated a motor vehicle, (2) the vehicle was one that required a driver's license, (3) appellant's license was cancelled at the time he was operating the motor vehicle, and (4) appellant received notice of the cancellation. 10A *Minnesota Practice*, CRIMJIG 29.36 (5th ed. 2006) (listing elements for crime of driving after cancellation); *see* 10A *Minnesota Practice*, CRIMJIG 29.39 cmt. (5th ed. 2006) (stating instruction should be given in accordance with CRIMJIG 29.36 if defendant stipulates to grounds for cancellation). Appellant stipulated that his driver's license was cancelled and that he was aware of the cancellation. Appellant now challenges his conviction because, prior to accepting the stipulation, the district court failed to "secure appellant's personal and express waiver of his right to a jury trial on the stipulated-to elements."

"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). The record reflects, and the parties agree, that appellant was not informed of his right to a jury trial on the stipulated elements. Therefore, we conclude that the district court erred in accepting appellant's stipulation prior to obtaining a proper waiver of his right to a jury trial on these elements.

Relying on *State v. Antrim*, 764 N.W.2d 67, 70 (Minn. App. 2009), appellant asserts 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 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 we pointed out in *Kuhlmann*, this "argument 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. Here, appellant stipulated to two elements, leaving the jury to determine whether he was driving a motor vehicle and whether that motor vehicle required a valid driver's license. By stipulating to only two elements of the charged offense, appellant was still able to "compel witnesses to testify on [his] behalf, cross-examine the state's witnesses, challenge the state's other evidence, and argue the case to the jury." *Id.* at 406. We therefore apply a harmless-error analysis.[1] *See Fluker*, 781 N.W.2d at 403; *Wright*, 679 N.W.2d at 191. Under the harmless-error test, "[a] constitutional error will be found prejudicial if there is a reasonable possibility that the error complained of might have contributed to the conviction." *Wright*, 679 N.W.2d at 191 (quotation omitted). The state bears the burden of establishing that the error was harmless beyond a reasonable doubt. *Id.* "If, after reviewing the basis on which the jury rested its verdict, we conclude that the verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *Id.* (quotation omitted).

Appellant does not challenge the fact that his license was indeed cancelled, and he did not object when the district court informed the jury of the stipulation. Moreover, the state is correct that appellant benefited from the stipulation by keeping his driving record

[1] We acknowledge that it is currently an open question whether to apply a harmless-error or plain-error analysis to the improper waiver of the right to a jury trial involving stipulated elements. *See, e.g.*, *Fluker*, 781 N.W.2d at 403 (harmless error); *Kuhlmann*, 780 N.W.2d at 404-06 (plain error); *Wright*, 679 N.W.2d at 191 (harmless error). In light of the supreme court's pending ruling in *Kuhlmann*, we follow the settled law of *Fluker* and *Wright* and apply a harmless-error analysis.

and the reason for the cancellation of his license from the jury. *See Fluker*, 781 N.W.2d at 403 (defendant "benefitted from the stipulation by keeping evidence regarding his 1994 conviction for 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).

Appellant maintains that, by reading the stipulation to the jury, the district court directed a verdict for the state on the driving-after-cancellation charge. First, "district courts are prohibited from directing verdicts for the state even if all the facts point only to guilt." *State v. Hooks*, 752 N.W.2d 79, 87 (Minn. App. 2008). "[A] defendant is entitled to have all the elements of the offense with which he is charged submitted to the jury even if the evidence relating to these elements is uncontradicted." *Id.* (quotation omitted); *see also State v. Ferguson*, 561 N.W.2d 901, 902 (Minn. 1997) ("[N]o matter how strong the state's evidence, the defendant is entitled to 'go to the jury' in a criminal case on all of the elements, there being no such thing as a directed verdict of guilt either with respect to the crime or with respect to the elements of the crime."). Second, the main issue for trial was the identity of the driver: the deputy testified that he observed appellant driving; appellant testified that he did not leave his home that evening. As a result, the driver's identity came down to a credibility determination. It was up to the jury, sitting as the fact-finder, to determine whether the state had proven that appellant was operating a motor vehicle. *See State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) ("The jury is in the best position to weigh the credibility of the evidence and thus

determine which witnesses to believe and how much weight to give their testimony."). The fact that appellant stipulated to some elements of the offense with which he was charged did not amount to a directed verdict.

Therefore, although the district court erred in accepting appellant's stipulation to two elements of the offense prior to obtaining a proper waiver of appellant's right to a jury trial on these elements, the error was harmless, and we affirm appellant's conviction. *See Hinton*, 702 N.W.2d at 281-82 (improper waiver of right to jury trial in connection with existence of prior convictions was harmless when record of convictions was accurate and defendant did not challenge existence of prior convictions).

II. Appellant waived the right to challenge the absence of a specific-intent instruction.

District courts have considerable discretion in instructing the jury and we will not reverse a district court's decision on jury instructions absent an abuse of that discretion. *State v. Jorgenson*, 758 N.W.2d 316, 323 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). "Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). Unobjected-to jury instructions must meet the three prongs of the plain-error test before we will consider whether the error should be addressed to ensure the fairness and integrity of the judicial proceedings. *Jorgenson*, 758 N.W.2d at 323 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "[T]here must be (1) error; (2) that is plain; and (3) that affects substantial rights." *Id.*

Appellant contends that the district court erred in failing to instruct the jury on the element of specific intent required for conviction of fleeing a peace officer in a motor vehicle. *See* Minn. Stat. § 609.02, subd. 9(4) (2008) (defining "with intent to" as "the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result"). "It is well settled that jury instructions must define the crime charged and explain the elements of the offense to the jury." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). An error occurs if an instruction materially misstates the law. *Id.*; *see State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007) ("A jury instruction that eliminates a required element of the crime is error that is not harmless beyond a reasonable doubt.").

Minnesota law provides that "[w]hoever by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, is guilty of a felony . . . ." Minn. Stat. § 609.487, subd. 3. For purposes of section 609.487, "flee" is defined as "increas[ing] speed, extinguish[ing] motor vehicle headlights or taillights, refus[ing] to stop the vehicle, or us[ing] other means *with intent to* attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." *Id.*, subd. 1 (2008) (emphasis added). On the element of whether appellant fled or attempted to flee a peace officer, the district court instructed the jury:

> First, the defendant by means of a motor vehicle fled or attempted to flee a peace officer . . . . *To flee means to increase speed, refuse to stop the vehicle or use other means with intent to attempt to elude a peace officer following a*

> *signal given by any peace officer to the driver of a motor vehicle.*

(Emphasis added); *see* 10A *Minnesota Practice*, CRIMJIG 24.17 (5th ed. 2006) (defining elements of fleeing a peace officer in a motor vehicle as (1) the defendant fled or attempted to flee a peace officer; (2) the peace officer was acting in the lawful discharge of an official duty; and (3) the defendant knew or reasonably should have known that it was a peace officer from whom the defendant was fleeing or attempting to flee).

In support of his argument that a specific-intent instruction was required, appellant relies on *State v. Johnson*, in which we held that failure to give such an instruction was fundamental error based on the circumstances of the case. 374 N.W.2d 285, 288-89 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985). But "Johnson's defense rested on his words and actions, along with the surrounding circumstances which challenged the conclusion that he 'intended' to flee the officer." *Id.* at 288. Because Johnson's "entire defense went to the question of intent," he was entitled to the specific-intent instruction. *Id.* at 289. Moreover, the *Johnson* holding was later limited to the specific facts of that case. *State v. Erdman*, 383 N.W.2d 331, 333 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986). In *Erdman*, we held "that failure to request a specific intent instruction in a prosecution [for fleeing a peace officer in a motor vehicle] precludes review of any claimed error on this point." *Id.* Defense counsel here did not request a specific-intent instruction or object to the instruction given to the jury. Therefore, appellant's assertion of error is waived. *See id.*

Furthermore, unlike Johnson, appellant did not assert an intent-based defense. Johnson maintained that he continued on his way home after speaking with a police officer in order to get his driver's license and told the officer that, if the officer wanted to ticket him, the officer knew where to find him, negating the inference that his departure from the scene was with the intent to elude the officer. *See Johnson*, 374 N.W.2d at 289. Appellant's defense was that he was not driving the van and had not left his home at any point during the evening. Thus, the primary issue for trial was the identity of the driver, not whether the driver's actions showed an intent to elude the deputy.

The Minnesota Supreme Court has expressly distinguished the omission of the specific-intent element in cases where intent was not at issue. *See Vance*, 734 N.W.2d at 660 (citing *State v. Spencer*, 298 Minn. 456, 216 N.W.2d 131 (1974)). In *Spencer*, an assault case, the district court erroneously instructed the jury that there was no intent requirement. 298 Minn. at 464, 216 N.W.2d at 136. While concluding that the instruction was "obviously in error," the *Spencer* court focused on the fact that the trial centered on the identity of the perpetrator and whether this defendant was the person who committed the crime. *Id.* The *Spencer* court observed that "having found that the defendant held a loaded gun on the officer, deliberately cocked the weapon, and then fired a bullet into [the officer's] back, [the jury] could infer that [the defendant] intended the natural and probable consequences of his act." *Id.* Here, the driver of the van quickly accelerated away from the deputy, failed to stop once the deputy activated his squad's lights and siren, fishtailed around a corner, drove through two stop signs, and then lost control attempting to turn another corner, spinning out into a yard. Based on the

undisputed actions of the driver, the jury could infer that the driver's purpose and objective was to elude the deputy or that the driver believed these evasive maneuvers would elude the deputy.[2] *See* Minn. Stat. § 609.02, subd. 9(4). We conclude that the district court did not err in failing to sua sponte provide a specific-intent instruction to the jury when describing the elements of fleeing a peace officer in a motor vehicle. *See Erdman*, 383 N.W.2d at 333.

Affirmed.

[2] This case is therefore similarly distinguishable from *State v. Fleck*, ___ N.W.2d ___, ___, 2011 WL 1544553, at *4 (Minn. App. Apr. 26, 2011) (holding that defendant was entitled to requested jury instruction on defense of voluntary intoxication "[b]ecause a charge of assault based on the intentional infliction of bodily harm is a specific-intent crime" and defendant alleged he was intoxicated and offered his intoxication as an explanation for his actions); *see* Minn. Stat. § 609.075 (2008) ("[W]hen a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind."). Appellant's defense was that he was not the driver, not that there was some other explanation for his actions.