STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1653

State of Minnesota,
Respondent,

vs.

Jose Richard Pompa,
Appellant.

Filed July 11, 2011
Affirmed
Bjorkman, Judge

Olmsted County District Court
File No. 55-CR-09-3500

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

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his conviction of unlawful possession of a firearm, contending that the district court erred in accepting his stipulation to the ineligibility

element of the offense without first obtaining a waiver of his right to have a jury decide this essential element. Because the error in failing to obtain his jury waiver was harmless, we affirm.

FACTS

On May 7, 2009, Rochester police searched appellant Jose Richard Pompa's apartment pursuant to a warrant. Pompa led police to a 12-gauge shotgun, which was stored in a gun case under the mattress in the bedroom. Pompa denied that the shotgun was his, but admitted that it was in his bedroom. Based on a prior conviction of aggravated robbery, Pompa was charged with being an ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subds. 1(2), 2 (2008) (prohibiting "a person who has been convicted of . . . a crime of violence" from possessing a firearm).

Pompa pleaded not guilty and demanded a jury trial. Prior to trial, the district court asked whether Pompa wanted to present information about his prior conviction to the jury. After speaking with his lawyer, Pompa agreed to "stipulate that he's ineligible to possess firearms." He stated that he was thinking clearly and that he had enough time to discuss the issue with counsel. The district court accepted the stipulation and agreed to remove the issue of Pompa's eligibility to possess a firearm from the jury's consideration. The jury found Pompa guilty of the charged offense. This appeal follows.

D E C I S I O N

The United States and Minnesota constitutions guarantee the right to a jury trial in a criminal case. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also* Minn. R. Crim. P. 26.01, subd. 1(1). This includes the right to a jury determination on every element of

the charged offense. *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010). When stipulating to an element of an offense, a defendant effectively waives the right to a jury trial on that element and removes evidence regarding that element from the jury's consideration. *State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984). Accordingly, a defendant must personally waive the right to a jury trial in writing or on the record in open court before stipulating to an element of an offense. *Fluker*, 781 N.W.2d at 400.

Pompa argues that, while his colloquy with the district court demonstrates Pompa's personal agreement to the stipulation, the court did not "explicitly" inform him of his right to have the jury decide the ineligibility element and Pompa did not expressly waive his jury-trial right. The state urges us to find no error, arguing that a valid waiver is implicit in the stipulation because "a defendant's personal agreement to the stipulation necessarily implies a jury waiver with respect to the element stipulated." *See Berkelman*, 355 N.W.2d at 397 (stating that the defendant "in effect" offered to waive his right to a jury trial on one element of the offense by judicially admitting the existence of that element). We are not persuaded by the state's argument.

Not only does the record reveal no express jury-trial waiver by Pompa, but there is no indication that Pompa was advised of his right to have the jury decide the ineligibility element of the offense. Implying waiver of the fundamental right to a jury trial in the absence of an advisory is problematic. Further, the state's reliance on *Berkelman* for its implied-waiver argument is misplaced. In *Berkelman*, the supreme court held that the district court erred in "not letting defendant use the stipulation procedure to remove the element from consideration by the jury," but did not directly address the requirements of

a valid stipulation and jury-trial waiver. 355 N.W.2d at 395. Accordingly, we conclude that the district court erred in accepting Pompa's stipulation to the ineligibility element of the offense without obtaining a jury-trial waiver.

But our conclusion that the district court erred does not end our analysis. When a defendant stipulates to an element of an offense without waiving the right to a jury trial, we determine whether the error was harmless.[1] *Fluker*, 781 N.W.2d at 403; *Wright*, 679 N.W.2d at 191 (applying harmless-error analysis when defendant stipulated to element of offense without personally waiving right to jury trial). 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 (quotations omitted). An error is harmless beyond a reasonable doubt when the verdict was "surely unattributable to the error." *Id.* (quotation omitted). The state has the burden of establishing beyond a reasonable doubt that the error was harmless. *Id*.

Pompa argues that the error is not harmless and requires reversal. He emphasizes that the stipulation was the only evidence presented at trial indicating he was ineligible to possess a firearm. The state argues that any error is harmless and that because of its very

[1] Pompa argues that harmless-error analysis is inappropriate. Whether to apply a harmless-error or plain-error analysis to the improper waiver of the right to a jury trial on stipulated-to elements has not been conclusively determined. *See, e.g.*, *Fluker*, 781 N.W.2d at 403 (harmless error); *State v. Kuhlmann*, 780 N.W.2d 401, 404-06 (Minn. App. 2010) (plain error), *review granted* (Minn. June 15, 2010); *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004) (harmless error), *review denied* (Minn. June 29, 2004). But, in light of the supreme court's review and pending ruling in *Kuhlmann*, we follow the settled law of *Fluker* and *Wright* and apply a harmless-error analysis.

nature, it is appropriate that the stipulation was the only evidence presented on the eligibility element.

We agree with the state. Pompa does not deny his prior conviction, and the record demonstrates that he did not want further evidence of the conviction to be presented to the jury. *See State v. Hinton*, 702 N.W.2d 278, 282 (Minn. App. 2005) (finding erroneous acceptance of stipulation to prior convictions harmless in part because "there is no challenge as to the existence of the prior convictions"), *review denied* (Minn. Oct. 26, 2005). Not only did Pompa request the stipulation, but he was present when the district court advised the jury of the stipulation and did not object. And because the jury, in fact, received no other evidence of Pompa's prior conviction for aggravated robbery, Pompa received the benefit of the stipulation during his jury trial. On this record, we conclude that the jury's verdict was surely unattributable to the district court's error in accepting Pompa's stipulation without obtaining a jury-trial waiver.

Affirmed.