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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1024

State of Minnesota,
Respondent,

vs.

Jing Hai Jiang,
Appellant.

Filed April 29, 2013
Affirmed
Kalitowski, Judge

Isanti County District Court
File No. 30-CR-10-641

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey Edblad, Isanti County Attorney, Cambridge, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Tania Kristine Marie Lex, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Jing Hai Jiang challenges the district court's order finding him guilty of first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2010). Appellant

argues that (1) his trial counsel was ineffective because he conceded appellant's guilt, (2) the district court committed plain error that affected appellant's substantial rights by receiving documentary exhibits instead of stipulated facts, and (3) the district court abused its discretion by ordering appellant to pay $97,674.61 in restitution. We affirm.

D E C I S I O N

I.

To determine whether counsel made an improper concession, "we first perform a de novo review of the record to see if counsel in fact conceded the defendant's guilt and, if so, we must proceed to the second prong of the inquiry and determine whether the defendant acquiesced in that concession." *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010).

"The decision whether or not to admit guilt at trial belongs to the defendant, and a new trial will be granted where defense counsel, explicitly or implicitly, admits a defendant's guilt without permission or acquiescence." *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991). "When counsel for the defendant admits a defendant's guilt without the defendant's consent, the counsel's performance is deficient and prejudice is presumed." *Prtine*, 784 N.W.2d at 317-18. "[T]he defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission." *Id.* at 318.

Appellant argues that he is entitled to a new trial because his counsel conceded his guilt to first-degree assault against victim K.B.N. Assault is "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd.

10 (2010). A defendant is guilty of first-degree assault if he "assaults another and inflicts great bodily harm." Minn. Stat. § 609.221, subd. 1 (2010). "Great bodily harm" is "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2010). Assault is a general-intent crime, meaning that the state need only prove that the defendant intended to do the physical act. *State v. Fleck*, 810 N.W.2d 303, 309-10 (Minn. 2012).

Following a stipulated-facts trial in which appellant and respondent State of Minnesota submitted nine documentary exhibits, the parties submitted written closing arguments. In the written closing argument, counsel conceded that appellant struck K.B.N. with a knife, stating that appellant "quickly picked up the knife and struck [K.B.N.]" and "snapped during the argument and used the instrument in his possession, which was a Chinese cooking knife." Counsel further stated that, "As for [K.B.N.'s] injuries, the knife cuts delivered by [appellant] did create a 'high probability of death.'" Finally, counsel concluded, "The evidence does not support a First-Degree Attempted Premeditated Murder conviction against [K.B.N.]. It more accurately reflects a First-Degree Assault charge."

Both parties acknowledge, and we agree, that counsel conceded the great-bodily-harm element of first-degree assault. Although the parties dispute whether counsel conceded the general-intent element by stating that appellant snapped, picked up the knife, and struck K.B.N., counsel arguably conceded that appellant intended to do the

physical act. Because appellant's counsel further stated that the evidence "accurately reflects a First-Degree Assault charge," we conclude that counsel at least implicitly conceded the general-intent element.

But this does not end our inquiry. We must "look at the entire record to determine if the defendant acquiesced in his counsel's strategy." *Prtine*, 784 N.W.2d at 318. "The absence of a personal, on-the-record consent to counsel's strategy of admitting guilt to a lesser charge is not dispositive." *Id.*; *see also State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992) ("Nor do we agree with defendant that there must be a 'contemporaneous' record made of the defendant's consent to his counsel's strategy of admitting guilt to a lesser charge."). "We have held that when trial counsel uses the same strategy from beginning to end of trial and the defendant does not object, the defendant acquiesces in the admission." *Prtine*, 784 N.W.2d at 318.

Appellant stated on-the-record that he reviewed and understood the contents of the documentary exhibits submitted for the stipulated-facts trial. Counsel also stated that he reviewed each of the exhibits with appellant. The exhibits, consistent with counsel's closing argument, show that appellant picked up a knife, struck K.B.N., and caused K.B.N. great bodily harm; nothing in the record is inconsistent with these facts. By stipulating to this record, appellant acquiesced to his counsel's acknowledgment of the uncontroverted facts contained therein. Moreover, counsel's acknowledgment of these uncontroverted facts was a reasonable trial strategy. Counsel's strategy produced verdicts of "not guilty" for two of the three counts against appellant, including the most serious charge of attempted first-degree premeditated murder.

In sum, because we conclude that appellant acquiesced in his counsel's strategy, appellant is not entitled to a new trial.

II.

"The interpretation of the rules of criminal procedure is a question of law subject to de novo review." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

The parties agreed to submit the question of appellant's guilt to the district court under Minn. R. Crim. P. 26.01, subd. 3, which provides that "[t]he defendant and the prosecutor may agree that a determination of defendant's guilt . . . may be submitted to and tried by the court based on stipulated facts."

Appellant argues that the district court plainly erred by receiving nine documentary exhibits as stipulated facts, and that this error affected his substantial rights. Appellant relies on *Dereje v. State*, in which the parties agreed to a stipulated-facts trial and submitted a body of evidence in which facts material to the elements of the charged offenses were disputed. 812 N.W.2d 205, 208-10 (Minn. App. 2012), *review granted* (Minn. June 27, 2012). In *Dereje*, we held that rule 26.01, subdivision 3 requires a stipulated-facts trial to be held on stipulated facts, rather than on a body of disputed evidence. *Id.* at 209-10. We concluded that the stipulated-facts trial was invalid and proceeded with a plain-error analysis. *Id.* at 210-11. We concluded that the error of the invalid stipulated-facts trial did not affect appellant's substantial rights because appellant had a valid court trial, as permitted by Minn. R. Crim. P. 26.01, subd. 2, in which the evidence was received by stipulation. *Id.* at 211.

Here, unlike *Dereje*, the record is not a body of evidence in which material facts on the elements of the crimes charged are disputed. The parties agreed to submit nine documentary exhibits, which included the criminal complaint, two competency evaluations, medical records, depositions from a worker's compensation claim, and police reports. The record consistently shows that appellant struck K.B.N. with a knife and caused him great bodily harm. Although the record contains conflicting evidence about how the argument between appellant and K.B.N. began, this conflict is irrelevant to appellant's first-degree assault charge against K.B.N. Because appellant's stipulated-facts trial was based on a record that contains no disputed material facts, it is distinguishable from *Dereje*.

Moreover, appellant's trial could be appropriately characterized as a court trial without a jury under Minn. R. Crim. P. 26.01, subd. 2, which permits a trial based on the "stipulation to a body of evidence [and] permit[s] a court trial to proceed without live witnesses and based only on documentary testimony." *Id.* Thus, any possible error was harmless because it did not affect appellant's substantial rights.

III.

The district court has broad discretion in awarding restitution. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). We review a district court's restitution order for an abuse of discretion. *Id.* at 672.

If an offender is convicted, the victim has the right to receive restitution. Minn. Stat. § 611A.04, subd. 1 (2010). A request for restitution may include any out-of-pocket losses resulting from the crime, including medical costs and wage replacement. *Id.*

“[T]he record must provide a factual basis for the amount awarded by showing the nature and amount of the losses with reasonable specificity.” *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000).

An offender who intends to challenge the amount of restitution “must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later.” Minn. Stat. § 611A.045, subd. 3(b) (2010). “The hearing request must be made in writing and filed with the court administrator. A defendant may not challenge restitution after the 30-day time period has passed.” *Id.* The burden to produce evidence is on the offender, who must submit a sworn affidavit to the prosecuting attorney and the district court at least five business days before the hearing. *Id.*, subd. 3(a) (2010). The affidavit must set forth all challenges and specify all reasons justifying dollar amounts that differ from the amounts requested by the victim. *Id.* If the offender did not raise any legal or factual challenges to restitution before the district court, his claim is procedurally barred. *State v. Bauer*, 776 N.W.2d 462, 480 (Minn. App. 2009), *aff’d on other grounds*, 792 N.W.2d 825 (Minn. 2011).

Appellant argues that the district court abused its discretion by ordering him to pay $97,674.61 in restitution because the victim had been compensated by insurers in the amount of $66,158.76. We disagree.

Following the filing of K.B.N.’s affidavit of restitution requesting $97,674.61 in total out-of-pocket expenses, appellant neither requested a restitution hearing in writing, nor did he submit a sworn affidavit setting forth his challenges. Rather, prior to

sentencing, appellant submitted a "Claim Summary report," alleging payments made by insurers on various claims. And at the sentencing hearing, counsel merely stated that a workers' compensation attorney told him that K.B.N.'s medical providers had received over $67,000 for treatment provided to K.B.N. Following sentencing, appellant took no further action to challenge the order of restitution.

We conclude that because appellant did not comply with the procedural requirements of Minn. Stat. § 611A.045, subd. 3, appellant's restitution challenge is procedurally barred.

Affirmed.