STATE OF MINNESOTA
IN COURT OF APPEALS
A09-902

State of Minnesota,
Respondent,

vs.

Carl Michael Campbell,
Appellant.

Filed October 19, 2010
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. 62-CR-08-14098

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

KLAPHAKE, Judge

This court issued an unpublished opinion that reversed appellant's conviction for third-degree assault but did not specifically address appellant's claim that his two

convictions for violating a domestic-abuse no-contact order must also be reversed because he failed to adequately waive his right to a jury trial on an element of those two offenses. *See State v. Campbell*, No. A09-902 (Minn. App. Apr. 27, 2010). The supreme court granted review and remanded for this court to address the jury trial waiver issue. Because we conclude that any error committed by the district court in failing to obtain a proper waiver was harmless, we affirm those convictions.

D E C I S I O N

"A person is guilty of a gross misdemeanor who knowingly violates [a domestic-abuse no-contact order] within ten years of a previous qualified domestic violence-related offense conviction." Minn. Stat. § 518B.01, subd. 22(c) (2008). The aggravating factor of the prior offense is an essential element of a gross misdemeanor offense. *See id.* Appellant had the right to have the jury determine each element of his offense. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see State v. Hinton*, 702 N.W.2d 278, 281-82 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

A defendant may stipulate to an aggravating factor that serves as a prior qualifying conviction to establish an aggravated offense. *Id.*; *see State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004) ("When stipulating to an element of the offense, a defendant effectively waives the right to a jury trial on that element and removes unduly prejudicial evidence from the jury's consideration"), *review denied* (Minn. June 29, 2004). But in order to waive a jury trial on an element of an offense, the defendant must do so "personally, in writing, or on the record in open court." Minn. R. Crim. P. 26.01, subd. 1(2) (a); *see State v. Antrim*, 764 N.W.2d 67, 70 (Minn. App. 2009) (requiring waiver to

be "personal, explicit, and in accordance with rule 26.01"). At trial, appellant stipulated to having a prior domestic no-contact order offense, and defense counsel engaged in the following colloquy with appellant with regard to the stipulation:

> MR. SARETTE: Mr. Campbell, you understand that counts 2 and 3 of the, I guess, amended complaint are allegations that you violated a domestic abuse no-contact order on October 27th as well as October 28th. Is that correct?
>
> THE DEFENDANT: Yes.
>
> MR. SARETTE: And do you understand these are charged as gross misdemeanors?
>
> THE DEFENDANT: Yes.
>
> MR. SARETT: And the reason why they're charged as gross misdemeanors versus a simple misdemeanor is because that you have in fact been convicted of a domestic assault within the last five years?
>
> THE DEFENDANT: Yes.
>
> MR. SARETTE: Specifically that was February 28, 2008, in Hennepin County, for misdemeanor domestic assault?
>
> THE DEFENDANT: Yes.
>
> MR. SARETTE: And are you in agreement that we can stipulate to that fact so Miss Gerber need not bring in a certified copy of that conviction to prove that particular element of the charge?
>
> THE DEFENDANT: Yes.
>
> MR. SARETTE: Do you have any question about that?
>
> THE DEFENDANT: No.

This colloquy does not explicitly inform appellant that he had the right to have a jury decide the aggravated element of the gross misdemeanor offenses, nor does it ask him to waive that right. Under these circumstances, the waiver is ineffective. *See Antrim*, 764 N.W.2d at 70-71; *Wright*, 679 N.W.2d at 191 (finding waiver incomplete when it did not inform defendant of his jury trial rights in accepting proof of an element of an offense).

The parties disagree about whether the harmless error test should apply to the district court's acceptance of appellant's incomplete waiver under the circumstances presented here. Historically, appellate courts have applied a harmless error analysis to this issue. *See, e.g.*, *Hinton*, 702 N.W.2d at 282 (concluding that admitting defendant's prior convictions by stipulation to prove a necessary element of an offense, without appellant's consent on the record, although erroneous, was harmless when record established no challenge to the existence of prior convictions); *Wright*, 679 N.W.2d at 191-92 (applying harmless error rule to district court's acceptance of a stipulation to an element of an offense regarding the difference in defendant's and victim's ages when record demonstrated no actual prejudice to defendant because of error).

Two pertinent cases were recently released by this court during the pendency of this case. In *State v. Kuhlmann*, 780 N.W.2d 401 (Minn. App. 2010), *review granted* (Minn. July 15, 2010), the defendant, who was convicted of felony domestic assault and second-degree driving while impaired, argued that his stipulation to conviction-based elements that was made without his personal waiver of a jury trial on these elements entitled him to a new trial. *Id.* at 403. This court concluded that reversal was not required under the third prong of the plain-error test, because the error was not prejudicial

and would not have affected the outcome of the case. *Id.* at 406. This court stated: "In light of the fact that the stipulation was for Kuhlmann's benefit, and the evidence to establish the omitted elements was readily available and uncontroverted, we conclude that the error provides no basis for questioning the fairness and the integrity of judicial proceedings." *Id.*

In *State v. Fluker*, 781 N.W.2d 397 (Minn. App. 2010), this court affirmed Fluker's conviction for failure to register as a predatory offender, despite the court's failure to obtain his personal waiver of his right to a jury trial on two stipulated elements of the offense. *Id.* at 399. There, this court concluded that the district court erred by accepting Fluker's stipulation without obtaining a personal waiver, *id.* at 400, but the court applied an harmless-error analysis to affirm Fluker's convictions because it concluded that his guilty verdict was surely unattributable to the error. *Id.* at 403. The court stated:

> [A]ppellant was present when the stipulation was read into the record and when it was mentioned throughout the trial, and appellant did not object. Also, as discussed above, the underlying facts of the stipulations were not in dispute. Finally, appellant benefited from the stipulation by keeping evidence regarding his 1994 conviction for criminal sexual conduct from being heard by the jury.

Id.

In keeping with the majority position emanating from the case law, we conclude that the harmless-error analysis should apply here. As in *Fluker*, appellant stipulated to the prior offense that served as an element of the current gross misdemeanor offenses; he suffered no prejudice due to the incomplete waiver; and by stipulating to the prior

offenses, he benefitted from having the jury hear as little as possible about those offenses. Under these circumstances, any error in acceptance of appellant's incomplete waiver was harmless.

Affirmed.