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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-394

State of Minnesota,
Respondent,

vs.

Moses Hillary Digga,
Appellant.

Filed February 15, 2011
Affirmed
Bjorkman, Judge

Olmsted County District Court
File No. 55-CR-09-4940

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

Mark A. Ostrem, Olmsted County Attorney, Jeffrey D. Hill, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Judge; and Stoneburner, Judge.

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

BJORKMAN, Judge

In this appeal from his convictions of second-degree assault, terroristic threats, two counts of second-degree driving while impaired (DWI), and driving after

cancellation, appellant argues that the district court abused its discretion by denying his request for a different public defender and erred in accepting a stipulation to an element of the DWI offenses without appellant's waiver of his right to a jury trial. We affirm.

FACTS

Appellant Moses Digga and S.G. met in 2000 and were good friends until they had a falling out several years later. S.G.'s wife died in June 2009, and Digga gathered with family and friends at S.G.'s house after the funeral. During the course of the evening, Digga consumed alcohol.

Around 3:00 a.m., S.G. went to the garage to sleep on a make-shift bed that he had prepared. Digga, who also was in the garage, went into the kitchen, obtained a knife, walked back out to the garage, and approached S.G. with the knife upraised. S.G. exclaimed that Digga was trying to kill him. Another man in the garage grabbed Digga from behind. In the ensuing struggle, the knife hit S.G.'s arm, causing a small cut.

S.G.'s niece observed these events and called 911. While she was talking to the 911 operator, she saw the men release Digga and Digga drive away. Law enforcement was dispatched to S.G.'s house at 3:04 a.m. The responding officers collected a knife that they were told was the one Digga had used. Another officer proceeded to Digga's home, arriving at 3:19 a.m. The officer saw a car parked outside and Digga on the doorstep of the house. The officer confronted Digga, who was uncooperative. The officer noted that Digga smelled of alcohol and had bloodshot and watery eyes. After receiving an implied-consent advisory, Digga agreed to a breath test, which revealed an alcohol concentration of .14.

Digga was charged with second-degree assault, in violation of Minn. Stat. § 609.222, subd. 1 (2008), terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2008), two counts of second-degree DWI, in violation of Minn. Stat. §§ 169A.20, subd. 1(1), (5), .25, subd. 2 (2008), and driving after cancellation, in violation of Minn. Stat. § 171.24, subd. 5 (2008). A jury found Digga guilty of all charges. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying Digga's request for substitute counsel.

A criminal defendant has the right to select counsel of his or her choice. *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). "[B]ut an indigent defendant does not have the unbridled right to be represented by the attorney of his choice." *Id.* Following appointment of counsel, a district court will grant an indigent defendant's request for substitute counsel "only if exceptional circumstances exist and the demand is timely and reasonably made." *Id.* (quotation omitted). Exceptional circumstances are generally "those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). Exceptional circumstances do not include "[g]eneral dissatisfaction or disagreement with appointed counsel's assessment of the case," *Worthy*, 583 N.W.2d at 279, differences of opinion as to strategy, *Gillam*, 629 N.W.2d at 449-50, or "personal tension" between the attorney and the client, *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

We review the decision whether to appoint substitute counsel for abuse of discretion. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006). If we conclude that the district court abused its discretion by denying a request for substitute counsel, we consider whether the defendant has demonstrated prejudice. *See State v. Lamar*, 474 N.W.2d 1, 1, 3 (Minn. App. 1991) (applying harmless-error review to failure to determine whether appellant was entitled to substitute counsel), *review denied* (Minn. Sept. 13, 1991); *see also State v. Fields*, 311 N.W.2d 486, 487 (Minn. 1981) (holding that district court "did not prejudicially err" in denial of request for substitute counsel).

Digga requested substitute counsel on the first day of trial by submitting a handwritten letter to the district court. Digga asserted that appointed counsel would not "deliver for [him] a fair trial" because counsel had not (1) retained a "wound specialist" to defend against S.G.'s claim that he was cut by the knife, (2) asked for a hearing to review the state's evidence, or (3) investigated the witnesses Digga identified. The district court determined that Digga was "just complaining about [appointed counsel's] representation." The district court asked appointed counsel whether he felt that he had "sufficient grasp of the file to adequately represent Mr. Digga at this time." Counsel responded that he did. The district court then denied Digga's request and advised Digga to cooperate with his lawyer.

Digga argues that the district court abused its discretion because Digga "raised legitimate concerns" about appointed counsel's representation. We disagree. First, Digga did not establish exceptional circumstances. He did not assert that appointed counsel lacked competence. Rather, he requested substitute counsel based solely on his

belief that appointed counsel should have prepared for trial differently. But disagreement with appointed counsel's assessment of the case and trial strategies does not constitute exceptional circumstances. *See Gillam*, 629 N.W.2d at 449-50 (differences of opinion as to strategy are not exceptional circumstances). Digga argues that the district court should have inquired further to determine whether exceptional circumstances warranted appointment of substitute counsel, citing *State v. Paige*, 765 N.W.2d 134 (Minn. App. 2009). But *Paige* involved a request to discharge private counsel, not a motion to substitute a different public defender. It does not require the district court to inquire as to "how the defendant intends to proceed upon the discharge of counsel." *Paige*, 765 N.W.2d at 136. It does not address the inquiry required when a defendant seeks appointment of substitute counsel. *See id.* Nor do we discern any other authority establishing the depth of inquiry required. *Cf. Clark*, 722 N.W.2d at 464 (stating in dictum that "searching inquiry," which defendant argued was necessary, "may" be appropriate "when a defendant voices serious allegations of inadequate representation"). And Digga does not indicate what the district court would have gleaned from such an inquiry, since his argument on appeal mirrors the concerns he voiced in his letter to the district court, which do not establish exceptional circumstances.

Second, Digga's request was untimely. The only record evidence of a request for substitute counsel is the letter Digga submitted on the first day of trial. A request for substitute counsel is untimely when it is made on the first day of trial. *See Worthy*, 583 N.W.2d at 278-79. Even if Digga contacted the district court regarding his desire for substitute counsel one week earlier, as he claimed in his letter, his request was still

untimely. *See State v. Reed*, 398 N.W.2d 614, 616 (Minn. App. 1986) (stating that request for substitute counsel made one week before trial was a "last-minute" request that would "inevitably delay trial"), *review denied* (Minn. Feb. 13, 1987).

Because our careful review of the record reveals that Digga neither timely requested substitute counsel nor supported his request with evidence of exceptional circumstances, we conclude that the district court did not abuse its discretion by denying Digga's substitute-counsel request.

II. The district court's error in accepting Digga's stipulation to an element of the DWI charges without Digga's personal jury-trial waiver was harmless.

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 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; *see* Minn. R. Crim. P. 26.01, subd. 1(2)(a).

Digga argues and the state does not dispute that the district court erred by failing to obtain Digga's personal jury-trial waiver before accepting a stipulation as to his prior DWI convictions, an element of the second-degree DWI charges. *See* Minn. Stat.

§§ 169A.25, subd. 1(a), .03, subd. 3(1) (2008) (requiring proof of prior qualified DWI convictions as aggravating factors). Because the record confirms that Digga did not personally waive his right to have the jury determine the existence and number of his prior convictions, we agree. But that 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. *Fluker*, 781 N.W.2d at 399; *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004) (applying harmless-error analysis when defendant stipulated to element of offense without personally waiving right to jury trial), *review denied* (Minn. June 29, 2004). An error is harmless beyond a reasonable doubt when the verdict was "surely unattributable to the error." *Wright*, 679 N.W.2d at 191 (quotation omitted). The state bears the burden of establishing beyond a reasonable doubt that the error was harmless. *Id.*

The state has met its burden. Digga does not deny his prior convictions. *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). And despite the stipulation, Digga testified on direct-examination about his three prior DWI offenses. Digga argues that the erroneous stipulation was prejudicial because these and other references to his prior convictions during trial kept him from realizing the benefit of the stipulation. *See Berkelman*, 355 N.W.2d at 397 (stipulation to uncontroverted prior-conviction element generally is beneficial to defendant because it removes potentially prejudicial evidence from jury's consideration). We disagree. To the contrary, the

repeated references reinforce the fact that Digga's prior convictions are uncontroverted, eliminating any possibility that the jury's decision was affected by the erroneous stipulation. On this record, we conclude that the district court's erroneous acceptance of Digga's stipulation was harmless.

III. Digga's pro se arguments lack merit.

Digga's pro se supplemental brief asserts two arguments: (1) the state withheld the knife from him before trial and (2) the evidence is insufficient to support his DWI convictions. We address each argument in turn.

Withholding evidence

Digga argues that the state violated Minn. R. Crim. P. 7.01 by withholding the knife seized at S.G.'s house. We disagree. Rule 7.01 requires the prosecutor to provide the defendant or defense counsel written notice of "any evidence against the defendant obtained as a result of a . . . search and seizure." Here, the prosecutor served a standard rule 7.01 notice, and nothing in the record suggests that defense counsel was prevented from obtaining access to the evidence before trial. Indeed, Digga's own argument that he "requested this evidence (knife) from [his] defense attorney when he brought to [Digga] the other evidence without success," indicates that defense counsel not only had access to the evidence but also sought to provide Digga reasonable access to the evidence. On this record, Digga's argument that the state withheld evidence is unavailing.

Sufficiency of the evidence

Digga also asserts that the evidence is insufficient to support his two DWI convictions. In considering a claim of insufficient evidence, our review is limited to a

painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends primarily on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Digga challenges only the sufficiency of the evidence that he was driving on the night in question. S.G.'s niece testified that she saw Digga driving away from S.G.'s house. Digga argues that this testimony is not sufficient because it conflicts with the 911 call in which S.G. told the operator that "they're driving this guy away," and the 911 statement should be given greater weight because it was contemporaneous. We disagree. First, it is the sole province of the jury to resolve conflicts in testimony. *See Pieschke*, 295 N.W.2d at 584. Second, the 911 statement, considered as a whole, indicates that S.G.'s niece saw Digga drive himself away from S.G.'s house. After making the statement that Digga references, S.G.'s niece told the operator that "he's driving away," confirmed that Digga was the one driving, and stated that Digga was drunk and "driving really fast." These statements are consistent with her trial testimony that she saw Digga

driving and amply establish that element of the DWI offenses. Accordingly, Digga's challenge to those convictions fails.

Affirmed.