

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

HOANG X. NGUYEN,

Appellant.

No. 38564-3-II

UNPUBLISHED OPINION

Armstrong, J. — Hoang X. Nguyen appeals his conviction of felony violation of a domestic violence no contact order, arguing that his stipulation to prior offenses constituted an invalid waiver of his right to a jury trial. Nguyen raises additional issues in a pro se statement of additional grounds. We affirm.

Facts

A no contact order prevented Nguyen from having any contact with his former wife. After she received two phone calls from Nguyen, the State charged him with two counts of felony violation of a domestic violence no contact order.

Although Nguyen answered the trial court's questions during a pretrial omnibus hearing without assistance, the court granted his request to have an interpreter during trial. During a subsequent hearing, defense counsel said that based on a discussion in chambers, he would stipulate that Nguyen had two prior convictions for violating a no contact order. After the trial court asked counsel to confirm that Nguyen did not object to the attorneys meeting with the judge in chambers without him present, counsel consulted with Nguyen about the topics discussed and informed the court that his client had no objection. Counsel added that he planned to submit a

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jury instruction to address the stipulation, and he argued against any mention of the details underlying Nguyen's criminal history. The court documents supporting the stipulation were admitted as exhibits for the court file but did not go to the jury. Both attorneys signed the written stipulation; there was no signature line for the defendant.

The jury heard evidence that Nguyen twice called his former wife in violation of the no contact order. A police officer read the stipulation aloud without objection during his testimony, and the trial court included it in the following jury instruction:

The parties have agreed that the following evidence will be presented to you:

“The parties have entered into the following agreements concerning evidence in the defendant's jury trial:

The parties stipulate and agree that the defendant has the following prior convictions:

Violation of a No Contact Order Domestic Violence, 04-1-00027-4, conviction date of February 24, 2004

Violation of a No Contact Order Domestic Violence, 02-1-01519-4, conviction date of January 21, 2003”

This is evidence that you will evaluate and weigh with all of the other evidence.

II Report of Proceedings at 113-14, 144-45; Clerk's Papers (CP) at 26.

The jury found Nguyen guilty of Count I and acquitted him of Count II. The jury returned a special verdict on Count I answering “yes” to whether he had twice previously been convicted of violating a no contact order. CP at 10. The court imposed a standard range sentence, and Nguyen now appeals his conviction.

Analysis

I. Stipulation and the Right to a Jury Trial

Without Nguyen's two prior convictions, the charged offenses would have been gross misdemeanors punishable by a maximum of one year in jail. RCW 26.50.110(1)(a); RCW 9.92.020. With two prior convictions for the same crime, however, Nguyen's offenses became class C felonies punishable by a maximum of five years in prison. RCW 26.50.110(5); RCW 9A.20.021(1)(c).

Nguyen asserts that the stipulation to his two prior offenses waived his right to a jury trial on the felony charges against him and that the trial court should have ensured he was making that waiver knowingly, voluntarily, and intelligently. Because there is no such waiver in this record, Nguyen argues that reversal is required. *See State v. Treat*, 109 Wn. App. 419, 427-28, 35 P.3d 1192 (2001) (reversing conviction where State conceded that knowing and voluntary jury waiver was neither in writing nor done orally on the record).

Although instruction 12 effectively waived Nguyen's right to have the jury determine whether the State had proved his two prior convictions, waiver of a jury determination on a single element of an offense is not the same as waiver of the right to a jury trial in its entirety. *See United States v. Mason*, 85 F.3d 471, 472 (10th Cir. 1996) (by stipulating to elemental facts, defendant waives right to jury trial on that element); *United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980) (voluntariness inquiry not required before accepting stipulation to crucial fact). The Washington Supreme Court recently observed that due process does not require a trial court to ensure that a defendant understands the rights waived by a factual stipulation as long as

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the stipulation is not equivalent to a guilty plea. *In re Det. of Moore*, 167 Wn.2d 113, 120, 216 P.3d 1015 (2009). A stipulation is typically an admission that if the State's witnesses were called, they would testify in accordance with the summary presented. *Moore*, 167 Wn.2d at 121. A stipulation waives the defendant's right to require the State to prove its case on the stipulated element only. *State v. Stevens*, 137 Wn. App. 460, 466, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008). In such situations, the trier of fact still must determine guilt or innocence; the State must prove guilt beyond a reasonable doubt; and the defendant may offer evidence or cross examine witnesses. *Moore*, 167 Wn.2d at 121; *State v. Johnson*, 104 Wn.2d 338, 342, 705 P.2d 773 (1985).

Nguyen argues that his prior convictions constituted the sole element of the felony offenses charged and that the stipulation thus left no room for a subsequent acquittal. His prior convictions functioned as only one element of the charges filed, however, and his stipulation to that element still required the jury to determine guilt or innocence, as demonstrated by his acquittal on one of the two felony violations charged. *See State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002) (prior convictions are one element of felony violation of a no contact order charge).

Nguyen's stipulation was similar to the defendant's stipulation to a crucial fact in *Ferreboeuf*. There, as here, the written stipulation was signed by defense counsel, but the trial court made no specific attempt to ascertain whether it was voluntarily given. *Ferreboeuf*, 632 F.2d at 835. The Ninth Circuit declined to hold that a stipulation must be preceded by personally questioning the defendant about its voluntariness:

Instead, we hold that when a stipulation to a crucial fact is entered into the record

in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation.

Ferreboeuf, 632 F.2d at 836.

Nguyen argues that the trial court should have taken extra measures to ensure he understood the stipulation and the rights he was waiving because of his language difficulties, as evidenced by the fact that he needed an interpreter during trial. In *Moore*, the petitioner made the same argument based on his mental issues. By the time of the stipulation, however, the trial court had found him competent to stand trial, and the standby guardian ad litem had not been used. The Supreme Court rejected the contention that extra measures were needed to ensure that the petitioner understood the stipulation. *See Moore*, 167 Wn.2d at 121.

The record here shows that Nguyen had at least a rudimentary understanding of and ability to speak in English. He had a certified Vietnamese interpreter during trial and testified clearly on his own behalf. He also gave a statement during sentencing that displayed his understanding of the proceedings. The fact that Nguyen used an interpreter during trial does not demonstrate that the trial court needed to ensure his understanding of the stipulation with individual questioning.

Stipulations can operate to keep potentially prejudicial matters from the jury's consideration. *State v. Wiley*, 26 Wn. App. 422, 425-26, 613 P.2d 549 (1980). Our review of the court documents establishing Nguyen's prior convictions reveals details that would have been much more prejudicial than the stipulation. *See Mason*, 85 F.3d at 473 (evidence of prior convictions far more prejudicial than "antiseptic" stipulation to those offenses). We decline to

hold that constitutional error occurred when the trial court admitted the stipulation without personally questioning Nguyen about its voluntariness.

II. Statement of Additional Grounds (SAG)

Nguyen raises two issues in his SAG. *See* RAP 10.10. He argues first that he received ineffective assistance of counsel when his trial attorney failed to move for a mistrial and object to one of the State's witnesses.

A defendant has the constitutional right to effective assistance from counsel. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. To show that counsel was ineffective, a defendant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance is not shown by matters that go to legitimate strategy or trial tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). This court gives considerable deference to counsel's performance and presumes it was effective. *Thomas*, 109 Wn.2d at 226. Prejudice is shown when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Thomas*, 109 Wn.2d at 226.

Nguyen does not explain why his attorney should have moved for a mistrial, and no reason is evident to this court. He argues that his attorney should have objected to an "unreliable" prosecution witness who could not identify Nguyen from a photo montage. Defense counsel sought to demonstrate the witness's unreliability during his cross examination, however, and we see no deficient performance in this regard. Nguyen does not establish that he received ineffective assistance of counsel.

He also argues that insufficient evidence supports his conviction because the stipulation to his prior offenses was fabricated. Citing his appellate attorney's argument, he contends further that he did not understand the stipulation. Court documents showing Nguyen's prior convictions supported his stipulation. Defense counsel reviewed the underlying judgments and did not object to their admission on a limited basis. Having failed to object to use of the stipulation at trial, Nguyen waived his right to raise that objection on appeal. *See State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) (failure to object during trial waives right to argue against admission of stipulation on appeal).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.