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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-2260**

State of Minnesota,  
Respondent,

vs.

Duane Charles Hansen,  
Appellant.

**Filed February 19, 2013  
Affirmed in part, reversed in part, and remanded  
Worke, Judge  
Hudson, Judge, concurring**

Clay County District Court  
File No. 14-CR-11-2033

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

Brian J. Melton, Clay County Attorney, Gregg S. Jensen, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Charles F. Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Worke, Judge.

**UNPUBLISHED OPINION**

**WORKE**, Judge

Appellant challenges his convictions of fourth-degree assault of a peace officer, disorderly conduct, and possession of an open container of intoxicating liquor, arguing

that (1) his inadequate jury-trial waiver violated his Sixth Amendment rights; (2) the evidence was insufficient to sustain his fourth-degree assault-of-a-peace-officer conviction; (3) the conduct and speech giving rise to his disorderly-conduct conviction was protected by the First Amendment; (4) the evidence was insufficient to charge him with possession of an open container of liquor; and (5) he received ineffective assistance of counsel. Because appellant did not validly waive his right to a jury trial on the amended charge of fourth-degree assault and the failure to do so affected his substantial rights and denied him a fair trial, we conclude that he is entitled to a new trial on that charge. Because appellant validly waived his right to a jury trial on the disorderly-conduct charge and that charge did not implicate his First-Amendment rights, we affirm his disorderly-conduct conviction. Because the facts are wholly insufficient to support the open-container charge, we reverse that conviction. We also conclude that appellant waived his ineffective-assistance-of-counsel claim. We therefore affirm in part, reverse in part, and remand for a new trial on the charge of fourth-degree assault.

## **FACTS**

On June 10, 2011, Hawley police chief Glen Hanson and four other officers were approached by appellant Duane Charles Hansen as they were working at a rodeo. Appellant told the officers that they should spread throughout the grounds rather than stand at the top of a hill overlooking the event. Ten minutes later, appellant again approached the officers and began yelling and swearing at them, accusing them of wasting taxpayer dollars and abusing their positions to watch the rodeo for free. Appellant became increasingly confrontational, moving closer to Chief Hanson as he was

yelling. Hanson instructed appellant to leave the rodeo, and along with the other officers, he escorted appellant down a hill toward the exit. As they made their way, appellant “belly-bumped” Hanson several times, and Hanson had to brace himself to absorb each bump. Near the exit, appellant told Hanson he was going to “beat the living sh-t out of him,” clenched his fists, and “squared up” to Hanson. Interpreting this as a threatening gesture, the officers arrested appellant.

In the search incident to appellant’s arrest, the officers discovered a flask in appellant’s pocket that contained a liquid that had an odor of alcohol. Appellant did not smell of alcohol, nor did he exhibit any visible signs of intoxication, and the record does not show that police verified that the liquid was alcohol.

Appellant was initially charged with gross misdemeanor obstruction of legal process, fifth-degree misdemeanor assault, and misdemeanor disorderly conduct. At his June 30, 2011 arraignment, the district court informed appellant generally of his right to a jury trial and other constitutional rights. There was no discussion of the composition of the jury, the requirement of a unanimous jury verdict, or disclosure that the judge would act as fact finder if appellant waived his right to a jury trial. Appellant stated that he wanted a bench trial because “judges know the laws a lot better than juries[,] . . . and juries can become confused.” The district court advised appellant to consult with his attorney, but appellant’s counsel indicated that consultation was unnecessary because appellant had decided to proceed with a bench trial. Appellant again stated that he wanted to “waive a jury trial” on the charged offenses.

On August 10, 2011, the state filed an amended complaint to add one count of fourth-degree gross misdemeanor assault and, under the Hawley city code, one count of misdemeanor possession of an open container of intoxicating liquor. Nothing was put on the record about the appellant's rights relative to the new charges, and no objection was posed by appellant or his counsel.

A bench trial was held on August 17, 2011. The state called Chief Hanson and three other officers as witnesses, and appellant testified on his own behalf. The district court found appellant guilty of fourth-degree assault of a peace officer, disorderly conduct, and possession of an open container of intoxicating liquor. The district court imposed a 365-day sentence, stayed, for the fourth-degree assault offense. This appeal followed.

## DECISION

### *Original Charges*

*Validity of jury-trial waiver.* An accused is guaranteed the right to a jury trial under both the state and federal constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. In Minnesota, “[a] defendant has a right to a trial by jury for any offense punishable by incarceration.” Minn. R. Crim. P. 26.01, subd. 1(1)(a). “Whether a criminal defendant has been denied the right to a jury trial is a constitutional question that we review de novo.” *State v. Kuhlmann*, 806 N.W.2d 844, 848–49 (Minn. 2011).

A defendant may waive his right to a jury trial. Minn. R. Crim. P. 26.01, subd. 1(2); *Williams v. Florida*, 399 U.S. 78, 88, 90 S. Ct. 1893, 1899 (1970). A defendant must personally waive the right to a jury trial “in writing or on the record in open court,

after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel.” Minn. R. Crim. P. 26.01, subd. 1(2)(a). The waiver must be voluntary, knowing, and intelligent. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). Before accepting a jury-trial waiver, the district court must be satisfied that the defendant was informed of his rights, that the waiver was voluntary, and that the defendant “understands the basic elements of a jury trial.” *Id.* at 654.

Appellant argues that his jury-trial waiver to the original charges of obstruction of legal process, fifth-degree assault, and disorderly conduct was invalid because the district court made no inquiry to ensure that his waiver was voluntary or that he understood the basic elements of a jury trial. Although the record contains no discussion of the basic elements of a jury trial, appellant’s counsel indicated that consultation was unnecessary because appellant had decided to proceed with a bench trial. On review, we must consider whether appellant had sufficient understanding of his constitutional right to voluntarily waive a jury trial.

The Minnesota Supreme Court has encouraged district courts to engage in a colloquy with defendants to ensure that they understand their jury-trial rights and that waivers are not coerced, but it has stopped short of mandating such an inquiry. *See State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979); *State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984). In *Pietraszewski*, the supreme court ruled that an inadequate jury-trial waiver inquiry did not mandate reversal when the defendant’s numerous contacts with the district court and “ability to express himself and participate in the

proceedings” were sufficient to demonstrate a voluntary and intelligent waiver of the right. *Id.*

Likewise here, appellant had prior criminal convictions and demonstrated by his actions that his waiver of the right to a jury trial was an informed one. *See, e.g., State v. Hansen*, No. C9-90-998, 1991 WL 21617, at \*2 (Minn. App. 1991) (affirming appellant’s jury-trial conviction on two felony counts of defeating security). At appellant’s two bail hearings, appellant participated actively, even asking the judge to recuse himself from one bail hearing on the basis that the judge had recused himself “many times” in prior matters involving appellant. Before his arraignment, appellant also submitted two pretrial motions. In addition, appellant gave valid reasons for preferring a bench trial to a jury trial. Because of appellant’s frequent prior contacts with the criminal justice system, his active and competent participation in pretrial proceedings, and his plausible explanation about why he preferred a bench trial, the district court did not err in upholding the validity of appellant’s jury-trial waiver to the original charged offenses.

*First Amendment challenge.* Appellant specifically challenges his conviction of disorderly conduct, arguing that his speech and conduct were protected by the First Amendment. He asserts that his speech and conduct were “expressions of frustration with what he perceived as a waste of government resources.” In reviewing a First Amendment challenge to a disorderly conduct conviction, we “review the evidence in the light most favorable to the state and then determine, as a matter of law, whether the defendant’s language under that set of circumstances falls outside the protection of the First Amendment.” *In re Welfare of M.A.H.*, 572 N.W.2d 752, 757 (Minn. App. 1997).

Appellant repeatedly bumped into Chief Hanson as he was being escorted from the rodeo. After threatening to “beat the living sh-t” out of Chief Hanson, appellant clenched his fists and faced Chief Hanson in a confrontational fashion. This behavior resembles the behavior portrayed in *State v. White*, 292 N.W.2d 16 (Minn. 1980), where the defendant swore at a group of officers, raised his fists, and threatened to knock down the officers when they tried to make him leave a bar. *Id.* at 17. The supreme court ruled that such conduct constituted disorderly conduct. *Id.* at 18. Appellant’s speech and conduct also conveyed verbal and physical threats that were likely to elicit a retaliatory response and were therefore unprotected by the First Amendment. *See Hess v. Indiana*, 414 U.S. 105, 107–08, 94 S. Ct. 326, 328 (1973); *M.A.H.*, 572 N.W.2d at 757 (stating that the First Amendment does not protect “an explicit verbal or physical threat of violence”); *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978) (permitting a disorderly conduct conviction to be premised on “fighting words”); *see also City of St. Paul v. Azzone*, 287 Minn. 136, 141, 177 N.W.2d 559, 562 (1970) (stating “the fact that the vile and abusive language was directed towards a policeman and was not overheard by members of the public does not prevent it from being a violation of the [disorderly conduct] ordinance”). For these reasons, we affirm appellant’s conviction of disorderly conduct.

### ***Later-Added Charges***

*Jury-trial waiver.* Appellant next argues that his Sixth Amendment right to a jury trial was violated when his waiver on the original charges was applied to include the later-added charges of fourth-degree assault on a police officer and possession of an open container of intoxicating liquor. The right to a jury trial accrues “whenever the defendant

is charged with an offense that has an authorized penalty of incarceration.” *Kuhlmann*, 806 N.W.2d at 848. Because the later-added charges were punishable by incarceration, appellant had the right to a jury trial on them. Minn. R. Crim. P. 26.01, subd. 1(1)(a). As appellant’s right to a jury trial on the later-added charges did not accrue until the state filed the amended complaint a week before trial, appellant did not actually waive his right to a jury trial on those charges. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009) (defining waiver as “the voluntary relinquishment of a known right”).

Respondent argues that there is no requirement under the rules of criminal procedure that a new jury-trial waiver be obtained any time a new charge is added, apparently claiming support in rule 26.01, subdivision 1(2)(a), which states that a defendant “may waive a jury trial on the issue of guilt.” This argument ignores other language of subdivision 1, which states that a defendant “has a right to a jury trial for *any offense* punishable by incarceration.” *Id.*, subd. 1(1)(a) (emphasis added). Read in context, subdivision 1(2)(a) provides that a defendant may waive the right to a jury trial for any offense punishable by incarceration.

Respondent also argues that caselaw on the right to counsel suggests that an early waiver can apply to later-brought charges. In *State v. Rhoads*, 813 N.W.2d 880 (Minn. 2012), the Minnesota Supreme Court considered whether a defendant’s waiver of the right to counsel needed to be renewed upon amendment of a complaint to add new charges. The supreme court ruled that a defendant “need not renew a valid waiver-of-counsel . . . when the amended charge does not increase the possible range of punishment.” *Id.* at 888. However, the right to counsel is fundamentally different from

the right to a jury trial, and we conclude that *Rhoads* is not authoritative here. The right to counsel attaches at critical phases of a trial. *See Maine v. Moulton*, 474 U.S. 159, 170, 106 S. Ct. 477, 485 (1985) (holding that the right to counsel attaches upon “the initiation of adversary criminal proceedings,” and extends to “every stage of the proceedings” against a defendant). But the right to a jury trial attaches to each charged offense. *See Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356 (2000) (explaining that the right to a jury trial “has been understood to require that the truth of every accusation . . . should afterwards be confirmed by” a unanimous jury verdict); *Kuhlmann*, 806 N.W.2d at 848 (“In Minnesota, the right to a jury trial attaches whenever the defendant is charged with an offense that has an authorized penalty of incarceration.”). In fact, the right to a jury trial attaches to every element of every charged offense, including any fact (other than a prior conviction) necessary to support a sentence exceeding the maximum authorized by the guilty plea or verdict. *Blakely v. Washington*, 542 U.S. 296, 301, 303–04, 124 S. Ct. 2531, 2536, 2537 (2004); *State v. Dettman*, 719 N.W.2d 644, 651 (Minn. 2006).

Minnesota courts have consistently held that the waiver of the right to a jury trial as to the elements of an offense may not be construed as a waiver of that right as to any other offense, element, or sentencing factor. *See Dettman*, 719 N.W.2d at 654 (holding that defendant’s waiver of the right to a jury trial as to guilt for the underlying offense did not constitute a waiver of his right to a jury determination of the existence of aggravating sentencing factors); *State v. Zulu*, 706 N.W.2d 919, 927 (Minn. App. 2005) (concluding that because defendant was not aware that the state would seek an enhanced penalty

under a new statute until after defendant had waived his right to a jury trial, defendant was entitled to a jury determination of whether the criminal conduct occurred after the new statute's effective date); *State v. Whitley*, 682 N.W.2d 691, 696 (Minn. App. 2004) (holding that jury-trial waiver on issue of guilt did not waive defendant's right to a jury determination of the factors permitting sentencing enhancement, because the waiver was not knowingly made). We observe no distinction between cases such as *Whitley* or *Zulu*, where the defendant's waiver of the right to a jury determination of guilt on a particular offense did not waive his right to a jury determination of facts that enhanced the defendant's sentence, which are effectively separate elements of the offense, and this case, where the defendant's waiver of the right to a jury determination of the elements of fifth-degree assault and disorderly conduct did not waive his right to a jury determination of the elements of fourth-degree assault of a peace officer and possession of an open container of liquor.<sup>1</sup> See *Washington v. Recuenco*, 548 U.S. 212, 220, 126 S. Ct. 2546, 2552 (2006) (holding that "elements and sentencing factors must be treated the same for Sixth Amendment purposes").

Respondent asserts that appellant's waiver was knowing and intelligent because the amended complaint included additional charges that covered the same conduct as the original complaint. We disagree. First, the open-container charge pertained to

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<sup>1</sup> We also reject respondent's argument that appellant waived the right to object to the violation of his right to a jury trial because he did not object to the bench trial. "[T]he right to a jury trial cannot be waived by silence." *State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006). Further, a defendant cannot implicitly waive the right to a jury trial based on the actions of counsel. *Kuhlmann*, 806 N.W.2d at 850 n.4.

completely different conduct than any of the charges that arose from appellant's disruptive behavior. Further, each additional charge required the state to prove different offense elements. *Compare* Minn. Stat. § 609.2231, subd. 1 (2010) (fourth-degree assault) *with* Minn. Stat. § 609.224 (2010) (fifth-degree assault). We therefore decline to construe appellant's jury-trial waiver to the original charges to apply to the later added charges.

Finally, we note that any waiver of appellant's right to a jury trial on the later-added charges was not knowing or intelligent. *See Ross*, 472 N.W.2d at 654. A valid waiver requires knowledge of the "relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970). Specific facts to be proven are highly relevant to the defendant's choice of a fact finder. *See, e.g., People v. Hernandez*, 949 N.E.2d 1139, 1142 (Ill. App. Ct. 2011) ("Common sense says that a person must be at least generally aware of the charges he or she faces before he or she can knowingly and intelligently decide whether guilt for those charges should be determined by a jury or a judge."). Also relevant is the potential sentence, which is charge-dependent. *See Whitley*, 682 N.W.2d at 696 (stating that a waiver was not knowing when defendant was unaware he could be imprisoned up to the statutory maximum sentence, rather than the significantly lesser presumptive sentence). The amendment of the complaint to charge appellant with fourth-degree assault as well as fifth-degree assault increased appellant's potential punishment.

For all of these reasons, we conclude that the district court erred by ruling that appellant's waiver of the right to a jury trial on the original charges applied to the amended charges that were added after the waiver was made.

Having determined that the district court erred, we must next determine the proper standard of review. Most constitutional errors are reviewed for harmless error. *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263 (1991). However, a limited set of errors are classified as structural errors and require automatic reversal of a conviction. *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997). Structural errors are “defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards.” *Fulminante*, 499 U.S. at 309–10, 111 S. Ct. at 1265; *accord Kuhlmann*, 806 N.W.2d at 85. A structural error undermines the “structural integrity of the criminal tribunal itself” and therefore “is not amenable to harmless-error review.” *Vasquez v. Hillery*, 474 U.S. 254, 263–64, 106 S. Ct. 617, 623 (1986). A trial error, on the other hand, is an error in the trial process itself whose impact can be quantitatively assessed in the context of the trial as a whole to determine its impact, if any. *Fulminante*, 499 U.S. at 307–308, 310, 111 S. Ct. at 1264, 1265.

Appellant stated that he wanted a bench trial, which he subsequently received. While appellant's jury-trial waiver was not effective as to the two later-added charges, the trial mechanism itself was constitutionally valid and consistent with appellant's stated wishes. *See Williams*, 399 U.S. at 88, 90 S.Ct. at 1899 (holding that a criminal defendant may waive his right to a jury trial). We conclude that the district court's failure to obtain a waiver of appellant's right to a jury trial on the later-added charges constituted “a trial

error[] occurring in the prosecution of the case, rather than a defect in the constitution of the trial mechanism.” *Kuhlmann*, 806 N.W.2d at 852. Because the error was not structural, we must next determine whether it was harmless.

As appellant did not object to the amended complaint or to the district court’s failure to obtain a waiver of his right to a jury trial on the later-added charges, we review for plain error. *See State v. Schlienz*, 774 N.W.2d 361, 365 (Minn. 2009) (stating that plain-error analysis is used to review an unobjected-to trial error). “To establish plain error, a defendant must show: (1) an error; (2) that is plain; and (3) the error must affect the defendant’s substantial rights.” *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (quotation omitted). An error affects substantial rights if the error was prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). If these three prongs are met, a reviewing court will order a new trial if the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011) (quotation omitted).

As discussed earlier, we believe that the district court erred by failing to obtain a waiver from appellant of his right to a jury trial on the later-added charges. Because we cannot say with certainty that appellant would have waived his jury trial rights on the additional higher level charges and subsequently was convicted of the added charges and sentenced, the error was prejudicial. *See, e.g., Dettman*, 719 N.W.2d at 655 (holding that an erroneous upward sentencing departure was prejudicial “because we cannot say with certainty that a jury would have found the aggravating factors used to enhance Dettman’s sentence had those factors been submitted to a jury”); *Osborne*, 715 N.W.2d at 447

(holding that an upward sentencing departure imposed in violation of *Blakely* was “necessarily prejudicial”). Given the fundamental importance of the right to a jury trial to the integrity of judicial proceedings, we must also conclude that the error regarding appellant’s waiver of his jury-trial rights on the later-added charges seriously undermined the fairness of appellant’s criminal trial. We therefore reverse appellant’s convictions of fourth-degree assault and possession of an open container.

*Sufficiency-of-evidence claim on fourth-degree assault charge.* Appellant argues that the evidence was insufficient to support his conviction of fourth-degree assault of a peace officer. “The Double Jeopardy Clause precludes retrial where a conviction is set aside because the evidence supporting it is legally insufficient.” *State v. Cox*, 779 N.W.2d 844, 853 (Minn. 2010). “A reviewing court considers all of the evidence admitted by the trial court . . . in deciding whether retrial is permissible under the Double Jeopardy Clause.” *Id.*

Under Minn. Stat. § 609.2231, subd. 1 (2012), it is a crime to physically assault a peace officer “when that officer is effecting a lawful arrest or executing any other duty imposed by law.” Physical assault includes acts “done with the intent to cause fear in another of immediate bodily harm or death.” 10 *Minnesota Practice*, CRIMJIG 13.22 n.1 (2012). The evidence offered by the state was sufficient to show that appellant’s conduct at the rodeo, including “belly-bumping” Chief Hanson as Hanson escorted appellant down a hill, constituted an attempt to inflict bodily harm upon Chief Hanson. Because the evidence presented by the state was sufficient to support a conviction of fourth-degree assault, we conclude that the Double Jeopardy Clause does not prohibit appellant from

being retried on that charge. *State v. Clark*, 755 N.W.2d 241, 256 (Minn. 2008) (requiring an appellate court to address sufficiency-of-evidence argument, even when a conviction must be reversed on other grounds, to determine whether retrial would violate Double Jeopardy Clause).

*Open-container violation.* Appellant also challenges his misdemeanor code violation for possession of an open container of intoxicating liquor. Hawley’s city code prohibits a person from possessing an open container of any intoxicating liquor on any street or in any public place of business. Hawley, Minn., City Code § 3-2-14(B) (2011). The code does not define the phrase “open container,” but the plain meaning of the word “open” is “[a]ffording unobstructed entrance and exit; not shut or closed.” *The American Heritage Dictionary of the English Language* 1266 (3d ed. 1996).

The arresting officers confiscated a closed flask from appellant, opened it, and concluded that it contained a liquid that had an odor of alcohol. The record does not show that further investigation verified that the liquid was alcohol. Appellant admittedly exhibited no signs of intoxication at the rodeo that would support an inference that he had opened the container while at the rodeo. On these facts, there was insufficient evidence from which the state could charge appellant with a code violation. We therefore reverse appellant’s conviction and order entry of a judgment of acquittal on this charge. *See Clark*, 755 N.W.2d at 256 (stating that if evidence is legally insufficient to support a conviction, even when the conviction must be reversed on other grounds, the proper remedy is direction of a judgment of acquittal).

***Pro Se Issue***

Appellant submitted a pro se supplemental brief that apparently raises an issue of ineffective assistance of counsel. The pro se brief includes only accusatory rhetoric unsupported by the record or any citation to legal authority. As such, we deem this issue waived. *State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (deeming as waived pro se argument that included “no citation to any relevant legal authority”); *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (same).

**Affirmed in part, reversed in part, and remanded.**

**HUDSON, Judge (concurring specially)**

I concur in the result reached by the majority and agree that Hansen did not validly waive his right to a jury trial on the charges added after Hansen's original jury-trial waiver. I disagree, however, with the majority's conclusion that the error was not structural.

A proper understanding of the critical role of the jury to the fundamental fairness of a criminal trial makes it clear that the deprivation of Hansen's right to a jury trial was structural error. The right to a trial by jury in criminal cases "is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447 (1968). Reflecting a "profound judgment about the way in which law should be enforced and justice administered," the constitutional guarantee of the right to a trial by jury reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.* at 155–56, 88 S. Ct. at 1451. Thus the right to a jury trial provides the individual defendant with "an inestimable safeguard" against "arbitrary law enforcement," "the corrupt or overzealous prosecutor," and the "compliant, biased, or eccentric judge." *Id.*

"Structural errors are 'defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.'" *State v. Kuhlmann*, 806 N.W.2d 844, 851 (Minn. 2011) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309–10, 111 S. Ct. 1246, 1265 (1991)). Cases involving structural error "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833 (1999) (quotation omitted).

In Minnesota, structural errors are not subjected to plain-error review because “[s]tructural errors always invalidate a conviction whether or not a timely objection to the error was made.” *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007).

In *Kuhlmann*, the Minnesota Supreme Court held that the failure to obtain a defendant’s jury-trial waiver on the previous-conviction element of an offense was not structural error. *Kuhlmann*, 806 N.W.2d at 851–52. Similarly, in *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546 (2006), the Supreme Court held that failure to submit a sentencing factor to a jury was not structural error. *Id.* at 222, 126 S. Ct. at 2553. The critical distinction, however, is that in each of those cases the structural integrity of the trial mechanism was intact—the defendant received a jury trial and a verdict of guilty beyond a reasonable doubt. *Id.* at 215, 126 S. Ct. at 2549; *Kuhlmann*, 806 N.W.2d at 852. But Minnesota appellate courts have consistently reversed errors in obtaining a jury-trial waiver where the defendant foregoes a jury trial, such as in a bench trial, stipulated-facts trial, or where the defendant stipulates to the prosecution’s case to obtain review of a pretrial ruling.<sup>1</sup> See *State v. Antrim*, 764 N.W.2d 67, 71 (Minn. App. 2009); *State v. Knoll*, 739 N.W.2d 919, 921–22 (Minn. App. 2007); *State v. Halseth*, 653 N.W.2d 782, 787 (Minn. App. 2002); *State v. Tlapa*, 642 N.W.2d 72, 75 (Minn. App. 2002), *review denied* (Minn. June 18, 2002); *State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986).

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<sup>1</sup> Such trials are conducted under the procedures outlined in subdivisions 2, 3, and 4 of Minn. R. Crim. P. 26.03. In each type of case the defendant waives his right to a jury determination of his guilt. See *State v. Kuhlmann*, 780 N.W.2d 401, 405–06 (Minn. App. 2010), *aff’d*, 806 N.W.2d 844 (Minn. 2011).

Moreover, Supreme Court caselaw makes clear that given the fundamental importance of the right to a jury trial to our judicial system, the total deprivation of that right, where a defendant does not receive a jury trial without having waived that right, constitutes structural error. In *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101 (1986) the Supreme Court observed that

harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that “a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.” This rule stems from the Sixth Amendment’s clear command to afford jury trials in serious criminal cases. *Where that right is altogether denied, the State cannot contend that the deprivation was harmless* because the evidence established the defendant’s guilt; the error in such a case is that *the wrong entity judged the defendant guilty*.

*Id.* at 578, 106 S. Ct. at 3106 (alteration in original) (emphasis added) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73, 97 S. Ct. 1349, 1355 (1977)) (citations omitted).

In *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993), the Supreme Court stated in no uncertain terms that “[d]enial of the right to a jury verdict” constitutes a “structural defect[] in the constitution of the trial mechanism” because the jury guarantee is “a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” *Id.* at 281, 113 S. Ct. at 2082–83.<sup>2</sup>

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<sup>2</sup> Though the error in *Sullivan* was a defective reasonable-doubt instruction, the court framed the error as a denial of the Sixth Amendment right to a jury determination of

Because the right to a jury trial reflects a “profound judgment about the way in which law should be enforced and justice administered[,] [t]he deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, *unquestionably qualifies as ‘structural error.’*” *Id.* at 281–82, 113 S. Ct. at 2083 (emphasis added) (quotation omitted).

The applicability of *Rose* and *Sullivan* to the present case is apparent. Here, Hansen was deprived of his right to a jury trial on the charges of fourth-degree assault and possession of an open container. And that deprivation is significant. Many factors influence a defendant’s decision between a jury trial and a bench trial including: the elements to be proved; the strength of the state’s case; the potential sentence; the complexity of the issues; and the visceral or emotional nature of the facts to be presented. It is the height of form over substance to suggest that a defendant has implicitly weighed these factors as to charges that did not exist when he or she waived the right to a jury trial. While we do not require the district court to discuss these factors in its colloquy with a defendant, our system of justice assumes that a defendant, with the assistance of counsel and a valid charging instrument, has the necessary tools to reach an informed decision. Here, Hansen was not afforded the opportunity or the “tools” to make an informed decision.

In sum, the deprivation of the right to a jury trial here was significant and constituted a structural defect in the trial mechanism because “the wrong entity judged

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whether the defendant is guilty beyond a reasonable doubt, and thus the court’s analysis is directly applicable. *Sullivan*, 508 U.S. at 278, 113 S. Ct. at 2081.

