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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-176**

State of Minnesota,
Respondent,

vs.

Brandon Lee Bible,
Appellant.

**Filed March 1, 2011
Reversed and remanded
Hudson, Judge**

St. Louis County District Court
File No. 69HI-CR-09-217

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

Melanie Ford, St. Louis County Attorney, Jeffrey M. Vlatkovich, Assistant County Attorney, Hibbing, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Ross, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from convictions of aiding and abetting the drive-by shooting of an occupied building, aiding and abetting second-degree assault with a dangerous weapon,

and possession of a firearm by an ineligible person, appellant argues that a new trial is required because he did not personally waive his right to a jury trial in stipulating to the conviction-based elements of the firearms-possession offense. He also asserts additional challenges to his conviction and sentencing. Because the district court erred by accepting the stipulation without a personal jury-trial waiver, and because repeated references to appellant's unspecified felony conviction prejudiced appellant's substantial rights, we reverse and remand for a new trial.

FACTS

The state charged appellant Brandon Lee Bible with one count of aiding and abetting the drive-by shooting of an occupied building; two counts of aiding and abetting second-degree assault against two people occupying the building; possession of a firearm by an ineligible person; and third-degree controlled-substance crime. The charges resulted from an incident in which several shots were fired from a passing car into a Hibbing apartment building.

Before appellant's jury trial, defense counsel informed the district court that appellant was willing to stipulate that he was "a convicted felon" ineligible to possess a firearm, so that the jury would not receive information about his prior qualifying felony convictions. The district court accepted the stipulation and informed counsel that they could tell the jury that appellant had stipulated "that he was convicted of a prior felony that is a prerequisite for—that he is no longer able to possess firearms or however you want that language." Appellant was present in court when the stipulation was received,

but he was not questioned regarding the stipulation and did not personally waive his right to a jury trial on the element of his ineligibility to possess a firearm.

Before trial, the district court told the jury that appellant was charged with “possession of a firearm by a felon,” which “charge is that if a person has a prior felony conviction of what the law defines as a crime of violence and I believe that during the course of the trial the defendant would not dispute that fact, that the defendant has in his possession and control a firearm.” At closing argument, the prosecutor referred to appellant’s “prior felony conviction.” Appellant’s attorney also stated at closing that “the elements of a felon in possession of a firearm [include that] defendant has been convicted of a qualifying felony. Which he has. That’s an easy one for you to find.”

The district court instructed the jury by labeling the ineligibility charge as “possession of a firearm by a felon.” The court then recited the elements of that offense as including “that the defendant has been convicted of a qualifying felony” and further instructed the jury that “the defendant has stipulated that he has, in fact, been convicted of a qualifying felony.” In addition, the verdict form referred to the charge as “possession of a firearm by a felon.” No curative instruction was given.

The jury convicted appellant of the firearms-possession offense, aiding and abetting a drive-by shooting, and one count of aiding and abetting second-degree assault. The jury found appellant not guilty of the additional assault and controlled-substance charges. The district court sentenced appellant to 60 months on the firearms-possession conviction and a concurrent 88 months on the drive-by-shooting conviction. The district court also sentenced appellant to 36 months on the second-degree assault conviction

concurrent to the firearms-possession sentence, but consecutive to the drive-by-shooting sentence. This appeal follows.

DECISION

The United States and Minnesota constitutions guarantee the right to a jury trial to a defendant in a criminal case. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also* Minn. R. Crim. P. 26.01, subd. 1(a). This right “includes the right to be tried on each and every element of the charged offense.” *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). A defendant may waive the right to a jury trial on an element of the charged offense by stipulating to that element. *Id.* When, as here, a prior conviction is an element of the charged offense, a defendant’s stipulation to the existence of that conviction removes potentially prejudicial evidence from the jury’s consideration. *State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984). The defendant must make the waiver personally on the record in open court either orally or in writing. Minn. R. Crim. P. 26.01, subd. 1(2)(a). It cannot be delegated to defendant’s counsel. *Wright*, 679 N.W.2d at 191.

Here, it is undisputed that appellant did not personally waive his right to a jury trial on the stipulated element of the firearms offense: his ineligibility to possess a firearm because of his previous qualifying felony convictions. *See* Minn. Stat. § 624.713, subd. 1(2) (2008) (prohibiting possession of firearm by certain ineligible persons, including “a person who has been convicted of . . . a crime of violence”). Although appellant was present in the courtroom when the stipulation was accepted, the record does not show that he was questioned about the stipulation or that he consented to it

orally or in writing. Therefore, the district court erred by accepting the stipulation without appellant's personal jury-trial waiver.

Appellant argues that the district court's acceptance of the stipulation without a personal waiver of his jury-trial right amounts to structural error, which compels reversal. *See State v. Antrim*, 764 N.W.2d 67, 70–71 (Minn. App. 2009) (concluding that, in a trial held on stipulated facts under Minn. R. Crim. P. 26.01, subd. 4, a defendant's failure to personally waive right to require favorable witnesses to testify on her behalf required reversal). But this court has recently restricted the analysis in *Antrim* to the context of a stipulated-facts trial, concluding that a defendant's failure to personally waive his or her jury-trial right on an element of a charged offense is not structural error when a jury trial occurs. *State v. Fluker*, 781 N.W.2d 397, 402–03 (Minn. App. 2010); *State v. Kuhlmann*, 780 N.W.2d 401, 405–06 (Minn. App. 2010), *review granted* (Minn. June 15, 2010). In *Fluker*, we applied a harmless-error analysis in reviewing the district court's failure, preceding a jury trial, to elicit a defendant's personal waiver of his jury-trial right on an element of the charged offense. *Fluker*, 781 N.W.2d at 403. In *Kuhlmann*, we reviewed for plain error the district court's unobjected-to error of failing to instruct a jury on conviction-based elements of charged offenses when the defendant stipulated to the conviction but did not personally waive his right to a jury trial on the conviction-based elements. *Kuhlmann*, 780 N.W.2d at 405–06.¹

¹ The plain-error and harmless-error standards differ. Under a harmless-error review, a lower-court error affecting constitutional rights will be reversed unless the error is harmless beyond a reasonable doubt. *State v. Vance*, 734 N.W.2d 650, 660 n.8 (Minn. 2007). An error is harmless beyond a reasonable doubt if the verdict is "surely

The state concedes that the district court erred by accepting appellant's stipulation without a personal waiver on the element of his prior convictions. *See Kuhlmann*, 780 N.W.2d at 405. And because the lack of personal waiver contravened procedural and statutory requirements, the error was plain. *Id.*; *see also* Minn. R. Crim. P. 26.01, subd. 1. We therefore examine whether the error affected appellant's substantial rights, which is required under either a harmless-error or a plain-error analysis. *See* Minn. R. Crim. P. 31.01, 31.02.

The record establishes that the state could readily have proved the nature and date of appellant's prior convictions if he had not sought to remove them from the jury's consideration by entering the stipulation. *See Fluker*, 781 N.W.2d at 402–03 (stating that “the nature of the prior offense and the date of the conviction for [the] offense are highly objective and readily confirmed public judicial records”). The state also points out that the record contained ample evidence to connect appellant with the firearm used during the offenses and that the jury heard appellant's statement to police that he was a “felon” who could not possess a firearm.

But we note that, in a prosecution for possession of a firearm by an ineligible person, the purpose of stipulating to a defendant's ineligibility to possess a firearm is to

unattributable to the error.” *Id.* (quotation omitted). The plain-error standard involves consideration of whether an error occurred, whether the error was plain, and whether it affected the defendant's substantial rights. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). If these three factors have been satisfied, an appellate court then determines “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted). But under both the harmless-error test and the plain-error test, an error must affect a defendant's substantial rights to warrant reversal. *See* Minn. R. Crim. P. 31.01, 31.02. The result in this case is the same under either standard.

remove from jury consideration the issue of whether he has been convicted of a qualifying offense. *State v. Davidson*, 351 N.W.2d 8, 11 (Minn. 1984). “In the vast majority of such cases,” evidence of a defendant’s prior qualifying convictions is unfairly prejudicial because the evidence would likely lead the jury to convict the defendant “for the wrong reason.” *Id.* Here, the district court not only accepted a stipulation that permitted references to appellant as having committed a “felony,” but it also provided the jury with instructions that mischaracterized the charged offense as “felon in possession,” rather than possession of a firearm by an ineligible person. It also impermissibly allowed counsel to refer to appellant as a “felon.” These repeated references to appellant as a felon—references which occurred at nearly every phase of the trial—impermissibly invited the jury to draw an adverse inference that appellant committed the charged offenses based on his past criminal record, or to find appellant guilty because the jury thought he was a bad person. *See id.* The references negated any benefit that appellant might have derived from the stipulation, and there is a reasonable likelihood that they significantly affected the jury’s verdict. *See Vance*, 734 N.W.2d at 656 (stating that an error affects substantial rights “if there is a reasonable likelihood that [it] had a significant effect on the jury’s verdict”).

If the plain-error test is otherwise met, reversal may be required to ensure fairness and integrity in the judicial proceedings. *Reed*, 737 N.W.2d at 583. We conclude that, in this case, reversal is required. The district court has the duty to supervise, direct, and control trial proceedings, which includes the responsibility to assure a proper waiver of appellant’s jury-trial right on an element of a charged offense. *See State v. Graham*, 371

N.W.2d 204, 207 (Minn. 1985) (stating this duty with respect to declaration of mistrial). The district court also has a responsibility to provide balanced jury instructions. *See State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992) (stating that district court has responsibility to provide a “balanced [jury] instruction on the various relevant factors” pertaining to the element at issue). Here, the district court not only failed to secure appellant’s personal jury-trial waiver, but it also further prejudiced appellant by instructing the jury in a manner that invited a connection between appellant’s prior unspecified felony convictions and the charged offense.

We note that appellant’s counsel agreed to the portion of the stipulation that permitted references to appellant as a “felon in possession.” Generally, a party may not assert on appeal an error that he invited, or that could have been prevented in district court. *State v. Everson*, 749 N.W.2d 340, 348–49 (Minn. 2008). But the invited-error doctrine does not apply if all of the elements of the plain-error test are met. *Id.* Because all of these elements are met, we decline to apply the doctrine of invited error in this case.

Because we conclude that appellant is entitled to a new trial, we need not address appellant’s additional arguments, including those in appellant’s pro se supplemental brief.

Reversed and remanded.