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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1333**

State of Minnesota,
Respondent,

vs.

Gerald Ira Evans,
Appellant.

**Filed May 20, 2013
Reversed and remanded
Worke, Judge**

Mille Lacs County District Court
File No. 48-CR-10-2522

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

Richard J. Schieffer, Damien F. Toven, Dove Fretland & Van Valkenburg, PLLP,
Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Julie Loftus Nelson, St. Paul,
Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his second-degree DWI convictions, arguing that his stipulated-facts proceeding was invalid because he failed to waive his rights to testify at

trial, to have prosecution witnesses testify, and to question those witnesses. Because appellant did not make a complete waiver of his rights, we reverse and remand.

D E C I S I O N

Appellant Gerald Ira Evans agreed to a stipulated-facts proceeding on two counts of second-degree driving while impaired (DWI). He argues that the district court failed to secure his valid waiver of the rights set forth in Minn. R. Crim. P. 26.01, subd. 3(a). We must determine whether the district court complied with the requirements of rule 26.01. “The interpretation of the rules of criminal procedure is a question of law subject to de novo review.” *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

Following the district court’s ruling on appellant’s probable-cause challenge, the parties agreed to a stipulated-facts proceeding. Minn. R. Crim. P. 26.01, subd. 3(a) provides:

The [parties] may agree that a determination of [appellant’s] guilt . . . may be submitted to and tried by the court based on stipulated facts. Before proceeding, the defendant must acknowledge and personally waive the rights to:

- (1) testify at trial;
- (2) have the prosecution witnesses testify in open court in the [appellant’s] presence;
- (3) question those prosecution witnesses; and
- (4) require any favorable witnesses to testify for the defense in court.

Under this rule, “The agreement and the waiver must be in writing or be placed on the record.” Minn. R. Crim. P. 26.01, subd. 3(b).

In *State v. Knoll*, this court held that the district court must strictly comply with the waiver requirements of rule 26.01, subdivision 3. 739 N.W.2d 919, 921-22 (Minn.

App. 2007) (reversing and remanding a conviction because record did not reflect waiver of rights as required by Minn. R. Crim. P. 26.01, subd. 3). This court also reversed and remanded a conviction in *State v. Antrim*, because the appellant did not validly waive the right to require favorable witnesses to testify for the defense in court as required by Minn. R. Crim. P. 26.01, subds. 3, 4. 764 N.W.2d 67, 71 (Minn. App. 2009).

The state argues that this court should apply a harmless-error standard in determining whether appellant's rights were violated. The state cites to *State v. Kuhlmann*, in which this court held that the district court's failure to instruct the jury on conviction-based elements of offenses was not plain error. 780 N.W.2d 401, 406 (Minn. App. 2010), *aff'd*, 806 N.W.2d 844 (Minn. Dec. 21, 2011).¹ But *Kuhlmann* had a jury trial and stipulated only to predicate convictions. *Id.* at 403. *Kuhlmann* had an opportunity to "compel witnesses to testify on the [his] behalf, cross-examine the state's witnesses, challenge the state's other evidence, and argue the case to the jury." *Id.* at 406.

By contrast, and noted in *Kuhlmann*, cases involving a bench trial or a stipulated-facts proceeding are much different because in these situations the defendant "gives up the right to a determination of guilt by a jury of the defendant's peers . . . does not call his own witnesses, challenge the credibility of the evidence or the existence of facts, and essentially relieves the state from much of its burden of proving guilt." *Id.* Thus, we do

¹ Although the state cites to *Kuhlmann* in arguing that we review for harmless error, the court in *Kuhlmann* reviewed the district court's failure to obtain a personal waiver of a jury trial on previous-conviction elements for plain error. 806 N.W.2d at 852.

not review the district court's failure to secure appellant's waiver for harmless or plain error.

The district court advised appellant that he had a right to a jury trial and asked appellant if he was willing to waive a jury trial. Appellant waived his right to a jury trial. Although the district court noted in its order that appellant waived his "right to testify at trial," "waived his right to have the prosecution's witnesses testify in open court in [appellant's] presence," "waived the right to cross examine the prosecution's witnesses," and "waived the right to obtain a court order requiring any favorable witnesses to testify for the defense in court," there is nothing in the record to indicate the appellant waived any right other than his right to a jury trial. The state acknowledges:

Appellant raises on appeal only the second clause of subd. 4(d) which requires [appellant's] personal waiver of his right to testify at trial, his right to confront the prosecution witnesses, his right to question prosecution witnesses, and his right to subpoena witnesses favorable to his defense. *On those personal waivers, the record is silent.*

(Emphasis added.)

In *Knoll*, this court held that in a stipulated-facts proceeding, a defendant is required to expressly waive his right to testify, to confront witnesses, and to subpoena favorable witnesses. 739 N.W.2d at 922. Appellant waived only his right to have a jury trial. Therefore, we reverse and remand to the district court for further proceedings.

Reversed and remanded.