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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0912**

Otis Rodney Elder, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 6, 2017
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CR-12-3000

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant appeals the denial of his petition for postconviction relief, challenging his conviction of being a prohibited person in possession of a firearm. At trial, appellant stipulated that he was ineligible to possess a firearm and expressly waived his right to have a jury determine this element of the charged offense. This stipulation was initiated by appellant, discussed on the record, signed by both parties and filed with the court, all of which occurred outside the jury's presence. The state rested without informing the jury about the stipulation reached with appellant. Appellant argues: (1) the district court erred by denying his motion for judgment of acquittal because the state failed to offer the parties' stipulation into evidence; (2) the district court abused its discretion by granting the state's motion to reopen its case; (3) he was denied his right to an impartial judge; and (4) the district court committed reversible error in its jury instructions. We affirm.

FACTS

The evidence at trial established that police responded to a 911 call from C.D., appellant Otis Elder's cousin, on December 10, 2011. C.D. told the dispatcher that Elder needed assistance because "[s]omebody just drove by" and shot him in the leg.

When police arrived, Elder was "laying on the ground in a large pool of blood" in an alley behind a house. Police noticed a blood trail leading to that spot from the house. While one officer stayed with Elder, other officers entered the house through the open front door to ensure that no one inside was injured or potentially dangerous. The officers followed the blood trail to the back bedroom, where they saw a spent shell casing on the

floor and a clear plastic bag containing what appeared to be cocaine in the adjoining bathroom.

Police applied for and obtained a search warrant. During execution of the warrant, police collected two plastic bags containing a suspected controlled substance, a backpack containing a semiautomatic gun, a spent shell casing, and a bullet fragment. A mixture of DNA from at least four people was found on the gun. Elder's DNA "could not be excluded from being a possible contributor" to the mixture.

The state charged Elder with being a prohibited person in possession of a firearm and second-degree possession of a controlled substance. During trial, Elder admitted that he owned the backpack in which the gun was found, but denied it was his gun. C.D. and Elder testified that the gun belonged to an intruder, who entered the house and pointed a gun at C.D. According to C.D., Elder wrestled with the intruder for the gun, and, during the scuffle, the gun discharged a bullet that hit Elder in the leg. C.D. testified that the intruder yelled, dropped the gun, and ran out of the house. C.D. stated that he threw the gun into a backpack to keep it away from children who lived in the house.

On the first day of a four-day jury trial, Elder requested to stipulate that he was ineligible to possess a firearm based on two prior offenses.¹ On the second day of trial,

¹ In the complaint, the state alleged that Elder was ineligible to possess a firearm based on a 2002 aggravated robbery conviction and a 2010 second-degree controlled-substance conviction. A person is ineligible to possess a firearm if he "has been convicted of a crime of violence, as defined in section 624.712, subdivision 5." Minn. Stat. § 609.165, subd. 1b(a) (2010). Aggravated robbery and controlled-substance crimes are "crimes of violence" under Minn. Stat. § 624.712, subd. 5 (2010).

Elder, his trial attorney, and the prosecutor signed a stipulation that Elder was ineligible to possess a firearm. In the stipulation, Elder waived his right to have a jury determine the ineligibility element beyond a reasonable doubt.

Outside the presence of the jury, the district court discussed the stipulation with the parties. Elder responded to questions from the court and orally waived his right to have a jury determine whether he is ineligible to possess a firearm beyond a reasonable doubt. Elder stated that he understood that the state had the burden of proving beyond a reasonable doubt that he was ineligible to possess a firearm and that the state could meet its burden by submitting certified copies of his two prior convictions. The district court accepted the parties' signed stipulation and admitted it "as a court exhibit that will not go to the jury." The district court also told the parties that it would read the stipulation to the jury at the end of the state's case-in-chief and instruct the jury that the ineligibility element was proved beyond a reasonable doubt. Neither party objected. Additionally, the parties approved the district court's proposed instruction that "[t]he Defense and State have stipulated that defendant is ineligible. This element has been proven."

By the time the state rested, neither the district court nor the state had informed the jury about the stipulation. After both parties had rested and agreed to jury instructions and the verdict form, the district court began instructing the jury.

After stating the elements of being a prohibited person in possession of a firearm, the district court excused the jury and advised the parties that the ineligibility stipulation had not been read to the jury. The state responded that the stipulation did not need to be read to the jury because the stipulation removed the ineligibility element from the jury's

consideration. Elder moved for judgment of acquittal, arguing that the stipulation was evidence that must be submitted to the jury to prove the ineligibility element beyond a reasonable doubt. The district court agreed with Elder that the stipulation needed to be submitted to the jury to prove the ineligibility element, but stated “that the State can make a motion to reopen the evidence and [] that’s discretionary with the court.” The state then orally moved to reopen its case. Elder opposed the state’s motion, arguing that the evidence was closed and it was too late to receive additional evidence.

The district court granted the state’s motion to reopen because “it appear[ed] as though the prosecution simply forgot to introduce the evidence.” The district court summoned the jury into the courtroom, explained that a stipulation had not been submitted into evidence, told the jury that “Mr. Elder stipulates to the single element of his ineligibility to possess a firearm,” and then began reading the jury instructions anew. In instructing the jury on the elements of being a prohibited person in possession of a firearm, the district court gave the instruction that had been previously approved by the parties.

The jury found Elder guilty of being a prohibited person in possession of a firearm, but acquitted him of second-degree possession of a controlled substance. The district court sentenced Elder to 60 months in prison. Elder filed a direct appeal, but he voluntarily dismissed it. Elder then filed a petition for postconviction relief, which the district court denied. This appeal follows.

D E C I S I O N

Denial of a petition for postconviction relief is reviewed for an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). A postconviction court abuses its

discretion if it bases “its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (quotation omitted). A district court’s factual findings are clearly erroneous if they “are not factually supported by the record.” *Riley*, 819 N.W.2d at 167. “[W]e review the court’s legal conclusions de novo.” *Id.*

The state questions the applicable standard of review. Relying on *Santiago v. State*, the state argues that, because Elder filed a direct appeal and then voluntarily dismissed it to pursue postconviction relief, this court should apply the standard of review used in direct appeals. 644 N.W.2d 425, 439 (Minn. App. 2002) (“We use the standard of review for direct appeals when a defendant first files a direct appeal, subsequently moves for an order staying the direct appeal in order to proceed with a postconviction hearing, and the court of appeals then dismisses the direct appeal.”). *Santiago* does not apply because Elder did not seek to stay his first direct appeal; rather, he voluntarily dismissed it and then sought postconviction relief.

I. The district court did not err in denying Elder’s motion for judgment of acquittal because Elder had entered into a valid stipulation to the element challenged in his motion and the stipulation removed the element from the jury’s consideration.

A defendant may move for a judgment of acquittal “[a]t the close of evidence for either party . . . if the evidence is insufficient to sustain a conviction.” Minn. R. Crim. P. 26.03, subd. 18(1)(a). Whether to grant a motion for judgment of acquittal is an issue of law that this court reviews de novo. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), review denied (Minn. Oct. 15, 2013). In deciding a motion for judgment of

acquittal, a court must view “the evidence and all resulting inferences in the light most favorable to the state” and determine whether “the evidence is sufficient to present a fact question for the jury.” *Id.* In reaching this determination, courts consider the admissible evidence and the elements of the offense charged. *Id.* Here, only the ineligible-possession charge is at issue and the applicable Minnesota statute provides two elements: (1) defendant possessed, shipped, transported, or received a firearm, and (2) defendant was previously convicted of a crime of violence, making the defendant ineligible to possess a firearm. Minn. Stat. § 609.165, subd. 1b(a). For ease, we will refer to the second element as the ineligibility element.

Elder asserts that the district court erred in denying his motion for judgment of acquittal because, at the time he brought the motion, the state had not proved the ineligibility element by submitting the stipulation into evidence for the jury’s consideration. The postconviction court concluded that the district court did not err because Elder’s ineligibility was proved via the stipulation, which the district court accepted as a court exhibit, and which “took the fact question away from the jury.”

We begin our analysis by considering that a defendant’s right to a jury trial includes the right to be tried on every element of the charged offense, but a defendant may also agree to stipulate to facts or even to elements of an offense. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1985); *State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984); *see also* Minn. R. Crim. P. 26.01, subd. 1 (2)(a) (waiver of jury trial on issue of guilt). By stipulating to an element of an offense, a defendant “waives the right to a jury trial on that element and removes unduly prejudicial evidence from the jury’s consideration.” *State v.*

Wright, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). Before stipulating to an element of the offense, a defendant must give a valid oral or written jury-trial waiver. *State v. Kuhlmann*, 806 N.W.2d 844, 848 (Minn. 2011).²

In *State v. Davidson*, the supreme court carved out an exception to the general rule that the state must prove every element when a defendant is charged with being a prohibited person in possession of a firearm. The supreme court noted that, in “the vast majority of such cases,” the prejudice from admitting evidence of a defendant’s prior convictions outweighs the probative value. 351 N.W.2d 8, 11–12 (Minn. 1984). Therefore, a defendant should be allowed to stipulate to his ineligibility, unless the “the probative value of the evidence outweighs its potential for unfair prejudice.” *Id.* While finding no prejudicial error, the supreme court held that the district court should have permitted the stipulation and also instructed the jury that the defendant was ineligible to possess a firearm. *Id.* at 12; *see also Old Chief v. United States*, 519 U.S. 172, 190–92, 117 S. Ct. 644, 654–56 (1997) (holding that district court abuses its discretion when it declines defendant’s offer to stipulate to prior-conviction element of being a felon in possession of a firearm under federal law).³

² To be valid, the waiver must be “personal, explicit, and in accordance with rule 26.01.” *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010). Minnesota Rule of Criminal Procedure 26.01, subdivision 1(2)(a), requires that a jury-trial waiver be made “personally, 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.”

³ Based on analysis similar to that expressed in *Davidson*, the supreme court has recognized other limited exceptions to the general rule that the state must prove every element of the charged crime, for example, when a defendant’s prior convictions establish a gross

While *Davidson* did not address whether the stipulation must be offered into evidence, other settled caselaw establishes that, when a defendant stipulates to an element of an offense, the stipulation should not be offered into evidence for the jury's consideration. The effect of the stipulation is "to judicially admit the existence of that element, thereby removing the issue from the case." *Berkelman*, 355 N.W.2d at 397; *see also Kuhlmann*, 806 N.W.2d at 850 n.4 (comparing a stipulation to an element of the offense to an entry of a guilty plea because both require valid jury-trial waivers). In light of *Davidson*'s rationale, that the state generally must accept the defendant's offer to stipulate to ineligibility to avoid unfair prejudice, we conclude that it is consistent with the state's obligation to ensure a fair trial that the state should not offer the ineligibility stipulation into evidence.⁴

Here, the parties stipulated to the ineligibility element, and the district court accepted the stipulation, which was offered in writing and on the record outside the jury's presence. Moreover, Elder validly waived his right to a jury trial on this element in writing and orally on the record. Elder does not contest the validity of the stipulation or jury-trial waiver. Because the state was not required to offer the stipulation into evidence for the

misdemeanor- or felony-level offense in assault and driving-while-intoxicated cases. *See Kuhlmann*, 806 N.W.2d at 849–50; *Berkelman*, 355 N.W.2d at 397.

⁴ We note the difference between stipulating to an element of the offense and stipulating to facts. Stipulated facts are considered evidence and, therefore, must be submitted to the jury before it determines whether the state carried its burden of proving each element of the charged offense beyond a reasonable doubt. *See generally 10 Minnesota Practice*, CRIMJIG 1.02 (6th ed. 2016) (providing that a district court judge should instruct the jury at the beginning of trial that "facts that the parties agree on" are evidence).

jury's consideration, the postconviction court did not abuse its discretion in concluding that the district court did not err in denying Elder's motion for judgment of acquittal.

II. The district court did not abuse its discretion in granting the state's motion to reopen.

Minnesota Rule of Criminal Procedure 26.03, subdivision 12, expressly provides the district court discretion to grant a party's request to reopen its case and also provides instruction on the sequence of a jury trial. The relevant portions of the rule are:

- e. The prosecutor presents evidence in support of the state's case.
- f. The defendant may offer evidence in defense.
- g. The prosecutor may rebut the defense evidence, and, the defense may rebut the prosecutor's evidence. In the interests of justice, *the court may allow any party to reopen that party's case to offer additional evidence.*
- h. The prosecutor may make a closing argument.
- i. The defendant may make a closing argument.
-
- m. The court instructs the jury.
- n. The jury deliberates and, if possible, renders a verdict.

Minn. R. Crim. P. 26.03, subd. 12 (emphasis added).

A district court should consider three factors in determining whether to grant a party's motion to reopen the evidence: (1) when the request was made, (2) whether the evidence was material, not cumulative, and concerned a controlling issue; and (3) whether there was an improper purpose for failing to produce the evidence earlier. *State v. Caine*, 746 N.W.2d 339, 353 (Minn. 2008). This court reviews "the disposition of a party's request to reopen its case after the party has rested under an abuse-of-discretion standard." *Id.* at 352–53 (Minn. 2008). This court reviews a postconviction court's interpretation of the rules of criminal procedure de novo. *State v. Nerz*, 587 N.W.2d 23, 24 (Minn. 1998).

Here, the district court granted the state's motion to reopen its case, after which the court read the parties' stipulation to the jury. The postconviction court concluded that the district court did not abuse its discretion because "the court did not technically allow the case to be reopened," and the district court was merely correcting what it "considered a procedural error." Additionally, the postconviction court determined that any error did not prejudice Elder because the ineligibility element was proved beyond a reasonable doubt via the stipulation.

We agree with the postconviction court that, although the district court and parties discussed this issue as a motion to reopen during the trial, the district court did not reopen the state's case because it did not receive any evidence after it granted the state's motion. Rather, the district court clarified the jury instructions, which the parties had previously agreed upon, and informed the jury that the parties had stipulated "to the single element of [Elder's] ineligibility to possess a firearm." Thus, any analysis of the three *Caine* factors was unnecessary. The postconviction court also did not err in concluding that Elder suffered no prejudice from informing the jury of the stipulation because the ineligibility element was proved via the stipulation, and the state was not required to offer the stipulation into evidence.

III. The district court did not deny Elder his right to be tried by an impartial judge.

"Although the right to a trial before an impartial judge is not specifically enumerated in the Constitution, this principle has long been recognized by the United States Supreme Court." *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005). Whether a defendant has been denied an impartial judge is a legal question which we review de novo. *Id.* "[W]hen a

defendant has been deprived of an impartial judge, automatic reversal is required.” *Id.* at 253.

It is presumed that a judge can “approach every aspect of each case with a neutral and objective disposition.” *Troxel v. State*, 875 N.W.2d 302, 314 (Minn. 2016) (quotation omitted). To rebut this presumption, there must be “evidence of favoritism or antagonism.” *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). “A judge’s conduct must be fair to both sides, and a judge should refrain from remarks which might injure either of the parties to the litigation.” *Dorsey*, 701 N.W.2d at 250 (quotation omitted). Additionally, “[a] judge ‘should not act as counsel for a party by raising objections which the party should make.’” *State v. Schlienz*, 774 N.W.2d 361, 367 (Minn. 2009) (quoting *Hansen v. St. Paul City Ry.*, 231 Minn. 354, 360, 43 N.W.2d 260, 264 (1950)). In particular, a judge must not advocate. *Id.*; *State v. Costello*, 646 N.W.2d 204, 213 (Minn. 2002) (noting that a defendant’s fundamental rights outweigh the factfinding mission of our adversarial judicial process).

The postconviction court determined that Elder was not deprived of an impartial judge because the district court was required to ensure that both sides received a fair trial, and “it would be unfair for the defense to stipulate to evidence and then because of an error in the trial process be able to benefit from such a mistake.” Elder argues that he was denied his right to an impartial judge because the district court showed its bias toward the state when, after beginning the jury instructions and without prompting by the parties, it recessed the jury to notify the parties that the state had not submitted the ineligibility stipulation to the jury and then affirmatively suggested that the state could move to reopen its case. The state contends that the district court “plainly did not prompt the prosecutor to offer a fact

or exhibit not already in evidence” and the district court was merely “directing the trial and controlling the exhibits.”

We conclude that Elder was not denied his right to an impartial judge. During the course of trial, the district court not only determined that Elder knowingly and voluntarily waived his right to a jury trial on the ineligibility element and accepted Elder’s request to stipulate to the ineligibility element, but also the district court told the parties that it would inform the jury about the stipulation, to which neither party objected. While the district court may have accepted more responsibility than was necessary, the failure to present the stipulation to the jury clearly troubled the court. In fact, after the district court called the omission to the parties’ attention, the court noted it had “some responsibility for not having read” the stipulation. Although we conclude that the district court erred in determining that the stipulation needed to be offered into evidence, the district court approached the issue neutrally and was fair to both sides. The district court gave each side an opportunity to present arguments and provided options on how to proceed.

Any attempt by Elder to take advantage of what the district court perceived as a technical deficiency in otherwise proper trial proceedings is inappropriate in light of Elder’s unequivocal jury-trial waiver and stipulation through which prejudicial evidence was removed from the jury’s consideration. We conclude the district court’s decision to stop reading jury instructions and inform the parties, outside the jury’s presence, that the stipulation had not been read to the jury, did not prejudice Elder and was within the district court’s discretion in managing the trial and properly instructing the jury. *State v. Blom*, 682 N.W.2d 578, 609 (Minn. 2004) (“[C]ourts are vested with discretion in managing trials.”);

State v. Baird, 654 N.W.2d 105, 113 (Minn. 2002) (providing discretion to district courts in selecting jury instructions). Accordingly, the postconviction court did not abuse its discretion in concluding that Elder was not denied his constitutional right to an impartial judge.

IV. The district court did not abuse its discretion in instructing the jury that the ineligibility element was proved beyond a reasonable doubt.

“Jury instructions, reviewed in their entirety, must fairly and adequately explain the law of the case.” *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). “A trial court is given considerable latitude in selecting the language of jury instructions, but instructions may not materially misstate the law.” *Baird*, 654 N.W.2d at 113.

Relevant to this appeal, the district court instructed the jury as follows:

The elements of Ineligible Person in Possession of a Firearm are: First, that the defendant knowingly possessed or received a firearm. Second, the defendant has been determined to be ineligible. The defendant and the State have stipulated that the defendant is ineligible. This element has been proven beyond a reasonable doubt. Third, the Defendant’s act took place on or about December 10th, 2011, in Ramsey County.

The postconviction court concluded that, because Elder validly waived his right to have a jury determine his ineligibility beyond a reasonable doubt, the district court did not err in instructing the jury that the ineligibility element was proved beyond a reasonable doubt. Elder asserts that the district court deprived him of his right to have a jury determine each element of the offense beyond a reasonable doubt. Elder further contends that the jury instructions were structural error requiring automatic reversal. *See State v. Moore*, 699 N.W.2d 733, 738 (Minn. 2005) (holding that reversal is required and harmless-error

analysis is inapplicable when a jury instruction “deprives the defendant of the right to have the jury determine that every element of the charged offense has been established”).

The state counters, arguing that this court should review the district court’s jury instructions for plain error because Elder did not object to them at trial. *See Baird*, 654 N.W.2d at 113 (holding that unobjected-to jury instructions are reviewed for plain error, requiring a showing that there was plain error affecting the defendant’s substantial rights); *see also State v. Watkins*, 840 N.W.2d 21, 25–28 (Minn. 2013) (discussing standard for reviewing unobjected-to jury instructions which omitted an element of the charged offense). Because we conclude that the district court’s jury instructions were not erroneous, Elder’s claim fails under either the structural-error or plain-error standard of review.

Davidson directed district courts to instruct the jury that the “defendant had stipulated that under Minnesota law he was not entitled to possess a pistol and that therefore the jury should direct its attention to the issue of whether or not the state had established beyond a reasonable doubt that he possessed the pistol, either actually or constructively.” 351 N.W.2d at 12. The district court’s jury instructions in this case followed the pattern set out in *Davidson*.

Because Elder validly waived his right to have a jury determine his ineligibility beyond a reasonable doubt, we conclude that the postconviction court did not abuse its discretion in determining that the district court properly instructed the jury that the ineligibility element had been proved beyond a reasonable doubt. *See, e.g., Kuhlmann*, 806 N.W.2d at 851–52 (holding that district court’s failure to obtain a valid jury-trial waiver

before accepting a stipulation to an element of the crime was not reversible error because defendant received a jury trial on the remaining elements of the charged crime).

Affirmed.