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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0268**

State of Minnesota,
Respondent,

vs.

Warren Patrick Banks, Jr.,
Appellant.

**Filed January 22, 2019
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-17-19591

Keith M. Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neil Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Warren Patrick Banks Jr. appeals from his conviction for possessing ammunition while being ineligible to do so. He argues that the district court committed

structural error by instructing the jury that it must accept that Banks was ineligible to possess ammunition. Because Banks waived his right to a jury trial on that element and did not effectively withdraw his waiver, we affirm.

FACTS

In August 2017, police officers responded to a report of a van emitting loud music. They found Banks sleeping in the van and, in the course of their interaction with him, found a gun and ammunition in the vehicle. Banks was charged with one count of being an ineligible person in possession of a firearm and one count of being an ineligible person in possession of ammunition.

On the record, before beginning jury selection, the parties discussed a potential stipulation that Banks was ineligible to possess either a firearm or ammunition. Banks was agreeable to the stipulation, but it was not finalized at that time.

The parties subsequently stipulated that Banks was ineligible to possess a firearm or ammunition. In response to questioning by the district court, Banks agreed that he was waiving the requirement of proof beyond a reasonable doubt on that element. The court indicated that it would read the stipulation, saying that the jury “must accept” Banks’s ineligibility, both at the close of the state’s case-in-chief and in the jury instructions. Banks did not object.

Based on the parties’ stipulation, the state did not introduce evidence of Banks’s past convictions that made him ineligible to possess firearms or ammunition. At the close of the state’s case-in-chief, the court described the stipulation to the jury: “So, ladies and gentlemen of the jury, the parties have stipulated in this case—the parties have stipulated

and therefore you must accept, that on August 6, 2017, the defendant, Mr. Banks, could not legally possess a firearm or ammunition.” Banks again did not object.

Then, while discussing jury instructions, the state asked the court to include an instruction that the second element of both counts—Banks’s ineligibility to possess a firearm or ammunition—had been proved beyond a reasonable doubt. Banks objected. The court told Banks that he had already stipulated to the instruction. Banks responded: “Right. Now [the prosecutor is] asking you to say to them something that’s already . . . been said and done.” The court reiterated that Banks had agreed to the instruction, and Banks continued to object that the information had already been given to the jury. The discussion became side-tracked and ended without Banks re-agreeing to the instruction.

As part of its final instructions to the jurors, the court told them that they “must accept” that Banks could not legally possess a firearm or ammunition on the day in question.

The jury found Banks guilty of being an ineligible person in possession of ammunition but not guilty of being an ineligible person in possession of a firearm. Banks appeals, arguing that he “only agreed that the jury would hear *evidence* that he stipulated that he was ineligible.” He argues that he never waived his right to a jury trial on the issue of his ineligibility and that the mandatory instruction on that element therefore violated his “right to have the jury determine that every element of the charged offense has been established.” *State v. Moore*, 699 N.W.2d 733, 738 (Minn. 2005). He argues that the error was structural, requiring reversal without consideration of whether it was harmless.

DECISION

Whether Banks properly waived his right to a jury trial is an issue that is reviewed de novo. *See State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011). Waivers of jury trials are controlled by Minn. R. Crim. P. 26.01. *See State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010). For a waiver to be valid, a defendant must waive the right “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.” Minn. R. Crim. P. 26.01, subd. 1(2)(a). The district court must approve the waiver. *Id.* These requirements are strictly construed. *Fluker*, 781 N.W.2d at 402.

The district court asked Banks whether he understood “that typically, the State would be required to prove each and every element with proof beyond a reasonable doubt,” and whether he was “agreeing to give up or waive that requirement for [the] element [of his ineligibility].” Banks replied affirmatively to both questions. When asked whether he had had enough time to discuss the stipulation with his attorney, Banks again replied, “yeah.” The court said that it intended to include the stipulation both in the jury instructions and at the end of the state’s case-in-chief, and Banks did not object. Banks made these statements himself, on the record, in open court. This was a valid waiver of Banks’s right to have a jury find beyond a reasonable doubt that he was ineligible. Minn. R. Crim. P. 26.01, subd. 1(2)(a).

However, Banks subsequently objected to the inclusion of the stipulation as an instruction to the jury. On appeal, he relies on that objection, arguing that it shows that “he only agreed that the stipulation was a piece of evidence that would be presented to the jury

during the evidentiary portion of the trial.” That argument ignores the language of his earlier statements, in which he expressly waived the right to have a jury find the element beyond a reasonable doubt. Because Banks’s initial comments were a valid waiver of his right to a jury trial, the most liberal interpretation of his later comments is that they were an attempt to withdraw the initial waiver.¹

A defendant may withdraw the waiver of a jury trial any time before the trial begins. Minn. R. Crim. P. 26.01, subd. 1(3). The comments to the rules reflect that trial begins when jeopardy attaches—that is, when the jury is sworn. Minn. R. Crim. P. 26.01, subd. 1(3) cmt.; see *State v. Yeboah*, 691 N.W.2d 87, 91 (Minn. App. 2005) (“Jeopardy attaches as soon as the jury is sworn.”), *review denied* (Minn. Apr. 19, 2005).

Though phrased permissively—a defendant “may withdraw the waiver . . . any time before trial begins”—the negative implication of Minn. R. Crim. P. 26.01, subd. 1(3), is that a defendant may not withdraw a waiver after trial begins. The negative implication is

¹ It is also plausible to interpret Banks’s comments as demanding that the issue be wholly removed from the jury. See *State v. Davidson*, 351 N.W.2d 8, 11 (Minn. 1984) (“We believe that generally in a prosecution for being a felon in possession of a weapon the defendant should be permitted to remove the issue of whether he is a convicted felon by stipulating to that fact.”). Caselaw suggests that the jury should be instructed that the defendant has already been determined to be ineligible, and that jurors need not concern themselves with that element. See, e.g., *id.* at 12 (“The [district] court should have . . . instructed the jury to the effect 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 [possession] . . .”). Such an instruction would differ from the one given here because the jury would not be instructed to make any findings; it would simply be told that the element had already been proved. But regardless of which instruction was given, the jury could not have made an independent finding that the state had failed to prove that Banks was ineligible to possess a firearm or ammunition. Because the effect of the two instructions would be the same, any error that occurred was harmless.

supported by caselaw. In *State v. Johnson*, this court relied on that subdivision in holding that a defendant could not withdraw his waiver of the right to a jury trial after trial and sentencing. 689 N.W.2d 247, 252-53 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). The only temporal reference in Rule 26.01, subd. 1(3), is to the start of trial. Neither the rule itself nor any published case differentiates between withdrawal after trial has begun but before it has ended—as in this case—and withdrawal after trial has begun and after it has ended—as in *Johnson*. See *Johnson*, 689 N.W.2d at 252-53. Thus, once a jury is sworn, a defendant may not withdraw a waiver of the right to trial by jury. Banks did not object to the instruction until after the jury had been sworn and after the prosecution had already rested. In reliance on the stipulation and waiver, the state did not introduce evidence of Banks’s previous criminal convictions. Even if his comments are interpreted as an attempt to withdraw his waiver, they were too late to be effective.

When a criminal defendant waives the right to a jury trial on an element, the court may direct a verdict on that element. *State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984) (stating that the general rule against directing a verdict on an element does not apply where there has been “a judicial admission by the defendant”). Banks properly waived his right to a jury trial on the element of his ineligibility and did not withdraw his waiver. The district court therefore did not err in instructing the jury that it “must accept” that Banks was prohibited from possessing ammunition on the relevant date.

Because the district court’s instruction was not erroneous, we do not consider whether the purported error would have been structural.

Affirmed.