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I. ISSUE PRESENTED

- A. Unlike the situation wherein a defendant waives the right to a jury determination on all essential elements of an offense, where a defendant stipulates to less than all the elements required to establish guilt, the trial court need not question the defendant personally about the stipulation and resulting waiver if the record indicates that he was, or should have been aware of its effect. Nguyen's counsel stipulated to his prior convictions, the stipulation was read to the jury in Nguyen's presence, and his counsel did not object to a jury instruction that reiterated the stipulation. Was the effective waiver to a jury determination on the existence of the prior convictions voluntary?

II. STATEMENT OF THE CASE

The State charged Hoang Xuan Nguyen with two counts of felony violation of a no-contact order, pursuant to RCW 26.50.110(5).¹ The case proceeded to trial on November 3, 2008. Nguyen was assisted by a certified Vietnamese interpreter.² In addressing the State's motions *in limine*, Nguyen's counsel indicated that, based on a discussion in chambers, he and the deputy prosecutor would be entering a stipulation as to Nguyen's prior no-contact order convictions.³ The trial judge asked Nguyen's counsel to confirm that it was okay with Nguyen that the attorneys met with the judge in chambers outside Nguyen's presence.

1 CP 3, 4.

2 Trial RP at 4.

3 Trial RP at 5.

Counsel consulted with his Nguyen, then stated, “I conferred with my client. I explained to him [sic] what the topics we discussed. He has no objection.”⁴ Nguyen’s counsel further stated that he planned to submit a jury instruction to address the stipulation.⁵ The State also proposed—and the trial court admitted—certified copies of Nguyen’s prior convictions for violation of a no-contact order⁶. These were admitted on a limited basis, and did not go to the jury, because the parties instead stipulated to the existence of the aforementioned prior convictions.⁷ Nguyen’s attorney did not object.

Jury Instruction number 12 states:

The parties have agreed that the following evidence will be presented to you:

“The parties have entered into the following agreements concerning evidence in the defendant’s jury trial:

The parties stipulate and agree that the defendant has the following prior convictions:

Violation of a No Contact Order Domestic Violence, 04-1-00027-4, conviction date of February 24, 2004

Violation of a No Contact Order Domestic Violence, 02-1-01519-4, conviction date of January 21, 2003”

4 Trial RP at 12.

5 Trial RP at 8.

6 Trial RP at 10, 89; EX 2-7.

7 Trial RP 5, 10.

This is evidence that you will evaluate and weigh with all of the other evidence.⁸

The defense did not object to the court's proposed instructions.⁹

The jury found Nguyen guilty on Count I, and acquitted him on Count II.¹⁰

The jury returned a special verdict (as to each count) indicating that they found that he had twice been previously convicted of violating the provisions of a valid no-contact protection order.¹¹

III. ARGUMENT

- A. UNLIKE THE SITUATION WHEREIN A DEFENDANT WAIVES THE RIGHT TO A JURY DETERMINATION ON ALL ESSENTIAL ELEMENTS OF AN OFFENSE, WHERE A DEFENDANT STIPULATES TO LESS THAN ALL THE ELEMENTS REQUIRED TO ESTABLISH GUILT, THE TRIAL COURT NEED NOT QUESTION THE DEFENDANT PERSONALLY ABOUT THE STIPULATION AND RESULTING WAIVER IF THE RECORD INDICATES THAT HE WAS, OR SHOULD HAVE BEEN AWARE OF ITS EFFECT. NGUYEN'S COUNSEL STIPULATED TO HIS PRIOR CONVICTIONS, THE STIPULATION WAS READ TO THE JURY IN NGUYEN'S PRESENCE, AND HIS COUNSEL DID NOT OBJECT TO A JURY INSTRUCTION THAT REITERATED THE STIPULATION. WAS THE EFFECTIVE WAIVER TO A JURY DETERMINATION ON THE EXISTENCE OF THE PRIOR CONVICTIONS VOLUNTARY?

8 CP 26.

9 Trial RP at 136.

10 CP 8, 9.

Nguyen contends that by stipulating to his two prior convictions for violation of a no-contact protection order, his counsel waived Nguyen's constitutional right to have the jury decide whether he had been convicted of these two prior offenses, in violation of the procedural safeguards described in *State v. Treat*,¹² which require that a defendant's waiver of his or her right to a jury trial must be knowing, intelligent, and voluntary and that the defendant waive the right in writing or orally on the record.¹³ He argues that this waiver was invalid because it was not signed by the defendant, and there was no colloquy specifically addressing whether Nguyen understood the implications of stipulating to his prior convictions.

Although the stipulation effectively waived Nguyen's right to have the jury determine whether the State had proved the two prior convictions for violation of a protection order,¹⁴ where the court stated that waiver of a jury determination on single element of an offense is not the same as waiver of the right to a jury trial in its entirety.¹⁵ Unlike the defendant in *Treat*, Nguyen did not waive his right to a jury trial in its entirety. Here,

11 CP 10.

12 109 Wn. App. 419, 35 P.3d 1192 (2001),

13 *Treat*, 109 Wn. App. at 427-28.

14 *United States v. Mason*, 85 F.3d 471 (10th Cir., 1996),

15 *United States v. Ferreboeuf*, 632 F.2d 832 (1980), *cert. denied*, 450 U.S. 934, 67 L. Ed. 2d 368, 101 S. Ct. 1398 (1981).

the jury still had the duty to determine whether the State had proven the elements of the offenses; thus, the procedural protections announced in *Treat* do not necessarily apply.

The inquiry into the validity of a defendant's waiver of a constitutional right depends on the nature of the right waived and the consequences of the waiver.¹⁶ When the waiver involves important rights and carries with it serious consequences, the trial court is required to accept the waiver with extreme caution and to ensure that the defendant understands the nature and consequences of the waiver.

At one end of the spectrum, a guilty plea relieves the State from having to prove any element of the alleged offense, offers no hope of acquittal, and precludes the defendant from offering any legal or factual defense or appealing the conviction under most circumstances.¹⁷ Thus, a court accepting a guilty plea must engage in a colloquy on the record that demonstrates the defendant is making the waiver knowingly, voluntarily, and intelligently with a full understanding of the charges and the consequences the plea.¹⁸ But because a defendant's waiver of his or her right to a jury trial in favor of a bench trial does not preclude acquittal, prevent him or her from presenting a defense, or waive his or her right of

16 *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994).

17 *State v. Wiley*, 26 Wn. App. 422, 425-26, 613 P.2d 549, *review denied*, 94 Wn.2d 1014 (1980).

appeal, the assurances of validity required are not as stringent as those required for a guilty plea.¹⁹ Accordingly, when a defendant chooses to waive her right to a jury trial in its entirety, the record must show only that the defendant made this waiver voluntarily, knowingly, and intelligently, and the waiver must be made either in writing or orally on the record.²⁰ Further, when a defendant only partially waives his or her right to trial before 12 jurors by agreeing to a smaller jury panel, the record need only reflect some personal expression of waiver by the defendant or that counsel or the court discussed the waiver with the defendant before it was entered.²¹ On the other hand, a stipulation is "functionally and qualitatively different" from a guilty plea if the stipulation does not preclude the defendant from arguing the issue of guilt and presenting a legal or factual defense.²² A stipulation may remove an element of the offense from the jury's consideration, but Nguyen's argument that the stipulation here was tantamount to a waiver of his right to a jury trial is unpersuasive. Although the jury was relieved of the burden of determining the degree of the crime, the issue of Nguyen's guilt was still

18 CrR 4.2(d).

19 *Stegall*, 124 Wn.2d at 725 (no "colloquy or on-the-record advice as to the consequences of [the] waiver" required when defendant waives right to jury trial).

20 *Treat*, 109 Wn. App. at 427-28; *Stegall*, 124 Wn.2d at 725.

21 *Stegall*, 124 Wn.2d at 725.

22 *Wiley*, 26 Wn. App. at 425.

before the jury. Interestingly, Nguyen asserts that the existence of prior convictions is not an element of the offense, but rather only raises the level of the offense from a gross misdemeanor to a felony.²³ Although there appears to be no state case directly on point, federal cases support the conclusion that when a defendant stipulates to less than all the elements required to establish guilt, the trial court need not ensure that the defendant understands the effect of the waiver or question the defendant personally about the stipulation and resulting waiver.²⁴ Instead, unless the defendant objects, the trial court is entitled to rely on defense counsel's stipulation to facts that establish an element of the offense.²⁵ Indeed, the Ninth Circuit has specifically addressed the issue of whether a trial court must question the defendant personally regarding whether a stipulation to a crucial fact was voluntary, and it has declined to impose such a requirement. Instead, the court held that:

when a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates

23 Brief of Appellant at 4.

24 *Ferreboeuf*, 632 F.2d at 835-36.

25 *Id.* at 836.

objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation.²⁶

In the present case, Nguyen's counsel entered a formal stipulation in open court, after a discussion in chambers. At the trial court's request, counsel conferred with Nguyen and told the court that he explained the topics discussed in the pre-trial in-chambers conference. As the stipulation was one such topic, it may be presumed that Nguyen's lack of objection to the conference held outside his presence included the stipulation. Further, counsel told the court that he contemplated submitting a jury instruction to address the stipulation. There is no indication on the record that Nguyen objected when the stipulation was read to the jury. Finally, when the trial court proposed its instructions, neither Nguyen nor his counsel objected to Instruction 12. The instruction itself did not actually relieve the State of its burden of proving the prior convictions, because—by its terms—it allowed the jury to ascribe whatever weight it wished to the stipulated-to evidence. With the exception of the in-chambers discussion, all of the foregoing occurred in Nguyen's presence, and with the assistance of a court-certified interpreter. Accordingly, under these circumstances, the trial court was entitled to presume that Nguyen agreed with and approved of his counsel's actions

²⁶ *Id.*

and any resulting waiver was valid. Further, because Nguyen's counsel agreed to this stipulated instruction the invited error doctrine would apply.²⁷

IV. CONCLUSION

Nguyen was present when his attorney agreed to stipulate to his prior convictions for violation of a no-contact protection order. His trial counsel stated on the record that he informed Nguyen of the in-chambers pretrial meeting, and the matters discussed therein. Nguyen was present when the stipulation was presented to the jury, and when his counsel agreed to the instruction which contained the stipulation and the weight the jury should ascribe to it. At no point did he object. Because the stipulation waived a jury determination on only one aspect of his case—not even an essential element of the offense, but rather a finding which raised it to a greater degree of offense, and because the stipulation was to his benefit as it prevented the jury from seeing the documents establishing the details of the prior convictions, the lower court's failure to specifically inquire as to whether he fully understood the implications of entering into

²⁷ *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990) (doctrine of invited error applies even when error alleged is of constitutional magnitude).

the stipulation was not reversible error, if it was error at all. Nguyen's claim should be rejected.

Respectfully submitted this 20th day of July, 2009.

EDWARD G. HOLM

Thurston County Prosecuting Attorney

By:


J. ANDREW TOYNBEE, WSBA #22582
Criminal Trials Division Chief

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DIVISION II

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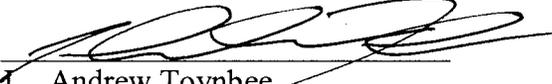
CERTIFICATE

I certify that on 7/20/09, I mailed a copy of the foregoing
response by depositing same in the United States Mail, postage pre-paid,
to the following parties at the addresses indicated:

David C. Ponzoha—Clerk
Court of Appeals--Div. II
950 Broadway
Suite 300
Tacoma, WA 98402-4454

Anne Cruser
P.O. Box 1670
Kalama, WA 98625

DATED this 20 day of July, 2009.


s. Andrew Toyne
Attorney for Respondent
WSBA No. 22582