

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3178-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY DANIEL EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. Billy Evans appeals from a judgment convicting him of battery by a prisoner as a habitual offender and sentencing him to six years in prison. He claims that the State was improperly relieved of the burden of proving an element of the offense by defense counsel's stipulation that Evans was

a prisoner at the time of the incident. We are satisfied, however, that the stipulation did not remove any elements of the offense from the jury's consideration. We therefore affirm.

BACKGROUND

¶2 The information alleged that Evans intentionally caused bodily harm to a correctional officer while he was confined at the Rock County Jail. The State sought to admit testimony and a judgment of conviction to show that Evans was legitimately confined in jail at the time of the incident. Defense counsel offered to stipulate that Evans was being held in jail on cash bond pending appeal in case no. 96-CM-547B¹ to avoid having the State present evidence that Evans had been convicted of resisting a police officer.² The State accepted the stipulation and refrained from presenting evidence on the nature of any of Evans' prior convictions. The trial court instructed the jury that stipulations were to be accepted as evidence and that the parties had stipulated that Evans was a prisoner being held in jail on cash bond at the time of the alleged offense. Evans did not personally voice his approval of the stipulation or indicate that he would waive his right to a jury trial on all elements of the offense.

¹ After the conviction, defense counsel learned that Evans was actually on recognizance bond in case no. 96-CM-547B at the time of the incident. However, as the State pointed out, Evans was also serving a separate sentence and being held on cash bond in two other cases.

² Defense counsel first noted that Evans kept insisting that he not stipulate to an element of the offense. However, a few moments later, following a discussion of the evidence which the State would be allowed to admit to prove Evans' status as a prisoner, defense counsel indicated that Evans was willing to stipulate that he was being held in jail in lieu of bond when the alleged incident occurred.

STANDARD OF REVIEW

¶3 We will independently review whether the stipulation deprived Evans of his constitutional and statutory right to a jury trial. *See State v. Benoit*, 229 Wis. 2d 630, 634, 600 N.W.2d 193 (Ct. App. 1999), *review denied*, 604 N.W.2d 571 (1999).

ANALYSIS

¶4 A jury trial is a fundamental right which can be waived only by the defendant personally. *See State v. Albright*, 96 Wis. 2d 122, 130-31, 291 N.W.2d 487 (1980). The right applies to every element of an offense. *See State v. Villarreal*, 153 Wis. 2d 323, 332, 450 N.W.2d 519 (Ct. App. 1989). Therefore, no element of a crime may be submitted to the trial court rather than the jury for determination unless the record demonstrates a voluntary, knowing and intelligent waiver. However, a defendant is not deprived of a jury trial by a factual stipulation so long as all of the elements of the crime are submitted to the jury. *See Benoit*, 229 Wis. 2d at 638.

¶5 The parties agree that Evans' status as a prisoner who was confined in a county detention facility for a violation of the law was an element of the offense charged. They stipulated that he was being held in jail on cash bond. This is a factual stipulation. The record shows the jury was instructed that it must find Evans was a prisoner before finding him guilty. The element was adjudicated by the jury, not the trial court. Therefore, no personal waiver of the right to a jury trial was required to validate the stipulation. *See id.*; *see also State v. Aldazabal*, 146 Wis. 2d 267, 268-69, 430 N.W.2d 614 (Ct. App. 1988). The trial court properly relied upon counsel's representation that the stipulation was being made for the strategic purpose of excluding potentially prejudicial testimony.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

