2017 IL App (1st) 150229-U

No. 1-15-0229

Order filed August 4, 2017

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 07198
	)	
WILLIE POWELL,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The record sufficiently established that defendant knowingly and understandingly waived his right to a jury trial. The mittimus is modified.

¶ 2 Following a bench trial, defendant Willie Powell was found guilty of two counts of aggravated battery with a firearm, four counts of aggravated discharge of a firearm, and four counts of aggravated unlawful use of a weapon. The trial court merged all counts into the two aggravated battery counts and sentenced defendant to nine years in prison for each count to be

served concurrently. On appeal, defendant contends that the trial court committed reversible error because it failed to ensure that he knowingly and intelligently waived his right to a jury trial. Defendant also challenges the count numbers listed on the mittimus for the aggravated battery counts. For the reasons below, we affirm defendant's conviction but order modification of the mittimus.

¶ 3 Defendant's conviction arose from a drive-by shooting incident that occurred on April 4, 2014. Jalen Searcy, who is not a party to this appeal, was the shooter and the driver of the vehicle, and defendant was a passenger in Searcy's vehicle. At the August 5, 2014, court date prior to trial, the trial court asked defense counsel in defendant's presence, "Bench or jury?" Defense counsel responded, "Indicated bench, Judge." At the next court day, September 8, 2014, the following exchange occurred between defense counsel and the trial court, again in defendant's presence:

> "THE COURT: As to Willie Powell, it will be motion State October 27th.
>
> [DEFENSE COUNSEL]: We will continue the demand.
>
> THE COURT: With for bench. It's still a bench trial?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Defendant demands trial."

¶ 4 On the day of trial, October 29, 2014, prior to opening statements, the trial court and defendant engaged in the following exchange regarding defendant's jury waiver:

> "THE COURT: All right. Mr. Powell, your attorney has just handed me a document which indicates that you want to waive or give up your right to a trial by jury. Is that your signature on the jury trial waiver?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know what a jury trial is?

THE DEFENDANT: Yes, sir.

THE COURT: Anybody force you or threaten you in any way to get you to waive your right to a trial by jury?

THE DEFENDANT: No, sir.

THE COURT: Did anyone promise you anything to get you to waive that right?

THE DEFENDANT: No, sir.

THE COURT: All right. You did it out of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about what a jury is, what a jury does or about the fact that you're the only person in this room that can waive your right to a trial by jury?

THE DEFENDANT: No, sir.

THE COURT: Jury waiver will be accepted, made part of the court file in this particular case."

The record contains a preprinted "Jury Waiver" form signed by defendant and filed with the clerk of the circuit court on October 29, 2014, stating "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing."

¶ 5 After opening statements, the State proceeded with its case. Andre Jackson and Michael Pitts testified that, on the day in question, while they were sitting in a vehicle in the area of 3444 West Walnut Street, in Chicago, they heard about six or seven gunshots hit their car. Pitts and Jackson both suffered a gunshot wound from the incident.

¶ 6 Chicago police officer Wayne Novy testified that on the day in question, while he was conducting narcotics surveillance near the subject location, he heard about six or seven gunshots. When he turned his attention to the gunshots, he saw a muzzle flash come from the driver's side door of a white van and saw the van speed off. Chicago police officer Nicholas Cervantes testified that he and his partner stopped the white van shortly after Officer Novy radioed them about the shooting. Seven passengers were in the van, including defendant, who was sitting in the middle row behind the passenger seat. Officer Cervantes observed shell casings on the floor and a small pistol under the front passenger side seat, on the floor by defendant's feet.

¶ 7 The State called Robert Gilmore, Devontae Searcy, and Devon Harris, who were passengers in the van, as witnesses. Gilmore testified that he remembered hearing two gunshots but did not remember seeing a gun in the van. The State showed Gilmore People's Exhibit No. 4, a typewritten statement taken after the incident, and he testified that his signature was on the document. Gilmore's statement stated that Jalen Searcy asked defendant for the gun and that defendant gave Jalen Searcy the gun prior to Jalen Searcy shooting at the vehicle. Devontae Searcy testified that he did not remember seeing a gun, seeing Jalen Searcy shooting, or seeing defendant hand Jalen Searcy the gun. The State showed him People's Exhibit No. 5, a typewritten statement taken after the incident, and he testified that his signature was on the document. Devontae Searcy's statement also stated that Jalen Searcy asked defendant for the gun and that defendant gave Jalen Searcy the gun prior to Jalen Searcy shooting at the vehicle. Devon Harris testified that he never saw a gun in the car, Jalen Searcy holding a gun, defendant give Jalen Searcy a gun, or Jalen Searcy hand defendant the gun back. The State showed Harris People's Exhibit No. 6, a typewritten statement taken after the incident, and he testified that his

signature was on the document. Harris's statement stated that "someone" asked defendant for the gun, that Jalen Searcy's door opened, and that there were six, seven, or eight gunshots. Assistant State's Attorney Reardon testified that he spoke with Gilmore, Devontae Searcy, and Harris after the incident and that all three agreed to take a statement. Reardon identified People's Exhibits No. 4, 5, and 6 as the statements that Gilmore, Devontae Searcy, and Harris took after the incident, and the statements were admitted into evidence.

¶ 8 Chicago police detective John Hillman testified that, after he read defendant his *Miranda* warnings, defendant indicated that he understood his rights and wanted to answer questions. Detective Hillman testified that defendant told him that when they were driving around, Jalen Searcy saw people that he knew from a prior conflict; drove the van to a vehicle; pointed the gun directly at the vehicle and fired at it; "tossed" the gun back to defendant, who was sitting in the middle row on the passenger's side; and that defendant dropped the gun on the floor and kicked it.

¶ 9 The State presented various stipulations by the parties. Following closing argument, the trial court found defendant guilty of two counts of aggravated battery with a firearm, four counts of aggravated discharge of a firearm, and four counts of aggravated unlawful use of a weapon. All counts were merged into the two aggravated battery counts. The trial court denied defendant's motion for a new trial and sentenced him to nine years in prison for each count of aggravated battery with a firearm, to be served concurrently.

¶ 10 Defendant contends on appeal that the trial court committed reversible error because it did not ensure that he knowingly and intelligently waived his right to a jury trial. Defendant argues that the trial court did not establish that he understood that he had a constitutional right to

a jury trial, or ensure that he understood the "substance" of his constitutional right, as it did not inform him about the nature of a jury trial and the difference between a bench and jury trial. He asserts that his discussion with the trial court regarding his jury waiver did not establish that he knowingly and intelligently waived his right to a jury trial. Defendant requests that we reverse his conviction and remand for a new trial.

¶ 11 As an initial matter, to preserve a claim for review, a defendant must both object at trial and include the issue in a written posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Defendant argues, and the State concedes, that even though he did not object to the validity of the jury waiver in the trial court, we may review this issue under the plain error doctrine. Pursuant to the plain error doctrine, the reviewing court may review a forfeited issue affecting substantial rights if: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The issue of whether a defendant's fundamental right to a jury trial was violated may be reviewed under the plain error rule. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). However, when we review a contention under the plain error doctrine, we must first determine whether any error occurred at all (*People v. Bannister*, 232 Ill. 2d 52, 65 (2008)) because if there is no error, there can be no plain error (*People v. Reed*, 2016 IL App (1st) 140498, ¶ 11).

¶ 12 The right to a jury trial is a fundamental constitutional right. *Bracey*, 213 Ill. 2d at 269. This right also includes the right to waive a jury trial. *Bannister*, 232 Ill. 2d at 65. These rights

are provided in the Code of Criminal Procedure (Code) as follows: "Every person accused of an offense shall have the right to a trial by jury unless (i) understandingly waived by defendant in open court[.]" 725 ILCS 5/103-6 (West 2014). For a defendant's jury trial waiver to be valid, it must have been knowingly and understandingly made. *Bracey*, 213 Ill. 2d at 270.

¶ 13 While the trial court must ensure that a defendant understandingly waived the right to a jury trial, there is no set admonition or advice that the trial court is required to give for a jury waiver to be valid. *People v. Tooles*, 177 Ill. 2d 462, 469 (1997). Whether a jury waiver is valid does not rest on any "precise formula" but depends on the facts and circumstances of each case. *People v. Clay*, 363 Ill. App. 3d 780, 791 (2006). If a defendant's attorney requests a bench trial in the presence of a defendant and he remains silent, that silence provides evidence that the jury waiver is valid. *Reed*, 2016 IL App (1st) 140498, ¶ 7. Moreover, while a signed jury waiver form alone may be insufficient to establish that a defendant understandingly waived his right to a jury trial, a signed waiver is evidence that a waiver was knowingly made. *Id.* It is a defendant's burden to establish that his jury waiver was invalid. *Id.* Because the facts are not in dispute in this case, we review *de novo* the issue of whether defendant knowingly and understandingly waived his fundamental right to a jury trial. *Bracey*, 213 Ill. 2d at 270.

¶ 14 Here, the facts and circumstances support a finding that defendant's jury waiver was knowingly and understandingly made. At two court dates prior to trial, defense counsel informed the trial court in defendant's presence that defendant was proceeding with a bench trial. Defendant did not object or ask questions at either time. *People v. Asselborn*, 278 Ill. App. 3d 960, 962-63 (1996) (where defense counsel and the trial court engaged in a colloquy prior to opening statements, the defendant was present, and the defendant did not object, the reviewing

court found that the defendant's jury wavier was valid, stating, "A defendant, who permits his counsel in his presence and without objection to waive his right to a jury trial, is deemed to have acquiesced in, and is bound by his counsel's actions."); *In re R.A.B.*, 197 Ill. 2d 358, 364 (2001) ("[a] jury waiver may be valid if it is made by defense counsel in the defendant's presence and the defendant does not object"). In addition, the record indicates that on October 29, 2014, defendant filed a signed jury waiver form. *Reed*, 2016 IL App (1st) 140498, ¶ 7 ("Although a signed jury waiver alone does not prove a defendant's understanding, it is evidence that a waiver was knowingly made."). Furthermore, on the day of the trial, the trial informed defendant that his counsel had handed him "a document which indicates that you want to waive or give up your right to a trial by jury," and asked defendant if it was his signature on the jury waiver form, if he knew what a jury trial was, and if he was waiving this right out of his own free will. Defendant responded "Yes, Sir" to these questions. The trial court asked defendant if anybody forced him or threatened him in any way to get him to waive his right to a jury trial, and if he had any questions about what a jury is, what it does, "or about the fact that you're the only person in this room that can waive your right to a trial by jury." Defendant responded "No, sir" to these questions. At the conclusion of the exchange, the trial court stated that the jury waiver would be accepted and made part of the court file. We conclude that under these particular facts and circumstances, defendant knowingly and understandingly waived his right to a trial by jury. *Clay*, 363 Ill. App. 3d at 791-92 (where the trial court asked the defendant if she knew what a jury trial was, informed her that she had the right to have a jury trial, and asked her whether she was giving up her right to a jury trial, the reviewing court found a valid jury waiver, noting, "[d]efendant was represented by counsel, acknowledged she understood the meaning of a jury trial and specifically stated she was giving up that right. She then signed the jury waiver and

tendered it to the court. Under these circumstances, we find defendant knowingly waived her right to a jury trial.").

¶ 15 To support his argument that the trial court did not adequately determine whether he understood the meaning and implication of a jury waiver, defendant cites *People v. Tooles*, 177 Ill. 2d 462 (1997). We do not find *Tooles* persuasive. In *Tooles*, the supreme court explained that the "sole question presented" was whether a defendant's conviction should be reversed and remanded for a new trial where the trial court did not obtain a written jury waiver form in violation of section 115-1 of the Code (725 ILCS 5/115-1 (West 1992)). *Tooles*, 177 Ill. 2d at 464. The court held that a trial court's failure to comply with the written waiver requirement in section 115-1 "does not result in reversal so long as the defendant's waiver was made understandingly in accordance with section 103-6 of the Code of Criminal Procedure. 725 ILCS 5/103-6 (West 1992)." *Id.* at 468. While the court discussed the colloquies between the trial courts and the respective defendants, the court did not mandate that a trial court must give certain admonishments for jury waiver to be valid, and it specifically stated, "[W]hile the circuit court must insure that a defendant's jury waiver is understandingly made, no set admonition or advice is required before an effective waiver of that right may be made." *Id.* at 469. Here, unlike the defendants in *Tooles*, defendant signed a jury waiver form, and the trial court confirmed that it was his signature on the form. Moreover, because *Tooles* does not stand for the proposition that there is a set admonition or advice that the trial court must give for a jury waiver to be valid, we reject defendant's reliance on *Tooles*.

¶ 16 In addition, defendant cites *People v. Sebag*, 110 Ill. App. 3d 821 (1982), to support his argument that the trial court did not adequately advise him of the meaning of a jury trial or the

implications of waiving this right. *Sebag* is distinguishable from the facts of the instant case. In *Sebag*, the defendant was not represented by counsel. *Sebag*, 110 Ill. App. 3d at 829. The trial court's colloquy with the defendant regarding the jury waiver occurred at arraignment on one of his charges but did not relate to the charge that he was convicted of at trial, as he had not yet been arraigned on that charge. *Id.* at 828-29. The trial court's exchange with the defendant regarding the jury waiver consisted of the trial court informing the defendant, "You are entitled to have your case tried before a jury or judge," and, after the defendant responded, "Judge," the trial court stated, "Jury waiver. Do you understand that by waiving a jury at this time that you cannot reinstate it; do you understand that?" *Id.* at 829. Here, unlike *Sebag*, defendant was represented by counsel, and as discussed above, the record indicates that defense counsel, in defendant's presence, informed the trial court two times prior to trial that defendant wanted a bench trial. Further, unlike *Sebag*, the trial court's discussion with defendant regarding the jury waiver occurred prior to opening statements and related to all charges, including the aggravated battery counts, which he was convicted of. Moreover, the colloquy that occurred between the trial court and the defendant in *Sebag* was not as extensive as the questions that the trial court asked defendant in the instant case. Accordingly, we do not find *Sebag* persuasive for our ruling.

¶ 17 In sum, under the facts and circumstances of this case, we conclude that no error occurred because defendant's waiver of his right to a trial by jury was made voluntarily, knowingly, and intelligently. There being no error, the plain error doctrine does not apply and defendant's claim remains forfeited.

¶ 18 Defendant's second contention on appeal is that, while the mittimus correctly provides that he was convicted of two aggravated battery counts, it incorrectly refers to these offenses as

counts III and IV instead of counts IX and X. Defendant asserts, and the State concedes, that the mittimus should be corrected to indicate that he was convicted of counts IX and X. We agree. As a reviewing court, pursuant to Supreme Court Rule 615, we may correct the mittimus without remanding the case to the trial court. *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992). We review *de novo* the issue of whether a defendant's mittimus should be corrected. *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 23. Here, the mittimus correctly provides that defendant was convicted of the aggravated battery counts, but it incorrectly lists these offenses as counts III and IV instead of counts IX and X. Therefore, we order the clerk of the circuit court to modify the mittimus to reflect that defendant was convicted of counts IX and X.

¶ 19 For the reasons explained above, we affirm defendant's conviction and order the mittimus to be modified.

¶ 20 Affirmed; mittimus modified.