2017 IL App (1st) 150591-U

No. 1-15-0591

Order filed September 27, 2017

Third Division

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. 11 CR 1444
	)	
DAVID AYALA-GUZMAN,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's finding defendant guilty of first degree murder is affirmed over defendant's contention that his offense should be reduced to second degree murder. Further, the record sufficiently established that defendant knowingly and understandingly waived his right to a jury trial.

¶ 2 Following a bench trial, defendant David Ayala-Guzman was found guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2006)) and subsequently sentenced to 23 years in prison. On appeal, defendant contends that we should reduce his conviction to second degree murder

because, when he killed the victim, Sotera Vargas, he was overcome by sudden and intense passion resulting from Vargas's criminal sexual assault against him. He also contends that the trial court failed to ensure that he knowingly and intelligently waived his right to a jury trial. We affirm.

¶ 3 In January 2011, defendant was charged with first degree murder for stabbing and killing Vargas on October 5, 2007. Defendant is a citizen of Mexico, and an interpreter was utilized throughout the trial proceedings. Prior to trial, defendant filed a motion to suppress statements he made to detectives from the Chicago police department after he was arrested. The trial court denied defendant's motion. Defendant waived his right to a jury and the case proceeded to a bench trial.

¶ 4 Sergeant Velma Guerrero of the Chicago police department testified that Spanish is her first language and that, on December 21, 2010, she interviewed defendant about the incident. Her partner, Detective Casale, was also present in the interview at various times. Guerrero did not have any trouble communicating with defendant, defendant did not have trouble understanding her, and defendant responded appropriately to her questions. The interview was videotaped and Guerrero translated the entire interview from Spanish to English. The State presented the transcript of the interview as an exhibit, the parties stipulated that the transcription was proper, the State published the transcript, and Guerrero read the entire transcript into evidence.

¶ 5 The transcript established that, after defendant received his *Miranda* warnings, he told Guerrero that, on October 5, 2007, Vargas approached him, asked for money, and requested defendant to invite him over to have a beer. Defendant did not know Vargas but "accepted" and

invited Vargas to his niece's apartment, where he had previously lived. His niece was not at the apartment.

¶ 6 At the apartment, Vargas pulled out a "crystal tube," and a drug that defendant had never used before. Vargas and defendant drank beer and Vargas invited defendant to use the drugs he had. Defendant told Guerrero, "since it was the first I used it, I felt, I don't know how I reacted." Defendant smoked the drug "like four or five times," which made him feel "dizzy," "weak," "dumbfounded" and "like [his] whole body was asleep."

¶ 7 After defendant smoked the drug, Vargas "made insinuations towards [him] in a sexual manner" and he "felt assaulted." Defendant told Guerrero that Vargas "wanted to sexually assault me and I said no. What is wrong with you? No. We are drinking." Defendant told Guerrero that Vargas touched defendant on his "part" and Vargas "would get near me and we struggled and I told him, No, I don't want this." Defendant had previously given Vargas money to buy more beer. Vargas was going to use it to buy more drugs, so defendant asked for it back, as defendant wanted to use it to buy more beer. He told Guerrero that Vargas "kept assaulting" him, he told Vargas, "you know what, no," and they "struggled and fought." Then, Vargas pulled out a knife and they started to fight.

¶ 8 At another time in the interview, defendant told Guerrero that Vargas told defendant he "wanted something with [him]" and defendant responded, "No, I have my wife." Vargas asked defendant if he had experience with men, and defendant told him "no." Vargas told defendant "well, I would like to," and defendant said, "No, I don't like to do that." Vargas responded, "but why." They started to argue, defendant went to his old bedroom and then the bathroom, Vargas continued to insist, they "exploded," he felt uncomfortable, and they started to "struggle."

¶ 9 Later in the interview, defendant told Guerrero that, after he used the drugs, he felt "dumbfounded," a sudden "sensation like my whole body was asleep," and "I didn't notice when [Vargas] pulled down his pants. I just realized when I was like this - -." The transcript indicates that defendant was "demonstrating by sitting, slightly bent at waist, face forward." Defendant then stated that he "was seated on the bed. When I had it like this, I felt a horrible disgust and I vomited a little in the bedroom," then "crawled in the bathroom," and said to himself, "what am I doing? What is this?" Defendant continued to vomit in the bathroom and was "angry" and "furious"

¶ 10 At another time in the interview, defendant stated that "[s]uddenly [Vargas] started touching me and I felt weak and excited, and when I felt, he had his penis in my mouth, and then after I smoked that from how bad I felt, I dropped it and broke the crystal." He felt "humiliated," "very very bad" and was a "little offended." When discussing the incident at another time in the interview, defendant said: "When I was in front of him, and he put his penis in my mouth, I reacted within ten seconds, and said to myself, What am I doing, and I felt disgusted and began to vomit and ran to the bathroom to finish vomiting."

¶ 11 Defendant then "attacked [Vargas] verbally" and told him to leave and to give him the money back. Vargas said to defendant, "But why, this is normal," and stated that "he had been in jail and this is normal." Vargas also told defendant, "Why, if that is nothing bad." Defendant started pushing Vargas in the hallway and tried to hit him and get him out of the apartment. Vargas grabbed a knife from the kitchen. Defendant tried to get the knife from him and there was a "struggle" from the kitchen to the "passageway by the garage." Defendant told Guerrero that

they were both "trying not to get assaulted by the other" and defendant did not "want to be the one that lost."

¶ 12 Defendant stated that Vargas "wanted to flee what is the kitchen to the outside. We were struggling, and I was able to get the knife at the door of the garage and in that passageway is when he wanted to run and I gave him the first one." He also stated that that he "won the knife. And that is when [Vargas] saw that I won the knife and [Vargas] tried to run and I caught up to him." When defendant caught up to him, he stabbed Vargas in the back. Vargas then "fell outside because the door was opened," and "[d]ue to the energy [Vargas] fell outside." When Vargas exited the door to the garage, they both fell. Defendant got up quickly. Vargas tried to get up, and defendant "simply gave him another."

¶ 13 Guerrero asked defendant, "When you both fell on the ground, you think you stuck him with the knife when you both were on the ground?" defendant nodded yes. Guerrero then asked, "Yes, both or just one?" and defendant responded, "The thing is, I was, I recall, but not exactly, I was too drunk and drugged." Guerrero also asked defendant if he "had rage?" and defendant responded, "Yes, I had, I felt humiliated. I felt rage. I didn't want to give him at anyplace. I was frustrated." After defendant stabbed Vargas the second time, defendant was frightened and ran to car. He "remembered about the knife" so he then returned to get the knife, "gave [Vargas] another," and then ran down the alley towards the front of the house because people started chasing him. Defendant thought he struck Vargas with the knife three times.

¶ 14 Defendant's arm was bleeding a "little" and he had a lot of blood on his clothes and hands. When he came back inside the apartment, he changed his clothes and tried to wash up. He saw police lights and "allowed it to pass." He heard his niece come home, but hid from her.

¶ 15 When Guerrero asked defendant why he invited Vargas over when he did not know him, defendant responded, "Because I only looked to talk to an older person. I never had a father. My father died as an alcoholic. I looked for older people for paternal affection not sex." During the interview, Guerrero asked defendant, "Explain to me how you say you don't know how that happened, or you think that, or what you think that." Defendant responded, "I don't know why I reacted that way. Well, perhaps because I felt assaulted due to the struggle. It was a fight, but I don't know why I reacted like that. It was a fight, but I don't know why I reacted in that manner." Defendant also told Guerrero that his life had changed and "I knew sooner or later, but it was something, unfortunately, I did this. I don't know why."

¶ 16 Samantha Uribe testified that, at around 11 p.m. on October 5, 2007, while she waited for her ride in a parking lot that faces Harding Avenue, a jeep Blazer drove down the alley and drove to Harding Avenue. The jeep stopped, the driver, identified in court as defendant, exited and ran back into the alley. After a few moments, she heard a "scuffling noise" and "like a lot of garbage cans, a lot of movement almost garbage cans being moved about." About 45 seconds later, defendant ran out from the alley and passed his vehicle. There were three men chasing him.

¶ 17 Veronica Ayala, defendant's niece, testified that, on October 5, 2007, she was living in the basement at 5211 South Harding Avenue. She went to a party that night and when she returned home at about 3 a.m. on October 6, 2007, the fence to the gangway, the door to the garage, and the side door of the house were open. There was a light on in defendant's old room. She called her father, closed all the doors, and checked every room. She noticed a beer can and bottle in defendant's old bedroom, which were not there when she left that night. She put the beer bottle in the refrigerator, closed all the doors, and went to bed. When she woke up the next

morning, she saw dirt stains on the bathtub and by the wall. Police subsequently inspected her apartment.

¶ 18 Detective Casale from the Chicago police department testified that, when he saw Vargas in the alley after the incident, Vargas was lying face down in a pool of blood that was dripping towards the middle of the alley. There was a blood trail from Vargas's body to the gangway entrance of 5211 South Harding. Casale observed bloodstains on Ayala's bathtub.

¶ 19 The State presented various stipulations. If the physician who performed Vargas's autopsy was called to testify, he would testify that Vargas sustained four stab wounds, Vargas's cause of death was multiple stab wounds, and Vargas's manner of death was homicide.

¶ 20 Stephanie McConnell, a DNA analyst, would testify that DNA samples taken from the beer can matched the DNA profiles of an unknown male and Vargas. DNA samples taken from the bathtub matched those of Vargas and the unknown male donor identified on the beer can. Lynette Wilson, a forensic scientist, would testify that the major male DNA profile identified on the beer can matched defendant's DNA profile, and defendant cannot be excluded as having contributed to the mixture of DNA profiles identified on the bathtub. Jennifer Barrett, a forensic scientist, would testify that the fingerprint found on the beer can was made by defendant.

¶ 21 At closing argument, defendant argued a theory of self-defense, arguing, *inter alia*, "[defendant] was acting in self defense at least when this began, your Honor, when the struggle began. The struggle got totally out of control ***" and "This evidence discloses that he intended to defend himself. He may obviously have gone way too far in that endeavor, your Honor. He was obviously upset. He was drugged and the [*sic*] under those circumstances, your Honor, I don't think he formulated the necessary intent" for first degree murder. Defendant requested that

the court find him not guilty of first degree murder and suggested that a "lessor [*sic*] included offense might be the appropriate verdict in this case."

¶ 22 The trial court found defendant not guilty of the intentional first degree murder alleged in Count I but guilty of the knowing first degree murder count alleged in Count II. It found each witness to be credible, including defendant in his interview, and concluded that defendant "knew that the wounds he inflicted created a strong probability of death or great bodily harm." The trial court rejected defendant's theory of self-defense and found that the evidence was not sufficient to support provocation, concluding:

> "The type and amount of force used was completely unnecessary. Vargas was not hurting or attempting to hurt the defendant when he was stabbed. Defendant's rage, not a belief in self-defense, caused him to stab Vargas.
>
> There is no legal basis from which to conclude that provocation sufficient to reduce first degree murder to second degree murder exists where the offender and victim engaged in sex acts that angered, humiliated and disgusted the offender.
>
> The defendant has not met his burden to show self-defense or legal provocation for his actions."

The trial court denied defendant's motion for a new trial and sentenced him to 23 years in prison. This appeal followed.

¶ 23 Defendant first contends on appeal that his offense should be reduced from first degree murder to second degree murder because the evidence shows serious provocation caused by criminal sexual assault. He argues Vargas's acts constituted a criminal sexual assault and, when he killed Vargas, he was overcome by sudden and intense passion caused by the criminal sexual

assault. Defendant asserts that criminal sexual assault fits into the category of "substantial physical assault," which is considered serious provocation sufficient to reduce first degree murder to second degree murder. He claims that the State did not disprove beyond a reasonable doubt that he did not act under sudden and intense passion and the trial court therefore erred when it concluded that there was not sufficient provocation to reduce his conviction to second degree murder.

¶ 24 As an initial matter, the State asserts that defendant's argument that he was acting under a sudden and intense passion resulting from a criminal sexual assault is improper because he did not assert this theory with the trial court. Defendant concedes that defense counsel did not "explicitly articulate" a second degree murder defense at trial, but argues that he requested the trial court "to consider that a lesser-included offense to first degree murder would be appropriate."

¶ 25 From our review, at closing argument, defense counsel asserted a self-defense theory but did not argue that defendant acted under sudden and intense passion resulting from serious provocation by criminal sexual assault. Nevertheless, the trial court did expressly reject a theory based on provocation. After setting forth the elements of second degree murder, it specifically concluded: "There is no legal basis from which to conclude that provocation sufficient to reduce first degree murder to second degree murder exists where the offender and victim engaged in sex acts that angered, humiliated and disgusted the offender." Thus, the court considered the argument defendant raises here, and rejected it as unsupported by the evidence. Accordingly, because defendant's challenge on appeal addresses the sufficiency of that evidence, his argument that defendant acted under sudden and intense passion resulting from serious provocation is not

forfeited. *People v. Cowans*, 336 Ill. App. 3d 173, 176 (2002) (a defendant may raise a challenge to the sufficiency of the evidence for the first time on direct appeal). Thus, we will review its merits.

¶ 26 When we review the sufficiency of the evidence, the trial court's factual determinations and credibility assessments "are entitled to 'great weight.' " *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 41 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007)). The trier of fact, the trial court here, is in a "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. We will not retry a defendant (*People v. Giraud*, 2011 IL App (1st) 091261, ¶ 17), or substitute our judgment for that of the fact finder on issues about the weight of the evidence or the credibility of the witnesses (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009)). We will only reverse a conviction if the evidence is "so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt." *Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 27 To prove first degree murder as charged, the State had to prove beyond a reasonable doubt that defendant stabbed and killed Vargas without lawful justification and, in performing the acts which caused Vargas's death, he knew that such acts created a strong probability of death or great bodily harm to Vargas. 720 ILCS 5/9-1(a)(2) (West 2006). Under Section 9-2 of the Criminal Code, first degree murder is reduced to second degree murder if the defendant proves the existence of a "mitigating factor" by a preponderance of the evidence. 720 ILCS 5/9-2 (West 2006); *People v. Romero*, 387 Ill. App. 3d 954, 966-68, (2008). The mitigating factor relevant here is provocation, which occurs where: "at the time of the killing [the defendant] is

acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but [the defendant] negligently or accidentally causes the death of the individual killed[.]" 720 ILCS 5/9-2(a)(1) (West 2006). Under the second degree murder statute, the State must first prove that the defendant committed first degree murder beyond a reasonable doubt before the factfinder determines whether the defendant proved the presence of a mitigating factor by the preponderance of the evidence. *People v. Castellano,* 2015 IL App (1st) 133874, ¶¶ 3, 155. The State is not required to prove the absence of the mitigating factor beyond a reasonable doubt. *People v. Simon,* 2011 IL App (1st) 091197, ¶ 51; *Romero,* 387 Ill. App. 3d at 966-68. The determination of whether the defendant is guilty of first or second degree murder is a question of fact for the trier of fact. *Simon,* 2011 IL App (1st) 091197, ¶ 52.

¶ 28 Defendant here is not challenging the trial court's finding that the State proved the elements of first degree murder beyond a reasonable doubt or that the trial court erred in rejecting his self-defense theory. Rather, he asserts that we should reduce his conviction to second degree murder because the evidence showed that, when he killed Vargas, he was overcome by sudden, intense passion resulting from the serious provocation of Vargas's criminal sexual assault. The trial court determined that defendant failed to establish this mitigating factor. The question, therefore, is whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have reached the same conclusion. See *Castellano,* 2015 IL App (1st) 133874, ¶158; *Simon,* 2011 IL App (1st) 091197, ¶ 52; *Romero,* 387 Ill. App. 3d at 968.

¶ 29 Serious provocation is "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2006). In Illinois, courts have recognized four categories that constitute serious provocation: "(1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the offender's spouse." *People v. Viramontes*, 2014 IL App (1st) 130075, ¶ 39. Defendant argues that the serious provocation here was a criminal sexual assault committed by Vargas when Vargas put his penis into defendant's mouth, knowing defendant was too drunk and drugged to give knowing consent. He claims that criminal sexual assault is a category of serious provocation because it is a type of "substantial physical assault," one of the four categories our courts have considered serious provocation.[1]

¶ 30 The State does not dispute that criminal sexual assault may be considered serious provocation, as it argues: "And, while the People have no quarrel with the law regarding the fact that sexual assault may be sufficient to mitigate a first-degree murder charge into a second-degree conviction, there is simply no facts in this case to warrant such an analysis." We agree. Even if we assume that criminal sexual assault is considered serious provocation, viewing all the evidence in the light most favorable to the State, we find that any rational trier of fact could have found that, at the time of the killing, serious provocation by criminal sexual assault did not occur and defendant therefore did not act under a sudden and intense passion as a result.

¶ 31 Although defendant stated that he felt "disgusted" "angry," "furious," "humiliated," "very very bad," and a "little offended" after the alleged criminal sexual assault occurred, the evidence does not show that he was acting under a sudden and intense passion after the incident

[1] A defendant commits criminal sexual assault if he or she commits an act of sexual penetration and, as relevant here, knows the victim is unable to give knowing consent. 720 ILCS 5/12-13(2) (West 2006). Sexual penetration is "any contact, however slight, between the sex organ *** of one person by *** mouth *** of another person." 720 ILCS 5/12-12(f) (West 2006).

when he stabbed and killed Vargas. Rather, after the alleged criminal sexual assault, he "attacked [Vargas] verbally," remembered to ask for his money back, told Vargas to leave, pushed him, and tried to hit him to get him out of the apartment. Clearly defendant's passions were not so aroused by the alleged assault that he could not control himself.

¶ 32 Defendant's own description of the fight that followed between him and Vargas supports that he was not acting under sudden and intense passion resulting from the alleged criminal sexual assault, as he stated that during the "struggle" from the kitchen to the passageway, Vargas and defendant were "trying not to get assaulted by the other" and defendant did not "want to be the one that lost." According to defendant, after he "won the knife" from Vargas, Vargas tried to run, but defendant caught up with Vargas and stabbed him in the back. Thus, defendant first stabbed Vargas after the alleged criminal sexual assault was over, after he was trying not to "be the one that lost" the "struggle," and when Vargas was actively trying to run away from him. Defendant also stated that he could not recall whether he struck Vargas with the knife the first two times when they were both on the ground because he was "too drunk and drugged," not because he was so out of control or impassioned from Vargas's alleged criminal sexual assault.

¶ 33 After defendant stabbed Vargas the second time, defendant ran to his car, and, according to Uribe, drove away. However, he then remembered that the knife was with Vargas so he returned to get the knife and stabbed Vargas again. Defendant then ran away from the three people who were chasing him in the alley, went back inside the apartment, changed his clothes, washed the blood off of him, and hid from his niece and the police. Viewing all this evidence in the light most favorable to the State, we conclude that any rational trier of fact could have found that defendant failed to prove that he committed first degree murder while under a sudden and

intense passion resulting from the serious provocation of Vargas's alleged criminal sexual assault. On these facts, as the trial court found, there is no basis to reduce defendant's conviction from first degree murder to second degree murder.

¶ 34 Defendant's second contention on appeal is that the trial court failed to ensure that he knowingly and intelligently waived his right to a jury trial. He asserts that he is a citizen of Mexico, did not speak English, and had no prior experience with the American legal system. Defendant claims that the trial court accepted his jury waiver without ensuring that he understood the nature of a jury trial, the rights he was giving up, and the function and purpose of a jury trial. Defendant requests that we reverse his conviction and remand this case for a new trial.

¶ 35 Initially, "[t]o preserve a claim for review, a defendant must both object at trial and include the alleged error 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 preserve the issue of his jury waiver for review, we may review it under the plain error doctrine. We agree that we may review the issue of whether defendant's fundamental right to a jury trial was violated under the plain error doctrine. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). However, under this 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).

¶ 36 A defendant's right to a jury trial is a fundamental constitutional right. *Bracey*, 213 Ill. 2d at 269. This right also includes the defendant's right to waive a jury trial. *Bannister*, 232 Ill. 2d at

65. To be a valid jury waiver, the defendant must waive the right knowingly and understandingly. *Bracey*, 213 Ill. 2d at 269-70.

¶ 37 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 it must give for a jury waiver to be valid. *People v. Tooles*, 177 Ill. 2d 462, 469 (1997). Rather, whether a jury waiver is valid depends on the facts and circumstances of each case and does not rest on any "precise formula." *People v. Clay*, 363 Ill. App. 3d 780, 791 (2006). "Although a signed jury waiver alone does not prove a defendant's understanding, it is evidence that a waiver was knowingly made." *Reed*, 2016 IL App (1st) 140498, ¶ 7. It is the defendant's burden to establish that his jury waiver was invalid. *Id.* Because the facts relating to the jury trial waiver are not in dispute here, we review *de novo* the issue of whether defendant knowingly and understandingly waived his right to a jury trial. *Bracey*, 213 Ill. 2d at 270.

¶ 38 At trial, prior to opening statements, the trial court and defendant, through an interpreter, engaged in the following colloquy about his jury trial waiver:

> "THE COURT: Mr. Ayala-Guzman, I want to speak to you for a moment. Do you know what a jury is?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand this case you have a right to have a trial by a jury or a trial by a judge. If it's a trial by a judge, in this case it will be me. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you sign this piece of paper?

THE DEFENDANT: Yes.

THE COURT: Do you understand when you signed this paper that mean [*sic*] you give up your right to a trial by jury and you want a trial by a judge, called a bench trial? In this case, it would be me.

THE DEFENDANT: Yes.

THE COURT: Has anyone forced you or threatened you or made you any promises to sign the paper or to give up your right to trial by jury.

THE DEFENDANT: No.

THE COURT: Did you sign this paper and now you are giving up your right to a trial by a jury of your own free will?

THE DEFENDANT: Yes.

THE COURT: I find the jury waiver is made knowingly and voluntarily. It will be accepted and made part of the record."

The record contains a preprinted jury waiver form that was filed with the clerk of the circuit court on December 20, 2013. It is signed by defendant and states: "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing."

¶ 39 We find that the facts and circumstances support the conclusion that defendant knowingly and understandingly waived his right to a jury trial. On December 20, 2013, defendant filed a signed jury waiver form, which provides evidence that he knowingly waived his right. See *Reed*, 2016 IL App (1st) 140498, ¶ 7. Further, defendant was represented by counsel, and on the day of trial, the trial court engaged in a colloquy with defendant, through an interpreter, about his jury waiver. Defendant acknowledged in open court with his defense counsel present that he signed

the jury waiver form and that he understood that, when he signed it, he was giving up his right to a jury trial. Defendant also specifically acknowledged he knew "what a jury" was, he understood he had a right to a trial by jury, and no one forced, threatened, or made any promises to him to sign the jury waiver form. And, at the conclusion of the colloquy, defendant expressly acknowledged that he signed the jury waiver and that he was giving up the right to jury trial by his own free will. Thus, the trial court explicitly ensured that defendant knew that he had a right to a jury trial and that he was waiving this right knowingly and understandingly.

¶ 40 Furthermore, on November 20, 2013, prior to the trial date, when an interpreter was present, defense counsel stated in open court in defendant's presence that the case was scheduled for a bench trial and that the parties had agreed on a date for the bench trial. Defendant did not object or ask questions. See *People v. Asselborn*, 278 Ill. App. 3d 960, 962-63 (1996) (the defendant's jury waiver found valid despite court's failure to obtain a written waiver where the defendant did not object when his counsel informed the court the case would be a bench trial). "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." *Asselborn*, 278 Ill. App. 3d at 962-63.

¶ 41 Accordingly, under the particular facts and circumstances here, we conclude that defendant knowingly and understandingly waived his right to a trial by jury. See *People v. Clay*, 363 Ill. App. 3d at 791-92. Thus, we find that no error occurred here.

¶ 42 Nevertheless, defendant argues that the trial court did not ensure that he knowingly and intelligently waived his right to a jury trial, as it failed to explain that a jury trial means that members of the community would be the fact finder. To support his position, defendant cites

People v. Phuong, 287 Ill. App. 3d 988 (1997), where the appellate court held that the defendant's jury waiver was invalid. *Phuong* is distinguishable from the case at bar.

¶ 43 In *Phuong*, the defendant was a Chinese-speaking recent immigrant to the United States, who had only a few months of education in the United States, no criminal history with the criminal justice system, and no prior experience with the American judicial system. *Phuong*, 287 Ill. App. 3d at 991. The defendant signed a jury waiver, and the trial court "without further elaboration" advised her "that she could be tried by either a judge or a jury." *Id.* The appellate court found that the defendant did not knowingly waive her right to a jury trial. *Id.* at 996. It acknowledged that she signed a jury waiver form that was translated for her. *Id.* However, given her lack of familiarity with the American judicial system and the trial court's failure to inform her that a jury trial meant that members of the community would be the fact finders, the court found it was not clear that the defendant "actually understood what a jury trial is." *Id.* The court was "not convinced that the mere translation of the language of the waiver form adequately conveyed its meaning to defendant." *Id.*

¶ 44 In contrast, here, defendant was not a recent immigrant to the United States. He had been in the United States since 2005, about seven to eight years prior to the December 20, 2013, trial date, and took the course "English as a second language" at Trinton College in Maywood, Illinois. In addition, at a May 29, 2013, pretrial continuation hearing at which neither an interpreter nor defense counsel was present, the trial court asked defendant, "Do you understand some English?" Defendant responded, "Right." The trial court, the prosecutor, and defendant then confirmed the next court date, and the trial court stated, "The Court will note its belief that [defendant] understands without difficulty what just took place." Thus, the record supports that

defendant understood trial proceedings when they were conducted in English. Accordingly, given these facts, defendant was not similar to the defendant in *Phuong* as he was able to understand English, the trial proceedings, and the American criminal justice and judicial system.

¶ 45 Furthermore, unlike the trial court in *Phuong* that advised the defendant "without further elaboration" that she "could be tried by either a judge or a jury (*Phuong*, 287 Ill. App. 3d at 991), the trial court here engaged in an extensive colloquy with defendant about his jury trial waiver. It expressly asked defendant, and defendant acknowledged, that he knew what a jury was and he understood that he had a right to a trial by jury. Therefore, we do not find *Phuong* persuasive.

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

¶ 47 For the reasons explained above, we affirm defendant's conviction.

¶ 48 Affirmed.