2018 IL App (1st) 160704-U
Order filed: July 6, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-16-0704

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 13663
	)	
ANTONIO HARRIS,	)	Honorable
	)	Neera Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held*: We reverse defendant's conviction for vehicular hijacking where the record does not show that he validly waived his constitutional right to a jury trial; we remand this cause for a new trial.

¶ 2 Following a bench trial, defendant-appellant, Antonio Harris, was convicted of vehicular hijacking (720 ILCS 5/18-3(a) (West 2012)), and sentenced to 10 years' imprisonment. On appeal, defendant contends his constitutional right to a jury trial was violated where the record

shows that he did not knowingly and intelligently waive that right in open court. For the following reasons, we reverse defendant's conviction and remand for a new trial.[1]

¶ 3 Because defendant does not contest the sufficiency of the evidence, we recite only those facts necessary to our disposition. Prior to trial, at a status hearing on September 21, 2015, defense counsel requested another date for a later hearing and stated: "I will file my answer and we will talk about a bench trial date." On October 20, 2015, counsel stated: "I did speak with the State. We are asking, if it's agreeable with the Court, for bench trial on December 2nd." Counsel later asked for another date for a "bench trial."

¶ 4 On December 10, 2015, the court stated: "We're here for a bench trial." The evidence at trial established that, in July 2012, defendant contacted the victim, Jeffrey Timmons, regarding a vehicle Mr. Timmons had listed for sale on Craigslist. On July 9, 2012, they met so that defendant could view the vehicle. Defendant asked to look at the engine and, when Mr. Timmons exited the vehicle to lift the hood, defendant sat in driver seat. Mr. Timmons sat in the passenger seat and defendant pointed a black gun at him and told him to exit the vehicle or "he'[d] blow [Mr. Timmons'] brains out." Mr. Timmons exited the vehicle and defendant drove away. The following day, Mr. Timmons saw defendant driving a different vehicle. Defendant was subsequently arrested. At the time of his arrest, defendant was carrying the keys to Mr. Timmons' vehicle. Mr. Timmons identified defendant in a lineup.

¶ 5 The trial court found defendant guilty of vehicular hijacking and was sentenced to 10 years' imprisonment.

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[1] There was no request for oral argument.

¶ 6 On appeal, defendant argues that his constitutional right to a jury trial was violated where the record shows that he did not sign a written jury waiver, was not admonished regarding his right to a jury trial, and that nothing in the record shows he knowingly and intelligently waived this right in open court. Defendant acknowledges that he failed to preserve this issue below, but argues that it is reviewable under the plain-error doctrine.

¶ 7 The plain-error doctrine permits a reviewing court to consider unpreserved errors:

" 'where (1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). "Whether a defendant's fundamental right to a jury trial has been violated is a matter that may be considered under the plain error rule." *People v. Bracey*, 213 Ill. 2d 265, 270 (2004) (citing *In re R.A.B.*, 197 Ill. 2d 358, 363 (2001)).

¶ 8 "The right to a trial by jury is a fundamental right guaranteed by the federal Constitution and the Illinois Constitution of 1970." (Citations omitted.) *People v. Bannister*, 232 Ill. 2d 52, 65 (2008) (citing U.S. Const., amends. VI, XIV; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); and Ill. Const. 1970, art. I, §§ 8, 13). "Indeed, based on our state constitution, an Illinois criminal defendant's right to a trial by jury includes the right to waive a jury trial." *Id.* (citing *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 222 (1988)). Section 103-6 of the Code of Criminal Procedure of 1963 (Code) provides that a jury waiver is not valid unless it is made knowingly and understandingly in open court. 725 ILCS 5/103-6 (West 2014); *Bracey*, 213 Ill. 2d at 269. While it is the duty of the trial court to ensure that a defendant's jury trial waiver is expressly and

understandingly made, there is no specific admonition or advice that must be given before an effective waiver may be made. *Bannister,* 232 Ill. 2d at 66. There is no precise formula in the determination of the validity of a jury waiver, but the facts and circumstances of each particular case should be considered. *Bracey,* 213 Ill. 2d at 269. Generally, a jury waiver is considered valid if it is made by defense counsel in a defendant's presence in open court, without objection by the defendant. *Id.* at 270. "Reviewing courts may also consider a defendant's prior interactions with the justice system in determining whether a jury waiver was made knowingly." *People v. Reed,* 2016 IL App (1st) 140498, ¶ 7 (citing *Bannister*, 232 Ill. 2d at 71). Where, as here, the relevant facts are not in dispute, the issue of whether a defendant validly waived his right to a jury trial is a question of law and reviewed *de novo*. *People v. Ruiz,* 367 Ill. App. 3d 236, 238 (2006) (citing *Bracey,* 213 Ill. 2d at 270).

¶ 9 On the facts of this case, we agree with defendant that the record does not show he knowingly and understandingly waived his right to a jury trial, nor that the trial court admonished defendant of his right to a jury trial, nor does it contain a signed jury waiver form. Although the lack of a written waiver is not necessarily fatal if it can be ascertained that a defendant understandingly waived his right to a jury trial (*Bracey*, 213 Ill. 2d at 270), here, the record contains nothing that shows defendant was informed he was entitled to choose between a jury or bench trial, or that he understandingly waived his right to a jury trial. There is no indication that defense counsel discussed a jury waiver with defendant. While defense counsel mentioned a bench trial several times on the record, counsel did so only in the context of scheduling and, at no point, waived the right to a jury trial on defendant's behalf. See *e.g.*,

People v. Watson, 246 Ill. App. 3d 548, 549 (1993) ("Vague references to a bench trial at the rescheduling conferences were not sufficient to constitute a valid jury waiver, especially in light of the fact that the record is devoid of evidence suggesting that the defendant was ever apprised of his right to a jury trial.").

¶ 10 On these facts and as the State contends, the mere mention of a bench trial, without more, is insufficient to demonstrate that there was "an understanding of waiver." We acknowledge that defendant had a criminal history with five prior convictions; however, we conclude that the record before us is inadequate to show that defendant validly waived this right as required by section 103-6 of the Code. Accordingly, we find that defendant's right to a jury trial was violated and he has, therefore, met this burden under the plain-error doctrine.

¶ 11 In reaching this conclusion, we reject the State's contention that the totality of the record shows defendant understandingly waived his right to a jury trial where his counsel mentioned a bench trial at several hearings and defendant failed to object. The State relies on *People v. Asselborn*, 278 Ill. App. 3d 960 (1996), to support its position. However, we find *Asselborn* distinguishable.

¶ 12 In *Asselborn*, prior to trial, the following colloquy transpired:

> "THE COURT: Have a seat. Jury waiver. Bench or jury?
>
> *** [Defense Counsel]: It will be a bench [trial] your Honor." *Id.* at 962.

The defendant was subsequently tried and convicted of arson. *Id.* at 960. The defendant appealed, arguing that he did not validly waive his right to a jury trial in writing. *Id.* This court found that, despite the absence of a written jury waiver, the record demonstrated that the

defendant knowingly waived his right to a jury trial in open court because he was present and failed to object when defense counsel elected to proceed by way of bench trial. *Id.* at 962. This court determined that "[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." *Id.* at 962-63 (and cases cited therein).

¶ 13 By contrast, in the instant matter, the court did not ask whether defendant wanted a bench trial or a jury trial, which would have indicated that defendant could choose how to proceed. As noted above, there was no indication in the record that defendant knew he had a choice between a bench trial or a jury trial, and there was certainly no discussion of jury waiver in open court. See *People v. Scott*, 186 Ill. 2d 283, 285 (1999) (emphasizing that, for a jury waiver to be valid, the defendant must be present in open court when a jury waiver is discussed); see also *People v. Eyen*, 291 Ill. App. 3d 38, 43 (1997) ("[W]here nothing is stated in defendant's presence to suggest that defendant has an option between a bench trial and a jury trial, we cannot deem defendant to have acquiesced knowingly in his counsel's participation in a bench trial."). Defense counsel, instead, simply mentioned a bench trial several times on the record in order to schedule future hearings. Again, we find this is not a valid jury waiver by, or on behalf of, defendant. Accordingly, we reverse the judgment of the circuit court and remand this cause for a new trial.

¶ 14 Reversed and remanded.