

No. 1-09-1736

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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. 06 CR 21591
)	
ROBERT BROWN,)	
)	Honorable
Defendant-Appellant.)	Thomas M. Tucker,
)	Judge Presiding.
)	

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.
JUSTICES LAVIN and PUCINSKI concurred in the judgment.

ORDER

HELD: Trial court did not err in denying defendant's motion to suppress statements made to an assistant state's attorney where he did not invoke his right to counsel prior to making the statements at issue. Trial court did not deny defendant's right to a jury trial where it adequately ensured that his waiver of that right was made with knowledge and understanding.

Following a bench trial, defendant Robert Brown was found guilty of first degree murder and sentenced to 20 years' imprisonment. On appeal, defendant contends that his statement to an assistant state's attorney should have been suppressed and that he was denied his right to a jury

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trial. We affirm.

BACKGROUND

Defendant was charged with first degree murder for stabbing his wife, Roi Lynn Brown, on August 19, 2006. Prior to trial, defendant filed a motion to suppress inculpatory statements that were obtained from him by interrogation that was allegedly conducted after he had elected to consult with an attorney, in violation of the fifth and fourteenth amendments of the United States Constitution.

At the hearing on defendant's motion to suppress, Assistant State's Attorney (ASA) Steven Krueger testified that he arrived at the Bellwood Police Department shortly after 8 a.m. on August 21, 2006, and was briefed by Bellwood police detective Jiminez Allen on an investigation of a homicide that had happened that weekend. ASA Krueger and Detective Allen then met with defendant, and ASA Krueger introduced himself and explained his role in the court system. After defendant acknowledged that he had previously been advised of his *Miranda* rights, ASA Krueger again advised him of his *Miranda* rights by reading them from a preprinted form. ASA Krueger then conducted a videotaped interview of defendant, and the video was published to the court.

During the videotaped interview, defendant stated that he understood his *Miranda* rights and that he had previously spoken with the police after waiving those rights. ASA Krueger then read defendant his *Miranda* rights, confirmed that he understood them, and questioned him as follows:

“Q: Okay. Now knowing these rights, and again, you can stop talking to

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me at any time you want, you know, I'm not here to pressure you. I'm just here to figure out what's going on. Knowing your rights, do you want to tell me what happened? I know you told the police.

A: Well, I can tell you what happened but shit I can talk to you now without a lawyer?

Q: Well, again, all right, you understand that I'm not a – I'm not your lawyer, you understand?

A: I know that.

Q: Okay. I'm just –

A: How about, how about a public defender?

Q: Well, I'm not a public defender.

A: I mean I can get one here.

Q: Right, well you – that's what I'm asking you. Do you want to, do you want to speak to me – you understand I'm working with the police here?

A: Okay.

Q: Okay, all right. And I'm not your, I'm not your lawyer.

A: I know you're not.

Q: All right, I'm a prosecutor, we got that. You understand the prosecutors in court, okay. I'm here to figure out what's going on and you don't have to talk to me if you don't want to. Do you understand that?

A: I might as well.

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Q: Okay.

A: Okay.

Q: Okay. I'm not for – I'm not forcing or threatening you, right?

A: Right.

Q: Okay. And if you want a lawyer one will be appointed to be here. But if you want to talk to me now without a lawyer, that's fine. I mean that's – no, that's, that's up to you, you understand that?

A: Yeah.

Q: Okay. Have, have, have they – have you been given anything to eat today?

A: Yes.

Q: Okay. All right, you under – so you're awake, you under – it's 9:30 in the morning, you understand what's going on?

A: Yes.

Q: Okay. Let me, let me – one more time – I mean I know these have been read to you. You understand you have the right to remain silent?

A: Right.

Q: All right. Anything you say can be used against you in court, do you understand that?

A: Right.

Q: You have the right to talk to a lawyer before I ask you any questions

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and to have him with you during questioning, do you understand that?

A: Uh-huh.

Q: Okay. If you can't afford a lawyer, one will be appointed for you before any questioning, do you understand that right?

A: Right.

Q: Okay. Now understanding those rights, do you wish to tell me what happened without a lawyer being present?

A: I'll talk to you.

Q: Well, yes, yes or no?

A: Yes, yes.

Q: Yes, okay. So you wish to talk to me without a lawyer being present?

A: Right."

During the videotaped interview, defendant stated that on the afternoon of August 19, 2006, he was drinking in his garage with his friend Leroy. Roi Lynn, defendant's wife, was inside the house with her cousin Clifton. Roi Lynn was also drinking and joined defendant and Leroy in the garage a couple of times. After Leroy left, defendant went into the house and saw Tracy Nesbitt, who defendant believed to be a thief, sitting on the couch. Defendant told Roi Lynn and Nesbitt that he did not want Nesbitt in his house, and Nesbitt left. Defendant and Roi Lynn began arguing about Nesbitt and defendant picked up a steak knife that was sitting on a table in the hallway and stabbed her one time in the chest. Defendant put the knife on the counter by the kitchen sink and did not notice any blood on it. Roi Lynn fell down and called

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someone on her cell phone and told that person to call the paramedics. About 10 minutes later, defendant went outside because he did not think that Roi Lynn was serious. Once outside, defendant was confronted by Roi Lynn's daughter, who beat him with a stick and cursed at him for stabbing her mother. The police arrived a few minutes later and arrested defendant in his backyard.

On cross-examination, ASA Krueger stated that prior to interviewing defendant, he was informed by Detective Allen that defendant had given a statement on August 20, 2006, after he had been advised of his *Miranda* rights. ASA Krueger did not know whether defendant raised the issue of representation during his conversation with Detective Allen. ASA Krueger did not believe that defendant asked him for a lawyer or public defender prior to giving his videotaped statement. On re-direct examination, ASA Krueger testified that defendant did not invoke his right to have counsel present.

Detective Allen testified that he advised defendant of his *Miranda* rights on August 19, 2006, but did not question him because he took a breathalyzer test and registered a blood alcohol content of .12. Detective Allen again advised defendant of his *Miranda* rights about 12:10 p.m. on August 20, 2006, and he indicated that he understood his *Miranda* rights and agreed to speak with Detective Allen. Defendant did not tell Detective Allen that he wanted a lawyer or invoke his right to have counsel present. Detective Allen's interview of defendant was videotaped and published to the court.

During the videotaped interview, defendant stated that his friend Leroy came to his house about 10 a.m. on August 19, 2006, and that they drank together in his garage. Roi Lynn also

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began drinking at 10 a.m. and periodically joined them in the garage. Defendant went into the house after Leroy left, and Roi Lynn emerged from the kitchen “talking crazy about something” with a knife in her hand shortly thereafter. Defendant began talking to Roi Lynn about a man named Tracy that lived across the street and who defendant did not want in his home. Defendant grabbed Roi Lynn’s arm and they began to struggle until he let go of her arm and she accidentally stabbed herself. Roi Lynn immediately pulled the knife out, and defendant picked it up and put it on the kitchen counter. Roi Lynn fell down and called her daughter and told her to call the paramedics. Defendant did not call the paramedics because he did not think Roi Lynn was seriously injured, and he went outside. Roi Lynn’s daughter arrived with her husband as defendant smoked a cigarette in the backyard by the garage, and she began hitting him with a stick. Defendant picked up a piece of metal to defend himself, but did not hit her.

During the interview, defendant was informed that Roi Lynn had died, and he became upset. After some time had passed, defendant stated that he wanted to change his story because “I didn’t think it was as serious as it is.” Defendant then stated that Roi Lynn had argued with him on the day of the stabbing about how he would always drink when Leroy came over and that he went into the house after Leroy had left, grabbed a knife from a hallway table and stabbed Roi Lynn. Defendant explained that he did not intend to kill Roi Lynn when he stabbed her and was drunk at the time. Detective Allen informed defendant that someone from the State would be coming to the station, and the following colloquy ensued:

“Q: They’re gonna come out here, they’ll probably talk with you if you’re willing to. You tell them your side of the story, tell them the truth because, you

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know --

A: Shouldn't I, shouldn't I have a lawyer?

Q: Well, that's up to you. If you want a lawyer, you have that right.

A: I can get a public defender?

Q: You can get a public defender. So that's up to you. When he comes out here if you want to tell them that, you're more than welcome to tell them that. But when we get to that, we cross that bridge when we get to it, okay.

A: So I don't have to – I just tell them the truth. I don't have to tell them nothing about the public defender?

Q: No, you, you just – he'll just probably read you your rights again. And then you, you feel what's best for you.

A: See what I, what I can do –

Q: Cause I can't – I'm not your lawyer so I can't really give you any advice.”

Defendant further stated that he was going to get someone to mortgage his house, and Detective Allen responded that “when he gets here why don't we talk about that and we'll figure out – I mean you seem like a pretty intelligent guy and you probably know what's best for you. And then we can try to go from there, okay? Why don't we think about that when that, when that – when we approach that bridge.”

On cross-examination, Detective Allen stated that he did not believe that defendant was requesting counsel when he asked him whether he could have a public defender. Following

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argument, the trial court denied defendant's motion to suppress, finding that he did not invoke his right to counsel.

The trial court subsequently conducted a bench trial and found defendant guilty beyond a reasonable doubt of first degree murder. In doing so, the court stated that there was not sufficient evidence of sudden passion to reduce the crime to second degree murder and that the evidence was not sufficient to show that the stabbing was the result of recklessness.

ANALYSIS

I. Motion to Suppress

Defendant first contends that his videotaped interview with ASA Krueger should have been suppressed because neither Detective Allen nor ASA Krueger addressed his two separate inquiries about getting a lawyer. The State responds that the trial court properly denied defendant's motion to suppress the interview because he never invoked his right to counsel. In reviewing a trial court's ruling on a motion to suppress, we accept the trial court's findings of fact unless they are against the manifest weight of the evidence and review the court's ultimate ruling as to whether suppression is warranted *de novo*. *People v. Harris*, 228 Ill. 2d 222, 230 (2008).

An individual held for interrogation has the right to consult with counsel and to have counsel with him during questioning. *Miranda v. Arizona*, 384 U.S. 436, 471 (1966). Once an accused has expressed his desire to exercise his right to counsel, the authorities may not subject him to further interrogation until counsel has been made available or the accused initiates further communication. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). However, law enforcement

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authorities are only required to cease questioning a suspect pursuant to *Edwards* if the suspect clearly and unambiguously requests an attorney. *Davis v. United States*, 512 U.S. 452, 461-62 (1994). Although the suspect's assertion of his right to counsel need not be made with unmistakable clarity, not every reference to an attorney, no matter how vague or ambiguous, constitutes an invocation of the right to counsel. *People v. Krueger*, 82 Ill. 2d 305, 311 (1980). The relevant inquiry is "whether the suspect's articulation of the desire to have counsel present was sufficiently clear that a reasonable officer in the circumstances would have understood the statement to be a request for an attorney." *In re Christopher K.*, 217 Ill. 2d 348, 381 (2005).

Defendant asserts that the record does not support the trial court's findings that he "understood his right to counsel and that his request for counsel was 'equivocal.'" Defendant maintains that he requested counsel when he asked Detective Allen "shouldn't I have a lawyer?" and "I can get a public defender?" at the conclusion of his videotaped interview with Detective Allen, and when he asked ASA Krueger "I can get one here?" in reference to a public defender at the beginning of his videotaped interview with ASA Krueger.

We initially note that the report of proceedings does not indicate that the trial court found that defendant's request for counsel was "equivocal," but rather that "[h]e never invoked his right to have a lawyer present" and that "[h]e indicated throughout that he wished to go ahead and speak." In addition, the transcript of defendant's videotaped interview with ASA Krueger and a viewing of the interview itself reveal that defendant responded to ASA Krueger's statement that he was not a public defender by stating "I mean[,] I can get one here," and did not ask him "I can get one here?"

Defendant maintains that his question to Detective Allen of “I can get a public defender?” was an unambiguous invocation of his right to counsel, then cites to *Smith v. Illinois*, 469 U.S. 91 (1984), and asserts that any statements he made subsequent to his clear invocation of his right to counsel cannot render that initial invocation ambiguous. In *Smith*, 469 U.S. at 96-98, the court held that the defendant clearly and unequivocally invoked his right to counsel by stating “I’d like to do that” upon learning of his right to the presence of counsel and that any subsequent statements made by him were not relevant to the question of whether he had invoked his right to counsel.

We determine that in this case defendant did not invoke his right to counsel at the conclusion of his videotaped interview with Detective Allen. Defendant merely asked Detective Allen whether a public defender was available to him and, unlike in *Smith*, he did not indicate that he wished to exercise his right to one. In addition, even if defendant’s question could be interpreted as a statement that “I can get a public defender,” such a statement would constitute an acknowledgment of his right to a public defender, and not a request for one.

We also determine that defendant’s question of “shouldn’t I have a lawyer?” to Detective Allen was not an invocation of his right to counsel because that question constitutes an inquiry into or clarification of the extent of his rights and does not indicate that he wished to exercise his right to counsel. In addition, our supreme court has held that similar comments and questions made by an accused have not amounted to an unambiguous request for counsel that would have required the authorities to cease questioning the accused until counsel was provided. *People v. Oaks*, 169 Ill. 2d 409, 451-53 (1996), *overruled on other grounds*, *In re G.O.*, 191 Ill. 2d 37

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(2000); *Krueger*, 82 Ill. 2d at 310-12.

Defendant also maintains that he invoked his right to counsel when he asked ASA Krueger “I can get one here?” in reference to a public defender and that ASA Krueger ignored that request for counsel and continued to interrogate him. As stated above, the record shows that defendant’s comment to ASA Krueger was a statement, and not a question, and we determine that defendant did not invoke his right to counsel when he made that statement, but rather verified that he was aware that he could exercise his right to counsel if he so chose. The record also shows that ASA Krueger spent a substantial amount of time confirming that defendant was aware of his rights and clarifying that he did not wish to consult with an attorney prior to speaking with him and that defendant had multiple opportunities to exercise his right to counsel had he wished to do so.

We thus conclude that defendant did not articulate a desire to have an attorney present prior to his videotaped interview with ASA Krueger and that the trial court’s finding that he did not invoke his right to counsel is therefore not against the manifest weight of the evidence. As such, we also conclude that the trial court did not err in denying defendant’s motion to suppress his videotaped interview with ASA Krueger.

II. Jury Waiver

Defendant further contends that the trial court violated his right to a jury trial when it accepted his jury waiver without explaining what a bench trial was or the difference between a bench trial and a jury trial. The State initially asserts that defendant has forfeited review of this issue by failing to object at trial or include this claim in his posttrial motion for a new trial, and

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defendant responds that we should review this issue under the plain-error doctrine.

Although an error is generally not preserved for review unless the defendant objects at trial and includes the error in a written posttrial motion, the plain-error rule bypasses normal forfeiture principles and permits reviewing courts to consider unpreserved error in certain circumstances. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). A reviewing court may consider unpreserved error under the plain-error doctrine when 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 the 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 first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

A defendant's right to a jury trial is protected by both the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8. A defendant may waive that right, but to be valid, the waiver must be made with knowledge and understanding. 725 ILCS 5/103-6 (West 2008); *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). Although the trial court has the duty of ensuring that a defendant's waiver of his right to a jury trial was made expressly and understandably, there is no set admonition or advice required before an effective waiver may be made. *People v. Smith*, 106 Ill. 2d 327, 334 (1985). The determination as to whether a jury waiver is valid turns on the facts and circumstances of each case (*People v. Frey*, 103 Ill. 2d 327, 332 (1984)), and our review of this issue is *de novo* (*Bracey*, 213 Ill. 2d at 270).

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The record shows that the following exchange occurred prior to the trial court's acceptance of defendant's jury waiver:

“THE COURT: [Y]ou have a right to have a trial by Court or a jury.

A jury is where people from the community could be brought to Court, and you, along with your attorney, would participate in the selection of twelve individuals. They would decide your innocence or guilt, not this Court.

Any verdict returned by a jury must be unanimous, meaning all twelve jurors must sign and agree to the verdict before it can be returned.

I have a signed waiver of your right.

Is that your signature?

DEFENSE COUNSEL: Yes. He is signing it right now.

THE COURT: And, sir, you have – that is your signature, and you have signed that after making yourself aware of that right and you wish to give it up, is that correct, sir?

THE DEFENDANT: Yes.”

Defendant, citing *People v. Sebag*, 110 Ill. App. 3d 821 (1982), asserts that the trial court failed to ensure that he understood the implications of waiving his right to a jury trial prior to accepting his jury waiver because it did not explain to him what a bench trial entailed or the difference between a bench and jury trial. Defendant also asserts that this court should take into account that he had little experience with the criminal justice system when he waived his right to a jury trial.

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Although a written jury waiver alone may not demonstrate that defendant understood the right he was waiving, the signed waiver lessens the probability that the waiver was not made knowingly. *People v. Dockery*, 296 Ill. App. 3d 271, 276 (1998). In this case, the court explained the meaning of a jury trial and advised defendant that in such a trial, the jury, and not the court, would decide his guilt or innocence. *People v. Tooles*, 177 Ill. 2d 462, 471 (1997). Unlike in *Sebag*, 110 Ill. App. 3d at 829, defendant was represented by counsel, was advised of the meaning of a trial by jury by the trial court, and acknowledged that he understood his right to a jury trial and that he wished to give it up. *People v. Clay*, 363 Ill. App. 3d 780, 791 (2006).

Although defendant's experience with the criminal justice system was minimal when he waived his right to a jury trial, we conclude that the trial court adequately advised him of his right to a jury trial such that his waiver of that right was made knowingly and understandingly. As such, the plain-error rule cannot excuse his procedural default of this issue because the trial court did not err in accepting his jury waiver.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.