

Nos. 1-09-0452 & 1-09-0530 (consolidated)

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FIRST DIVISION
May 9, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 06 CR 15632
)	
RICARDO GUZMAN and)	
FELIPE GOMEZ-RAMIREZ,)	Honorable
)	Garritt E. Howard,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices HOFFMAN and LAMPKIN concurred in the judgment.

O R D E R

HELD: Defendants' respective jury waivers were made knowingly and voluntarily; their trial counsels did not render ineffective assistance by deciding not to impeach a key State witness with his criminal background and history of alcohol abuse; and defendants' mittimus should not be corrected to reflect that they were convicted of "knowing" murder rather than "intentional" murder.

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Following simultaneous but severed bench trials before the same judge, defendants Ricardo Guzman, Felipe Gomez-Ramirez, and Jose Garcia-Sandoval,¹ were each convicted of first-degree murder for the beating death of Jose Sandoval and convicted of aggravated battery for an attack on Victor Gutama. Defendants were each sentenced to 20 years' imprisonment for first-degree murder along with a consecutive 2-year term of probation for the aggravated battery convictions.

The appeals of defendants Ricardo Guzman and Felipe Gomez-Ramirez were consolidated for review. These two defendants contend on appeal that: their respective jury waivers were not made knowingly or voluntarily; their trial counsels were ineffective for failing to adequately impeach a key State witness; and their mittimuses should be corrected to reflect that they were convicted of "knowing" murder rather than "intentional" murder.

For the reasons that follow, we affirm. The relevant facts are set forth as each issue is addressed.

ANALYSIS

Defendants first contend that their respective jury waivers were not made knowingly or voluntarily because: neither of them spoke nor read English; they both had limited educations (grammar

¹ Jose Garcia-Sandoval is not a party to this appeal. He is currently appealing his conviction and sentence in a case pending in this court under docket number 09-0723.

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school); and they both had minimal contacts with the criminal justice system. We disagree.

As an initial matter, we note that this is the first time defendants have raised this issue. Generally, alleged errors not objected to during trial or raised in a posttrial motion are considered waived. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). However, we elect to review this issue since it involves a fundamental right. *People v. Lundgren*, 309 Ill. App. 3d 230, 232-33, 722 N.E.2d 788 (1999); *People v. Brians*, 315 Ill. App. 3d 162, 176, 732 N.E.2d 1109 (2000).

A criminal defendant's right to a jury trial is a fundamental right guaranteed by both our federal and state constitutions. U.S. Const. amends VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13; *People v. Bracey*, 213 Ill. 2d 265, 269, 821 N.E.2d 253 (2004). This right may be waived however if it is done so understandingly and in open court. See 725 ILCS 5/103-6 (West 2002) ("[e]very person accused of an offense shall have the right to a trial by jury unless *** understandingly waived by defendant in open court").

The determination of whether a jury waiver was made knowingly and understandingly turns on the particular facts and circumstances of each case and therefore must be decided on a case-by-case basis. *Bracey*, 213 Ill. 2d at 269; *People v. Frey*, 103 Ill. 2d 327, 332, 469 N.E.2d 195 (1984). A defendant who challenges a jury waiver has the burden of establishing that the

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waiver was invalid. *People v. Stokes*, 281 Ill. App. 3d 972, 977, 667 N.E.2d 600 (1996). Since this issue concerns undisputed facts and involves a question of law, our review is *de novo*. *Bracey*, 213 Ill. 2d at 270; *In re R.A.B.*, 197 Ill. 2d 358, 362, 757 N.E.2d 887 (2001).

The record shows that on September 24, 2008, the trial court conducted a hearing, with a Spanish interpreter present, to discuss setting a date for trial. The trial court inquired as to whether the defendants were seeking bench or jury trials. Counsel for defendant Gomez-Ramirez indicated that his client probably wanted a bench trial. Counsel for defendant Guzman also indicated that his client probably wanted a bench trial.

At the conclusion of the hearing, the trial judge set a tentative date of November 17th for a bench trial, but stated that at the next court date he would have a better idea as to whether the defendants would be seeking bench or jury trials. The case was then continued to October 20, 2008, so that counsels could, among other things, confer with their clients and determine whether the clients wanted bench or jury trials.

On October 20, 2008, the trial court indicated, again with a Spanish interpreter present, that the case was still set for a bench trial on November 17th. Neither defendants nor defense counsels voiced any objections.

On November 17, 2008, by agreement of the parties, the case was continued and reset for a bench trial commencing on January

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14, 2009. The bench trial commenced as scheduled.

Prior to opening statements, the following colloquy occurred regarding defendants' signed, written jury waivers:

"MR. HENDRICK [defense counsel for Gomez-Ramirez]: I have a jury waiver.

THE COURT: I have Mr. Garcia-Sandoval's jury waiver. Mr. Hendrick, you have Mr. Gomez-Ramirez.

MR. NANCE [defense counsel for Guzman]: Mr. Guzman.

THE COURT: Mr. Guzman. The record should reflect that we are being assisted by the court interpreter. Mr. Interpreter, your name for the record?

THE INTERPRETER: Your Honor, for the record, my name is Jose Guerra. Thank you.

THE COURT: I will take them in the order that they are named in the charge. Mr. Filipe Gomez, does this form contain your signature, sir?

BY THE INTERPRETER: DEFENDANT GOMEZ: Yes.

THE COURT: Do you understand by signing this form, you are waiving your right to a jury trial?

BY THE INTERPRETER: DEFENDANT GOMEZ: Yes.

THE COURT: Mr. Ricardo Guzman, does this form contain your signature, sir?

BY THE INTERPRETER: DEFENDANT GUZMAN: Yes.

THE COURT: Do you understand by signing this form, you are waiving your right to a jury trial?

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BY THE INTERPRETER: DEFENDANT GUZMAN: Yes.

THE COURT: Mr. Garcia-Sandoval, does this form contain your signature, sir?

BY THE INTERPRETER: DEFENDANT GARCIA-SANDOVAL: Yes.

THE COURT: Do you understand by signing this form, you are waiving your right to a jury trial?

BY THE INTERPRETER: DEFENDANT GARCIA-SANDOVAL: Yes."

The trial court accepted the signed, written jury waivers and then three simultaneous but severed bench trials began. The trial court ultimately found each defendant guilty of first-degree murder and aggravated battery.

Defendants Ricardo Guzman and Felipe Gomez-Ramirez now contend on appeal that given the obvious language barrier and their limited educational backgrounds, the trial court should have conducted a more detailed inquiry into their jury waivers in order to clearly establish that they were made knowingly and understandingly. We disagree.

A review of the record shows that the trial court insured that defendants were provided with a qualified interpreter to translate the proceedings into Spanish so that defendants would understand the court's admonishments concerning the waiver of a jury trial. There is no indication in the record that the defendants were dissatisfied with the interpreter or that they had difficulty understanding the proceedings due to their alleged inability to read or speak English.

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When "a linguistic handicap is at issue on appeal, a reviewing court 'should accord more than ordinary deference to the conclusions of the trial judge, who observed the witness's demeanor and gestures' and who could determine whether the waiver was knowingly made." *People v. Crespo*, 118 Ill. App. 3d 815, 821, 455 N.E.2d 854 (1983), quoting *People v. Ortiz*, 96 Ill. App. 3d 497, 503, 421 N.E.2d 556 (1981). Such a deferential level of review applies in this case. Here, the trial judge was in a position to see the defendants' reactions to his admonishments and could determine whether their responses were made knowingly and understandingly. See *Ortiz*, 96 Ill. App. 3d at 503.

Defendants further maintain that their respective jury waivers were not properly authenticated and were therefore not properly admitted because neither defendant stated that he had read the jury waivers or that he understood what the waivers were. Again, we must disagree.

The defendants were represented by their respective counsels when they orally waived their rights to a jury trial in open court. In addition, the record indicates that defendants conferred with their respective counsels prior to signing the written jury waivers and prior to orally waiving their rights to a jury trial in open court. Although a signed, written jury waiver alone is insufficient proof to demonstrate that a defendant made an understanding waiver of the right to a jury trial, the signed waiver lessens the probability that the jury

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waiver was not made knowingly. *People v. Steiger*, 208 Ill. App. 3d 979, 982, 567 N.E.2d 660 (1991).

The record also shows that months prior to trial, when defendants' respective counsels indicated to the trial court, in defendants' presence, that their clients probably wanted bench trials rather than jury trials, none of the defendants voiced any objections. In general, an accused is presumed to speak through his counsel. *People v. Ruiz*, 24 Ill. App. 3d 449, 453, 321 N.E.2d 746 (1974). A jury waiver is generally valid if it is made by defense counsel in defendant's presence in open court, without an objection by defendant. *Bracey*, 213 Ill. 2d at 270; see also *People v. Ruiz*, 42 Ill. App. 3d 969, 972, 356 N.E.2d 881 (1976) (a "defendant is held to have knowingly and understandingly waived a jury trial when his attorney with whom he had an opportunity to confer waives a jury in his presence and without his objection"). Here, on more than one occasion, defense counsels represented on defendants' behalf and in defendants' presence that defendants would seek bench trials.

This court's decision in *People v. Phuong*, 287 Ill. App. 3d 988, 679 N.E.2d 425 (1997), does not support the defendants' position because *Phuong* is factually distinguishable from the instant case. In *Phuong*, this court determined that even though defendant signed a written jury waiver that was translated by a Chinese interpreter and even though the trial court admonished defendant about waiving her right to a jury trial, her waiver was

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nevertheless not made knowingly because the court failed to inquire if defendant actually knew what a jury trial was. *Phuong*, 287 Ill. App. 3d at 996.

The court pointed out that the defendant was a recent immigrant with only a few months of education in this country and that she had no prior criminal record or any involvement with the American criminal justice system. *Phuong*, 287 Ill. App. 3d at 996. Here, in contrast, defendant Guzman reported that he came to the United States in 2002, seven years prior to trial. And defendant Gomez-Ramirez reported that he arrived in this country in 1997. Furthermore, Gomez-Ramirez' record indicates at least five prior arrests, and Guzman's record indicates four arrests, with at least one conviction for theft.

Unlike the defendant in *Phuong*, defendants in the instant case resided in this country for long periods of time prior to their trials and both had multiple contacts with the American criminal justice system.

In sum, our review of the record reveals that the defendants' respective waivers of their rights to a jury trial, given in open court with the assistance of a Spanish interpreter, were made knowingly and understandingly.

Defendants next contend that their respective trial counsels rendered ineffective assistance by failing to adequately impeach State witness Mr. Joni Khoshaba. Khoshaba testified that he witnessed three Hispanic men, one of whom he identified as Jose

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Garcia-Sandoval, kicking the victim who was crawling along the street. Khoshaba testified that he witnessed at least nine or ten kicks to the victim's torso and head.

Khoshaba testified that when he approached the group and yelled at the three men to leave the victim alone, the men got into a vehicle and drove away from the scene. Khoshaba attempted to memorize the vehicle's license plate number and wrote the number down on a matchbook. The license plate number Khoshaba gave to police differed by one digit from the number on defendant Gomez-Ramirez' car.

Defendants now contend that their respective counsels were ineffective for failing to impeach Khoshaba with his criminal background and history of alcohol abuse. Again, we must disagree.

In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms; and (2) that the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the error, the outcome of the case would

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have been different. *People v. White*, 322 Ill. App. 3d 982, 985, 751 N.E.2d 594 (2001). A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699, 104 S. Ct. at 2069; *People v. Colon*, 225 Ill. 2d 125, 135, 866 N.E.2d 207 (2007).

The decision whether and how to cross-examine or impeach a witness is generally considered to be a matter of trial strategy that will not support a claim of ineffective assistance of counsel, unless counsel's approach to the cross-examination is shown to be objectively unreasonable. *People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875 (1997). Defendants fail to make such a showing.

Prior to Khoshaba taking the stand to testify, counsels for Gomez-Ramirez and Garcia-Sandoval asked the trial court for permission to impeach Khoshaba's credibility with the following: a 2005 Cook County conviction for criminal trespass to land related to a domestic dispute involving his wife and daughter; violation of an order of protection issued in connection with a pending telephone harassment charge related to the domestic dispute;² and the State's involvement in a bond hearing on

² At the time of trial, Khoshaba was living in California. When Khoshaba arrived in Chicago and met with prosecutors in preparation for testifying in this case, he was arrested for violating the order of protection.

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Khoshaba's behalf after his arrest for violating the order of protection. The trial court stated that the defense would be permitted to bring out the State's involvement in the bond hearing.

Defense counsels also wanted to impeach Khoshaba with a 2003 conviction out of Phoenix, Arizona for misdemeanor driving under the influence (DUI), in which he received 3 years' probation; and a pending DUI case out of California.

The trial court initially asked defense counsels, "[w]hat does all of that have to do with the case we are trying here today?" Counsel for Gomez-Ramirez replied that in light of Khoshaba's DUI and problems with alcohol abuse, the trial court should treat him as a drug addict in terms of his ability to observe or recollect events.

The trial court responded, "[i]t's certainly quite a leap from a person with a history of two DUI's and possibly a drinking problem on top -- in addition to what is indicated from two DUI arrests into treating him as a drug addict." The trial court ultimately stated, "I will allow certain latitude in cross examination, but that's a far stretch as far as I am concerned."

We believe that defense counsels' decisions not to impeach Khoshaba with his DUIs and history of alcohol abuse was objectively reasonable under the circumstances where the trial court, as the finder of fact in this bench trial, indicated that it was questionable as to whether this proposed evidence was

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relevant to impeaching Khoshaba. We believe that engaging in such cross-examination would have either been futile or inconsequential.

We also find that defendants were not prejudiced by their counsels' decisions not to cross-examine Khoshaba with his prior convictions and pending cases because this evidence did not involve dishonesty or falsity and therefore had limited impeachment value as related to Khoshaba's testimonial credibility. "When assessing the importance of the failure to impeach for purposes of a *Strickland* claim, '[t]he value of the potentially impeaching material must be placed in perspective.' " *People v. Salgado*, 263 Ill. App. 3d 238, 247, 635 N.E.2d 1367 (1994), quoting *People v. Jimerson*, 127 Ill. 2d 12, 33, 535 N.E.2d 889 (1989). Here, the impeachment value of the evidence defendants sought to introduce was limited by the fact that the witness's prior convictions and pending cases did not involve crimes of dishonesty or falsity.

Moreover, even if we assumed that defense counsels' decisions not to impeach Khoshaba with his criminal background and history of alcohol abuse amounted to deficient performance, we could not say that such deficiency was prejudicial. To establish prejudice under *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v. Mitchell*, 189 Ill. 2d 312, 333, 727

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N.E.2d 254 (2000).

Defendants contend they were prejudiced because the trial court heavily relied on Khoshaba's testimony in reaching its decision and there is a reasonable probability that the outcome would have been different if defense counsels had used the available impeachment evidence to attack Khoshaba's credibility. While it is correct that the trial court emphasized Khoshaba's testimony and credibility, it is also clear that his testimony was not the only evidence the court relied upon in finding defendants guilty.

As set forth in defendants' opening statements, the defense theory was that the defendants and victims engaged in mutual combat after a vehicle driven by the surviving victim, Victor Gutama, side-swiped defendants' vehicle. The defense argued that Khoshaba's testimony describing the attack on the deceased victim was not corroborated by the deceased's physical injuries. The defense argued that the decedent died after he was punched and he fell to the ground.

The trial court rejected the defense theory and instead highlighted the testimony of medical examiner Dr. Mitra Kalelkar, stating in part as follows:

"I found her testimony credible. She said a severe force caused the two fractures to the top of the head of the victim and that the victim was already on the ground when these injuries occurred. She testified that they were not

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caused by a fall to the ground and hitting of one's head.

That goes directly contrary to the way the defense would have us believe that the injuries occurred, but it did not occur that way."

The trial judge's statements clearly show that he did not solely rely on Khoshaba's testimony in finding defendants guilty of the described charges. Thus, we cannot say that defendants were prejudiced by their counsels' decisions not to impeach Khoshaba with his criminal background and history of alcohol abuse.

Defendants finally contend that their mittimuses should be corrected to reflect that they were convicted of "knowing" murder in count two, rather than "intentional" murder in count one. In support of this contention, defendants point to the trial court's following statement:

"I don't know if they had a specific intent to kill, but at a minimum they knew what that they were doing was creating a strong probability of death or great bodily harm."

Defendants interpret this comment as definitive proof of the trial court's intention to find them guilty of knowing murder, for which the State had to prove that a defendant knew that his actions created a strong probability of death or great bodily harm (720 ILCS 5/9-1(a)(2) (West 2004)). While the trial court's comment could be interpreted as defendants urge, there was no

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definitive statement by the court of its intention to find defendants guilty of knowing murder as opposed to intentional murder.

Defendants interpretation of the trial court's comment is not sufficient for this court to rely upon to change the trial court's findings. Especially in light of the mittimus which reflects that count two (knowing murder) was merged with count one (intentional murder), and listing defendants' offense as intentional murder (720 ILCS 5/9-1(a)(1) (West 2004)).

Accordingly, for the reasons set forth above, the judgment of the circuit court of Cook County is affirmed.

Affirmed.