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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08—CF—2248
)	
JOSHUA BARKSDALE,)	Honorable
)	George J. Bakalis,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Where defendant was charged with new offenses after waiving his right to a jury trial on earlier-filed charges, he did not knowingly and voluntarily relinquish his right to a jury trial on the new charges; and defendant's submission of a sample of his deoxyribonucleic acid (DNA) for forensic analysis and indexing and his payment of a \$200 DNA analysis fee (see 730 ILCS 5/5—4—3 (West 2008)) in a prior case barred a subsequent assessment of the \$200 DNA analysis fee in this case.

¶ 1 Defendant, Joshua Barksdale, initially was charged with eight offenses arising from a traffic incident with a police officer on August 9, 2008. He waived his right to a jury trial, and about a month later on the eve of trial, the State charged him with three more offenses related to the same

incident. Following a bench trial, defendant was convicted of counts 6 and 8, which had been charged before the jury waiver, and count 11, which had been charged after the jury waiver.

¶ 2 Ordinarily, defendant's felony convictions in this case would render him eligible for compulsory DNA indexing under section 5—4—3 of the Unified Code of Corrections (Code) (see 730 ILCS 5/5—4—3 (West 2008)), but because DNA had been collected from defendant in a prior case, the trial court did not order it again. The record shows that the clerk of the circuit court assessed the \$200 DNA analysis fee even though defendant had submitted to the testing and paid the fee following the previous conviction.

¶ 3 The two issues presented on appeal are (1) whether defendant's jury waiver extended to count 11, which was charged after the waiver, and (2) whether the applicable version of section 5—4—3 of the Code mandated the assessment of the \$200 DNA analysis fee where defendant already had submitted a DNA sample pursuant to a prior conviction and had paid the corresponding analysis fee.¹ We agree with defendant that he did not knowingly and understandingly waive his right to a jury trial on count 11 and that his conviction on that charge must be reversed as plain error. Additionally, we agree with defendant that, because a \$200 DNA analysis fee already was imposed after his previous

¹ In Public Act 96—426, effective August 13, 2009, the legislature amended section 5—4—3(a) to limit its application to an offender incarcerated in the Department of Corrections or Department of Juvenile Justice on or after August 22, 2002, "who has not yet submitted a sample of blood, saliva, or tissue." Pub. Act 96—426, §5, eff. August 13, 2009 (amending 730 ILCS 5/5—4—3(a) (West 2008)) (amendment evinces legislative intent that DNA indexing be conducted only once).

conviction, the assessment of the fee in this case must be vacated. The judgment is affirmed in part, reversed in part, and vacated in part. The cause is remanded for a new trial on count 11.

¶ 4

FACTS

¶ 5 During the early morning hours of August 9, 2008, defendant was pulled over by Officer Brett Kaczorowski of the Elmhurst Police Department for a traffic offense. Officer Kaczorowski testified that he and his trainee were in full uniform and were riding in a marked squad car at the time of the stop. Officer Kaczorowski smelled alcohol on defendant's breath, and defendant was verbally aggressive. Defendant denied that he had been drinking but shut off the engine when asked.

¶ 6 After being told three or four times to get out of the car, defendant started the engine. Officer Kaczorowski reached for his pepper spray with his right hand, and reached for the car door with his left hand. Defendant then hit Officer Kaczorowski's left hand with his fist four or five times. The officer grabbed defendant's left arm to stop him from fleeing. Defendant drove off while Officer Kaczorowski's right shoulder was partially in the car. The car struck the officer's right shoulder and the right side of his neck and spun him around.

¶ 7 The officer and his trainee returned to their squad car and chased defendant's car for 150 to 250 yards. Defendant drove through a red light, jumped a curb, crossed into oncoming traffic, and eventually hit and dragged a UPS box 20 to 30 feet. As the car continued to roll, defendant jumped out and ran. Defendant's driverless car crashed through a wooden fence and hit the side of a building.

¶ 8 Officer Kaczorowski exited the squad car and chased defendant. After jumping a fence, defendant turned around, jumped back over the fence and approached the officer with his fists

clenched, yelling. Officer Kaczorowski took cover, drew his weapon, and radioed for more police. After more police arrived, defendant was captured.

¶ 9 Defendant was arrested at the time of the incident and charged with counts 1 through 5, which were voluntarily dismissed before trial. Defendant remained in custody until August 26, 2008, when he posted bond. On September 2, 2008, defendant was charged with three additional offenses. Count 6 alleged aggravated fleeing or attempt to elude a police officer. See 625 ILCS 5/11—204.1(a)(3) (West 2008). Count 7 alleged aggravated battery in that defendant knowingly caused bodily harm to Officer Kaczorowski by striking him in the shoulder with a deadly weapon, an automobile. See 720 ILCS 5/12—4(b)(1) (West 2008). Count 8 alleged aggravated battery in that defendant used his car to cause bodily harm to Officer Kaczorowski, knowing him to be an Elmhurst Police Officer engaged in the execution of his official duties. See 720 ILCS 5/12—4(b)(18) (West 2008). On February 27, 2009, defendant waived his right to a jury trial on the pending charges.

¶ 10 On March 31, 2009, the State charged an additional three counts by indictment, all arising from the August 9, 2008, incident. Counts 9 and 10 alleged aggravated battery in that defendant made contact of an insulting or provoking nature by striking Officer Kaczorowski in the shoulder with an automobile. See 720 ILCS 5/12—3(a)(2) (West 2008). Count 11 alleged aggravated battery in that defendant made physical contact of an insulting or provoking nature by striking Officer Kaczorowski in the hand with his fist, knowing him to be a police officer. See 720 ILCS 5/12—4(b)(18) (West 2008). A short time before trial, the State voluntarily dismissed count 10, and defendant entered a plea of not guilty on counts 9 and 11.

¶ 11 At trial, the court entered a directed finding on count 7 because the State did not prove that defendant used his car as a deadly weapon. However, the court found defendant guilty of aggravated battery on count 8, finding that he knowingly caused bodily harm to Officer Kaczorowski by hitting him with his car, knowing that he was a police officer engaged in execution of official duties. The court also found defendant guilty on count 9 and merged the conviction with count 8. The court found defendant guilty on count 11, finding that defendant made insulting or provoking contact by using his fist to hit Officer Kaczorowski's hand. As to count 6, the court found that the injury was not caused by defendant's fleeing, as the injury occurred before the chase with siren and flashing lights. He was therefore found guilty of the lesser-included offense of misdemeanor fleeing.

¶ 12 On May 25, 2009, the trial court denied defendant's motion for a new trial. The court sentenced defendant to two concurrent terms of four years' imprisonment on the aggravated battery convictions of counts 8 and 11. The court also sentenced defendant to 102 days in jail on the misdemeanor fleeing conviction of count 6, with credit for 51 days served. Because DNA had been collected in a prior case, on March 20, 2007, the court did not order it again. Defendant's motion to reconsider the sentence was denied. According to a printout provided by the Du Page County Circuit Clerk's office and made a part of the record on appeal, defendant was assessed a \$200 DNA analysis fee.

¶ 13 ANALYSIS

¶ 14 A. Jury Waiver

¶ 15 Defendant argues that he must be granted a new trial on count 11 because his jury waiver predates the filing of that charge. Defendant raises the issue for the first time on appeal, but he asserts, and the State does not dispute, that a conviction by bench trial without a proper jury waiver

is reversible plain error. We agree. See, e.g., *People v. Bracey*, 213 Ill. 2d 265, 270 (2004) (holding that the right to a jury trial is fundamental and the deprivation of that right in the absence of proper waiver is reversible plain error). The plain error rule permits this court to determine whether a defendant's fundamental right to a jury trial has been violated even though the record does not show that the defendant objected to proceeding without a jury or raised the issue in a posttrial motion. *Bracey*, 213 Ill. 2d at 270. The facts pertinent to this issue are not in dispute, and thus, we review the issue *de novo*.

¶ 16 The right to a trial by jury is a fundamental right guaranteed by our federal and state constitutions unless it is understandingly waived by the defendant in open court. *Bracey*, 213 Ill. 2d at 269; see 725 ILCS 5/103—6 (West 2008) (subject to exceptions not relevant here, “[e]very person accused of an offense shall have the right to a trial by jury unless *** [it is] understandingly waived by defendant in open court.”) The validity of a jury waiver turns on the particular facts and circumstances of the case. *Bracey*, 213 Ill. 2d at 269; *People v. Hernandez*, No. 2—09—0674, slip op. at 4 (Ill. App. April 18, 2011).

¶ 17 The trial court is not required to provide a defendant with any particular admonishment or information regarding the constitutional right to a jury trial, but the court has a duty to ensure that any waiver of that right is made expressly and understandingly. *Hernandez*, slip op. at 4. Regardless of whether the defendant executed a written jury waiver, the record must show that the defendant understandingly relinquished the right to a jury trial. *Bracey*, 213 Ill. 2d at 270; *Hernandez*, slip op. at 4. Our supreme court has never recognized a waiver as valid “ ‘where the defendant was not present in open court when a jury waiver, written or otherwise, was at least discussed.’ ” *Bracey*, 213 Ill. 2d at 270 (quoting *People v. Scott*, 186 Ill. 2d 283, 285 (1999)).

¶ 18 The State argues that defendant's jury waiver on February 27, 2009, remained in effect from that point forward, thereby encompassing the later-filed charges, including count 11. The State argues that the trial court's failure to obtain a formal jury waiver on the new charges should be excused because, at the time of trial, defendant waived formal reading of the new charges, defense counsel indicated that the allegations in the new counts did not impede his ability to present a defense, and defendant did not object to the irregularity in the jury waiver process. We rejected similar arguments in *Hernandez*, and we decline to depart from our holding in that case.

¶ 19 In *Hernandez*, we held that the written jury waiver in that case could not be construed as a waiver of the defendant's right to a jury trial on later-filed charges. *Hernandez*, slip op. at 4 (defendant's waiver of a jury trial on the charges of domestic battery did not apply to the charges of obstruction of a police officer added almost five months later). Noting that “ '[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences,' ” (*Hernandez*, slip op. at 4 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))), we broadly stated that a defendant must be at least aware of the charges he faces before he can knowingly and intelligently decide whether guilt for those charges should be determined by a jury or judge. *Hernandez*, slip op. at 4. Here, the only charges facing defendant on the date he waived his right to a jury trial were counts 1 through 8. As in *Hernandez*, the record does not indicate that, at the time of the waiver, defendant was aware of, or intended his waiver to cover, any later-filed charges. See *Hernandez*, slip op. at 4-5. Accordingly, the February 27, 2009, jury waiver cannot be construed as a waiver of defendant's right to a jury trial on the later charges, including Count 11.

¶ 20 The State also argues that defendant waived a jury trial on counts 9, 10, and 11 by not objecting at the commencement of the bench trial on all of the charges. The State emphasizes defense counsel's statements at the start of trial that the allegations in the new counts did not impede his ability to present a defense and that he was aware of the allegations contained therein, based on discovery previously tendered. We agree with defendant that counsel was waiving any objection to the filing of the new charges and a formal reading for purposes of arraignment, which is different from waiving defendant's right to a jury trial. The possibility of a jury trial on the new charges was not discussed.

¶ 21 *Hernandez* and our decision in this case are supported by *Bracey*, where the supreme court held that the defendant's jury waiver in one trial did not cover a retrial on remand following a successful appeal. In *Bracey*, the defendant made a written waiver of his right to a jury on an aggravated battery charge and the trial court found him guilty, but the appellate court vacated the judgment and remanded the cause for a new trial. *Bracey*, 213 Ill. 2d at 267-68. On remand, the trial court "assumed" the retrial would also be a bench trial, and the topic of renewing the defendant's jury waiver was not discussed. *Bracey*, 213 Ill. 2d at 272. The new bench trial resulted in a conviction that was reversed by the supreme court on the ground that the jury waiver for the first trial did not apply to the second trial. *Bracey*, 213 Ill. 2d at 271-72. The supreme court held that "given the fact that, prior to defendant's second trial, defense counsel made no statements in defendant's presence indicating that defendant was electing, once again, to give up his right to a trial by jury, defendant's silent acquiescence to a second bench trial is insufficient to support a finding that he knowingly and voluntarily relinquished his fundamental right to trial by jury." *Bracey*, 213 Ill. 2d at 273.

¶ 22 Relying on *Bracey*, we held in *Hernandez* that, while a defendant may sufficiently express his intent to waive the right to a jury trial by acquiescence to a bench trial, there had been no statements made in the defendant's presence to indicate that he was electing to forgo a jury trial. *Hernandez*, slip op. at 7-8. Like in *Hernandez*, there were no statements regarding jury waiver made in defendant's presence after the new charges were filed, and defendant's behavior was not an adequate expression of an intent to waive a jury trial by acquiescence.

¶ 23 The State further asserts that, because counts 8 and 11 each alleged an aggravated battery under section 12—4(b)(18), the valid jury waiver on count 8 also should apply to count 11. The State contends that the allegations in the newly-charged counts were more formal than substantive, and did not constitute new charges. The State relies on *People v. Spain*, 91 Ill. App. 3d 900, 906-07 (1980), in which a jury waiver was found to remain valid after amendment of a charge because the substance of the charge was unaffected by the amendment. The State's reliance on *Spain* is misplaced.

¶ 24 Here, while counts 8 and 11 each alleged a violation of section 12—4(b)(18), the conduct underlying the two charges was different. Count 8 alleged aggravated battery in that defendant used his car to knowingly cause bodily harm to Officer Kaczorowski, knowing him to be an Elmhurst police officer engaged in the execution of his official duties. In contrast, count 11 alleged aggravated battery in that defendant made physical contact of an insulting or provoking nature by striking Officer Kaczorowski in the hand with his fist, knowing him to be a police officer. See 720 ILCS 5/12—4(b)(18) (West 2008). The new charge alleging different underlying conduct is distinguishable from the amended charge in *Spain*, where the appellate court held that the amendment to the preexisting charge lacked a substantive change. The new charge in this case

presents the same situation as the one in *Hernandez*, where the defendant in that case did not knowingly and voluntarily relinquish his right to a jury on entirely different charges filed after a jury waiver.

¶ 25 Because defendant was convicted of count 11 without properly waiving his right to a jury trial, the conviction must be reversed and the cause remanded for a new trial on that count. See *Bracey*, 213 Ill. 2d at 272-73. On remand, we direct the trial court not to proceed to a bench trial without first obtaining a valid jury waiver from defendant.

¶ 26 B. DNA Analysis Fee

¶ 27 Next, defendant argues that the assessment of the \$200 DNA analysis fee must be vacated because he submitted to DNA indexing and paid the corresponding fee in a prior case such that his DNA already is on file. The parties correctly assert that the facts are undisputed and that the question is one of statutory authorization. Questions of statutory interpretation when no facts are in dispute are subject to *de novo* review. *People v. Martinez*, 184 Ill. 2d 547, 550 (1998).

¶ 28 The relevant version of section 5—4—3 of the Code provides that a person convicted of a felony or certain juvenile offenses must submit a DNA sample and pay an analysis fee of \$200. 730 ILCS 5/5—4—3(a), (j) (West 2008). The samples are categorized into genetic marker grouping and kept in a central repository database by the Illinois State Police. 730 ILCS 5/5—4—3(d), (e) (West 2008). The primary purpose of section 5—4—3 is the creation of a criminal DNA database of the genetic identities of recidivist offenders. *People v. Marshall*, No. 110765, slip op. at 4-5 (Ill. May 19, 2011). Prior to his conviction herein, defendant had been convicted of a felony that required him to provide a DNA sample and to pay the corresponding analysis fee. The trial judge commented that, at the time of his sentencing in this case, defendant's DNA was registered in the database, and

therefore the judge declined to order an additional analysis fee. Defendant argues that the \$200 analysis fee for DNA collection imposed by the clerk was contrary to the judge's order, contrary to the statute and State Police Rules, and must be vacated as void. The State does not dispute that the clerk lacked authority to administer the \$200 DNA analysis fee, but argues that the fee was mandatory and should have been imposed by the sentencing court.

¶ 29 Until recently, the appellate court had been split on the issue of whether taking a DNA sample and assessing the analysis fee in a prior case bars the taking of a new sample and assessing the attendant fee in a subsequent case. In *People v. Evangelista*, 393 Ill. App. 3d 395 (2009), this court determined that a DNA analysis fee may not be assessed more than once because the purpose of the statute is to collect DNA to be stored in a database and that once the defendant has submitted a DNA sample, requiring additional samples would serve no purpose. *Evangelista*, 393 Ill. App. 3d at 399.

¶ 30 In *People v. Marshall*, 402 Ill. App. 3d 1080 (2010), *rev'd* No. 110765 (Ill. May 19, 2011), the Third District determined that, by using the mandatory language of "shall" in the subsection authorizing the DNA analysis fee, the General Assembly indicated that no qualifying offender is exempt from the fee assessment. *Marshall*, 402 Ill. App. 3d at 1083. The court noted that the subsection authorizing the expungement of collected DNA from the database in instances of the reversal of a conviction or pardon could be problematic. *Marshall*, 402 Ill. App. 3d at 1083. The court envisioned a scenario in which (1) a defendant is convicted of a qualifying offense and a DNA sample is collected; (2) the defendant is then convicted of a second qualifying offense but no DNA is collected or fee assessed, as the DNA is already on file; and (3) the defendant's first conviction is reversed and the DNA sample is expunged, leaving the DNA database without the defendant's

DNA, even though he has a valid conviction for a qualifying offense. *Marshall*, 402 Ill. App. 3d at 1083; see also *People v. Grayer*, 403 Ill. App. 3d 797, 801 (2010) (the DNA analysis fee may be assessed more than once because “nothing in the statutory language limits the taking of DNA samples or the assessment of the analysis fee to a single instance”).

¶ 31 The Illinois Supreme Court resolved this split of authority in *People v. Marshall*, No. 110765 (Ill. May 19, 2011), after the parties in this case had submitted their briefs. The supreme court determined that the implementation of the relevant version of section 5—4—3 shows an intent to require a single specimen of DNA be taken from each qualified person to create a profile for entry into the DNA database maintained by the Illinois Department of State Police, rather than an intent to require submission of multiple and duplicative DNA samples from an offender who has already submitted samples pursuant to a prior conviction. *Marshall*, slip op. at 12-14.

¶ 32 Further, the supreme court rejected the argument that a one-time DNA sample and analysis fee would result in a “loophole” if a defendant’s first qualifying offense was expunged. *Marshall*, slip op. at 11. The court interpreted the relevant version of section 5—4—3 as requiring that a single DNA sample remain in the database for each person convicted of a qualifying offense. *Marshall*, slip op. at 14. If an offender’s previous sample was expunged, a subsequent conviction naturally would require a new sample be taken, which would be sufficient for maintenance of the DNA database. *Marshall*, slip op. at 12.

¶ 33 In this case, defendant previously was convicted of an offense that required DNA indexing, his DNA was collected, and a \$200 DNA analysis fee was paid. Consistent with the supreme court’s decision in *Marshall*, we agree with the trial court’s original sentence and vacate the assessment of the additional \$200 DNA analysis fee that was imposed by the clerk’s office.

¶ 34 We reject the State’s argument that defendant forfeited this issue by failing to raise it in a postsentencing motion. In *Marshall*, the supreme court concluded that a trial court’s order to pay an additional DNA analysis fee did not conform to the statutory requirement, and thus was a void order and not subject to forfeiture. *Marshall*, slip op. at 14.

¶ 35 So long as defendant’s DNA currently is on file, we order the mittimus be corrected to reflect that defendant need not submit to DNA testing or pay the \$200 DNA analysis fee. Because we vacate the DNA analysis fee, we need not address defendant’s further argument that the fee was fully satisfied by the \$5-per-day sentencing credit for the 51 days he spent in custody before sentencing. See 725 ILCS 5/110—14 (West 2008).

¶ 36 C. Double Jeopardy

¶ 37 Finally, we conclude that double jeopardy principles do not preclude a new trial on the aggravated battery charge set forth in count 11. Both the federal and state constitutions provide that no person shall be put in jeopardy twice for the same criminal offense. *People v. Pinkonsly*, 207 Ill. 2d 555, 564 (2003), citing U.S. Const., amends. V, XIV; Ill. Const.1970, art. I, §10. “The double jeopardy clause protects a defendant from: (1) a second prosecution after an acquittal; (2) a second prosecution after a conviction; and (3) multiple punishments for the same offense.” *People v. Whitfield*, 228 Ill. 2d 502, 516 (2007) (citing *People v. Gray*, 214 Ill. 2d 1, 6 (2005)).

¶ 38 “A reversal for trial error is a determination that the defendant has been convicted by means of a judicial process defective in some fundamental respect, whereas reversal for evidentiary insufficiency occurs when the prosecution has failed to prove its case, and the only proper remedy is a judgment of acquittal.” *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). The double jeopardy clause precludes the State from retrying a defendant after a reviewing court has determined that the

evidence introduced at trial was legally insufficient to convict, but the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the proceedings leading to the conviction. *Olivera*, 164 Ill. 2d at 393; *People v. Taylor*, 76 Ill. 2d 289, 309 (1979). Because we have determined that the jury waiver did not extend to count 11 and thus a procedural error occurred leading to the conviction, we must consider whether the conviction should be reversed outright based on the sufficiency of the evidence.

¶ 39 “When reviewing the sufficiency of the evidence, ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (Emphasis in original.) *People v. Bishop*, 218 Ill. 2d 232, 249 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In this case, the trial court heard evidence that defendant, without legal justification, made physical contact of an insulting or provoking nature with Officer Kaczorowski, knowing him to be a police officer, while Officer Kaczorowski was engaged in the execution of his official duties. Officer Kaczorowski testified that he was in uniform and riding in marked squad car at the time of the traffic stop, which is evidence of his status as a police officer engaged in his official duties. Officer Kaczorowski asked defendant three or four times to get out of his car, but defendant started the engine instead. Officer Kaczorowski testified that he reached for his pepper spray with his right hand, and reached for the car door with his left hand. Defendant then used his fist to strike Officer Kaczorowski’s left hand four or five times. As the finder of fact, it was the province of the trial court to determine that using one’s fist to strike another person’s hand repeatedly qualifies as insulting or provoking contact. “Examining the trial evidence in the light most favorable to the State, we believe a rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt.” See *People v. Jordan*, 218 Ill. 2d 255, 270 (2006).

¶ 40

CONCLUSION

¶ 41 For the preceding reasons, the conviction of aggravated battery in count 11 is reversed, the assessment of the \$200 DNA analysis fee is vacated, and the remainder of the judgment of the circuit court of Du Page County is affirmed. The cause is remanded for further proceedings consistent with this disposition.

¶ 42 Affirmed in part, reversed in part, and vacated in part; cause remanded.