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2011 IL App (3d) 100294-U

Order filed November 21, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-10-0294
	)	Circuit No. 09-TR-73926
	)	
DAVID MARTINEZ,	)	Honorable
	)	Rick A. Mason,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE CARTER delivered the judgment of the court.  
Justice Schmidt concurred in the judgment.  
Justice Holdridge specially concurred.

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**ORDER**

¶ 1 *Held:* The trial court erred in not inquiring about defendant's waiver of his right to a jury trial; however, this error was not plain error.

¶ 2 Defendant, David Martinez, appeals from a bench trial where he was found guilty of leaving the scene of an accident involving property damage (625 ILCS 5/11-402(a) (West 2008)) and failure to reduce speed to avoid an accident (625 ILCS 5/11-601(a) (West 2008)). Defendant was sentenced to 12 months' court supervision for leaving the scene of an accident involving

property damage, and the State dismissed the charge of failure to reduce speed to avoid an accident. Defendant appeals, contending that his conviction should be reversed and the cause remanded for a new trial, because the record does not indicate defendant knowingly and understandingly waived his right to a jury trial in open court. We affirm.

¶ 3

#### FACTS

¶ 4 On July 15, 2009, defendant was charged with leaving the scene of an accident involving property damage and failure to reduce speed to avoid an accident. On July 24, 2009, prior to defendant's arraignment, the trial court received an *ex parte* letter from defendant requesting a bench trial. The request was denied by the trial court, and defendant was instructed to appear at his court date. At a pretrial hearing on September 1, 2009, defense counsel requested the next available jury trial date. The cause was scheduled for a jury trial on January 5, 2010. On January 5, 2010, the parties first appeared before Judge James Egan, and the discussion occurred as follows:

"THE COURT: Martinez. Do you want to go to 314 for bench trial?"

MS. SARICH [Assistant State's Attorney]: Oh, sure. Yes.

MS. JAKUSZ [Assistant Public Defender]: Sure.

THE BAILIFF: Judge Mason in 314."

Defendant's written jury waiver was then presented to Judge Rick Mason. The discussion before Judge Mason occurred as follows:

"THE COURT: Are we ready to start this case?"

MS. JAKUSZ: I believe so, Judge.

MS. SARICH: Yes.

\* \* \*

THE COURT: And we are proceeding on both counts?

MS. SARICH: Yes, Judge.

THE COURT: Or both citations. And, let's see, I do see a waiver of trial by jury.

Has that been done in court?

MS. JAKUSZ: I believe it was.

MS. SARICH: Yes.

THE COURT: It was done already?

MS. JAKUSZ: Yes, in front of Judge Egan.

THE COURT: Okay. So we are ready to proceed with a bench trial. Are there any motions before we start?"

Defendant's case went to a bench trial, which resulted in the trial court finding defendant guilty as charged. Defendant appeals.

¶ 5 ANALYSIS

¶ 6 On appeal, defendant contends his conviction should be reversed because the record does not indicate defendant knowingly and understandingly waived his right to a jury trial in open court.

¶ 7 The right to a jury trial is a fundamental right guaranteed by our federal and state constitutions. *People v. Bannister*, 232 Ill. 2d 52 (2008); see U.S. Const., amend. VI; Ill. Const. 1970, art. I, §§ 8, 13. However, a defendant may waive the right to a jury trial if the waiver is made understandingly in open court. 725 ILCS 5/103-6 (West 2008); *People v. Harris*, 363 Ill. App. 3d 586 (2006). The validity of a jury trial waiver cannot be determined by the application

of a precise formula, but instead depends on the facts and circumstances of the particular case. *Bannister*, 232 Ill. 2d 52.

¶ 8 The court has a duty to ensure the jury waiver is made knowingly and understandingly; however, there is no requirement that the court apprise a defendant of his right to a jury trial or advise defendant of the consequences of a waiver. *People v. Frey*, 103 Ill. 2d 327 (1984). By contrast, a valid jury waiver is never found where "defendant was not present in open court when a jury waiver, written or otherwise, was at least discussed." *People v. Scott*, 186 Ill. 2d 283, 285 (1999); see *People v. Bracey*, 213 Ill. 2d 265 (2004). If a jury waiver is made in writing, even though alone it is not sufficient to find a valid waiver, it lessens the probability that the waiver was not made knowingly. *People v. Clay*, 363 Ill. App. 3d 780 (2006); *Scott*, 186 Ill. 2d 283.

¶ 9 In this case, defendant admits that he did not object to this error during trial or raise the issue in a posttrial motion. Failure to do so ordinarily results in forfeiture of the issue. *People v. Enoch*, 122 Ill. 2d 176 (1988). However, we will consider whether the defendant's fundamental right to a jury trial was violated under the plain error rule. *Bracey*, 213 Ill. 2d 265; *Harris*, 363 Ill. App. 3d 586. Under the plain error rule, we will remand for a new trial only if: (1) the evidence is closely balanced; or (2) the error was so serious it denied defendant a fair trial. *People v. Herron*, 215 Ill. 2d 167 (2005). Here, the plain error test would only apply if defendant did not knowingly and understandingly waive his fundamental right to a jury trial, an issue we review *de novo* where the facts are not in dispute. See *Bracey*, 213 Ill. 2d 265.

¶ 10 In the instant case, the trial court only briefly addressed defendant's waiver of the right to a jury trial. However, the State argues that the accused typically speaks and acts through his trial counsel, and that courts of review have given effect to jury waivers made by defense counsel, in

defendant's presence, where defendant did not object to the bench trial. See *Frey*, 103 Ill. 2d 327. The State's reliance on *Frey* is misplaced. In *Frey*, "defendant was present on occasions when the matter of a bench trial was discussed, and at some point was advised of his right to trial by a jury or by the court." *Frey*, 103 Ill. 2d at 330. In contrast to *Frey*, the record here indicates defendant filed a written waiver, but the waiver was only addressed briefly in the record. Any discussion regarding defendant's right to a jury trial is lacking, and therefore the jury waiver is invalid. *People v. Elders*, 349 Ill. App. 3d 573 (2004); *Scott*, 186 Ill. 2d 283 (holding that defendant did not validly waive his right to a jury trial, despite the existence of a written waiver, because there was no discussion of the waiver in open court).

¶ 11 However, even if we find defendant did not knowingly and understandingly waive his right to a jury trial in open court, such error was not plain error. The defendant does not argue, and we do not find, that the first prong of the plain error analysis applies, as the evidence was not closely balanced. Thus, our analysis is limited to the second prong of the plain error test, which concerns whether the error substantially affected the fairness and integrity of defendant's trial. *People v. Thompson*, 238 Ill. 2d 598 (2010).

¶ 12 Defendant contends that the trial court's error was plain error, but we are not persuaded. In *Thompson*, our supreme court instructed that under the second prong of the plain error test, "automatic reversal is required only when an error is deemed 'structural.'" *Thompson*, 238 Ill. 2d at 608 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197 (2009)). An error is structural if it renders defendant's trial fundamentally unfair or unreliable, and the burden of persuasion is on defendant. *Thompson*, 238 Ill. 2d 598.

¶ 13 We find that the errors alleged by defendant in this case do not rise to the level of

structural errors. See *Thompson*, 238 Ill. 2d 598 (stating that recognized structural errors include a complete denial of counsel, trial before a biased judge, and denial of self-representation at trial). The record indicates that defendant initially requested a bench trial by sending an *ex parte* letter to the court. Later, defendant signed a written jury waiver, and furthermore failed to object to the bench trial at any time before or during the proceeding. In light of the record and defendant's arguments, defendant failed to meet his burden of showing that the error rendered his trial unfair or unreliable. See *Thompson*, 238 Ill. 2d 598.

¶ 14 Therefore, although the trial court may have erred in not inquiring about defendant's jury trial waiver in open court, we find that the trial court's error was not plain error. Accordingly, defendant's conviction and sentence is affirmed.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, the judgment of the trial court of Will County is affirmed.

¶ 17 Affirmed.

¶ 18 JUSTICE HOLDRIDGE, specially concurring:

¶ 19 I agree that the circuit court's judgment should be affirmed. I write separately to clarify the analysis that reviewing courts should apply to forfeited claims of error under the plain error doctrine. The first step in the analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The word "plain" here "is synonymous with 'clear' and is the equivalent of 'obvious.'" *Piatkowski*, 225 Ill. 2d at 565 n.2 (2007).

¶ 20 If the reviewing court determines that the trial court committed a clear or obvious (or "plain") error, it proceeds to the second step in the analysis, which is to determine whether the

error is reversible. Our supreme court has made clear that plain errors are reversible only when: (1) “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 (2) 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.” *Piatkowski*, 225 Ill. 2d at 565; *People v. Herron*, 215 Ill. 2d 167, 179 (2005).

¶ 21 Although the majority reaches the correct result in this case, it erroneously conflates “plain error” with reversible error. See *supra*, ¶¶ 11, 12, 14. Specifically, although the majority finds that the trial court “erred” by not discussing the defendant's jury waiver in open court in the defendant's presence, the majority concludes that this error is not “plain.” *Id.* I assume that the majority means to say, rather, that although plain error occurred in this case, it is not *reversible* because it does not fall within either of the two categories of reversible error discussed above.

¶ 22 Our court of appeals has repeatedly made the same mistake that the majority makes here. See, e.g., *People v. Haynes*, 399 Ill. App. 3d 903, 914 (2010). Even our supreme court has made this mistake. See, e.g., *People v. Bean*, 137 Ill. 2d 65, 80 (1990). These instances muddle what I believe to be the proper analysis under the plain error doctrine. Again, I write separately to urge our courts of review to exercise greater analytical clarity in our future plain error decisions.