

NOTICE
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2012 IL App (4th) 110323-U

Filed 8/7/12

NO. 4-11-0323

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
MELISSA R. ROGERS,)	No. 09CF364
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court held that defendant validly waived her right to a 12-member jury pursuant to section 115-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-4(b) (West 2010)).

¶ 2 In November 2010, after a jury trial, defendant, Melissa R. Rogers, was found guilty of aggravated battery (720 ILCS 5/12-4(b)(12) (West 2010)) and battery (720 ILCS 5/12-3 (West 2010)). In January 2011, after a hearing on posttrial motions, the trial court merged the guilty verdicts and entered a single conviction of aggravated battery.

¶ 3 Defendant appeals, arguing the trial court erred by empaneling a six-member jury without securing her personal waiver of a 12-member jury or her personal consent to a six-member jury. We disagree and affirm.

¶ 4 In July 2009, defendant was charged by information on two counts. Count I,

aggravated battery, alleged defendant knowingly caused bodily harm to Allan Mackiewicz, knowing him to be a police officer engaged in the execution of his official duties. Count II, battery, alleged defendant made physical contact of an insulting or provoking nature with Mackiewicz, knowing him to be a police officer engaged in the execution of his official duties.

¶ 5 In November 2010, the trial court and parties conducted *voir dire*. Defendant was present in the courtroom with her private defense counsel, Robert E. McIntire. Prior to when potential jurors were called into the courtroom, defense counsel made a motion to the court and stated:

"There is one matter, Judge, that I discussed with my client. We're willing to do a jury of six. That apparently had been happening in DuPage County for a while. I know recently in the case of [*People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 919 N.E.2d 311 (2009).] I think the Supreme Court said it was permissible. It is within the sound discretion of the Court. So, I have discussed this with my client. She is willing to be tried by a jury of six."

The assistant State's Attorney did not object. The court did not question defendant whether defense counsel's representation was accurate. The court granted the motion and the case proceeded through *voir dire*. Six jurors and one alternate were selected.

¶ 6 The six-member jury returned a guilty verdict on both counts. It is undisputed the trial court did not personally admonish defendant as to whether she waived her right to a 12-member jury, nor did defendant object to a six-member jury. In February 2011, the trial court

then sentenced defendant to two years' probation.

¶ 7 This appeal followed.

¶ 8 Defendant argues the trial court erred by empaneling a six-member jury without securing her personal waiver of a 12-member jury or her personal consent to a six-member jury. Defendant concedes she did not preserve this issue in a posttrial motion. As such, her contention of error is subject to plain-error review.

¶ 9 The plain-error doctrine permits a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and 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) a clear or obvious error occurred and that 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. Hale*, 2012 IL App (4th) 100949, ¶ 18, 967 N.E.2d 476 (quoting *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010)). The burden of persuasion remains with the defendant, and the first step in the analysis is to determine whether any error occurred at all. *Hale*, 2012 IL App (4th) 100949, ¶ 18, 967 N.E.2d 476.

¶ 10 The constitutional right to a jury trial is codified in section 115-1 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-1 (West 2010)), which provides that "[a]ll prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a jury unless the defendant waives a jury trial in writing." Section 103-6 of the Procedure Code provides that every person accused of an offense shall have the right to a trial by jury unless "understandingly waived by defendant in open court." 725 ILCS 5/103-6 (West 2010). Where the prosecution is tried by a jury, section 115-4(b) of the Procedure Code provides

"[t]he jury shall consist of 12 members." 725 ILCS 5/115-4(b) (West 2010).

¶ 11 It is well established that a defendant who permits her attorney, in her presence and without objection, to waive her right to a jury is deemed to have acquiesced in, and is bound by, her attorney's action. *People v. Murrell*, 60 Ill. 2d 287, 290, 326 N.E.2d 762, 764 (1975); *People v. Bracey*, 213 Ill. 2d 265, 270, 821 N.E.2d 253, 256 (2004). A defendant can waive her constitutional right to a jury panel composed of 12 members. *Dockery*, 235 Ill. 2d at 78, 919 N.E.2d at 314-15.

¶ 12 Defendant's contention of error is that "before proceeding to trial with a six-person jury (or any number fewer than twelve), the trial court must secure a defendant's personal and understanding waiver of a twelve-person jury in open court [(725 ILCS 5/103-6 (West 2010))], or in writing [(725 ILCS 5/115-1 (West 2010))]." In support, defendant asserts when the three right-to-jury-trial statutory provisions are read "*in pari materia*, *** [they] lead[] to the conclusion that the trial court must secure from the defendant personally a knowing and understanding waiver of a twelve-person jury." Additionally, defendant cites the Fifth District Appellate Court's opinion in *People v. Matthews*, 304 Ill. App. 3d 415, 710 N.E.2d 524 (1999). Defendant asserts *Matthews* stands for the proposition that error is presumed where the record contains no indication the trial judge specifically admonished the defendant in open court concerning her right to jury trial, and the defendant did not indicate personally she understood her right to a jury of 12 members.

¶ 13 The State responds no reversible error is found where a defendant acquiesces in her attorney's decision to proceed with a jury composed of fewer than 12 members. We agree with the State.

¶ 14 This court previously considered the issue of whether personal waiver of a 12-member jury was required in *People v. Quinn*, 46 Ill. App. 3d 579, 360 N.E.2d 1221 (1977). There, the agreement to try the case before a six-member jury was made by the prosecutor and defense counsel in the trial judge's chambers while the defendant remained in the courtroom. *Quinn*, 46 Ill. App. 3d at 581, 360 N.E.2d at 1222. Defense counsel represented he informed defendant of his right to a 12-member jury and defendant could waive that right and consent to be tried by a six-member jury. *Quinn*, 46 Ill. App. 3d at 581, 360 N.E.2d at 1222. The *Quinn* court found no indication in the statutory right to a 12-member jury that it could only be waived personally by the defendant. *Quinn*, 46 Ill. App. 3d at 582, 360 N.E.2d at 1223. Thus, the court held because defendant was informed of his rights and acquiesced in the waiver by counsel, plain-error did not occur. *Quinn*, 46 Ill. App. 3d at 583, 360 N.E.2d at 1224.

¶ 15 We do not read *Matthews* as requiring a personal waiver of defendant's section 115-4 rights. In *Matthews*, the Fifth District stated "[p]rejudice may be presumed where defendant was unaware of his right to a 12-person jury and neither agreed to nor acquiesced in a decision to waive the full number of jurors." *Matthews*, 304 Ill. App. 3d at 419-20, 710 N.E.2d at 527. Although the record showed four references to a six-person jury, with one being in defendant's presence where defense counsel stipulated to a six-person jury in the trial judge's chambers, the *Matthews* court stated the record was "silent" as to whether defendant was aware to his right of a 12-person jury. *Matthews*, 304 Ill. App. 3d at 420, 710 N.E.2d at 527. Ultimately, the court remanded for a new trial because "nothing in the record indicate[d] that defendant was aware of his right to a 12-person jury." *Matthews*, 304 Ill. App. 3d at 419, 710 N.E.2d at 527.

¶ 16 Unlike *Matthews*, the record in this case is not silent as to whether defendant was aware of her right to a 12-member jury. Defense counsel stated he discussed these rights with her, and that she was willing to be tried by a six-member jury. Importantly, defendant has not claimed counsel misrepresented her right to a 12-member jury to her, or rendered ineffective assistance of counsel in his waiver of her jury rights to the trial court.

¶ 17 In this case, defendant did not waive her right to a trial by jury, but only one aspect of that right, namely the number of jurors. Her argument personal waiver or consent to a jury composed of less than 12 members is required would exceed the minimum requirements for a waiver of a jury trial. See *Bracey*, 213 Ill. 2d at 270, 821 N.E.2d at 256 ("Generally, a jury waiver is valid if it is made by defense counsel in defendant's presence in open court, without an objection by defendant."); *People v. McCleary*, 353 Ill. App. 3d 916, 920, 819 N.E.2d 330, 335 (2004) (stating a trial court is not required to give any particular admonishments to a defendant before she waives her right to a jury trial). We are unpersuaded Illinois law requires personal waiver of these rights. However, we restate our comment in *Quinn* that "[t]he best procedure for the court to have followed in this case would have been for the court to have approved the stipulation for a 6-person jury only after having advised defendant in open court in the presence of [her] counsel of [her] right to a full jury of 12 and after having ascertained of the defendant personally if [she] understood the right and waived it." *Quinn*, 46 Ill. App. 3d at 552-53, 360 N.E.2d at 1224.

¶ 18 Because the record shows defendant was (1) informed of her jury rights by defense counsel, (2) the waiver was made in her presence in open court, and (3) she acquiesced in the waiver without objection, no error occurred.

¶ 19 For the reasons stated herein, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal.

¶ 20 Affirmed.