

No. 1-11-2734

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 10 CR 4130
)	
TRACY HARPER,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant forfeited claim that her jury waiver was made involuntary and unknowingly, judgment for heinous battery affirmed.
- ¶ 2 Following a bench trial, defendant Tracy Harper was convicted of heinous battery, then sentenced to six years' imprisonment. On appeal, she maintains that her jury waiver was invalid because it was not voluntarily and knowingly made, and requests this court to reverse and remand for a new trial.
- ¶ 3 Defendant was charged, *inter alia*, with heinous battery of the victim, Porcscha Tally, for throwing boiling water on her on January 24, 2010. When the parties appeared before the court

on October 21, 2010, the court asked defendant if she wanted a "[b]ench or jury" trial. She replied, "[j]ury," and her counsel stated for the record that defendant, "wishes a jury trial date." After further discussion, a jury trial was set for January 18, 2011.

¶ 4 On that date, the State informed the court that it had agreed with defendant to continue the matter for a bench trial. Counsel then asked defendant on the record, "[s]till a bench trial," and defendant responded, "I guess." The matter was then continued, by agreement, to March 10, 2011, for a bench trial. On that date, the matter was continued, after the court confirmed on the record with counsel that it was for a bench trial.

¶ 5 On April 14, 2011, defendant executed a written jury waiver and tendered it to the court. The court then admonished defendant as follows:

"THE COURT: [defendant], you are entitled to have -- a right to a jury trial.

Now, a jury trial is where you and your lawyer and State's Attorney select twelve people from the community. Those twelve people then be the ones that hear the evidence in the case. After they hear the evidence in the case they will -- would be the ones that make decision on verdict of whether you're guilty or not guilty. You understand what a jury trial is, [defendant]?

[DEFENDANT]: Yes.

THE COURT: And, is it your desire to waive your right to jury trial and instead have me hear the evidence and make a decision in what we call a bench trial?

[DEFENDANT]: Yes.

THE COURT: Now I have a form here, [defendant], a written jury trial waiver form. This form tells me you do not want a jury trial.

Did you have occasion to look at, examine and talk to your attorney about it and put your signature at bottom of it?

[DEFENDANT]: Yes.

THE COURT: You understand what this form is all about, [defendant]?

[DEFENDANT]: Yes.

THE COURT: For the record the Court does find [defendant] understands her right to a jury trial and is willfully waiving her right to jury trial.

The court will accept jury trial waiver."

¶ 6 At the ensuing bench trial, the evidence adduced by the State showed that in the afternoon hours of January 24, 2010, defendant was at the home of her sister, Nicole, at 436 West 15th Place in Chicago Heights, Illinois. Defendant's niece, the victim Porcscha Tally, defendant's biological daughter, Olivia, and Nicole (the victim's mother), were also present. At some point, defendant started screaming and yelling at Olivia for spending her birthday money because she needed it for a security deposit on an apartment, then pushed Nicole, who called police. Olivia went into another room in the house, and defendant started banging on the door threatening Olivia. The victim then told defendant not to worry and that it was "cool," but defendant picked up a pot of boiling water and threw it on the victim who suffered partial thickness burns over 12% of her body. She also underwent a skin graft and physical therapy, and was released from the hospital on February 4, 2010.

¶ 7 Defendant testified that she got into a verbal fight with her sister, who then pushed her and called the police. As defendant was leaving, she knocked over a pot of boiling water, and then ran out of the apartment. Defendant testified that she would never intentionally try to burn the victim, and denied throwing the pot of boiling water on the victim, who she did not know was in the kitchen at the time she had knocked over the pot.

¶ 8 The court found defendant guilty of heinous battery and sentenced her to six years' imprisonment. In this appeal from that judgment, defendant does not contest the sufficiency of

the evidence to sustain her conviction, but solely contends that she did not make a knowing and voluntary waiver of her right to a trial by jury. She maintains that she unequivocally expressed her desire for a jury trial, but was repeatedly ignored by the State, the court and her counsel.

¶ 9 We observe initially that defendant did not raise this issue at trial or in a post-trial motion, and has thus forfeited it for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges her omission, but maintains that this court should review the issue as plain error under the second prong of the plain error doctrine because the right to a jury trial is fundamental and its denial a structural error that affects the fairness of the entire trial.

¶ 10 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider forfeited errors where the evidence was closely balanced or where the error was so egregious that defendant was deprived of a substantial right and a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The first step in plain error review, however, is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 11 Defendant concedes that the admonitions given to her would normally be deemed "adequate." However, she claims that she expressly indicated that she wanted a jury trial, but that the court, the State and defense counsel ignored her express request, and that her later response of "I guess," to whether she wanted a bench trial, was reluctant and showed her "buckling under pressure." She thus maintains that she did not personally choose a bench trial, but rather, that it was chosen for her. We find for the reasons to follow, that the record does not support her contention.

¶ 12 The record shows that defendant initially expressed her preference for a jury trial, but that, over time, she clearly changed her mind. On three separate occasions, January 18, 2011, March 10, 2011, and April 14, 2011, counsel indicated that defendant wanted a bench trial without any objection from defendant. On two of these dates, March 10 and April 14, 2011,

defendant, herself, affirmatively indicated that she wanted a bench trial, and further, on April 14, 2011, the court explained to her in detail the right to a jury trial and what a waiver entailed. Defendant confirmed her understanding of these admonitions and that she wanted to waive her right to a jury trial. Defendant also executed a written jury waiver, and, as indicated above, she acknowledged her signature to the court and that she had examined the waiver form and talked to her attorney about it.

¶ 13 Under well settled law, a jury waiver has been deemed valid if it is made by defense counsel in defendant's presence in open court, without objection by defendant. *Bracey*, 213 Ill. 2d at 270; *People v. Asselborn*, 278 Ill. App. 3d 960, 962-63 (1996). Here, defendant raised no objection to her counsel's repeated representations in this regard. In addition, defendant affirmatively indicated on the record on two separate occasions that she wanted a bench trial and was explained the consequences of a jury waiver, thereby lessening the probability that her written jury waiver was not made knowingly. *People v. Lombardi*, 305 Ill. App. 3d 33, 39-40 (1999). In fact, these composite facts and circumstances (*People v. Bannister*, 232 Ill. 2d 52, 66 (2008)) demonstrate a knowing and voluntary waiver of her right to a trial by jury. *People v. Duncan*, 297 Ill. App. 3d 446, 452-53 (1998); *People v. Smith*, 114 Ill. App. 3d 1007, 1015 (1983).

¶ 14 Having found no error in this case, defendant cannot meet her burden of establishing plain error, and we, therefore, honor her forfeiture of this claim (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)), and affirm the judgment of the circuit court of Cook County.

¶ 15 Affirmed.