

No. 1-12-2118

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. 11 CR 11460
)	
GUY WHITMORE,)	The Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

HELD: Where defendant, who was represented by counsel, acknowledged, in response to the trial court's questioning in open court, that he understood the meaning of a jury trial, specifically stated that he was giving up that right, and signed a written jury trial waiver which he tendered to the trial court, defendant knowingly, voluntarily, and understandingly waived his right to a jury trial.

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¶ 1 Following a bench trial, defendant-appellant Guy Whitmore (defendant) was convicted of aggravated battery and was sentenced to an extended term of eight years in prison. He appeals, contending that the trial court violated his constitutional rights to a jury trial and to due process when it failed to ensure that he knowingly, voluntarily, and understandingly waived his right to a jury trial. He asks that we reverse his conviction and remand for a new trial. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant was charged with five counts of aggravated battery arising from an incident that occurred on March 12, 2010 at a gas station at 4520 South Cicero in Chicago. Prior to trial, the following exchange took place:

“THE COURT: Mr. Whitmore, sir, do you know what a jury trial is?

[DEFENDANT]: Yes, ma’am.

THE COURT: You have the right to have that kind of trial. Are you waiving your right to have a jury trial?

[DEFENDANT]: Well, yes, ma’am.

THE COURT: The court accepts your oral waiver.

Is this your signature that I just saw you affix to this written waiver of you right to have a jury trial?

[DEFENDANT]: Yes.”

¶ 4 The cause then proceeded to trial where several witnesses testified. Briefly, the State presented evidence that Larry White, Mohammed Siddiqi and Corey Beard were working in the

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gas station store on the day in question when White and Siddiqi saw a car pull up containing defendant and Darryl Watson; Watson had been previously banned from the gas station due to panhandling. White and Siddiqi saw defendant exit the car, watched as he approached another car parked at a gas pump and heard him ask for money. Via the intercom, Siddiqi asked defendant and Watson to leave, but they did not. White, Siddiqi and Beard then went outside the gas station store and approached defendant and Watson, again asking them to leave. The group of men became involved in an altercation. Suddenly, Siddiqi saw defendant swing at White twice with a box cutter, slashing White on his forehead and arm; following this contact, White also saw that defendant was holding a box cutter. Defendant and Watson then drove away. White sustained a three-inch cut on his forehead and a four-inch cut on his arm, requiring stitches. Siddiqi and Beard spoke to officers at the scene and identified defendant and Watson, and Siddiqi and White later picked defendant out of photo identification lineups as the man who attacked and cut White.

¶ 5 For his part, defendant testified on his own behalf, asserting self defense. He stated that on the day in question, he was a passenger in Watson's car when Watson pulled into the gas station. Defendant explained that he remained in the car while Watson went inside the store. When Watson returned, White, Siddiqi and Beard came over and told Watson he could not panhandle and had to leave. Watson asked defendant to get out of the car, which he did, and White immediately approached him. Since White was bigger than him, defendant began to back away, but White continued to approach him and, after exchanging words, White struck defendant in the eye with brass knuckles causing him to fall to the ground. Defendant recounted that, as

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White was about to hit him again, defendant swung at him with something he found on the ground; he was not sure what it was, but it may have been a piece of metal. White, Siddiqi and Beard then ran inside the store and Watson and defendant drove away. Defendant further testified that he swung at White only once, he did not cut White, he had to have surgery on his eye from White's hit, and he attempted to turn himself in to police several times but was told there was no warrant out for his arrest.

¶ 6 In rebuttal, the State presented Detective Bryant, who testified that, while investigating this altercation, he interviewed defendant, who told him he blacked out after White hit him in the eye with brass knuckles. Defendant recounted that, when he came to, he cut White with a knife or razor. Detective Bryant did not see any injury to defendant's eye.

¶ 7 At the close of trial, the trial court found defendant guilty on all five counts. It noted that it found White and Siddiqi's testimony to be credible and defendant's testimony to be incredible. Accordingly, the court denied defendant's motion for a new trial and sentenced him to an extended term of eight years in prison on count 1 of aggravated battery causing great bodily harm, merging counts 2 through 5 therein.

¶ 8 ANALYSIS

¶ 9 Defendant's sole contention on appeal is that the trial court violated his rights to a jury trial and to due process when it failed to ensure that he knowingly, voluntarily, and understandingly waived his right to a trial by jury. He asserts that, because the trial court failed to explain to him what a jury trial is, did not inform him that it would be deciding his case and failed to ascertain whether his waiver was voluntary, it did not conduct an adequate inquiry

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regarding his waiver, thereby rendering his conviction void and requiring a new trial. We disagree.

¶ 10 As a threshold matter, the State insists that defendant's argument is waived because he neither objected when his bench trial began nor raised the issue in a posttrial motion. The State further denounces defendant's request for review pursuant to plain error, insisting that, as there was no error here, his claim cannot be reviewed pursuant to that doctrine.

¶ 11 The State is correct that both an objection at trial and a written posttrial motion raising the issue are required to preserve it for review on appeal (see *People v. Steidl*, 142 Ill. 2d 204, 235 (1991)), and if not properly preserved in this manner, the issue is waived (see *People v. Fields*, 135 Ill. 2d 18, 59 (1990)). See *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). And, as defendant essentially admits he did not follow this procedure, his argument is, indeed, waived. Consequently, defendant urges us to employ the plain error doctrine, which may be used to review a forfeited claim when the evidence is so closely balanced that the error on its own threatens to tip the scales of justice against him, or when the error is so serious that one of his substantial right is affected to the point that the fairness and integrity of his trial may be questioned. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Wembley*, 342 Ill. App. 3d 129, 138 (2003) (plain error rule permits consideration of errors even though technically waived for review).

¶ 12 Before plain error may be invoked, it is necessary to first determine whether an error occurred, and the burden to demonstrate this lies with the defendant. See *Piatkowski*, 225 Ill. 2d at 565. In the instant cause, the State insists that there was no such error. However, the right to a

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jury trial constitutes such a fundamental right that our courts have universally agreed that a question regarding its waiver generally merits a second-prong plain error analysis. See *In re R.A.B.*, 197 Ill. 2d 358, 362 (2001); see also *People v. Bracey*, 213 Ill. 2d 265, 270 (2004); *People v. Hart*, 371 Ill. App. 3d 470, 471 (2007) (noting that the issue of whether the fundamental right to a jury has been violated may be considered under the plain error doctrine). Accordingly, and in line with those decisions, we review defendant's claim in the instant cause.

¶ 13 Criminal defendants have the right to a trial by jury. See 725 ILCS 5/103-6 (West 2010). However, a defendant may waive this right if he does so understandingly and in open court. See *Bracey*, 213 Ill. 2d at 269; *People v. Turner*, 375 Ill. App. 3d 1101, 1108 (2007). There is no precise formula for determining the validity of a jury waiver. See *Bracey*, 213 Ill. 2d at 269; *R.A.B.*, 197 Ill. 2d at 364; accord *Hart*, 371 Ill. App. 3d at 472. Instead, this depends on the particular facts and circumstances of each case. See *Bracey*, 213 Ill. 2d at 269; *R.A.B.*, 197 Ill. 2d at 364; accord *Hart*, 371 Ill. App. 3d at 472. For example, the existence of a written jury waiver signed by the defendant is one way to establish his intent to waive his right, but it is not necessarily conclusive. See *Bracey*, 213 Ill. 2d at 269-70. Other factors to consider include whether the defendant is represented by counsel, his prior experience with the legal system, and his silence when his counsel waives this right during pretrial proceedings. See *People v. Bannister*, 232 Ill. 2d 52, 71 (2008); *People v. Medina*, 221 Ill. 2d 394, 406 (2006). Ultimately, while the trial court is to ensure that the defendant's waiver is expressly and understandingly made, the court is not required to issue specific advice or admonitions as a prerequisite to a valid jury waiver. See *Bannister*, 232 Ill. 2d at 66; accord *Bracey*, 213 Ill. 2d at 270; *R.A.B.*, 197 Ill.

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2d at 364. We review the issue of whether the defendant knowingly and understandingly waived his right to a jury trial *de novo*. See *Bracey*, 213 Ill. 2d at 270 (where, as here, the facts are not in dispute, this question is a legal one meriting *de novo* review).

¶ 14 In the instant cause, the facts and circumstances demonstrate that defendant's jury waiver was valid. As noted earlier, the trial court here determined that defendant waived his right to a jury trial based on the following exchange:

“THE COURT: Mr. Whitmore, sir, do you know what a jury trial is?

[DEFENDANT]: Yes, ma'am.

THE COURT: You have the right to have that kind of trial. Are you waiving your right to have a jury trial?

[DEFENDANT]: Well, yes, ma'am.

THE COURT: The court accepts your oral waiver.

Is this your signature that I just saw you affix to this written waiver of you right to have a jury trial?

[DEFENDANT]: Yes.”

The record is clear that defendant was represented by counsel throughout these legal proceedings. From this exchange, it is evident that defendant acknowledged in open court that he understood the meaning of a jury trial and specifically stated that he was giving up that right. He then signed a written jury waiver, again in open court, and tendered it to the trial court. We find, under the circumstances presented, that defendant understandingly, knowingly, and voluntarily waived his right to a jury trial.

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¶ 15 Defendant relies heavily on *People v. Sebag*, 110 Ill. App. 3d 821 (1982), for the proposition that the trial court did not properly ensure that he validly waived his right to a jury trial because it failed to explain his right, to ask him whether he actually understood what that right entailed, to inform him that it would be deciding his cause, and to ascertain whether he was waiving his right voluntarily. That case, however, is clearly distinguishable. In *Sebag*, after telling the *pro se* defendant that he was entitled to have his case heard by a judge or a jury, the trial court asked him, “Do you understand that by waiving a jury at this time that you cannot reinstate it?” *Sebag*, 110 Ill. App. 3d at 828-29. After the defendant responded, “Yes,” the exchange regarding his right to a jury trial and to a waiver of this ended. *Sebag*, 110 Ill. App. 3d at 829. Following his conviction, defendant appealed, contending, in part, that the trial court failed to obtain a proper waiver of his right to a jury trial. The *Sebag* court agreed, reversing and remanding the cause for a new trial. See *Sebag*, 110 Ill. App. 3d at 829. The *Sebag* court found that the record did not adequately establish that the defendant knowingly and understandingly waived his right because, not only was defendant completely unrepresented by counsel throughout the proceedings, but the trial court never asked him if he understood what a jury trial was and only informed him that by waiving a jury trial at that time, he could not reinstate it. See *Sebag*, 110 Ill. App. 3d at 829.

¶ 16 In contrast, the facts of the instant cause mirror *People v. Clay*, 363 Ill. App. 3d 780 (2006), and merit the same result. There, a nearly identical exchange took place between the trial court and the defendant regarding the waiver of her right to a jury trial. See *Clay*, 363 Ill. App. 3d at 791. After asking her if she knew what a jury trial was, and after she responded that she

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did, the trial court told defendant that she had the right to that kind of trial and specifically asked her if she was giving up that right. See *Clay*, 363 Ill. App. 3d at 791. The defendant responded that she was and then signed a written waiver and tendered it to the trial court. See *Clay*, 363 Ill. App. 3d at 791. Rejecting the defendant's same contention on appeal that she was denied her right to a jury trial because the trial court failed to properly explain to her the difference between a jury and a bench trial, the *Clay* court specifically distinguished *Sebag* and noted that this defendant had been represented by counsel, acknowledged that she understood the meaning of a jury trial and unequivocally stated that she was giving up that right. See *Clay*, 363 Ill. App. 3d at 791. Accordingly, the *Clay* court upheld the defendant's conviction, finding that she had knowingly and understandingly waived her right to a jury trial. See *Clay*, 363 Ill. App. 3d at 791.

¶ 17 Unlike *Sebag*, defendant here was not proceeding *pro se* and the trial court did not simply inform him that he could not reinstate his right to a jury trial if he waived it. Rather, just as *Clay*, defendant was represented by counsel and the trial court asked him if he understood what a jury was, informed him that he had the right to that kind of trial, and specifically asked him if he was giving up that right. The record is clear that defendant acknowledged that he understood all this and that he unequivocally gave up this right. In addition, the record contains defendant's written jury waiver, as submitted in open court. Under these circumstances, it is clear that defendant understandingly, knowingly, and voluntarily waived his right to a jury trial and we will not reverse or remand his conviction on this ground. See, e.g., *Clay*, 363 Ill. App. 3d at 971; accord *People v. Bowman*, 227 Ill. App. 3d 607, 612 (1992) (distinguishing *Sebag* and holding that the defendant knowingly and understandingly waived his right to a jury trial where he was

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represented by counsel, the trial court asked him whether he knew what a jury trial was, and he signed a written jury waiver).

¶ 18

CONCLUSION

¶ 19 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 20 Affirmed.