SIXTH DIVISION
April 15, 2016

No. 1-13-3612

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. 13 MC4 003280
	)	
EARL TOOMER,	)	Honorable
	)	Thomas M. Tucker,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice DELORT concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant did not validly waive his right to trial by jury. Identification of stolen property by an in-court declarant was not hearsay. Judgment reversed and remanded.

¶ 2 Following a bench trial, defendant Earl Toomer was found guilty of misdemeanor theft and sentenced to 70 days in jail. In this appeal, defendant contends that the trial court failed to ensure that his jury waiver was knowingly and intelligently made. He further contends that the only evidence he was in possession of property that did not belong to him was inadmissible hearsay. We reverse and remand for a new trial.

¶ 3 Defendant was charged by misdemeanor complaint with theft in that he knowingly exerted unauthorized control over a blue men's Magna mountain bike, intending to deprive Brent Bernal permanently of its use.

¶ 4 The common law record contains a preprinted jury waiver form that was filed on the trial date, September 30, 2013, and states in substance: "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing." The form is hand-dated 9/30/13 and contains a signature purportedly that of "Earl Toomer."

¶ 5 When the case was called for trial, the following colloquy occurred:

"THE COURT: Okay. What are we doing with the case?

[711 Student]: It is set for trial. I believe we are both answering ready.

THE COURT: Okay. Sir, you're charged with a Class A misdemeanor. It's punishable by one to 365 [days] in county jail, probation, conditional discharge, supervision, fines up to $2500. Understanding the charge before the Court and possible penalties, how do you plead?

How do you plead?

THE DEFENDANT: Not guilty.

THE COURT: When you plead not guilty, you have a right to have a trial by this Court or by a jury. A jury is where people from the community would be brought to court, and you along with your attorney would participate in the selection of 12 individuals.

They would decide your innocence or guilt, not the Court. Any verdict returned by a jury must be unanimous, meaning all 12 jurors must sign and agree to a verdict before it can be returned. Do you understand that[?] Is that correct?

THE DEFENDANT: Yes, sir."

¶ 6 Neither the court nor defendant nor his counsel made any reference on the record to the written jury waiver.

¶ 7 The State's first trial witness was Brent Bernal who testified that on July 7, 2013, he owned a blue Magna mountain bike with a gel seat cover. On that date, Bernal discovered that the bike was missing from the garage of his North Riverside home, and he notified the police. He did not give permission to defendant or anyone else to remove his bike from his garage.

¶ 8 Officer Gaede of the North Riverside Police Department was on patrol duty on July 8, 2013, when he saw two males riding bicycles on First Avenue. Gaede observed that one of the bikes, a blue Magna mountain bike with a gel seat cover, matched the description of a bike that had been reported stolen. In court, Gaede identified defendant as the person riding the stolen bike. Gaede stopped the two bike riders near 2400 South First Avenue. They said they were heading toward their residence, but they were unable to provide a street address of the residence. Gaede and backup officers detained the two bikers and attempted to contact the bike's owner. Another officer went to the Bernal residence and spoke with Bernal's wife. "She initially described the bicycle and then came and identified the bicycle." She told Gaede that the bike he had seen defendant riding was the bike that had been stolen.

¶ 9 Bernal's wife, Dorene Bernal, testified that on July 7, her husband owned a blue Magna mountain bike which he reported stolen on that date. On the following day, the police told her

they had found the bike and asked her to come and identify it. They brought her to the location where police had detained defendant and there she identified her husband's bike.

"Q. Okay. And when you got there, what did you observe?

A. I saw the bicycle sitting there. Same color. Had a gel seat. Same thing. It was my husband's bicycle."

¶ 10 After the State rested, the defense moved for a directed finding, which was denied; and the defense rested. The court entered a finding of guilty and sentenced defendant to 70 days in Cook County jail, time considered served and actually served. The cause was continued for defendant to file posttrial motions. Defendant filed a motion for a new trial and later an amended motion, both of which were denied by the trial court. Neither motion alleged that defendant's jury waiver was invalid or that the court received inadmissible hearsay in evidence.

¶ 11 On appeal, defendant first contends that the trial court failed to ensure that his jury waiver was knowingly and intelligently made. He admits he did not challenge the validity of the jury waiver in the trial court, but he asserts that the issue should be reviewed as plain error. The State argues that defendant's claim is subject to procedural default and, alternatively, that defendant validly waived his right to trial by jury.

¶ 12 The parties correctly agree that defendant did not address or argue the validity of his jury waiver at trial or in his posttrial motions, resulting in forfeiture of the issue on appeal. See *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). However, we will address the merits of the jury waiver despite the procedural default because a defendant's right to a jury trial is a fundamental right. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). We may review the validity of the jury waiver under the second prong of the plain-error doctrine, *i.e.*, where the "error is so serious that

it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* Accord, *R.A.B.*, 197 Ill. 2d 358, 363 (2001).

¶ 13 The right to a trial by jury is a fundamental right afforded to criminal defendants. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13. A defendant's right to a trial by jury includes the right to waive a jury trial. *Bannister*, 232 Ill. 2d at 65. However, to be valid, the defendant must make the jury waiver knowingly and voluntarily. *Id.* Section 103-6 of the Code of Criminal Procedure of 1963 (the Code) requires that in every case where the accused has the right to trial by jury, the waiver of that right shall be made understandingly "in open court." 725 ILCS 5/103-6 (West 2012). The validity of a jury waiver cannot rest on any precise formula but depends on the facts and circumstances of each particular case. *R.A.B.*, 197 Ill. 2d at 364. No specific admonition or advice is required before an effective jury waiver may be made. *Id.* The statutory requirement of a written jury waiver (725 ILCS 5/115-1 (West 2012)) does not define or give substance to the constitutional right to choose to be tried by jury. Rather, a written jury waiver merely memorializes the defendant's decision, allowing the trial court to review the record to ascertain whether a defendant's jury waiver was understandingly made. *People v. Tooles*, 177 Ill. 2d 462, 468 (1997). Here, because the facts are not in dispute, the issue is a question of law and our review is *de novo*. See *Bracey*, 213 Ill. 2d at 270.

¶ 14 Defendant submits his appeal is controlled by *People v. Scott*, 186 Ill. 2d 283 (1999), where our supreme court affirmed that a defendant validly waives his right to a jury trial only if made understandingly and in open court. *Id.* at 284. There, the defendant had executed a written jury waiver in his attorney's office; it was filed subsequently outside of his presence. *Id.* On the day of trial and in the defendant's presence, his attorney advised the court that the defense would

proceed by way of a bench trial. *Id.* The supreme court found it significant that the defendant was never present in open court when a jury waiver was discussed (*id.* at 285), and he never acknowledged the written jury waiver in open court, either affirmatively or through his silence (*id.* at 286). The court concluded that defendant's silent acquiescence did not constitute a valid jury waiver in open court. *Id.* at 285.

¶ 15 In the present case, contrary to section 103-6 of the Code requiring that a jury trial be waived "in open court," we find that defendant did not validly waive his right to a jury trial where the jury waiver was never discussed in open court. When the case was called for trial, defendant was represented by counsel. The trial court advised defendant that he had a right to be tried either by "this Court" or by a jury and explained the meaning of a trial by jury. Defendant stated that he understood. However, the trial court did not follow up its explanation of defendant's options with an inquiry as to whether he wished to waive his right to a jury trial. The court did not ask whether defendant had signed a written jury waiver. In fact, neither the court nor the parties made any reference on the record to the written jury waiver. There was no explicit reference to waiving a jury trial or to conducting a bench trial. Here, unlike the defense attorney's statement in the defendant's presence in *Scott* that the parties would proceed with a bench trial, defendant's attorney in the present case remained silent, and neither the parties nor the court indicated that a bench trial had been decided on. Moreover, in *Scott* the record established the defendant had personally signed the jury waiver, whereas there was no such showing in the present case. While the jury waiver form here was file-stamped with the trial date, there is no indication as to whether the form was filed before or after trial. We also note that defendant, who was 19 years old at the time of the September 2013 trial in this case, had no criminal history

prior to the July 2013 bicycle theft that would indicate a familiarity with courtroom procedure. A defendant's history with and knowledge of the justice system may be a relevant factor in determining whether he entered a valid jury waiver. *People v. Thornton*, 363 Ill. App. 3d 481, 490 (2006).

¶ 16 The State asserts that the supreme court's decision in *People v. Frey*, 103 Ill. 2d 327 (1984) requires the conclusion that there was a valid waiver here. In *Frey*, the trial court entered an order, approved by defense counsel, stating that " 'the defendant's attorney indicates the defendant will waive a jury trial in this case.' " *Id.* at 333. The supreme court recognized that an accused typically speaks and acts through his attorney (*id.* at 332) and concluded that a jury waiver was made with defendant's knowledge and consent (*id.* at 333). Here, there was no discussion of a jury waiver nor an indication by defendant's counsel that a bench trial was desired. Other cases relied on by the State that have found a valid waiver are similarly distinguishable because in each case the defendant's counsel waived trial by jury and opted for a bench trial in the defendant's presence in open court. See *People v. Brials*, 315 Ill. App. 3d 162, 177 (2000); *People v. Asselborn*, 278 Ill. App. 3d 960, 962 (1996); *People v. Tucker*, 183 Ill. App. 3d 333, 334-35 (1989). We find the instant case is more analogous to *People v. Warnock*, 2013 IL App (2d) 120057. There, as here, the defendant's jury waiver was invalid where there was no explicit reference to waiving a jury trial or conducting a bench trial. *Id.* at ¶ 9. We conclude that here, as in *Scott*, where defendant did not validly waive his right to a jury trial in open court as required by section 103-6 of the Code, the trial court judgment must be reversed and the cause remanded for further proceedings. *Scott*, 186 Ill. 2d at 286.

¶ 17 Defendant next contends that the trial court impermissibly allowed hearsay testimony identifying the ownership of the stolen bicycle. Since a retrial is necessary, we address this issue because it may recur on retrial. Defendant contends that, to prove the crime of theft, the State was required to prove that the bicycle in defendant's possession and recovered by Officer Gaede belonged to Brent Bernal. 720 ILCS 5/16-1(a)(1) (West 2012). He asserts that to prove ownership, the State relied on the hearsay out-of-court identification of the bicycle by Officer Gaede and Dorene Bernal. Gaede testified that after he detained defendant, the bicycle owner's wife, Dorene Bernal, came to the scene and indicated that the bicycle defendant had been riding was her husband's bicycle. Defendant asserts that this testimony was inadmissible hearsay. Defendant also claims that Dorene's testimony about her out-of-court testimony was also hearsay. Defendant notes that the State never displayed either the bicycle or a picture of it to Brent Bernal or his wife Dorene for them to identify at trial. Conceding he did not preserve this issue for review, defendant asks that we review his claim under the "closely-balanced" prong of the plain-error doctrine. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 18 Hearsay is an out-of-court statement that is offered to establish the truth of the matter asserted. *People v. Banks*, 237 Ill. 2d 154, 180 (2010). Hearsay is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). Hearsay evidence admitted without objection is considered and given its natural and probative effect. *People v. Banks*, 378 Ill. App. 3d 856, 861 (2007).

¶ 19 We agree with the State that we need not consider defendant's contention under plain-error analysis because no hearsay error occurred during Dorene's testimony. See *People v. Willhite*, 399 Ill. App. 3d 1191, 1197 (2010). Dorene was not asked at trial to repeat her previous

out-of-court statement to police officers. Rather, she was asked what she personally *observed* when she went to the scene where Gaede had curbed the bike defendant was riding. She testified: "I saw the bicycle sitting there. Same color. Had a gel seat. Same thing. It was my husband's bicycle." While Gaede's testimony was hearsay, Dorene's testimony, based on her own personal knowledge, was not hearsay and was admissible to show ownership of the stolen bicycle. See *People v. Drake*, 131 Ill. App. 3d 466, 470-71 (1985).

¶ 20 Defendant contends, however, that the ownership of the bicycle was not properly established because the State failed to produce either the bicycle or a photograph of it at trial for identification by Brent Bernal or his wife Dorene. Defendant relies on section 115-9 of the Code (725 ILCS 5/115-9 (West 2012)), allowing reception in evidence of a photograph of stolen property in place of the property itself in prosecutions for certain enumerated property crimes, including theft and retail theft. However, we have held that it is not necessary to produce the stolen item or its photograph in court. *People v. Mikolajewski*, 272 Ill. App. 3d 311, 317 (1995); *Drake*, 131 Ill. App. 3d at 469-70. We conclude the State established by competent evidence that the bike in defendant's possession was the same bike owned by, and stolen from, Brent Bernal.

¶ 21 Defendant also contends that his trial counsel was ineffective for failing to object to the court's admission of, and reliance on, what he terms Dorene's "prior identification." As we have concluded that Dorene's testimony was not a hearsay recital of what she told the police, but was based on her own personal knowledge, defendant's counsel was not ineffective for failing to object to her testimony on hearsay grounds. See *People v. Vasser*, 331 Ill. App. 3d 675, 685-86 (2002).

¶ 22 For the reasons stated above, where the record does not show any occasion on which defendant was present in open court when a jury waiver, written or otherwise, was discussed, we conclude defendant did not validly waive his right to trial by jury. Accordingly, we reverse the judgment of the trial court and remand the cause for a new trial.

¶ 23 Reversed and remanded.