No. 1-08-0327

SIXTH DIVISION
May 13, 2011

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. 05 CR 28547
	)	
SERAFIN CORTEZ,	)	Honorable
	)	James M. Schreier,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices McBride and R. E. Gordon concurred in the judgment.

O R D E R

Held: Defendant's jury waiver was knowingly and understandingly made. Automatic reversal under plain error does not apply to *voir dire* issue absent a showing of juror bias. The day of sentencing should not be counted as part of defendant's presentencing custody credit.

Following a jury trial, defendant Serafin Cortez was found guilty of the attempted murder of a police officer and the aggravated discharge of a weapon. Following a bench trial, held simultaneous to the jury trial, defendant was also found guilty of unlawful use of a weapon by a felon (UUWF). He was sentenced to concurrent prison terms of 27 years for attempted murder

and 3 years for UUWF. On appeal, defendant contends he did not voluntarily and knowingly waive his constitutional right to a jury trial on the UUWF charge. Defendant also contends that the trial court failed to strictly comply with Supreme Court Rule 431(b) (eff. May 1, 2007), when questioning the jury, and this alone triggers automatic reversal under plain error. Finally, defendant contends the day of sentencing must be included in his presentencing custody credit. We affirm, with no change to the custody credit in the sentencing order.

On October 29, 2007, the defendant's case was set for trial. Defense counsel appeared and stated her client had "chosen a jury [trial]." Because the judge was already overseeing another jury trial, the case was held on call to November 1, 2007. Before jury selection, defense counsel presented a motion *in limine* to exclude defendant's prior felony UUWF and drug possession convictions, which the court denied. The State stated it was proceeding to trial on the UUWF count, as well as the other charges. The court asked defense counsel whether she desired the UUWF charge to be decided by a jury or "severed by way of a bench trial[?]" Defense counsel answered she wished to proceed with a "simultaneous bench." The court instructed defense counsel: "Have your client sign now a jury waiver." After defendant executed the jury waiver, counsel presented it to the court. The other counts were presented to a jury.

Defendant was found guilty by a jury of attempted murder and aggravated discharge of a weapon. The trial judge found defendant guilty of UUWF. He was sentenced to concurrent prison terms of 27 years for attempted murder and 3 years for UUWF. Defendant appealed.

Defendant first contends he did not voluntarily and knowingly waive his constitutional right to a jury trial as to the UUWF charge.

The State responds that defendant forfeited review of this issue because he failed to preserve it below. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges that forfeiture applies, but argues that review is permitted under the plain error doctrine because the validity of a defendant's jury waiver implicates a fundamental right. We agree. See *People v.*

Bracey, 213 Ill. 2d 265, 270 (2004). However, plain error applies only if the 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 at 270.

Every criminal defendant has a constitutional right to a jury trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§8, 13. However, a defendant may waive that right if he does so knowingly and understandingly and in open court. 725 ILCS 5/103-6 (West 2008). Although the court has a duty to ensure the jury waiver is made knowingly and understandingly, there is no constitutional requirement that the court apprise a defendant of his right to a jury trial. *People v. Rincon*, 387 Ill. App. 3d 708, 717-18 (2008). In addition, although a written and signed jury trial waiver alone does not demonstrate the defendant's understanding, it lessens the probability that the waiver was not made knowingly. *People v. Clay*, 363 Ill. App. 3d 780, 791 (2006). Generally, a jury waiver is valid if it is presented by defense counsel in defendant's presence in open court, without objection by defendant. *Bracey*, 213 Ill. 2d at 270; *People v. Frey*, 103 Ill. 2d 327, 332 (1984).

That is exactly what occurred here. In defendant's presence, counsel stated the defendant wished to have UUWF count heard by the judge. In accordance with this representation, defendant signed a written jury waiver limited to the UUWF charge. The charges of attempted murder and aggravated battery with a firearm proceeded before a jury.

We reject the defendant's claim that because he was not directly admonished by the trial judge on his decision to proceed to a bench trial on the UUWF charge, the waiver of his right to a jury trial announced by his trial counsel and confirmed by a written jury waiver was not knowingly and understandingly made. Defendant obviously knows what a jury trial is because he elected to have a jury determine the other two charges. See *Frey*, 103 Ill. 2d at 333 (apparent from the record that "defendant was aware of his right to a jury trial").

The defendant's reliance on *People v. Ruiz*, 367 Ill. App. 3d 236 (2006), for his contrary

position is misplaced. This case is not like the situation in *Ruiz* where the signed jury waiver was presented by defense counsel a month before the scheduled bench trial. On the day of the bench trial, the trial judge made only a passing reference to the signed jury waiver. We held "that these two instances [the signed jury waiver and its passing reference] do not support a finding that defendant's jury waiver was discussed in open court as required." *Ruiz*, 367 Ill. App. 3d at 239. The record demonstrated that in neither instance was there a "discussion of the defendant's waiver of his right to a jury trial." *Ruiz*, 367 Ill. App. 3d at 239. Here, a jury trial was held simultaneously with a bench trial. No other conclusion can be drawn but that defendant knowingly and understandingly gave up his right to a jury trial on the UUWF charge and exercised that right as to the other charges. See *Rincon*, 387 Ill. App. 3d at 722.

Defendant next argues that the trial court failed to strictly comply with Supreme Court Rule 431(b) (eff. May 1, 2007) because the court did not ask the jury members whether they understood and accepted the *Zehr* principles. Defendant acknowledges that he forfeited this issue by failing to preserve it below. He contends, however, that we may proceed in our review under the plain error doctrine because the issue affects the integrity of the judicial process. Defendant argues that the court's failure to strictly comply with Rule 431(b), alone, triggers automatic reversal under the second-prong of plain error.

The supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010) resolves this issue against defendant. As defendant acknowledges in his reply brief, under *Thompson* his claim of automatic second-prong plain error has no merit. *Thompson* held that in order to avoid forfeiture, defense counsel must preserve a claim that trial court failed to comply with Rule 431(b). A court's failure to comply with Rule 431(b) alone does not trigger a second-prong plain error absent a showing of juror bias. No claim of juror bias is made here. Defendant's plain error claim is foreclosed by *Thompson*. Defendant also acknowledges that a first-prong plain error that the evidence was "closely balanced" is unavailing in this case in light of the evidence presented.

Finally, defendant contends the day of sentencing should be added to his presentencing credit of 797 days. Once again this issue was recently resolved by our supreme court. In *People v. Williams*, 239 Ill. 2d 503, 504 (2011), our supreme court held that the circuit court should not credit defendant with the day he is sentenced. Under *Williams*, this claim fails.

We affirm the decision of the circuit court of Cook County.

Affirmed.