

[Cite as *State v. Mayes*, 2015-Ohio-2588.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

PLAINTIFF-APPELLEE,

VS.

BRIAN KELLY,

DEFENDANT-APPELLANT.

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CASE NO. 14 MA 100

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio

Case No. 13CR1302

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman St., 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. J. Michael Thompson
42 N. Phelps St.
Youngstown, Ohio 44503

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 16, 2015

{¶1} Defendant-appellant Brian Kelly (“Appellant”) appeals his conviction entered by the Mahoning County Common Pleas Court. Appellant asserts that the trial court did not obtain a proper jury waiver prior to conducting the bench trial. He contends the colloquy conducted in open court was insufficient to show a knowing, voluntary, and intelligent waiver. He claims the record lacks a proper oral acknowledgement that he previously executed a written waiver. For the following reasons, Appellant’s conviction is upheld.

STATEMENT OF THE CASE

{¶2} In December 2013, Appellant’s wife reported to police that Appellant threw a cell phone at her head. This caused a cut on her forehead requiring stitches. Appellant was indicted for domestic violence for knowingly causing or attempting to cause physical harm to a family or household member in violation of R.C. 2919.25(A). The offense was a third-degree felony due to his two prior convictions of domestic violence. See R.C. 2919.25(D)(4).

{¶3} Counsel was appointed and a trial date was set. After a January 2014 pretrial, the case was set for a February 18, 2014 jury trial. On February 19, 2014, the day after the trial was to have proceeded, a “Waiver of Right to Jury Trial” was filed, which stated:

I, Brian Kelly, the above-named Defendant in the above case number(s) and charged with the crime(s) of DV in violation of Ohio Revised Code Section 2919.25(A)(D) being represented by counsel and having been advised of my constitutional and statutory right to a jury trial under the United States Constitution; and under Criminal R. 23, hereby waive my right to a jury trial and request trial to the Court.

The signatures of the prosecuting attorney, defense counsel, and the defendant were then set forth. Under this waiver was the heading “JUDGMENT ENTRY” and the ruling:

This 18 day of FEB., 2014, the above named Defendant and his/her counsel appeared in open Court and presented the foregoing Waiver of Right to Jury Trial. After inquiry of the Defendant by the Court, the Court finds that Defendant knowingly, intelligently, and voluntarily waived his/her right to a Jury Trial. Said waiver is accepted and ordered filed.

The judge's signature was stamped on the line for her signature.

{¶4} On February 25, 2014, a judgment entry was filed stating that upon agreement of the parties, the case was set for a bench trial on April 7, 2014. It was signed by both attorneys, and the judge's signature was stamped on the judge's signature line. The case was then reset for a bench trial on April 21, 2014, on which date Appellant appeared for trial with his attorney.

{¶5} As the attorneys were speaking about waiving opening statements, the court interrupted and the following discussion was had:

THE COURT: Hold on. * * * We have to put on the record that your client is waiving a jury. Would you do that for me please?

[DEFENSE COUNSEL]: "Yes, Your Honor. Your Honor, at this time, this trial was set for a jury trial. At a prior hearing, I believe it was on February - - I don't have the exact date, but we did execute a waiver of a jury trial before the Court. We put that on the record at the time.

THE COURT: I don't think we did, but now it's on the record. So - - Mr. Kelly, you understand that you have the right to have a jury trial?

THE DEFENDANT: Pardon me?

THE COURT: You have the right to have this matter tried to a jury. Do you understand that?

THE DEFENDANT: Yes, Ma'am.

THE COURT: Do you want to waive a jury?

THE DEFENDANT: Yes, Ma'am. (Tr. 6-7).

{¶6} The bench trial then began. Various witnesses testified as did the defendant. The court found Appellant guilty as charged. A presentence investigation was ordered, and a sentencing hearing proceeded thereafter. In a July 2, 2014 entry, the court sentenced Appellant to thirty-six months in prison.

{¶7} In filing the notice of appeal, trial counsel filed a praecipe requesting the trial and sentencing transcripts and asked for the appointment of appellate counsel. New counsel was immediately appointed. On November 5, 2014, counsel filed a praecipe asking the court reporter to transcribe "any and all recorded/open court hearings on or about February 19th, 2014, pertaining to defendant-appellant's waiver of jury trial entered into the record that date."

{¶8} The court reporter filed a response that same day stating that a thorough search had been conducted of the court reporter's records pertaining to this case and "[n]o record exists of any open court hearing responsive to Defendant-Appellant's November 5th Praecipe." The reporter also stated: "All open court hearings in Mahoning County Common Pleas cases are conducted in the presence of, and are recorded by, one of the court reporters employed by my office." On December 8, counsel filed the appellant's brief and a motion to supplement the record with the November 5 praecipe and the court's reporter's response.

ASSIGNMENT OF ERROR

{¶9} Appellant's sole assignment of error provides:

"The trial court erred in failing to conduct a proper colloquy pursuant to R.C. § 2945.02 and Crim.R. 23; thereby failed to establish that Defendant's jury trial waiver was knowing, intelligent and voluntary; and thereby divested itself of jurisdiction to try the case by bench trial."

{¶10} There is a constitutional right to a jury trial in all criminal prosecutions. U.S. Constitution, Eighth Amendment. See *a/so* Ohio Constitution, Article I, Section 5 ("The right of trial by jury shall be inviolate * * *"); Ohio Constitution, Article I,

Section 10 (“the party accused shall be allowed * * * to have * * * a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed * * *”). The waiver of this right is governed by Crim.R. 23 and R.C. 2945.05.

{¶11} “In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury.” Crim.R. 23. Pursuant to R.C. 2945.05, the jury waiver must be in writing, signed by the defendant, and filed as a part of the record of the case. “Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel.” R.C. 2945.05.

{¶12} There must be strict compliance with these elements or the trial court lacks jurisdiction to try the defendant without a jury. *State v. Reese*, 106 Ohio St.3d 65, 2005-Ohio-3806, 831 N.E.2d 983, ¶ 9, citing *State v. Pless*, 74 Ohio St.3d 333, 337, 658 N.E.2d 766 (1996). If the record shows a jury waiver, the conviction will not be set aside except on a plain showing that the defendant's waiver was not freely and intelligently made. *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 106, citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 37. A written waiver is presumed to have been validly executed. *Jackson*, 141 Ohio St.3d 171 at ¶ 106.

{¶13} As to the open court requirement, it has long been held that the trial court is not required to interrogate a defendant in order to ascertain whether he is fully informed about the right to a jury trial. *Id.* at ¶ 107, citing *State v. Jells*, 53 Ohio St.3d 22, 559 N.E.2d 464 (1990), paragraph one of syllabus. *See also Fitzpatrick*, 102 Ohio St.3d 321 at ¶ 43, 49 (a colloquy is not constitutionally required). In fact, the “defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it.” *Jackson*, 141 Ohio St.3d 171 at ¶ 107, quoting *State v. Bays*, 87 Ohio St.3d 15, 20, 716 N.E.2d 1126 (1999).

{¶14} The law simply requires that “a defendant while in the courtroom and in the presence of counsel, if any, acknowledge to the trial court that the defendant wishes to waive the right to a jury trial.” *Jackson*, 141 Ohio St.3d 171 at ¶ 107,

quoting *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, 872 N.E.2d 279, ¶ 48. The *Jackson* Court further explained that if a defendant “informed the trial judge in open court that he was waiving his right to a jury trial[,] [t]his was all that was necessary to satisfy R.C. 2945.05. Further questioning was not required to ensure that [he] understood all the rights to a jury trial that he was giving up.” *Id.* at ¶ 109, citing *State v. Sanders*, 188 Ohio App.3d 452, 2010-Ohio-3433, 935 N.E.2d 905, ¶ 13-15 (10th Dist.).

{¶15} In the cited *Sanders* case, the defendant argued that his jury waiver did not satisfy the “open court” requirement because the trial court did not specifically ask whether he signed the waiver and whether his signature was voluntary. *Sanders*, 188 Ohio App.3d 452 at ¶ 12. The trial judge stated to the defendant in open court, “it is my understanding that you have waived your right to a jury trial and would like to have the court decide this case,” to which the defendant replied, “yes.” *Id.* at ¶ 13. The Tenth District found this satisfied the minimum requirements of R.C. 2945.05 and the Supreme Court’s *Lomax* case, which required only “some evidence in the record of the proceedings that the defendant acknowledged the waiver to the trial court while in the presence of counsel, if any.” *Id.*, quoting *Lomax*, 114 Ohio St.3d 350 at ¶ 42.

{¶16} The Tenth District concluded that by responding “yes” to the trial court’s simple question, the defendant acknowledged that he had waived his right to a jury trial. *Id.* at ¶ 14. The court rejected the argument that the trial court was required to engage in further questioning about the defendant’s understanding of his rights or to inform the defendant of the nature of the right. *Id.* The court held: “*Lomax* requires only that appellant acknowledge the waiver in open court, and appellant did so here.” *Id.* (and factually distinguished *Lomax* where the only reference to a jury waiver was: “Since there’s going to be a jury waiver, does the State care to make an opening statement at this time?”).

{¶17} The Supreme Court declined to accept the appeal from the Tenth District’s *Sanders* case. See *State v. Sanders*, 127 Ohio St.3d 1462, 2010-Ohio-6008, 938 N.E.2d 364 (where the memorandum in support of jurisdiction argued that the trial court should have directed the defendant’s attention to the written waiver and

asked him if he signed it). As aforementioned, the Supreme Court later favorably cited paragraphs thirteen through fifteen of the *Sanders* holding. *Jackson*, 141 Ohio St.3d 171 at ¶ 109.

{¶18} Here, a jury trial was scheduled for February 18, 2014. The trial did not proceed on that day but was instead reset for a bench trial. On February 19, 2014, the day after the scheduled jury trial, a written jury trial waiver was filed. This was nearly two months after the arraignment and appointment of counsel and two months prior to the bench trial.

{¶19} The written waiver was labeled with the defendant's name and case number, signed by the defendant, file-stamped, and placed into the record of his case. We note it was also signed by the defendant's appointed attorney and the prosecutor. This written waiver is presumed to have been entered voluntarily, knowingly, and intelligently. See *Jackson*, 141 Ohio St.3d 171 at ¶ 106; *Fitzpatrick*, 102 Ohio St.3d 321 at ¶ 37. Nothing has been presented to show otherwise. See *id.* (if the record shows a jury waiver, the conviction will not be set aside except on a plain showing that the defendant's waiver was not freely and intelligently made).

{¶20} A portion of the court's entry memorializing the written waiver stated the defendant was addressed in open court. This may not have been accurate as the court reporter may not have been present in the courtroom at the time the waiver was entered. However, this does not make Appellant's signed waiver an invalid writing. In fact, the court's memorialization of the waiver in a judgment entry is not a required element of the jury waiver; nor is the court's presence at the execution of the written waiver required. See R.C. 2945.05.

{¶21} Although the defendant may not have acknowledged his waiver in open court *on the day it was signed, the open court requirement was satisfied prior to the commencement of trial.* Concern could arise if the case proceeded to bench trial the day of the written waiver without satisfaction of the open court requirement. However, upon the written waiver, the case was continued for a bench trial on a subsequent date.

{¶22} Before the April 21, 2014 bench trial began, the trial judge ensured in open court that Appellant acknowledged his earlier written waiver. Specifically, the court expressed the need to put Appellant's jury waiver on the record. Defense counsel responded by placing into the record the fact that they appeared before the court for the scheduled jury trial in February 2014 and executed a jury waiver before the trial court. Defense counsel mentioned his belief that the waiver was already orally placed on the record of proceedings. The judge countered that she did not believe the execution of the waiver occurred in open court (i.e. with a court reporter in the courtroom). Accordingly, the judge proceeded to address Appellant in order to ensure the written waiver (which was already signed by the defendant, file-stamped and made a part of the record in the case) was acknowledged in open court.

{¶23} The court addressed Appellant by name and asked: "you understand that you have the right to have a jury trial?" He initially responded, "Pardon me?" The court then stated: "You have the right to have this matter tried to a jury. Do you understand that?" Appellant answered, "Yes, Ma'am." The court then asked him if he wanted to waive a jury and he again responded, "Yes, Ma'am." (Tr. 6-7). Thus, Appellant expressly waived his right to a jury trial in open court. Contrary to appellate counsel's suggestion, the trial court was not required to ask Appellant if it was his signature on the waiver, especially where defense counsel pointed out that they previously executed the waiver in front of the court.

{¶24} In sum, the law simply requires there to be some evidence in the record that the defendant while in the courtroom and in the presence of counsel, if any, acknowledged that he wishes to waive the right to a jury trial. *Lomax*, 114 Ohio St.3d 350 at ¶ 48-49. This does not require a specific reference to the written waiver. All that is necessary to satisfy the open court requirement of R.C. 2945.05 is for the defendant to inform the trial judge in open court that he was waiving his right to a jury trial. *Jackson*, 141 Ohio St.3d 171 at ¶ 109, citing *Sanders*, 188 Ohio App.3d 452 at ¶ 13-15 (10th Dist.). "Further questioning was not required * * *." *Id.* at ¶ 109.

{¶25} In accordance, Appellant's sole assignment of error is overruled, and Appellant's conviction is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J. concurs.