

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
April 15, 2014

v

EUGENE DAVIDSON,  
Defendant-Appellant.

No. 313783  
Wayne Circuit Court  
LC No. 12-006434-FH

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Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant’s convictions arise from two hand-to-hand narcotics sales witnessed by an undercover police officer. On appeal, defendant complains only that his jury trial waiver was not knowing and voluntary. Defense counsel and the trial court advised defendant of his rights and he entered a waiver on the record, as required by law. We therefore affirm.

Defendant contends that the trial court’s warnings and inquiry into his waiver were so abbreviated that the court actually allowed defendant to waive his jury trial right in violation of constitutional and court rule requirements. Defendant failed to preserve this issue by raising it below and our review is limited to plain error affecting defendant’s substantial rights. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011).

A criminal defendant has a constitutionally guaranteed right to a jury trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). “The defendant . . . may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury.” MCR 6.401. MCR 6.402(B) defines the procedure a trial court must follow to permit a defendant’s waiver of his jury trial right:

Waiver and Record Requirements. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

“In order for a jury trial waiver to be valid, . . . it must be both knowingly and voluntarily made.” *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009). Compliance with the requirements of MCR 6.402(B) creates a presumption that a defendant’s waiver is knowing, voluntary, and intelligent. *Id.* at 422-423, citing *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003). The trial court need not go beyond the requirements of the court rule. This Court has definitively “concluded that a trial court is not required to explain the unanimity required in a jury trial as compared to a bench trial,” nor is it required “to ascertain whether he was promised anything or threatened.” *People v Leonard*, 224 Mich App 569, 595-596; 569 NW2d 663 (1997), citing *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992).

In this case, the trial court made the required verbatim record of defendant’s jury trial waiver. The record reveals that defendant’s attorney, Richard Lustig, brought the waiver issue to the court’s attention and initiated the necessary MCR 6.402(B) colloquy by addressing his client directly in the presence of the trial judge and the prosecutor, Pachia Yang, who consented to the waiver as required by MCR 6.401:

*MR. LUSTIG*: . . . It’s my understanding that the defendant wants to go to trial but he wishes to waive a jury. Is that correct, sir?

*[DEFENDANT]*: Yes.

*MS. YANG*: No objection, your Honor.

The trial judge then replied directly to defense counsel Lustig to inquire and confirm, in the presence of defendant, that counsel had explained and discussed defendant’s jury trial right:

*THE COURT*: Okay. And you’ve explained his right to a jury trial?

*MR. LUSTIG*: Absolutely.

Defendant correctly argues that under *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004), *Mosly*, 259 Mich App 90, and *People v Quick*, 114 Mich App 532, 536; 319 NW2d 362 (1982), “the waiver of jury trial is ‘of such moment that [it] cannot be made for the defendant by a surrogate’ including his attorney.” However, *Taylor v Illinois*, 484 US 400, 417-418 n 24; 108 S Ct 646; 98 L Ed 2d 798 (1988), qualifies the prohibition of waiver by counsel in holding that an attorney cannot waive the right to a jury trial “without the fully informed and publicly acknowledged consent of the client.” *People v Pasley*, 419 Mich 297, 302; 353 NW2d 440 (1984), requires that “the trial court has made a finding of fact on the record based upon information conveyed to the judge in open court by the defendant, *or in his presence*, that the defendant has personally, voluntarily, and understandingly given up his right to trial by jury. . . .” (Emphasis added.)<sup>1</sup> It is constitutionally permissible for a defendant to acquiesce in

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<sup>1</sup> *People v Reddick*, 187 Mich App 547, 549; 468 NW2d 278 (1991), explains that MCR 6.402(B) became effective on October 1, 1989, after the *Pasley* decision was rendered. The waiver procedure set forth in subrule (B) differs from the statute and the procedure adopted in

and ratify statements made by his attorney indicating a desire to waive the jury trial right, as long as such statements were made in the defendant's presence.

Here, defendant was part of a three-way conversation in open court. He was present when his attorney represented to the court that defendant wished to waive his jury trial right and was thereby "informed" of its content. Defendant made no objection when his attorney made the initial statement to the court that defendant desired to waive his jury trial right. Defendant then spoke directly with the trial judge to consent to the jury trial waiver, when the court immediately and personally addressed defendant as required by MCR 6.402(B):

*THE COURT:* Sir, you understand the constitution guarantees you a right to a trial by not one person, but by 12 impartial citizens from the community. Do you understand that, sir?

*[DEFENDANT]:* Yes, your Honor.

*THE COURT:* And you wish to waive or give that up and have me decide the case?

*[DEFENDANT]:* Yes, your Honor.

*THE COURT:* And you've gone through that with your attorney?

*[DEFENDANT]:* Yes, your Honor.

*THE COURT:* Okay, alright. The Court will hear a waiver trial in this case.

The court's decision to communicate with defendant initially through counsel was appropriate given the context of the discussion up to that point. Defense counsel addressed the court first and defendant stood by without objection or comment as his attorney informed the court of defendant's decision to waive a jury trial. The court confirmed with counsel—in defendant's presence—that defendant desired to waive his jury trial right. Defendant himself then participated in the conversation by responding to the court's direct inquiry. Defendant acknowledged his constitutional right to a 12-person jury trial, expressed his desire to waive that right and have the court decide the case, and confirmed that his attorney had reviewed the waiver matter with him. Accordingly, defendant ratified the earlier representations of his attorney that he wished to waive his jury trial right. Pursuant to *Taylor* and *Pasley*, the trial court was permitted to incorporate defense counsel's comments with those of defendant in conducting the MCR 6.402(B) colloquy. The court thus obtained the "fully-informed consent" of defendant required under MCR 6.402(B) for a valid waiver of defendant's jury trial right.

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*Pasley* because it eliminates a previously-existing written waiver requirement and replaces it with an oral waiver procedure consistent with the waiver procedure applicable at plea proceedings. The statutory procedure is superseded by the court rule procedure. See MCR 6.001(E).

In addition to the colloquy in open court, the trial court contemporaneously obtained a written waiver, signed by both defendant and his attorney. In response to the oral inquiry of defendant and his written acknowledgment, the trial court made specific written findings in that document:

1. The defendant/juvenile has been arraigned and properly advised of the right to a jury trial.
2. The defendant/juvenile has had an opportunity to consult with counsel.
3. Waiver occurred in open court as required by law.

Defendant acknowledges in his appellate brief that he is a “fourth habitual offender and had experience with the criminal justice system.” It is logical to conclude that, given defendant’s familiarity with the criminal justice system and the three-month interval between his jury trial waiver and the beginning of the bench trial, if defendant had any misgivings about his decision, he would have raised them at some point below.

Because the record shows that the trial court complied with the requirements of MCR 6.402(B) and accepted defendant’s waiver only after ascertaining that defendant was informed and personally understood his right to a jury trial, and knowingly and voluntarily chose to waive that right, defendant cannot establish plain error requiring reversal of his bench trial conviction.

We affirm.

/s/ Joel P. Hoekstra  
/s/ David H. Sawyer  
/s/ Elizabeth L. Gleicher