

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2001-KA-1290**
VERSUS * **COURT OF APPEAL**
KEVIN JAMES * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-340, SECTION "D"
Honorable Frank A. Marullo, Judge
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Judge Patricia Rivet Murray
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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,
Judge Max N. Tobias, Jr.)

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AFFIRMED

On August 24, 2000, the defendant, Kevin James, was charged with simple burglary of Rabouin High School. A bench trial was held on January 16, 2001, and the defendant was found guilty. He was sentenced to eight years in the Department of Corrections. The State then filed a multiple bill; the defendant waived his right to a multiple bill hearing, and the trial court found him to be a multiple offender. The trial court vacated his previous sentence of eight years and re-sentenced him to six years at hard labor. Mr. James now appeals his conviction. For the reasons that follow, we affirm.

FACTS

On Sunday, April 2, 2000, the alarm at Rabouin High School went off twice. The first time, the school's principal and two security guards responded and found nothing, but they suspected someone might have entered the school by climbing some scaffolding which had been left by the construction crew working on the building. The second time the alarm was triggered, the principal, the two school security guards, and two New Orleans police officers responded to the call.

The principal, Dr. Carol Chance, testified that upon searching the building the second time, they found that some of the teachers' desks and classroom cabinets had been ransacked, but they did not find an intruder. Dr. Chance further testified that she heard a noise in the basement/cafeteria area of the school, and she called for the security and police officers to investigate. Upon investigating the noise, the officers found Mr. James hiding behind some milk crates.

Harrison Baptiste, a security officer with the Orleans Parish School Board, and Officer Bradley Tollson, of the New Orleans Police Department, corroborated Dr. Chance's testimony as to their initial inspection of the classrooms and their discovery of Mr. James hiding in the basement. Officer Tollson said he ordered Mr. James, who was crouched in a small space between the milk crates and a screen door, to come out showing his hands. He complied. Mr. Baptiste found a blue book bag and a VCR in the space where Mr. James had been hiding. When the items were brought out, Mr. James spontaneously said, "Those are mine." The VCR was the same make and model used in the school, and the book bag contained a Polaroid camera and a pack of RTA bus passes of the type usually distributed to students by their homeroom teachers; the pack of passes had "Room 205" noted on it. Mr. James was advised of his rights and arrested; a pat down search revealed

an I.D. card for Mrs. Kissling, the homeroom teacher of room 205, in Mr. James' shirt pocket, and a pair of school scissors in his pants pocket. Mr. James had no explanation for his possession of these items, but he said he carried the VCR and book bag because his wife had thrown him out, and he had come into the school to sleep. Officer Tollson noted that it was about one o'clock in the afternoon when they found Mr. James.

Officer Tollson testified that he went to room 205 and found the molding peeled back from the plexiglass pane of the classroom door, the pane moved, and the door broken into. Inside, the teacher's desk drawer and the doors of the file cabinets were open and had been rifled through. Officer Tollson also testified that a school inventory requested by the police showed a VCR missing from room 314, the room where the first alarm had been triggered by a motion detector, and a Polaroid camera missing from the security desk of the school. Officer Tollson identified photographs of room 205 and other areas of the school, which were entered into evidence. The trial judge declined to admit into evidence the inventory, prepared by the school's vice-principal, on the basis that no predicate had been laid for its admission.

On appeal, Mr. James raises two assignments of error: that the trial court failed to advise him of his right to trial by jury; and that the trial court

erred in admitting hearsay evidence as to the identification of the missing property.

ERRORS PATENT

Our review of the record has revealed no errors patent.

ASSIGNMENT OF ERROR NUMBER 1

In this assignment, Mr. James argues the trial court erred in failing to address him or his counsel on the record as to his right to a jury trial. The defendant points to the lack of colloquy in the record showing whether or not he made a knowing and intelligent waiver of his right to a jury trial.

La. C.Cr.P. art. 780 provides, in part:

A. A defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. At the time of arraignment, the defendant in such cases shall be informed by the court of his right to waive trial by jury.

B. The defendant shall exercise his right to waive trial by jury in accordance with the time limits set forth in Article 521. However, with permission of the court, he may exercise his right to waive trial by jury at any time prior to commencement of trial.

In State v. Abbott, 634 So.2d 911 (La. App. 4th Cir. 1994), this court stated that the waiver of trial by jury was valid only if the defendant acted

voluntarily and knowingly. The court further stated that the preferred method of ensuring that right was for the trial judge to advise the defendant personally on the record of his right to a jury trial and to require the defendant to waive the right personally, either in writing or by oral statement in open court on the record. However, as noted by this court in State v. Richardson, 575 So.2d 421 (La. App. 4th Cir. 1991), the Supreme Court has upheld cases in which a waiver of jury trial was made by the defendant's attorney, rather than the defendant personally, when the defendant was considered to have understood his right to a jury trial and yet still to have consented to the waiver.

The record in the instant case contains the minute entry for October 26, 2000, which notes the defendant's arraignment and states that the trial court advised Mr. James of his right to be tried by judge or jury. The minute entry for January 16, 2001, states that the defendant appeared in court and through his counsel, informed the court that he wished to waive his right to be tried by jury, and he wished to be tried by judge. The trial transcript from January 16, 2001, also reflects that the trial court judge advised the defendant that he had the right to be tried before either a judge or a jury, and that, through counsel, the defendant informed the court that he wished to waive his right to be tried by jury.

Considering the existence of a minute entry showing that at arraignment, the defendant was advised of his right to a jury trial, and further that the trial court again advised the defendant of that right on the day of trial, and the defendant consented as his counsel waived the right for him, the record is sufficient for us to conclude that the defendant knowingly and voluntarily waived his constitutional right to a trial by jury. We therefore reject this assignment of error.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment of error, Mr. James contends the trial court improperly allowed hearsay evidence as to the purported identification of missing property. Specifically, the defendant argues that the hearsay evidence consisted of the actual list of missing school property compiled by Rabouin High School personnel in the days after the incident.

Officer Bradley Tollson, of the New Orleans Police Department, testified that he and the other police officer who responded to the second call about the alarm advised Dr. Chance to create an inventory list, presumably of the missing items, and to contact them when it was done. Officer Tollson further testified that he received a call from the vice-principal informing him the list had been completed. The list was actually compiled after the vice-

principal had spoken to the faculty and asked them to inventory their classrooms to determine if anything was missing.

The record reflects that the State did attempt to introduce the inventory list as evidence, but the trial judge did not allow it, saying, “You would have to lay a predicate for the inventory list.” The minute entry of January 16, 2001, the trial date, also reflects the fact that the trial judge did not allow the State to submit the list into the record as evidence.

Therefore, the evidence that the defendant contends is hearsay was not actually admitted. Additionally, Mr. James’ counsel did not object to the State’s attempt to introduce the list or to the officer’s testimony about the list. The defendant cannot complain on appeal about evidence to which his counsel failed to object at trial. La.C.Cr.P. art. 841. The trial court on its own decided the proper predicate had not been laid for the inventory list to be submitted into evidence; therefore, the list was not admitted. We reject this assignment of error.

CONCLUSION

Accordingly, for the reasons stated, we affirm the defendant’s conviction and sentence.

AFFIRMED