

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASHRAF NIZAR ALKHATIB,

Defendant-Appellant.

UNPUBLISHED
February 21, 2008

No. 274504
Wayne Circuit Court
LC No. 05-010329-01

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and domestic violence, MCL 750.81(2). Defendant was sentenced to life imprisonment for the first-degree murder conviction, two years' imprisonment for the felony-firearm conviction, and 373 days in jail, time served, for the domestic violence conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

This appeal arises from the shooting death of defendant's wife, Carolyn. We begin a recitation of the salient facts pertinent to the legal issues raised in this appeal by noting that the lower court record states defendant's initial trial was set to begin on December 14, 2005, as a bench trial. When the parties convened in court, the trial court explained to defendant that it was rare for a defendant charged with first-degree murder to elect a bench trial. The trial court indicated to defendant that he was facing a possible sentence of life without parole, he had a right to a jury trial, most defendants in his position elect a jury trial, and defense counsel's recommendation was that defendant be tried by a jury. After defendant repeatedly expressed that he understood all the statements of the trial judge, the trial court proceeded with questioning to determine whether defendant's waiver of his right to a jury trial was knowing, voluntary and intelligent. Defendant again stated that he understood that he has a right to a jury trial, expressed a desire to give up that right of his own free will, signed the waiver form and stated that he understood all of the language in the waiver form. The trial court accepted defendant's waiver.

Defendant then began his opening statement which is best characterized as long, rambling and infused with a distinct theme of paranoia. Defendant maintained that he was set up, the body of the deceased was not defendant's wife, the paperwork involved in his case was altered by a mysterious attorney who visited him in jail, and defendant feared for his life because he had been hearing the sounds of people running through his house. At the conclusion of

defendant's opening statement, defense counsel stated to the court that he believed a competency evaluation of defendant was in order.¹ The trial court agreed and adjourned defendant's trial for 60 days so that defendant could undergo a competency and criminal responsibility evaluation by the state forensic center. In closing, the trial court remarked that it would revisit any requests for a jury trial when the trial started up again, to which the prosecution responded, "[t]he People will be demanding a jury the next time." The court replied, "[a]ll right," and defendant's bench trial was adjourned.

Thereafter, defendant underwent a psychological evaluation and, in a February 5, 2006, report from the state forensic examiner, it was recommended that defendant be found incompetent to stand trial. The report noted that defendant was suffering from paranoid ideations such that he lacked the capacity to assist in his own defense at trial. On September 5, 2006, the trial court found defendant competent to stand trial on the basis of an August 14, 2006, forensic report indicating that defendant's paranoid ideations had subsided and he was recommended competent to stand trial.

On September 26, 2006, defendant's trial resumed. Rather than picking up the bench trial where it left off, the trial court indicated that it would begin "at square one" and restart the trial. The trial court noted:

[T]his trial did begin previously. After opening statements there was a request for competency evaluation, and we are, in essence, beginning at square one.

* * *

Couple of issues. One, this will be a jury trial. I don't want any issues of any prior waivers of counsel or jury to become an issue in the future. Mr. Harris is counsel of record, will represent the defendant, Mr. Alkhatib, although, Mr. Alkhatib, you are permitted at all times to consult with Mr. Harris and discuss with him anything that you think he may have overlooked or forgotten to ask.

Defendant then reiterated his desire for a bench trial and wanted to know why his trial would be proceeding with a jury against his wishes. The exchange occurred as follows:

¹ MCL 330.2020(1), the competency statute, provides:

A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.

DEFENSE COUNSEL: Your Honor, my client would like to know why he has to have a jury trial. He has indicated his willingness and, in fact, his preference -

THE COURT: People object.

DEFENSE COUNSEL: Can I finish for the record?

THE COURT: Go ahead, yes.

DEFENSE COUNSEL: He's indicated his preference for a - a bench trial and he'd like to know exactly why he's being obligated to try this case to the jury.

PROSECUTION: The People object to any waiver trial, Judge.

THE COURT: And the - Mr. Alkhatib, both defendant is entitled to ask for a jury trial and the People can ask for a jury trial. Even if you are willing to request a jury or bench trial or waiver trial, the People can object to that and demand a jury trial, which they are doing at this time. The - any prior waiver or acceptance of waiver has been nullified by the request for - subsequent request for competency evaluation. There was some concern about whether you were competent to make a decision to waive the jury, and at this juncture the People are insisting on a jury trial at this point. All right. And they have a right to do so.

The trial proceeded and the jury found defendant guilty of first-degree murder, felony-firearm and domestic violence. This appeal ensued.

Defendant's sole argument on appeal is that the trial court erred by finding his waiver of the right to a jury trial invalid and proceeding with a jury trial against defendant's request for a bench trial. This court's determination whether a defendant validly waived his right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

A defendant charged with a felony has a constitutional right to a jury trial. *People v Bearss*, 463 Mich 623, 629-630; 625 NW2d 10 (2001). A defendant does not, however, have a corresponding constitutional right to bench trial. *People v Kirby*, 440 Mich 485, 487; 487 NW2d 404 (1992). Any rights a defendant may have to waive his right to a jury are solely those granted to him by the Legislature. *Id.* Pursuant to MCL 763.3, a defendant is, "with the consent of the prosecutor and approval by the court," permitted to waive his right to a jury trial. *Leonard*, *supra* at 595; MCL 763.3. The trial court or the prosecutor is permitted to deny the defendant's request for a bench trial "for no reason at all or for any reason." *People v Jones*, 195 Mich App 65, 69; 489 NW2d 106 (1992). Finally, for a defendant's waiver of the right to a jury trial to be valid, it must be knowing and voluntary. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998); MCR 6.402(B).

The record contains sufficient evidence to conclude that defendant's incompetence to stand trial rendered his waiver of the right to a jury trial invalid. Defendant's long and rambling opening statement was filled with sincerely held paranoid ideations, leading his counsel to

request and the trial court to order an evaluation to determine defendant's competency to stand trial pursuant to MCL 330.2020(1). Thereafter, defendant was evaluated and adjudicated incompetent to stand trial, owing chiefly to his paranoid ideations. The characteristics upon which the finding of incompetence was based were present during the time that defendant waived his right to a jury trial. Defendant's mental condition was such that he could not make a knowing and voluntary waiver of the right to a jury trial, and thus, defendant's waiver was invalid. *People v Russell*, 471 Mich 182, 188; 684 NW2d 745 (2004) ("it is a long-held principle that courts are to make every reasonable presumption against the waiver of a fundamental constitutional right"); *People v Hall*, 97 Mich App 143, 145; 293 NW2d 742 (1980) (the defendant's preliminary examination was invalid where it was held prior to a competency examination at which the defendant was adjudged to be incompetent).

The trial court acknowledged that it had concerns about defendant's competence and that defendant's questionable mental condition at the time of the waiver and subsequent formal finding of incompetence "nullified" his waiver. Upon reinitiating the trial after defendant was declared competent to stand trial, the trial court concluded that the best course of action was to start from "square one," which entailed revisiting requests for a jury trial from either side. Because the prosecution may, for any reason or no reason at all, refuse a defendant's request to waive his right to a jury trial, the prosecution in the instant case had a right to insist on a jury trial despite defendant's request for a bench trial. *Jones, supra* at 69.

Therefore, the trial court's finding that defendant's waiver was invalid is not clearly erroneous. Furthermore, upon finding that defendant's waiver was invalid, the trial court did not err by asking the prosecution whether it consented to defendant's reaffirmed waiver, and upon determining that it did not, proceeding with a jury trial.²

Even assuming defendant could demonstrate that the trial court erred by refusing his request for a bench trial, defendant is not entitled to reversal of his convictions because he cannot establish that he was deprived of a fair trial. *Kirby, supra* at 494 (holding that the "denial of unconditional waiver of a jury does not automatically deny [the] defendants the right to a fair trial" and the defendant must present something more to establish error requiring reversal). Defendant presents no evidence that any of his rights were violated or that he likely would have been found not guilty had he had a bench trial, as the record contains ample evidence of defendant's guilt. Testimony was adduced from defendant and Carolyn's son, Nizar, who indicated that on the day in question, defendant, armed with a rifle, went into the den with Carolyn and locked the door. After Nizar heard a gunshot, defendant directed Nizar to call 911,

² Defendant presents no authority to support his position that the trial court was under an obligation to declare a mistrial after defendant was found incompetent to stand trial, and by failing to do so, waived its right to proceed with a bench trial. While we note that a party may not leave it to this Court to search for authority to sustain or reject its position, *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), we are also persuaded by the fact that since the initial bench trial only reached the opening statement stage in defendant's first trial, jeopardy did not attach. *People v Hicks*, 447 Mich 819, 836-827; 528 NW2d 136 (1994) (in a bench trial, jeopardy attaches once the court begins to hear evidence). Consequently, any argument that defendant's second trial violated double jeopardy would be without merit.

stating that he had shot Carolyn. A police officer whom was called to the scene of the shooting testified that defendant told her that Carolyn was having an affair and he shot her. After defendant was taken into custody, he gave a statement, explaining, “[m]y wife has been cheating on me for about four years. I’ve tried to keep our marriage together. Tonight I got my .22 rifle and went to the office and shot her.” The medical examiner opined that Carolyn’s death was a homicide, not an accident or suicide. The defendant, who was armed with a gun and was the only other person in the room with the victim when she was shot, admitted to several individuals, including the police that he shot the victim. Additionally, the medical examiner testified that the victim’s death was the result of a homicide. The evidence was such that defendant was not prejudiced by the fact that he had a jury trial rather than a bench trial, and his convictions should not be reversed.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello