STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2010
V ANTHONY LACALAMITA, Defendant-Appellant.	No. 294436 Oakland Circuit Court LC No. 2008-220963-FC

Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by leave granted his bench trial conviction of assault with intent to murder, MCL 750.83. Because the verdict was not against the great weight of the evidence, the trial court did not err in conducting defendant's trial outside of his presence, and, the trial court did not clearly err in accepting a written waiver of defendant's right to a jury trial outside of defendant's presence when defendant refused to appear in court, we affirm.

The instant charges arise from defendant's attack of Oakland County Sheriff's deputy David A. Szydlowski with a shank fashioned from a toothbrush at the Oakland County Jail on February 16, 2008. The prosecution charged defendant with assault with intent to murder, MCL 750.83 and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). Defendant's trial was set for August 19, 2008. When the trial was supposed to begin, a sheriff's deputy informed the trial court that defendant was being uncooperative and resisting efforts to escort him to the court for trial. The trial court adjourned trial and rescheduled it for October 6, 2008.

Before the second trial date, the trial court prepared a document for defendant's signature stating as follows:

> I am aware I have a right to be present at my jury trial on Monday October 6, 2008 at 8:30 am.
>
> If I am not there, my trial will be tried by a jury or the judge in my absence.

Defendant signed the form on October 3, 2008.

Handwritten on the same document is the following statement prepared by defendant's trial counsel:

> I, Anthony Lacalamita, waive my right to a jury in the above-captioned case. I know I have a right to a jury trial. This waiver is voluntary. No threats or promises have been made to get me to waive this right. I also waive my right to be present for the bench trial. Furthermore, I waive my right to an updated presentence report and presence at sentencing.

Defendant both initialed and signed this portion of the document as well on October 3, 2008, the Friday before trial.

While defense counsel appeared for defendant's trial on Monday, October 6, 2008, defendant did not appear. Defense counsel acknowledged that defendant executed both sections of the October 3, 2008 document in her presence. Defense counsel indicated that two deputies were also present when defendant signed the document. Defense counsel represented to the trial court that she and defendant discussed the document and that he completed it voluntarily and of his own free will. The trial court accepted the document and proceeded to commence a bench trial on the charges. At this point, the prosecutor voluntarily dismissed the charge of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1).

The prosecution called only one witness, Deputy Szydlowski. Szydlowski testified that he worked at the jail and was assigned to K Block, performing safety and security functions on February 16, 2008. Defendant was an inmate assigned to K Block on that day. Defendant had been released from his cell for a walk, and he had been summoned to return to his cell over the loud speaker. Szydlowski was doing his normal rounds when he noticed that the door to defendant's cell was not closed. When defendant returned to his cell after his walk, he had not closed his door.

As Szydlowski approached defendant's cell, he saw defendant peeking through the crack of the cell door. Szydlowski told defendant to secure his door. Defendant rushed out of his cell in the direction of Szydlowski, who was standing about ten feet from defendant. Defendant's hands were clenched and down to his side, and he had an aggressive stance. Defendant continued to approach Szydlowski, and as he did so his right hand came up. Defendant struck at Szydlowski's head and neck area with his clenched right hand at least two times. Defendant hit Szydlowski's shoulder and something grazed Szydlowski's neck. Szydlowski felt a puncture on the left side of his neck. Defendant came at Szydlowski again, and Szydlowski ducked his body, blocked defendant, and took defendant to the ground with a leg sweep.

Szydlowski then saw a white object fall from defendant's hand. He had secured defendant so defendant could not strike him anymore. Defendant was trying to move from underneath Szydlowski to get free, and Szydlowski told defendant to stop resisting. Szydlowski's supervisor helped handcuff defendant. Szydlowski's neck was cut and bleeding. The white object that fell out of defendant's hand was a toothbrush that had been sharpened to a point like a shank. At trial, showing where the wound was on his neck, Szydlowski placed his finger over a pulsing vein.

On cross-examination, Szydlowski acknowledged that K Block is an area of the jail that is reserved for inmates with special circumstances, such as those with mental issues, suicidal tendencies, and those involved in high profile matters. After defendant cut Szydlowski, blood dripped down Szydlowski's neck. The cut was more severe than one that might occur while shaving. Szydlowski had a tetanus shot, and the wound was cleaned and dressed with a band-aid. It did not require stitches.

After the close of testimony, the parties stipulated the admission of a recording, and its transcript, of a telephone conversation defendant had with his father on the morning of February 16, 2008, about an hour before the incident. During that telephone conversation defendant complained to his father about Szydlowski. Defendant told his father that he was going to be "waiting for [Szydlowski] to come out and make me go back to my cell and then he's going to know. I'm ready for him and he's going to pay." Defendant's father repeatedly pleaded with defendant not to do anything and reminded him that he should think of his family. Defendant told his father that Szydlowski "may not survive this day and then true justice will be done." Defendant further stated to his father that as a result of what he was going to do, Szydlowski was "gonna be gone," "gonna be off the face of the earth," and that Szydlowski would "meet his eternal death." Defendant also stated to his father that "if I'm eliminated in the process then I'll be a martyr."

At trial, Szydlowski was still under oath and the trial court asked him if he knew about the subject matter of the conversation or if there was anything ever stated between himself and defendant. Szydlowski responded in the negative. The trial court also asked Szydlowski if he was aware that the conversation had taken place at the time of the attack and Szydlowski responded that he had not heard about the conversation before defendant attacked him.

The defense did not call any witnesses. After closing arguments, the trial court found defendant guilty as charged. In support of its verdict, the trial court referred to the comments defendant made to his father, the fact that defendant had to take time to make a weapon out of his toothbrush, the location of the wound and the aggressiveness in the manner defendant approached Szydlowski. Based on these facts, the trial court found defendant guilty of assault with intent to murder and immediately sentenced defendant to a term of 10 to 25 years in prison.

On October 6, 2008, the trial court entered the judgment of sentence. On December 18, 2008, defendant requested the appointment of appellate counsel, and on February 17, 2009, the court appointed counsel to represent defendant. Defendant moved for a new trial, and the trial court heard defendant's motion on June 10, 2009. The trial court rejected defendant's request for new trial based on the great weight of the evidence, noting that the prosecution presented sufficient evidence to support defendant's conviction. Defendant filed a delayed application for leave to appeal which this Court granted. Thus, defendant now appeals by leave granted.

On appeal, defendant first argues that the verdict is against the great weight of the evidence. This Court reviews for an abuse of discretion the trial court's denial of defendant's motion for new trial based on an argument that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A new trial on this basis is justified only where "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*.

The elements of assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The evidence in this case supports the verdict of assault with intent to murder. Defendant took the time to create a dangerous weapon from a toothbrush and waited for Szydlowski in his cell. Defendant watched for Szydlowski through the crack of the door, and when he saw him, he aggressively rushed toward Szydlowski with the weapon. Defendant raised his arm with the sharpened toothbrush and twice struck Szydlowski about the head and neck. Defendant cut Szydlowski's neck in the region of an artery or vein before being subdued. It was only by mere happenstance, and not defendant's doing, that Szydlowski only sustained a minor cut to the neck. Defendant had only an hour earlier in the day expressed to his father his intention to help Szydlowski "meet his maker" and that Szydlowski "may not survive this day." Clearly, defendant had the requisite intent and therefore, the evidence is more than sufficient to support the elements of assault with intent to commit murder and to allow the verdict to stand.

Defendant next argues that the trial court erred in conducting defendant's trial outside of his presence. He specifically asserts that the trial court accepted an invalid waiver of his right to be present and that his conviction must be reversed on this basis. Reversal of a conviction of a defendant who was not present at trial is required where his absence created any reasonable possibility of prejudice. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

A defendant has the constitutional and statutory right to be present at his own trial. US Const, Am VI (Due Process Clause); US Const, Am XIV (Confrontation Clause); Const 1963, art 1, § 20; MCL 768.3. However, this right is not absolute. *People v Kreuger*, 466 Mich 50, 54 n 9; 643 NW2d 223 (2002). A defendant may lose the right to be present if he "continues disruptive behavior after being warned to refrain," *id.*, or where he waives the right to be present. *Id*. at 53. He may waive the right to be present by failing to appear for trial. *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). For a proper waiver of the right to be present at trial, two elements must exist: (1) the defendant's specific knowledge of the right and (2) an intentional decision to waive that right. *People v Travis*, 85 Mich App 297, 301; 271 NW2d 208 (1978).

Here, the record is clear that defendant resisted appearing for trial. On the first date set for trial, August 19, 2008, Sergeant Nacrotti of the Oakland County Jail informed the trial court that defendant was being "uncooperative" and "putting up resistance to coming over here for a trial." The trial court adjourned the trial date to a later date, Monday, October 6, 2008. Before the second trial date, the trial court informed defendant in writing of his right to be present at trial and the consequences of him not appearing. Defendant signed that writing, acknowledging that he understood his right and was making a conscious, intentional decision to waive the right to be present. Defense counsel presented the writing to the court. Defense counsel indicated on the record that she and defendant discussed the document and that he completed it voluntarily and of his own free will. The content of the writing together with defense counsel's statements to the trial court clearly demonstrate defendant's specific knowledge of his right to be present at trial, and, defendant's intentional decision to waive that right. *Travis*, 85 Mich App at 301.

Defendant now contends that he was required to make the waiver in the presence of the judge to enable the judge to determine from defendant's demeanor whether he understood his

right and was capable of voluntarily waiving his right. But defendant provides no authority to support this argument. In fact, nothing in the cases cited by defendant require that he be present in court and questioned personally by the judge regarding the right to be present at trial. Under the instant circumstances, the trial court's acceptance of defendant's signed waiver was sufficient under *Travis*, 85 Mich App at 301. Further, defendant has not shown that his absence at trial resulted in prejudice. *Armstrong*, 212 Mich App at 129. Defendant has failed to demonstrate reversible error.

Finally, defendant argues that his conviction must be reversed because the waiver of his right to a jury trial was invalid. This Court reviews for clear error the trial court's determination that a defendant validly waived the right to a jury trial. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). "The adequacy of jury trial waiver is a mixed question of fact and law." *People v Cook*, 245 Mich App 420, 422; 776 NW2d 164 (2009). In order for a waiver of the constitutional right to a jury trial to be valid, it must be both knowingly and voluntarily made. *Id*.; MCR 6.402(B); *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998).

A defendant has a constitutional right to a trial by jury and a determination of guilt beyond a reasonable doubt. US Const, Am VI; Const 1963, art 1, § 20. A defendant may waive the right to a jury trial with the prosecution's consent and the court's approval. MCL 763.3(1). Such a waiver must be in writing and must in substance provide:

> I, [the defendant's name], defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury. [*Id*.]

The defendant must sign the waiver. MCL 763.3(1). The waiver must be made in open court after arraignment and after the defendant has had the opportunity to consult with counsel. MCL 763.3(2).

MCR 6.402 sets forth the procedural requirements for a waiver of a jury trial. MCR 6.402(B) states:

> 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.

Here, the trial court did not advise defendant of his right to a jury trial in open court, although it did so through the October 3, 2008 document. The trial court was unable to address defendant personally in open court to ensure a voluntary and understanding waiver in accordance with MCR 6.402(B) because defendant refused to appear in court.

This Court has held that reversal was not required simply because the court failed to follow the procedural requirements for obtaining a valid jury trial waiver. *People v Mosly*, 259 Mich App 90, 99; 672 NW2d 897 (2003). *Mosly* addressed the issue on review of a motion for

relief from judgment. This Court found that the waiver obtained in that case did not fulfill the requirement for judgment relief that the error be so "offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(iii). It rejected the defendant's challenge to the denial of his motion for relief from judgment.

The record in this case establishes a voluntary, intelligent, and understanding waiver by defendant of his constitutional right to trial by jury. Defendant signed an acknowledgment that he understood his right to a jury trial and that he voluntarily waived that right. Through that document, he indicated that no threats or promises were made to him. Furthermore, defendant's counsel indicated on the record that she was present when defendant signed, and that she and defendant discussed the document and that he completed it voluntarily and of his own free will. Under these circumstances, the writing would seem to be sufficient to support the waiver of jury trial. However, MCR 6.402, which sets forth the procedural requirements for a waiver of a jury trial requires the court to advise the defendant of his rights personally in "open court." Doing so allows the court to observe the defendant and discuss with him his rights and the waiver of those rights and determine whether the defendant's waiver is understanding and voluntary.

But in this case, defendant refused to appear in court for trial on two separate occasions. After the first time, the trial court adjourned the matter to a later date. After learning that defendant was determined not to appear in court, the trial court sought to preserve defendant's rights by sending the document to him in jail, notifying him of the new court date, that he had a right to be present, and that he would be tried in his absence. Defendant's attorney then made defendant aware that he had a right to a jury trial and defendant chose to waive that right by signing the October 3, 2008 document twice and initialing it once. The record is clear that defendant purposefully absented himself from appearing before the trial court and instead executed the document affirmatively waiving his right to a jury trial. It was defendant's choice not to appear in court that left the trial court with little or no option but to accept the jury trial waiver in writing without the appearance of the defendant. Defendant alone created the situation and a "'[d]efendant should not be allowed to assign error on appeal to something which [he] deemed proper at trial. To do so would allow defendant to harbor error as an appellate parachute.'" *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002), quoting *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988). Under these unique circumstances, we cannot say that the trial court clearly erred in accepting the document as a valid waiver of defendant's right to a jury trial outside of defendant's presence. *Leonard*, 224 Mich App at 595.

Even if there was procedural error in the trial court's acceptance of the waiver document in violation of the procedural requirements of MCR 6.402(B), any error did not affect defendant's substantial rights. An error is plain and merits reversal only when a defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 773; 597 NW2d 130 (1999). Defendant cannot establish plain error under these circumstances where, (1) defendant simply refused to appear in court, (2) the trial court attempted to act in good faith to preserve defendant's rights and the fairness and integrity of the judicial proceedings, and (3) there is nothing in the record to

indicate that defendant would have any defense to the charge or that reasonable minds could differ with regard to defendant's guilt. Defendant's conviction need not be disturbed.

Affirmed.

/s/ Christopher M. Murray
/s/ Kristen Frank Kelly
/s/ Pat M. Donofrio