

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 18AP-808
 : (C.P.C. No. 17CR-5602)
 Anthony Q. Banks, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 31, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

On brief: *Hollern & Associates*, and *H. Tim Merkle*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Anthony Q. Banks, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of having a weapon while under disability ("WUD"), in violation of R.C. 2923.13, and a firearm specification pursuant to R.C. 2941.145(D). For the reasons that follow, we reverse.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On October 13, 2017, a Franklin County Grand Jury indicted appellant on charges of attempted murder, in violation of R.C. 2923.02, a felony of the first degree; felonious assault, in violation of R.C. 2903.11, a felony of the second degree; and WUD, in violation of R.C. 2923.13, a felony of the third degree. A five-year firearm specification, pursuant to R.C. 2941.145(D), accompanied all the charges. A repeat violent offender

specification, pursuant to R.C. 2941.149(A), also accompanied all the charges with the exception of the WUD charge.

{¶ 3} In pre-trial proceedings, the trial court permitted appellant to waive a trial by jury as to the WUD charge. Over the objection of plaintiff-appellee, State of Ohio, the trial court also permitted appellant to waive jury trial as to the firearm specifications associated with the attempted murder and felonious assault charges. Appellant signed jury waiver forms which were filed with the trial court prior to commencement of the jury trial.

{¶ 4} The jury was unable to reach a verdict as to the charges of attempted murder and felonious assault, Counts 1 and 2 of the indictment, and the trial court declared a mistrial. Following a bench trial, the trial court convicted appellant of the WUD charge and the accompanying firearm specification. On September 26, 2018, the trial court held a sentencing hearing during which the prosecutor requested a nolle prosequi on the charges of attempted murder and felonious assault, and the trial court dismissed those charges. The trial court sentenced appellant to 30 months in prison for the WUD charge consecutive to 54 months in prison for the firearm specification, for an aggregate a prison term of 7 years.

{¶ 5} Appellant timely appealed to this court from the September 26, 2018 judgment.

II. ASSIGNMENT OF ERROR

{¶ 6} Appellant assigns the following as trial court error:

THE TRIAL COURT LACKED JURISDICTION TO TRY THE APPELLANT ON THE HAVING WEAPONS WHILE UNDER DISABILITY CHARGE BECAUSE HIS WAIVER OF A JURY TRIAL FAILED TO COMPLY WITH THE REQUIREMENTS OF R.C. §2945.05.

III. LEGAL ANALYSIS

{¶ 7} In appellant's sole assignment of error, appellant contends the trial court lacked jurisdiction to conduct a bench trial on the WUD charge because the trial court failed to comply with the requirements of R.C. 2945.05. We agree.

{¶ 8} "The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees an accused the right to trial by jury." *State v. Ames*, 3d Dist. No. 1-19-02, 2019-Ohio-2632, ¶ 7, citing *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). Section 5, Article I of the Ohio Constitution states that the "right of trial by jury shall be inviolate." Consequently, "[a] jury waiver must be

voluntary, knowing, and intelligent." *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, ¶ 45, citing *State v. Ruppert*, 54 Ohio St.2d 263, 271 (1978). "[A] written waiver is presumptively voluntary, knowing, and intelligent." *Osie* at ¶ 45, citing *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 52. However, "[w]aiver may not be presumed from a silent record." *Osie* at ¶ 45, citing *Foust* at ¶ 52. "[I]f the record shows a jury waiver, the verdict will not be set aside except on a plain showing that the waiver was not freely and intelligently made." *Osie* at ¶ 45, citing *Foust* at ¶ 52.

{¶ 9} Crim.R. 23(A) provides for a waiver of jury trial in criminal cases as follows:

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. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney.

{¶ 10} The General Assembly has set forth the manner in which a defendant may waive this right. R.C. 2945.05 states:

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I _____, defendant in the above cause, 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 said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

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. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

(Emphasis added.)

{¶ 11} "The Supreme Court of Ohio has construed R.C. 2945.05 to require five conditions be met in order for a waiver to be validly imposed." *State v. Sanders*, 188 Ohio App.3d 452, 2010-Ohio-3433, ¶ 11 (10th Dist.). "The waiver must be (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court." *Id.*, citing *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, ¶ 9. "A trial court must

strictly comply with the five requirements of R.C. 2945.05." *State v. Webb*, 10th Dist. No. 10AP-289, 2010-Ohio-6122, ¶ 23, citing *State v. Pless*, 74 Ohio St.3d 333, 337 (1996). "In the absence of strict compliance with R.C. 2945.05, a trial court lacks jurisdiction to try the defendant." *Pless* at 337.

{¶ 12} There is no question in this case that appellant signed a written jury waiver regarding the WUD charge, as set forth in Count 3 of the indictment, and that the written waiver was made part of the record by filing it with the trial court clerk. Appellant concedes the trial court strictly complied with the first four conditions of R.C. 2945.05 and *Lomax*. There is a great deal of disagreement, however, whether appellant made the waiver "in open court" which is the fifth condition that must be met in order for a waiver to be validly imposed.

{¶ 13} The record reveals a great deal of discussion prior to trial on the question of whether Ohio law permitted appellant to waive a jury trial on the firearm specifications attached to Counts 1 and 2 of the indictment. Appellee disagreed that appellant had the right to waive a jury trial on the specifications without also waiving a jury trial on the associated counts in the indictment. Conversely, the record shows that the parties agreed that Ohio law permitted appellant to waive a jury trial with regard to the WUD charge.

{¶ 14} The trial court's judgment entry of conviction provides, in relevant part, as follows:

On June 21, 2018, *Defendant in open Court waived a trial by a jury in writing* and elected to be tried by the Judge of this Court as to Count Three of the Indictment, to wit: Weapons Under Disability in violation of R.C. 2923.13, a Felony of the Third Degree, together with the Firearm Specification under R.C. 2941.145(D) of Count Three of the Indictment.

(Emphasis added.) (Sept. 26, 2018 Jgmt. Entry at 1.)

{¶ 15} Appellant argues that in spite of what is expressed in the judgment entry, the transcript reveals appellant did not waive his right to a jury trial in open court. We agree with appellant.

{¶ 16} In the *Lomax* case, defendant signed a written waiver of jury trial, but the court did not engage in a colloquy with defendant regarding his waiver. Instead, the trial court merely noted there would be a waiver of jury trial, stating "[s]ince there's going to be a jury waiver, does the State care to make an opening statement at this time?" *Id.* at ¶ 45.

On appeal, the First District Court of Appeals agreed with Lomax's contention that the trial court's "passing reference" to his jury waiver was insufficient to satisfy the "open court" requirement of R.C. 2945.05 and reversed Lomax's conviction. *Id.* at ¶ 47.

{¶ 17} In affirming the First District, the Supreme Court of Ohio noted that aside from this passing reference to a jury waiver, the trial court did not personally address Lomax to give him the opportunity to acknowledge in court, and in the presence of his trial counsel, that he was waiving his right to a jury trial. *Id.* With regard to the requirements of R.C. 2945.05, the court concluded:

[A] trial court does not need to engage in an extended colloquy with the defendant in order to comply with the statutory requirement that a jury waiver be made in open court. There must be, however, 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. Absent such evidence, the waiver does not comply with the requirements of R.C. 2945.05 and is therefore invalid.

Id. at ¶ 42.

{¶ 18} The court noted that the statute does "not mandate magic words, or a prolonged colloquy, but simply what Ohio law intends -- 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." *Id.* at ¶ 48.

{¶ 19} Subsequent decisions of the Supreme Court have determined that the "open court" requirement in R.C. 2945.05 may also be satisfied when the trial court specifically inquires whether the defendant voluntarily signed a jury trial waiver form, including questions concerning whether the defendant's signature appeared on the waiver, whether the defendant signed the waiver of his own free will, and whether anyone forced him to sign the waiver. *State v. Bays*, 87 Ohio St.3d 15, 19 (1999); *State v. Jells*, 53 Ohio St.3d 22 (1990). In *Bays*, the accused answered "[y]es" when the judge asked: "[A]re you giving up that right to a Jury Trial by your own volition?" *Id.* at 18. The accused in *Bays* then signed the jury waiver form in the courtroom, with his counsel present. The Supreme Court held that the accused knowingly and intelligently waived a jury trial, even though the record did not show that the accused had a complete or technical understanding of the jury trial right. *Id.* at 20.

{¶ 20} In *Webb*, defendant-appellant, Webb, challenged his conviction of a WUD charge arguing, among other things, the trial court did not have jurisdiction to conduct a bench trial on that charge because the trial court failed to strictly comply with the requirements of R.C. 2945.05 in accepting his jury waiver.¹ In *Webb*, the trial court read the entire content of the jury waiver form to appellant in open court and asked Webb if the signature on the waiver was his, to which he responded "[y]es, sir." *Id.*, 2010-Ohio-6122, at ¶ 32. The court then asked Webb if he had any questions with respect to the waiver, and appellant replied "[n]o sir." *Id.*

{¶ 21} In discussing the rule of law applied to jury waivers, this court noted "the term 'acknowledge,' as used in *Lomax*, * * * means ' "[t]o own, avow, or admit; to confess; to recognize one's acts, and assume the responsibility therefor." ' " *Sanders*, 2010-Ohio-3433, at ¶ 13, quoting *State v. Burnside*, 186 Ohio App.3d 733, 2010-Ohio-1235, ¶ 64 (2d Dist.), quoting *Black's Law Dictionary* (6th Ed.Rev.1990). In holding that the trial court strictly complied with R.C. 2945.05, we stated "appellant clearly acknowledged that he had waived his right to a jury trial by admitting that his signature appeared on the jury waiver form and by stating that he had no questions regarding the waiver." *Webb* at ¶ 34. In distinguishing *Lomax*, we noted the trial court personally addressed Webb and obtained his acknowledgment of the jury waiver in open court, whereas the trial judge in *Lomax* made only a passing reference to the jury waiver. *Id.*, 2007-Ohio-4277, at ¶ 47.

{¶ 22} The transcript of relevant proceedings in this case shows that following the trial court's ruling on appellant's motion to continue the trial, appellant's trial counsel mentioned that the parties had discussed waiving a jury trial on Count 3 of the indictment, charging appellant with WUD. Later in the proceedings, the following exchange took place between the court and the prosecutor:

[PROSECUTOR]: Judge, we have a jury waiver on Count 3, may I approach with that?

THE COURT: Yes.

[PROSECUTOR]: That is the weapons under Disability charge that the parties have executed.

(June 18, 2018 Tr. at 16.)

¹ Webb did not sign a jury waiver on the charge of improperly handling firearms in a motor vehicle, and the jury found him not guilty on that charge.

{¶ 23} During a lengthy discussion and debate whether appellant could waive jury trial on the firearm specification, the prosecutor reminded the court: "And again, with the WUD, in Count 3, they are waiving the entire count. That's not what they are trying to do here." (June 18, 2018 Tr. at 19.) After more discussion and debate about the timing of a potential jury waiver as to the firearm specification, the prosecutor stated: "[T]ypically, the jury waivers, like the Weapons under Disability charge in Count 3, we had to fill that out and that has to be then clerked before we even begin the trial." (June 18, 2018 Tr. at 23.) Another reference to the jury waiver on the WUD charge occurred later in the proceedings when the prosecutor stated: "In terms of Count 3, * * * [a]nd again, that count is going to be tried to you, your Honor." (June 18, 2018 Tr. at 28.) Finally, appellant's trial counsel referred to the waiver form in the following exchange:

[DEFENDANT'S COUNSEL]: Oh, sure. And I do believe the Court does have our prior waiver with regard to the Weapon under Disability.

THE COURT: Okay. I think I gave that back to you with --

THE BAILIFF: No, the Count 3 Weapon under Disability.

[DEFENDANT'S COUNSEL]: Right.

THE BAILIFF: That has already been filed with the clerk.

(June 18, 2018 Tr. at 33.)

{¶ 24} Here, as was the case in *Lomax*, the transcript does not contain a colloquy between the court and appellant regarding the waiver of jury trial on the WUD charge. Though the transcript contains numerous references to appellant's purported waiver of a jury trial on the WUD charge, the record does not show that the trial court personally addressed appellant about the waiver. Nor does the transcript show that appellant orally acknowledged, in open court, that he wished to waive the right to a jury trial on the WUD charge. Similarly, while the transcript contains several references to the jury trial waiver form executed by appellant in regard to the WUD charge and filed with the clerk, the transcript does not show the trial court personally addressed appellant and asked appellant if he had signed a jury waiver form.

{¶ 25} Appellee argues that "[g]iven the limited, charge-specific nature of the jury waiver and the discussions on the record about waiving jury on the WUD and the firearm specifications, defendant has not shown that his waiver was anything other than voluntarily

and intelligently made." (Appellee's Brief at 4.) Our reading of *Lomax* and *Webb* convinces us that there must be an oral acknowledgment by the accused, in open court, that he or she wishes to waive the right to a jury trial in order to comply with the requirements of R.C. 2945.05 and for the jury waiver to be valid. A jury "[w]aiver may not be presumed from a silent record." *Osie*, 2014-Ohio-2966, at ¶ 45, citing *Foust*, 2004-Ohio-7006, at ¶ 52. Because the record in this case does not reveal any such acknowledgment by appellant, we find the trial court did not comply with the requirements of R.C. 2945.05, and the jury waiver is invalid. *Lomax*. As a result, the trial court did not have jurisdiction to conduct a bench trial on the WUD charge.

{¶ 26} Appellee nevertheless contends the rule of law in *Lomax* applies only where the accused waives a jury trial on all the charges in the indictment rather than a single count. Appellant cites *State v. Kidd*, 8th Dist. No. 47510 (Apr. 24, 1986), in support of this proposition. We find *Kidd* distinguishable.

{¶ 27} In *Kidd*, the defendant orally requested the trial court allow him to either waive jury trial on the WUD charge in the indictment or determine, outside the presence of the jury, the specification of a prior conviction for rape. The trial court refused to either bifurcate the specification or permit a jury waiver on the WUD charge. On appeal, the court found the trial court did not err in refusing defendant's request to waive jury trial on the WUD charge, and any error in failing to bifurcate the specification was harmless error because the jury would hear about the prior rape conviction in determining defendant's guilt of the WUD charge.

{¶ 28} In our view, *Kidd* stands for the proposition that the accused may not waive jury trial, over the prosecutor's objection, as to a single count in a multi-count indictment. This being the rule of law adopted by the Eighth District Court of Appeals, it follows that R.C. 2945.05 would be inapplicable. In other words, there is no need for the trial court to comply with R.C. 2945.05 with regard to a legally impermissible jury trial waiver. In this case, however, the parties agreed at trial that appellant could waive jury trial as to the count in the indictment charging appellant with WUD, and there is no argument in this appeal that appellant did not have the right to waive jury trial on the WUD charge. Thus, the trial court was required to comply with R.C. 2945.05 with regard to the waiver.

{¶ 29} We also disagree with appellee's contention that the use of the term "criminal cases" and the word "cause" in R.C. 2945.05 shows that the statute applies only where the accused waives a jury trial on every count in an indictment. R.C. 2945.05. (Appellee's Brief at 8.) Appellee has not made a persuasive argument for abandoning the statutory requirements where the accused waives jury trial on only one count in a multi-count indictment. Moreover, as previously noted, this court in *Webb* applied the statutory requirements in a case where the accused waived jury trial only as to the WUD charge in a multi-count indictment. Thus, appellee's argument is unavailing.

{¶ 30} For the foregoing reasons, we hold the trial court did not have jurisdiction to try appellant on the WUD charge due to its failure to strictly comply with the requirements of R.C. 2945.05. Thus, the trial court committed reversible error when it convicted appellant of the WUD charge and the accompanying firearm specification. Accordingly, appellant's sole assignment of error is sustained.

IV. CONCLUSION

{¶ 31} Having sustained appellant's sole assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter to the trial court to vacate the judgment entry of conviction and sentence.

*Judgment reversed;
cause remanded.*

KLATT, P.J., and LUPER SCHUSTER, J., concur.
