Cite as 2011 Ark. App. 417

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 10-980

Opinion Delivered June 1, 2011

ROBERT JOSEPH MOTEN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, NORTHERN DISTRICT
[NO. CR-2007-109]

HONORABLE DAVID G. HENRY, JUDGE

AFFIRMED

DOUG MARTIN, Judge

The Arkansas County Circuit Court convicted appellant Robert Joseph Moten of first- and second-degree battery, and he was sentenced to terms of imprisonment of twenty-two years and thirty months, respectively. The trial court ordered that the sentences run concurrently. Appellant argues that the trial court erred in proceeding with a bench trial because the record is silent as to whether he knowingly, voluntarily, and intelligently waived his constitutional right to a jury trial. Although appellant may raise this issue for the first time on appeal, *see, e.g.*, *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992), the record establishes that appellant waived his right to a jury trial. We affirm.

Because appellant does not challenge the sufficiency of the evidence on appeal, only a brief recitation of the facts is necessary. On February 4, 2007, Iesha Timmons and Curtis Abrams were at Po-Dave's in Stuttgart for a birthday party for Iesha's cousin. Appellant's

friend, Jonathan Jones (J.R.), approached Iesha in a drunken state, began dancing with her, and put his hands down the back of her pants. When Iesha pushed him away, J.R. came toward her in a threatening manner. Curtis then intervened and "bumped chests" with J.R., who ended up on the floor. At that point, appellant came up behind Curtis and stabbed him in the back, the side, and in the buttocks with a knife. Iesha, who thought appellant had only struck Curtis with his hand, pulled appellant away from Curtis and consequently was cut twice on the arm. Iesha's wounds were not serious, but Curtis's intestines were exposed, requiring hospitalization and surgery.

At a pretrial hearing on February 1, 2010, at which appellant was present, the following colloquy occurred:

> MR. DITTRICH: Your Honor, for the record, the State has no objection to a non-jury trial, if that's where the defense ends up.
>
> THE COURT: Okay. All right.
>
> MR. MOLOCK: Your Honor, I will visit with Mr. Moten —
>
> THE COURT: Okay —
>
> MR. MOLOCK: And I certainly don't have any problem trying [appellant's case] to the Court, as opposed to trying it to a jury.

Defense counsel also said, "Your Honor, I will visit with Mr. Moten. I will make a point to visit with him Wednesday . . . when I am down there. So he fully understands the implications of waiving a jury . . . and being able to make a well informed decision on that."

On February 4, 2010, appellant signed a form entitled "Waiver of Trial By Jury," which provides:

> In accordance with Rule 31.2 of the Arkansas Rules of Criminal Procedure, the undersigned defendant, ROBERT MOTEN, hereby waives his entitlement to trial by jury in the above referenced matter and requests that the above referenced case be tried to the Court.

At the bench trial on March 9, 2010, the trial court addressed defense counsel and confirmed, "The defendant has elected to try this case before—to the Court, rather than to a jury. Is that correct, Mr. Molock?" Defense counsel replied, "That is correct, Your Honor. We have filed a written waiver of jury trial." Appellant was present for this open exchange on the record.

The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right to a trial by jury. *Davis v. State*, 81 Ark. App. 17, 97 S.W.3d 921 (2003). The right of trial by jury is also preserved by Ark. Const. art. 2, § 10, which states that the right remains inviolate and extends to all cases at law. *Id.* Arkansas's Constitution further directs that a jury trial may be waived by the parties in all cases in the manner prescribed by law, and it is the trial court's burden to ensure that, if there is a waiver of the right to trial by jury, the defendant waives the right in accordance with the Arkansas Rules of Criminal Procedure. *Davis*, *supra*.

Pursuant to Arkansas Rule of Criminal Procedure 31.1, criminal cases that require a jury trial must be so tried unless (1) waived by the defendant; (2) assented to by the prosecutor; and (3) approved by the trial court. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Further, Arkansas Rule of Criminal Procedure 31.2 provides:

> Should a defendant desire to waive his right to trial by jury, he may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in

> open court and in the presence of the defendant. A verbatim record of any proceedings at which a defendant waives his right to trial by jury in person or through counsel shall be made and preserved.

On appeal, appellant argues that the record is silent as to whether he made a knowing, voluntary, and intelligent waiver of his right to a jury trial. Appellant contends that there is nothing in the record to suggest that he possessed adequate knowledge upon which to base an intelligent decision regarding the waiver of a jury trial. Whether there was an intelligent, competent, and self-protecting waiver of a jury trial by an accused must depend upon the unique circumstances of each case. *Maxwell v. State*, 73 Ark. App. 45, 51–52, 41 S.W.3d 402, 407 (2001) (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942)). Appellant relies on the holdings in *Davis*, *supra*, and *Burrell v. State*, 90 Ark. App. 114, 204 S.W.3d 80 (2005), where this court found that the defendants were denied their right to a jury trial. However, those cases are readily distinguishable in that neither involved a signed jury-trial waiver, and there was no discussion in open court about those defendants waiving their right to a jury trial.

In *Davis*, the State conceded error when defense counsel simply said "yeah" in response to the trial court's inquiry as to whether the parties were ready for trial, and no mention was made about the defendant's desire for or right to a jury trial. *Davis*, 81 Ark. App. at 21–22, 97 S.W.3d at 923. In *Burrell*, while the defendant initially requested a jury trial at the pretrial hearing, defense counsel stated on the day of trial that it was to be a bench trial. *Burrell*, 90 Ark. App. at 119, 204 S.W.3d at 84. Subsequently, nothing was said about the defendant waiving his right to a jury trial. *Id.* Unlike the defendants in *Davis* and *Burrell*,

appellant signed a written waiver of trial by jury, and the waiver was thereafter referred to in open court and in appellant's presence.

Appellant also relies on *Maxwell*, *supra*, and complains that there was no preliminary statement by the trial court delineating his rights and the consequences of a proposed waiver. *Maxwell* is also distinguishable from the case at bar. Again, the defendant in *Maxwell* did not sign a written waiver, and the defendant waived her right to a jury trial while acting pro se. This court held that the trial court erred in concluding that the defendant knowingly and intelligently waived her right to a jury trial; however, this court reviewed that decision in the context of determining whether the trial court abused its discretion in denying the defendant's subsequent motion to withdraw her jury-trial waiver. After the judge in *Maxwell* had accepted the defendant's waiver, it became clear that Maxwell did not know the meaning of a "bench trial," and there was some indication that Maxwell's ability to comprehend her rights might have been impaired by a mental condition.

The record demonstrates that appellant is not new to the criminal justice system and, in fact, appears to have a good understanding of his rights and the judicial process. Nevertheless, appellant argues that, although defense counsel stated that he would explain the waiver process to his client, there is nothing in the record or in evidence that the visit even took place, much less what was discussed during the visit.

In *Barrow v. State*, 2010 Ark. App. 589, a case handed down just nine days before appellant filed appeal, the argument on appeal was strikingly similar to appellant's:

> Appellant urges that the record is silent of testimony that he abandoned his substantive right to trial by jury. He submits that there is no evidence of any discussion of the jury waiver, and the circuit court failed to ask whether appellant intended to knowingly, intelligently, and voluntarily waive his right to a trial by jury.
>
> . . . .
>
> Appellant urges that, because the record does not give any indication that appellant had sufficient understanding of his right to a trial by jury, the entry of the jury waiver alone simply does not give rise to even minimal awareness of a right to jury trial. He maintains that this court cannot conclude that appellant knew that his right to a trial by jury existed merely from a purported signature on that written waiver. He suggests that the fact that the record is silent raises an irrebuttable presumption that appellant did not waive his fundamental right to a jury trial.

Barrow, 2010 Ark. App. 589, at 6–7.

Appellant does not state that defense counsel did not visit with him to discuss the ramifications of waiving a jury trial; rather, he claims there is no evidence of the visit or discussion. In *Barrow*, this court held that the defendant's unequivocal signed writing was adequate to waive his right to a jury trial. This court also pointed out that Rule 31.2 does not require that a waiver in writing be made in open court. *Id.* Likewise, there need not be evidence of the visit or a record of the discussion between appellant and defense counsel, given appellant's express written waiver.

Here, appellant waived his right to a jury trial both in writing *and* through defense counsel in open court on the record and in appellant's presence. Thus, although stated in the disjunctive form, both options under Ark. R. Crim. P. 31.2 were satisfied here. The record establishes that appellant waived his right to a jury trial; that the prosecutor assented to the waiver; and that the trial court approved the waiver. Ark. R. Crim. P. 31.1. The trial court

thus sustained its burden to ensure that appellant's waiver of his right to a jury trial was accomplished in accordance with the Arkansas Rules of Criminal Procedure.

Accordingly, we affirm.

HART and GRUBER, JJ., agree.