Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI v HOWARD BRANDON CASTRO

Docket No. 279272

LC No. 2006-206380-FH

William B. Murphy
Presiding Judge

David H. Sawyer

Michael R. Smolenski*
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued December 9, 2008, is hereby VACATED. A new opinion will be issued.

*Smolenski, J., not participating, for the reason he has retired from this Court effective 12/31/2008.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 14 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BRANDON HOWARD CASTRO, Defendant-Appellant.	FOR PUBLICATION December 9, 2008 9:00 a.m. No. 279272 Oakland Circuit Court LC No. 2006-206380-FH

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his bench conviction of operating a vehicle while either intoxicated or visibly impaired, or with any amount of a schedule one controlled substance in his body, where the vehicle operation causes a serious impairment of a body function of another person. MCL 257.625(5). On appeal, defendant argues that the trial court committed three errors that warrant relief. He argues that the trial court erred when it permitted the prosecution to amend the information, when it declined to dismiss the case on the ground that his right to a speedy trial had been violated, and when it deprived him of his right to a jury trial. We find no merit to defendant's first two claims of error. However, we conclude that the trial court erred when it proceeded to conduct a bench trial without first establishing that defendant knowingly and voluntarily waived his right to be tried by a jury. Further, because we conclude that this error was structural, we must reverse defendant's conviction, vacate his sentence, and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument under MCR 7.214(E).

I. Facts and Procedural History

In October 2005, defendant was in a rollover accident involving a truck owned by a young woman named Janis Arsenault. At the time, defendant was dating Arsenault. A resident that lived near the site of the accident testified that she heard the accident. She stated that, shortly after she heard the crash, defendant came to her door and told her that there was an accident and that his girlfriend was injured. He then asked her to call for help, which she did. Several other persons came to the scene of the accident shortly after it occurred and saw Arsenault, who was seriously injured, sitting on the passenger side of the truck. The driver's side of the truck was not occupied. For this reason, the witnesses began to look for someone who might have been thrown from the truck.

One of these witnesses indicated that defendant came on the scene shortly after they began looking around the crash site. The witness testified that defendant first indicated that he was the driver and then later said that someone else was the driver. The witness also indicated that defendant left the site with a duffle bag and returned a few minutes later without the bag. The witness stated that, after the police arrived, he led an officer into the woods where defendant went with the bag and that they found the bag.

An officer testified that he responded to the accident. He stated that defendant initially stated that he was not the driver and implicated someone else. The officer also said that defendant gave him a false name. The officer explained that he was not at first aware that the name was false, but came to that realization after another officer recovered a duffle bag from the woods that contained identification with defendant's name and picture. The officer testified that he also smelled alcohol on defendant's breath and decided to give him a field sobriety test. After defendant failed the test, the officer arrested defendant for driving while intoxicated.

Although defendant was arraigned on the charges in this case in December 2005, he did not proceed to a bench trial until January 2007. At the conclusion of the bench trial, the trial court found defendant guilty of operating a motor vehicle with any amount of a schedule one controlled substance in his system causing serious impairment of body function. Defendant now appeals.

II. Amending the Information

A. Standard of Review

We shall first address defendant's argument that the trial court erred when it permitted the prosecution to amend the information to include a new charge before trial. This Court reviews a trial court's decision to permit the amendment of the information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

B. The Information

The prosecution filed the initial information in December 2005. The information alleged that defendant violated MCL 257.625(5). This statute provides that any person who operates a motor vehicle in violation of MCL 257.625(1), (3) or (8) and "by the operation of that motor vehicle causes a serious impairment of a body function of another person" is guilty of a felony. MCL 257.625(5). As the factual predicate for this offense, the prosecution alleged that defendant operated a vehicle on a highway "while under the influence of a controlled substance and/or under the influence of a combination of alcoholic liquor and controlled substance, and by the operation of that vehicle caused a serious impairment of a body function" of another. This language closely matches the provisions of MCL 257.625(1), which prohibits a person from operating a motor vehicle on a highway while "under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance." See MCL 257.625(1)(a). Hence, the initial information appears to allege a violation of MCL 257.625(5) with the underlying factual predicate being a violation of MCL 257.625(1).

On January 5, 2006, the district court held defendant's preliminary examination. At the examination, the prosecution wanted to present two reports concerning defendant's blood tests. The first indicated that defendant had a blood alcohol level of .05 grams per 100 milliliters of blood. The other indicated that defendant had marijuana in his system shortly after the accident. However, the witnesses who were going to authenticate and interpret these reports for the prosecution were not available. For that reason, the district court adjourned the hearing for one week.

The examination continued on January 12, 2006, but the prosecution's witnesses were still unavailable. Nevertheless, the district court continued with the proceeding. Defendant's trial counsel stipulated to the admission of the report on defendant's alcohol level, but refused to stipulate to the report regarding the amount of marijuana found in defendant's blood. As a result, the prosecution was not able to establish that defendant had marijuana in his system at the time of the accident. See MCL 257.625(8) (prohibiting the operation of a motor vehicle with any amount of a schedule one controlled substance in the driver's system). At the close of the examination, the district court concluded that the evidence did not support a finding that defendant was intoxicated within the meaning of MCL 257.625(1), but did find that there was probable cause to believe that defendant operated a vehicle while visibly impaired. See MCL 257.625(3). For that reason, the district court bound defendant over on a violation of MCL 257.625(5) with the underlying factual predicate being a violation of MCL 257.625(3).

In May 2006, the prosecution moved the circuit court to remand the case back to the district court for a continued preliminary examination. The prosecution stated that it wanted the continued preliminary examination in order to establish an evidentiary basis for what the prosecution characterized as an alternate element of the charge. Specifically, the prosecution wanted to establish that defendant had marijuana in his system so that it could prove a violation of MCL 257.625(8) as the underlying factual predicate for a violation of MCL 257.625(5). The circuit court granted the motion and remanded the case to the district court to determine whether defendant had marijuana in his system. On remand, the district court declined to alter defendant's bind over, but did make a finding that defendant had marijuana in his system.

In August 2006, the prosecution moved to amend the information to specifically allege a violation of MCL 257.625(8) as an alternate underlying basis for the charge that defendant violated MCL 257.625(5). The trial court held a hearing on this motion in September 2006. At the hearing, the trial court indicated that it did not agree with defendant's contention that the motion was to add a new charge. Rather, the trial court indicated that it viewed the amended information as alleging the same charge with an alternate factual basis. The trial court permitted the prosecution to amend the information to include a factual allegation that defendant operated the vehicle with marijuana in his system.

C. Amending the Information

On appeal, defendant contends that the trial court did not have the authority to amend the information to include a new charge—a violation of MCL 257.625(8). We do not agree that the amendment at issue added a new charge. Rather, the prosecution always alleged that defendant violated MCL 257.625(5), albeit under various theories. As our Supreme Court has noted for a similar offense, proof that the defendant had the requisite state—that is, operated a vehicle in violation of MCL 257.625(1), (3) or (8)—is merely an element of the offense. See *People v*

Schaefer, 473 Mich 418, 433-434; 703 NW2d 774 (2005) (interpreting MCL 257.625(4), which has the same elements as MCL 257.625(5) except that the defendant's operation must have caused a death rather than a serious impairment of a body function). And a change in the factual predicate underlying the charge is not the functional equivalent of bringing a new charge. Further, even if this Court were to conclude that the amendment added a new charge, MCR 6.112(H) clearly provided the trial court with the authority to do just that: "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." The court rule does not limit the trial court's ability to amend the information based on the nature of the amendment. Instead, the court rule limits the trial court's ability to amend the information based on the consequences that would follow from the amendment. Hence, under this court rule, a trial court may amend the information to include a new charge. See *McGee*, *supra* at 688-693. Consequently, whether framed as an amendment to the factual predicate underlying the first element of the charged offense, or as the addition of a new charge, the relevant inquiry is whether the amendment unfairly surprised or prejudiced defendant. MCR 6.112(H).

On appeal, defendant asserts that he was prejudiced by the trial court's decision to permit the amendment of the information, but fails to actually state how the amendment prejudiced him. A defendant may not merely assert a claim of error and then leave it to this Court to search for factual or legal support for the claim. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Hence, defendant has abandoned this issue on appeal. In any event, we conclude that defendant's claim is without merit.

From the inception of this case, the prosecution charged defendant with a violation of MCL 257.625(5). As an element of this charge, the prosecution had to prove that defendant was intoxicated in violation of MCL 257.625(1), or visibly impaired in violation of MCL 257.625(3), or had any amount of a schedule one controlled substance in his system in violation of MCL 257.625(8). Further, the original information alleged that defendant was under the influence of alcohol or under the influence of alcohol and a controlled substance. Hence, defendant was on notice that the prosecution alleged that he had a controlled substance in his system at the time of the accident. Therefore, the prosecution alleged sufficient facts within the original information to place defendant on notice that a violation of MCL 257.625(1), (3), or (8) could serve as the underlying factual basis for the violation of MCL 257.625(5).

In addition, defendant was clearly aware of the report that indicated that defendant had marijuana in his system shortly after the accident. Indeed, defendant refused to stipulate to its admission at the original preliminary examination and vigorously opposed the prosecution's subsequent efforts to rectify its failure to get the report into evidence at the preliminary examination. Defendant's efforts to capitalize on the prosecution's mistake belie any claim that he was unfairly surprised by the eventual amendment of the information to include an allegation that he had marijuana in his system. And defendant had a significant amount of time to prepare a defense to the claim that he had marijuana in his system. Under these circumstances, we cannot conclude that defendant was prejudiced by the amendment.

The trial court did not abuse its discretion.

III. The 180-day Rule

A. Standard of Review

We shall next address defendant's argument that the trial court erred when it declined to dismiss the charges against him based on a violation of his right to be tried within 180-days under MCL 780.131. This Court reviews for an abuse of discretion a trial court's decision on a motion to dismiss. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004). This Court reviews de novo the proper application and interpretation of a statute. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

B. MCL 780.131

A defendant, who is an inmate of a state correctional facility, has a statutory right to be brought to trial within 180 days after the department of corrections delivers notice to the prosecution of the defendant's place of imprisonment and a request for final disposition of the pending warrant, indictment, information, or complaint. MCL 780.131. In the present case, defendant was incarcerated after his arrest on an unrelated charge. Based on this, defendant contends that the prosecution had to bring him to trial within 180 days after the department of corrections knew or had reason to know about the charges in this case. However, our Supreme Court has held that the 180-day period only begins to run when the department of corrections actually delivers the statutorily required notice and request to the prosecution. *Williams*, *supra* at 259. In this case, there is no evidence that the prosecution ever received the notice required to trigger the 180-day period.

Defendant acknowledges that the decision in *Williams* appears to foreclose his argument. However, defendant argues that *Williams* does not apply to his case because it was decided while his case was still pending before the trial court. For that reason, he contends that this Court must apply the law as it existed before the decision in *Williams*. We do not agree. Normally, our Supreme Court's opinions are given full retroactive effect. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 205; 747 NW2d 811 (2008). However, in *Williams*, our Supreme Court indicated that its decision would apply with limited retroactive effect, applying to those cases pending on appeal in which the issue had been raised and preserved. *Williams*, *supra* at 255, 259. Nevertheless, because defendant did not move for dismissal under MCL 780.131 until after the decision in *Williams*, that decision applies to his case. Therefore, the trial court did not err when it declined to dismiss defendant's case based on a violation the 180-day rule.

IV. Speedy Trial

A. Standard of Review

Defendant also argues that the trial court erred when it declined to dismiss his case based on a violation of his constitutional right to a speedy trial. This Court reviews for an abuse of discretion a trial court's decision on a motion to dismiss. *Stephen*, *supra* at 218. Whether defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). This Court reviews for clear error the trial court's factual findings and reviews de novo the constitutional questions of law. *Id.*

B. The Right to a Speedy Trial

Both the United States Constitution and the Michigan Constitution guarantee a defendant the right to a speedy trial. US Const, Am 6; Const 1963, Art 1, § 20. In examining whether a defendant has been denied the right to a speedy trial, this Court balances the following four factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Williams, supra* at 261-262.

In this case, we note that the length of delay, which was about fourteen months from the date of defendant's arraignment to his trial, was not particularly long. See *id.* at 264 (noting that considerably longer delays have been held to not violate a defendant's right to a speedy trial). Further, the reasons for the delay were reasonable and included some delays that were caused by defendant's actions. Likewise, defendant did not assert his right to a speedy trial until approximately six weeks before the scheduled trial date and only three months before the actual trial date. Hence, the critical factor in this case is the fourth factor: the prejudice to the defendant.

When the length of delay is eighteen months or more, prejudice is presumed and the burden shifts to the prosecution to show that there was no injury. *Id.* at 262. However, where, as in this case, the length of delay is less than eighteen months, the defendant bears the burden of proving prejudice. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). There are two types of prejudice that a defendant may experience: prejudice to his person and prejudice to his defense. *Williams, supra* at 264. In this case, defendant argues that he suffered both personal prejudice and prejudice to his defense. Defendant contends that, due to the prosecutor's inexcusable delays, he lost the opportunity to serve his sentence in this case concurrently with the sentence he was serving on an unrelated matter during the lower court proceedings. However, the trial court gave defendant credit against the sentence in this case for the time he served awaiting trial. As such, defendant did not suffer any personal prejudice beyond that which typically follows from being incarcerated. And, because defendant was incarcerated on an unrelated matter, the personal prejudice that normally accompanies incarceration cannot be attributed to the delay in bringing him to trial in this case. See *People v Holtzer*, 255 Mich App 478, 493; 660 NW2d 405 (2003).[1]

Defendant also claims that his defense was prejudiced by the delay. Yet defendant does not indicate that he would have approached his defense any differently had he been brought to trial earlier. Indeed, the only result of the delay that defendant can identify is the fact that the prosecution was able to bolster its case during the period of delay. But the fact that the prosecution was able to improve its case is not the equivalent of an impairment of defendant's defense. *Holtzer, supra* at 493. Under the totality of the circumstances, we conclude that the trial court did not abuse its discretion when it refused to dismiss the charges against defendant based on a violation of his right to a speedy trial.

V. Right to a Jury Trial

[1] Defendant did spend a few days in jail after the completion of his sentence on the unrelated matter, but any prejudice was minimal.

A. Standard of Review

Finally, defendant argues that the trial court erred when it deprived him of his right to a jury trial without first determining whether he knowingly and voluntarily waived that right. The adequacy of a jury trial waiver is a mixed question of fact and law. *United States v Carmenate*, 544 F3d 105, 107 (CA 2, 2008).

B. Jury Waiver

A criminal defendant has a constitutionally guaranteed right to a jury determination that he is guilty beyond a reasonable doubt of every element of the crime with which he is charged. US Const, Am VI; Const 1963, art 1, § 20; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). However, a defendant may elect to waive the right to have a jury determine his guilt with the consent of the prosecutor and approval of the trial court. MCL 763.3; MCR 6.401; *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (2007). In order for a jury trial waiver to be valid, it must be both knowingly and voluntarily made. MCR 6.402(B); *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998).

Typically, a trial court ensures that a defendant's waiver is knowing and voluntary by complying with the requirements of MCR 6.402(B). See *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003) (noting that compliance with these procedures creates a presumption that the waiver was knowing, voluntary and intelligent). However, in this case, the prosecution concedes that the trial court did not comply with the requirements of the court rule. But the failure to comply with these provisions does not by itself warrant relief if the record adequately reflects that the defendant's waiver was nevertheless knowingly and voluntarily made. *Mosly*, *supra* at 96.

In the present case, defendant did not sign a written waiver statement and the trial court did not directly question defendant about whether he wanted to waive his right to a jury. The only indication that defendant might have wanted to waive his right to a jury trial occurred at a pretrial hearing held on September 27, 2006. After discussing some ancillary matters related to the upcoming trial, the trial court mentioned a possible jury waiver:

> THE COURT: And as I said, I don't—if you want to waive jury trial I don't have any objection, it's up to the People, okay, you make a decision by then.
>
> MR. LEVITT [defendant's counsel]: We would waive, your Honor—(multiple speakers)—
>
> THE COURT: All right, but lets wait—all right, well lets see what they want to do.

These brief comments suggest that the parties had been discussing a jury waiver off the record, but there is no indication that the parties wished to formalize the waiver. Indeed, the trial court appears to have declined defendant's trial counsel's attempt at waiver and postponed further discussion until after the prosecutor had an opportunity to give approval. Further, these comments provide no indication as to whether defendant was fully informed about his right to a jury trial and voluntarily decided to waive that right.

Nevertheless, the prosecution notes that defendant's trial counsel did affirmatively state that defendant wanted to waive his right to a jury trial. The prosecution argues that this statement along with defendant's failure to object to the bench trial indicates that defendant knowingly and voluntarily relinquished his right to a jury trial. But an attorney cannot waive the right to a jury trial "without the fully informed and publicly acknowledged consent of the client." *Taylor v Illinois*, 484 US 400, 417-418, 418 n 24; 108 S Ct 646; 98 L Ed 2d 798 (1987); see also *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2008) (noting that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate."); *People v Newson*, 173 Mich App 160, 165; 433 NW2d 386 (1988) (noting that a defendant's trial counsel may not waive his client's right to a jury trial); but see *Gonzalez v United States*, 553 US ___, ___; 128 S Ct 1765; 170 L Ed 2d 616 (2008) (Scalia, J., concurring in the judgment) (arguing that the Supreme Court has not directly held that there are fundamental rights that a defendant's attorney may not waive on the defendant's behalf and stating that he would adopt the rule that "all waivable rights . . . can be waived by counsel."). Likewise, a defendant's failure to object to a bench trial cannot be construed as a waiver of the right. *Newson*, *supra* at 165 (noting that a jury trial waiver will not be inferred from a silent record); see also *Walters v Nadell*, 481 Mich 377, 384 n 14; 751 NW2d 431 (2008) (noting that certain constitutional rights, such as the right to a jury trial, cannot be forfeited—they must be waived); *People v Russel*, 471 Mich 182, 188 n 10; 684 NW2d 745 (2004) (noting that courts must indulge every reasonable presumption against waiver of a fundamental right such as the right to a trial by jury). Hence, defendant's trial counsel's brief statement along with defendant's silence does not rise to the level of a valid waiver. Because there is no record evidence that defendant was fully informed about his right to a jury trial and voluntarily waived that right, we must conclude that defendant did not validly waive his right to a jury trial. Therefore, the trial court was without the authority to proceed with a bench trial.

C. The Nature of the Error

Having concluded that the trial court erred when it proceeded with a bench trial, we must next determine whether the error is susceptible to harmless error analysis. The deprivation of the right to trial by jury is a constitutional error. *Bearss*, *supra* at 629. Therefore, we must determine whether the error is structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). Because structural errors are intrinsically harmful, they are subject to automatic reversal. *Duncan*, *supra* at 51. However, nonstructural constitutional errors are subject to harmless error analysis. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

On appeal, the prosecution argues that an invalid jury waiver is subject to harmless error analysis. In support of this argument, the prosecution relies on *Mosly*, *supra*.[2] But the Court in

[2] The prosecution also relies on some of this Court's unpublished opinion. However, we are not bound by unpublished opinions, see MCR 7.215(C), and find the authorities cited unpersuasive.

Mosly did not hold that an invalid jury waiver was not subject to automatic reversal. The Court determined that the trial court's failure to follow the procedural requirements mandated by MCR 6.402(B) could be harmless if "the record establishes that [the] defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right." *Id.* at 96. For that reason, the Court in *Mosly* concluded that, in order for the defendant to obtain relief from judgment under MCR 6.508(D), he had to demonstrate that his waiver did not meet the constitutional requirements. *Id.* at 97. This case does not involve the mere failure to follow procedural requirements. In this case, defendant argues not only that the trial court failed to follow Michigan's procedural requirements, but that the trial court failed to meet the minimum constitutional requirements for a jury waiver. Therefore, *Mosly* does not apply to the error at issue here. Instead, we conclude that the decision in *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993) more aptly applies to the facts of this case.

In *Sullivan*, the United States Supreme Court determined that the defendant was denied the right to a jury trial by the trial court's failure to properly instruct the jury on reasonable doubt. *Id.* at 278. After making this determination, the Court next examined whether the error was amenable to harmless-error analysis under the holding in *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). *Id.* at 278-279. It concluded that it was not:

> Chapman itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which "the jury *actually* rested its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.
>
> Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. [*Id.* at 280 (citations omitted).]

In the present case, we have concluded that the trial court's failure to obtain a valid jury waiver resulted in defendant being denied his Sixth Amendment right to a jury. And, in order to conclude that this error was harmless, we would have to speculate about whether a hypothetical jury would also have found defendant guilty. While we might be persuaded that a hypothetical jury would likely—or even certainly—find defendant guilty beyond a reasonable doubt, the "Sixth Amendment requires more than appellate speculation about a hypothetical jury's action." *Id.* For this reason, we conclude that a constitutionally invalid jury waiver is structural error that mandates reversal.[3] Consequently, we must reverse defendant's bench trial conviction and remand this case for a new jury trial or, if defendant should so choose, a bench trial after a proper jury waiver.

We reverse defendant's bench conviction, vacate his sentence, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[3] We note that our holding is consistent with that of several other jurisdictions. See, e.g., *Miller v Dormire*, 310 F3d 600, 604 (CA 8, 2002); *Spytma v Howes*, 313 F3d 363, 372 (CA 6, 2002) (noting that, while counsel's performance is subject to harmless error analysis, the actual waiver issue is arguably not subject to harmless error); *United States v Duarte-Higareda*, 113 F3d 1000 (CA 9, 1997); *State v Gore*, 288 Conn 770, 790 n 20; 955 A2d 1 (2008); *State v Baker*, 217 Ariz 118; 170 P3d 727 (Ariz App, 2007); *Balbosa v State*, 275 Ga 574; 571 SE2d 368 (2002); *State v Hauk*, 257 Wis2d 579, 601 n 9; 652 NW2d 393 (Wis App, 2002); *People v Collins*, 26 Cal 4th 297; 27 P3d 726 (2001); *State v Simpson*, 29 Kan App 2d 862; 32 P3d 1226 (2001).