STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2002
v	No. 230943 Wayne Circuit Court
VINCENT CLAUDE ELLIS, Defendant-Appellant.	LC No. 99-011813

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

PER CURIAM.

Defendant was convicted after a bench trial of assault with intent to do great bodily harm, MCL 750.84, and felony-firearm, MCL 750.227b. He was sentenced to 3½ to 10 years for the assault, and a mandatory consecutive two-year term for the felony-firearm conviction. The judgment of sentence was thereafter amended to order the sentence be served consecutively to an existing sentence. Defendant appeals as of right, and we affirm.

Defendant first argues that his waiver of his right to a jury trial was invalid because it was not voluntary, intelligent and understandingly made. We disagree. Whether the trial court properly determined that a defendant validly waived his right to a jury trial is reviewed for clear error. *People v Taylor*, 245 Mich App 293, 305 n 2; 628 NW2d 55 (2001); *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1998). However, to the extent the issue may involve an interpretation of the law, or application of the constitutional standard to uncontested or properly determined facts, appellate review is de novo. *People v LeBlanc*, ___ Mich ___; ___ NW2d ___ (Docket No. 118774, issued 3/12/02) slip op at 4-5; *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

The written waiver of jury trial signed by defendant in this case exceeded the requirements of MCL 763.3(1). Not only did the written waiver contain the substance of the required statutory language, but it also contained the attestation of defendant that he executed the waiver after "having an opportunity to consult with counsel." Further, the waiver contains the following statement above the signature of defendant's counsel: "I have advised the above named defendant of his constitutional right to a trial by jury." An attorney's signature constitutes a certification that he or she has read the document and that, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact. MCR 2.114(D).

Defendant's waiver of jury trial in this case also fulfilled the requirements of MCL 763.3(2), which provides, in pertinent part, that "the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel." Here, defendant was represented by counsel and acknowledged his waiver in open court with counsel present. See *People v Pasley*, 419 Mich 297, 302-303; 353 NW2d 440 (1984); *People v Braxton*, 91 Mich App 689, 690-691; 283 NW2d 829 (1979). Thus, the record demonstrates compliance with MCR 6.402(A), which provides, in part, "The court may not accept a waiver of trial by jury until after the defendant [] has been offered an opportunity to consult with a lawyer."

Further, the record confirms that the trial court complied with MCR 6.402(B), which provides:

> 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.

In the present case, the trial court inquired of defendant as follows:

The Court: What is your full name?

Defendant: Vincent Ellis.

The Court: Raise your right hand for me. Do you solemnly swear or affirm that the testimony you will give in these proceedings will be the truth, so help you God?

Defendant: Yes.

The Court: How old are you?

Defendant: Thirty-six.

The Court: How far have you gone in school?

Defendant: I got a GED.

The Court: You understand that you have a constitutional right to have a jury trial, is that correct?

Defendant: Yes, sir.

The Court: Am I correct in understanding that you do not want a jury to decide this case, but you would rather have a judge decide it?

Defendant: Yes.

The Court: Is that your signature on that document entitled Waiver of Trial by Jury?

Defendant: Yes.

The Court: Did you read it and understand it?

Defendant: Yes.

The Court: I will accept the document and I will place it in the court file.

The record in this case establishes a voluntary, intelligent and understanding waiver by defendant of his constitutional right to trial by jury. Defendant's reliance on federal appellate case law is misplaced because the holdings of the federal cases cited are based on supervisory authority, not on constitutional requirement. *United States v Rodriquez*, 888 F2d 519, 526-527 (CA 7, 1989); *United States v Martin*, 704 F2d 267, 273-274 (CA 6, 1983); *United States v Delgado*, 635 F2d 889, 890 (CA 7, 1981). Indeed, these courts note that lesser procedures than the trial court employed here would satisfy the Constitution. "Lesser (even no) warnings do not call into question the sufficiency of the waiver so far as the Constitution is concerned." *Rodriquez, supra*, 527. "There is no constitutional requirement that a court conduct an on the record colloquy with the defendant prior to the jury trial waiver." *Martin, supra*, 274.

Further, the cases from this Court relied on by defendant are also distinguishable because in those cases, the statute was not complied with either because a written waiver was not signed by the defendant or because the waiver was not placed on the record in open court. See *People v Delahanty*, 173 Mich App 487; 434 NW2d 431 (1988) (no signed waiver; waiver imposed as penalty for failing to appear at jury selection held invalid); *People v Marcellis*, 105 Mich App 662; 307 NW2d 402 (1981) (signed waiver was not made as part of the record in open court and did not apply to habitual proceeding); and *People v Edwards*, 51 Mich App 403; 214 NW2d 909 (1974) (no signed written waiver). Further, defendant's argument is not supported by *People v James*, 184 Mich App 457; 458 NW2d 911 (1990), vacated and remanded 437 Mich 988; 469 NW2d 294 (1991), because the alleged deficiency of the trial court's fact finding was determined sufficient after remand, *People v James (After Remand)*, 192 Mich App 568, 570; 481 NW2d 715 (1992). Also, this Court specifically rejected defendant's argument that the trial court should advise a defendant that a jury verdict must be unanimous. *James (After Remand), supra*, 571.

This Court's opinions subsequent to *James I, supra*, confirm that the jury waiver in this case was adequate and that the trial court made a sufficient finding that it was the voluntary, intelligent and understanding choice of defendant. *People v Gist*, 188 Mich App 610; 470 NW2d 475 (1991); *People v Reddick*, 187 Mich App 547, 549-550; 468 NW2d 278 (1991). Moreover, in *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993), this Court also rejected the claim that the trial court should engage in a colloquy with the defendant to determine if any threats or promises may have induced the waiver of jury trial.

In summary, the trial court complied with the statute and court rule, and properly concluded that defendant's waiver of jury was voluntary, intelligent and understanding. No more is required. The trial court did not clearly err by accepting defendant's waiver of jury trial.

Next, defendant claims that he was denied a fair trial when the trial court did not direct a verdict of not guilty on the principal charge of assault with intent to commit murder and that insufficient evidence was presented to sustain his conviction for the lesser included offense of assault with intent to commit great bodily harm less than the crime of murder. We disagree.

As to the assault with intent to murder charge, any error in failing to grant a directed verdict would be harmless. In *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988), this Court concluded that "an erroneous denial of a directed verdict is rendered harmless when the judge, sitting as the trier of fact, ultimately convicts the defendant of a lesser offense for which sufficient evidence has been adduced." Here, the court convicted defendant of the lesser offense of assault with intent to do great bodily harm.

Defendant's argument that insufficient evidence was presented to sustain his conviction of assault with intent to do great bodily harm is without merit. The elements of an assault with intent to do great bodily harm are (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Sufficient evidence was adduced at trial, when viewed in the light most favorable to the prosecution, from which a rational factfinder could conclude that all of the elements of the offense of assault with intent to commit great bodily harm were proven beyond a reasonable doubt.

In the present case, a rational factfinder, viewing the evidence in the light most favorable to the prosecution, could have found that defendant intended to seriously wound the pursuing police officer so that he could escape, and that defendant intentionally aimed and fired one .40-caliber round from a semi-automatic pistol (the same type of gun that police officers use) at close range while the officer was in a vulnerable position on top of a fence. Thus, there was sufficient evidence for a rational trier of fact to have concluded that all of the elements of the offense of assault with intent to commit great bodily harm were proved beyond a reasonable doubt. While defendant offers a different account, the trial court specifically found the testifying police officer to be credible. After a bench trial, this Court will not resolve witness credibility anew. *People v Jackson*, 178 Mich App 62, 64-65; 443 NW2d 423 (1989); *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant also claims he was denied a fair trial when his trial counsel presented testimony and argument that defendant had prior convictions and was on parole at the time of the instant offenses. Defendant's claim is without merit.

Under the two-pronged test to determine if counsel's performance fell below the constitutional standard, a defendant must show that counsel's performance was deficient according to prevailing professional norms, and that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994).

On this record, it is patent from both the questions asked by counsel and from his closing argument that he was pursuing trial strategy. Defense counsel and defendant used defendant's parole status to explain why defendant ran from the police and why he did not throw away the

gun he had (because he "didn't want to catch another case"). Further, defense counsel used defendant's parole status through his questions to argue defendant would not have risked shooting at the officer.

Moreover, in closing argument defense counsel used defendant's parole status to buttress defendant's credibility in this case, which was in essence a one-on-one credibility contest. The theory of the defense was that defendant was a street-wise former convict who would not risk shooting at a police officer and that the officer was a rookie police officer who overreacted to an accidental discharge. Defense counsel specifically argued that defendant is a "street guy" who had been very "candid" about having "priors." This strategy was reasonable and "falls within the wide range of reasonable professional assistance" that could have been rendered in this case. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 LEd 2d 674 (1984). The fact that the strategy counsel pursued was unsuccessful does not mean he was ineffective. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Further, the present case was a bench trial, and the trial court is presumed to have adhered to its duty not to draw improper inferences. *People v Hawkins*, 245 Mich App 439, 452; 628 NW2d 105 (2001); *In re Forfeiture of $19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1989).

Affirmed.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald