

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 20, 2015

v

RANDY HOLLOWAY,

No. 322049
Chippewa Circuit Court
LC No. 13-001130-FH

Defendant-Appellant.

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of prisoner in possession of a weapon, MCL 800.2834. He was sentenced as a fourth habitual offender, MCL 769.12, to 3 to 20 years' imprisonment. Defendant's sole claim on appeal is that he is entitled to a new trial because there is no record demonstrating that he validly waived his right to a jury trial. We affirm.

I. FACTUAL BACKGROUND

On October 1, 2013, the trial court held a pretrial hearing. The trial court asked defendant on the record whether he intended to enter a plea or proceed to trial. Defendant confirmed that he wanted to proceed to trial. Next, the following discussion took place:

The Court: Okay, very well then, with that we will set it for a trial. I think we have a date of October 23rd anyway. I believe, is that correct.

[Defense Counsel]: That's the date of our jury trial, your Honor.

The Court: Okay, we'll just proceed with that date. We'll proceed with that date.

[Defendant]: Bench trial, bench trial sir.

The Court: You want a bench trial?

[Defendant]: Yes sir.

* * *

The Court: Okay, alright, what we'll do then Mr. Holloway is I'm going to send you a waiver of a trial by jury. If you just execute that document when presented and send it back to the court when you get it then we will have this matter set for a bench trial. Is that with your approval and consent?

[*Defendant*]: Yes sir.

The Court: Okay, very well. Thank you[,] Mr. Holloway[,] we appreciate it and we will set this matter for a bench trial as soon as we can get it in.

[*Defendant*]: Yes sir.

On January 15, 2014, the trial court stated on the record that “[t]his is the date, time and place scheduled for a bench trial in this matter” (Emphasis added.) Defendant requested an adjournment and again reiterated his desire to have a bench trial:

The Court: Okay and we are still proceeding with the bench trial is that correct?

[*Defendant*]: Yes you[r] Honor.

The Court: Okay, so the next matter then is the date for the bench trial. .

..

* * *

The Court: Okay, we'll reconvene at 8:30 in the morning on January 30th, 2014 for conclusion and a trial in this matter which is going to be [a] bench trial. Again, Mr. Holloway[,] this is a bench trial, is that correct?

[*Defendant*]: Yes you[r] Honor.

On January 30, 2013, neither the prosecution nor the defense objected to the trial court proceeding with the bench trial. On appeal, the prosecution and the defense agree that defendant never signed a written jury trial waiver, a written waiver was never entered into the record, and defendant was not advised of his right to a jury trial on the record in open court.

II. STANDARDS OF REVIEW

A trial court's determination that a defendant validly waived his right to a jury trial is usually reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). However, because defendant failed to raise this issue in the trial court, defendant's claim is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) “the

plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763. Even if a defendant establishes a plain error that affected his substantial rights, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (quotation marks and citation omitted; second alteration in original).

"The adequacy of a jury trial waiver is a mixed question of fact and law." *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009). "The proper interpretation and application of a court rule is a question of law that is reviewed de novo." *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

III. ANALYSIS

Under the United States and Michigan Constitutions, "[a] criminal defendant has a constitutionally guaranteed right to a jury determination that he is guilty beyond a reasonable doubt." US Const, Am VI; Const 1963, art 1, § 20; *Cook*, 285 Mich App at 422. "However, with the consent of the prosecutor and the approval of the trial court, a defendant may waive his right to a jury trial" as long as the waiver is both knowing and voluntary. *Id.*, citing MCL 763.3 and MCR 6.402.¹ Pursuant to MCR 6.402(B),

[b]efore 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.

This Court previously cited with approval federal cases holding that "compliance with the court rules only creates a presumption that a defendant's waiver was voluntary, knowing, and intelligent. If a defendant's waiver was otherwise knowingly, voluntarily, and intelligently made, reversal will not be predicated on a waiver that is invalid under the court rules because courts will disregard errors that do not affect the substantial rights of a defendant." *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003) (citations omitted).

¹ On appeal, defendant places significant emphasis on (1) the fact that the trial court stated that it would set the matter for a bench trial upon defendant's execution of a written waiver and (2) the fact that the file includes no record of written waiver. However, whether a written waiver was executed and entered into the record is not dispositive. The 1989 Staff Comment to MCR 6.402 indicates that the court rule supersedes the statute requiring a written waiver, MCL 763.3. See also MCR 6.001(E) ("The rules in this chapter supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter."); *People v Reddick*, 187 Mich App 547, 548-49; 468 NW2d 278 (1991).

In the instant case, it is evident that the trial court failed to follow the oral waiver procedure described in MCR 6.402(B). However, reversal is not required because “the record establishes that defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right.” *Mosly*, 259 Mich App at 96. By personally correcting the trial court and expressly confirming that he wanted a bench trial on multiple occasions, defendant demonstrated that he understood his right to a jury trial and voluntarily chose to give up that right, thereby effectuating a valid waiver. See *Cook*, 285 Mich App at 422. Defendant does not contend on appeal that his waiver was made unknowingly, involuntarily, or unintelligently. Moreover, he makes no showing on appeal—and, in fact, does not even argue—that the outcome of the lower court proceedings was affected, or that his rights were violated, by the trial court’s failure to comply with the procedure set forth in MCR 6.402(B). This Court has rejected the claim that a trial court’s failure to comply with MCR 6.402(B) warrants automatic reversal. *Mosly*, 259 Mich App at 92 (considering the validity of the defendant’s jury trial waiver in the context of a motion for relief from judgment). Given defendant’s clear and unequivocal requests for a bench trial, we cannot conclude that the trial court’s failure to comply with MCR 6.402(B) constituted a plain error that affected defendant’s substantial rights. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Jane E. Markey
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan