

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 19, 2012

v

LAURINO JAMES SCAFONE,

Defendant-Appellant.

No. 298072
Oakland Circuit Court
LC No. 2009-008934-AR

ON REMAND

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

In a previous opinion, we reversed defendant’s bench trial conviction of aggravated assault, MCL 750.81a, after concluding his claim that “the trial court failed to inform him of his right to a jury trial” was meritorious and constituted structural error warranting a new trial.¹ Thereafter, the prosecution sought leave to appeal on the grounds that “a previously unknown transcript” of the waiver proceeding was discovered. In lieu of granting leave to appeal, our Supreme Court vacated our opinion and remanded for reconsideration in light of the newly discovered transcript. The Supreme Court further directed that we consider defendant’s claim of ineffective assistance of counsel if we conclude that defendant validly waived his right to a jury trial.² After consideration of these issues, defendant’s bench trial conviction is affirmed.

As explained by this Court in *People v Cook*, 285 Mich App 420; 776 NW2d 164 (2009):

The adequacy of a jury trial waiver is a mixed question of fact and law. A criminal defendant has a constitutionally guaranteed right to a jury determination that he is guilty beyond a reasonable doubt. However, with the consent of the prosecutor and the approval of the trial court, a defendant may waive his right to a

¹ *People v Scafone*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2011 (Docket No. 298072).

² *People v Scafone*, 491 Mich 876; 809 NW2d 599 (2012).

jury trial. In order for a jury trial waiver to be valid, however, it must be both knowingly and voluntarily made. [*Id.* at 422 (citations omitted).]

Criminal procedure in district court is governed by MCR 6.610. Pursuant to that rule, a defendant must be informed of certain rights, including his right to a jury trial, which is not deemed waived unless the defendant has been informed of the right and has waived that right in writing or orally on the record. MCR 6.610(D)(3). Compliance with the court rule ensures that a waiver is knowingly and voluntarily made. *Cook*, 285 Mich App at 422 (citing MCR 6.402(B), the rule setting out the procedure for waiver of a jury trial in circuit court).

Here, the newly discovered transcript reveals that defendant appeared before the district court on the date originally set for jury selection and knowingly and voluntarily waived his right to a jury trial. First, the district court noted on the record that its understanding was that the parties had agreed to proceed with a bench trial, waiving their rights to a jury trial. Then the district court spoke directly to defendant and explained that a bench trial meant that his guilt or innocence would be decided by the court rather than a jury of six persons. The court then asked defendant: “Do you understand and agree to that?” Defendant answered in the affirmative. The court also asked defendant if anybody had threatened him or promised him anything to waive his right to a jury trial and defendant responded in the negative. Thereafter the court held: “Based upon your representations, we will waive your right to a jury [and] schedule this for a bench trial.” We conclude that this proceeding complied with MCR 6.610(D)(3) and that defendant validly waived his right to a jury trial.

Next, we consider defendant’s claim that he was denied the effective assistance of counsel because his counsel did not call him to testify in his own defense. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel’s performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel’s error, the result would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). In this case, our review is limited to errors apparent on the record because a *Ginther*³ hearing was not held. See *id.*

Defendant claims that if he had been called as a witness, his testimony would likely have changed the outcome of the trial because “[a]nyone who looked at [him] would most certainly doubt whether [he] was even physically able to attack a much younger, fitter man, let alone whether [he] was likely to get the better of such a man.” This claim is without merit. First, this was a bench trial and defendant was present during the proceedings which would have given the court plenty of opportunity to note defendant’s physical condition. Second, decisions “regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Third, the record showed that defendant voluntarily chose not to testify. Specifically, when the trial court asked defense counsel if he had any more witnesses to call, counsel replied “[y]our honor, I have conferred with [defendant] and I don’t believe that he will take the stand and testify.” Defendant

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

was present at the time his counsel advised the court that he and defendant had arrived at this decision and defendant never contested that statement or otherwise expressed a wish to testify. See *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Accordingly, defendant's claim of ineffective assistance of counsel is without merit.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio