NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 2424

STATE OF LOUISIANA

VERSUS

HERBERT A. BASS

Judgment rendered March 26, 2008.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 08-00-0599
Honorable Richard D. Anderson, Judge

* * * * * *

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HERBERT A. BASS

HERBERT A. BASS
MEMPHIS, TN

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DEFENDANT APPELLANT

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Herbert A. Bass, was charged by bill of information with filing or maintaining false public records, a violation of La. R.S. 14:133. He pled not guilty. Following a bench trial, the defendant was convicted as charged. The defendant was sentenced to imprisonment at hard labor for two years. The trial court suspended the sentence and placed the defendant on supervised probation for three years. The defendant now appeals urging two assignments of error as follows:

> 1. It was manifestly erroneous for the district court to return a guilty verdict against [the defendant] because the State failed to establish that [the defendant] intentionally provided false and misleading information on a public document with the intent to gain an unjust advantage.
>
> 2. The district court indeed violated [the defendant's] Sixth Amendment right to have the assistance of counsel when it forced him to represent himself at trial without first ascertaining whether he possessed the necessary intelligence or skill to understand the proceedings against him.

Finding no merit in the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

At sometime prior to June 2000, the defendant ("Herbert Andrew Bass"), a resident of the State of Tennessee, somehow learned that the residence located at 16702 Appomattox Avenue ("the Appomattox Avenue residence") in Baton Rouge, Louisiana, was owned by an individual named "Hubert A. Bass."[1] On June 5, 2000, the defendant appeared at the Department of Public Safety, Office of Motor Vehicles in Baton Rouge, Louisiana, to apply for a Louisiana driver's license. He completed the "Application For License Or Identification Card" and presented it to a Motor Vehicle Officer. On the application, the defendant listed the Appomattox Avenue residence as

[1] From the record, the exact source of this information is unclear. On one occasion, the defendant stated he received information from the Department of Treasury. On other occasions, he indicated he was notified by the Department of Justice. No correspondence from any governmental agency was ever introduced into evidence.

his residential address. The defendant was issued a Louisiana driver's license with this residential address.

At trial, Janet Bass testified that, at all times pertinent to this case, she and her husband, Hubert A. Bass, were the sole owners of the Appomattox Avenue residence. They purchased the residence from Olin Maage in March 1996. To corroborate this testimony, the March 25, 1996 Act of Cash Sale for the Appomattox Avenue residence was introduced into evidence. In the document, "Olin James Maage" is listed as the seller and "Hubert Ashley Bass and Janet Crowell Bass," the purchasers. Mrs. Bass further testified that prior to purchasing the Appomattox Avenue residence, she and her family leased the residence from Mr. Maage for several years. Mrs. Bass testified that the defendant never lived at the residence and was not authorized to use the residential address. Mrs. Bass explained that she did not know the defendant prior to the incident in question.

Sergeant Gordon Castlebury, the custodian of records for the Department of Public Safety, Office of Motor Vehicles, also testified at the trial. In connection with his testimony, the State introduced a copy of the application for a driver's license, completed and submitted by the defendant. The document contains a certification of truth to be signed by the applicant. It provides, "By my signature affixed below, I certify under penalty of law, that: (1) all statements on this application are true and correct." The defendant signed and dated the application directly beneath the aforementioned certification.

ASSIGNMENT OF ERROR ONE
SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant contends the evidence presented by the State at the trial of this matter was insufficient to support the conviction. Specifically, he asserts the State failed to show that he knew that the information provided on the State document was false or that he acted to gain an unjust advantage. The defendant claims he acted based on information from the United States

government indicating that he was the registered owner of the Appomattox Avenue residence.

The standard for appellate review of the sufficiency of evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

The **Jackson** standard of review, incorporated in La. Code Crim. P. art. 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Hendon**, 94-0516, p. 4 (La. App. 1 Cir. 4/7/95), 654 So.2d 447, 449.

As previously noted, the defendant was convicted of filing and/or maintaining false public records. Louisiana Revised Statutes 14:133, the statute defining the charged offense, provides, in pertinent part:

> A. Filing false public records is the filing or depositing for record in any public office or with any public official, or the maintaining as required by law, regulation, or rule, with knowledge of its falsity, of any of the following:
>
> . . . .
>
> (3) Any document containing a false statement or false representation of a material fact.

The statute does not require that the record filed be "public" but that it must be filed or deposited, with knowledge of its falsity, in any public office or with any public officer. See **State v. Salat**, 95-0072, p. 5 (La. App. 1 Cir. 4/4/96), 672 So.2d 333, 337, writ denied, 96-1116 (La. 10/4/96), 679 So.2d 1378.

At the trial of this matter, there was testimonial and documentary evidence from the Office of Motor Vehicles, a public body, reflecting that the defendant listed "16702 Appomattox Avenue" as his residential address on an application for a driver's license.

There was also testimonial evidence, from the homeowner of the Appomattox Avenue residence, reflecting that the defendant did not reside at this address on the date the application was made and that he had not lived there at any time since she and her family began occupying the residence in 1994. Also, the State introduced an "Appearance Bond" document signed by the defendant in connection with his arrest on July 24, 2000. On that document, a Memphis, Tennessee, address is listed as the defendant's residential address. The defendant signed the Appearance Bond document directly above his address.

Considering the foregoing, we find it clear that the defendant knowingly provided false information regarding his residential address on the application presented to the Office of Motor Vehicles. Because the defendant did not reside at the Appomattox Avenue residence on the date he indicated and he had never resided there, facts of which he was obviously aware, listing that address as his "residence address" constitutes a false representation for purposes of the statute. Upon submitting the application containing the knowingly false statement to the public office, the defendant violated the statute. The trial court in this case heard, and obviously rejected, the defendant's claim of "reasonable mistake or oversight."

Insofar as the defendant argues that the State failed to prove he provided the false information "to gain an unjust advantage," we note that the statute does not require such a showing. The language of the statute does not speak to the motivation for the falsification. Knowingly providing a false statement and/or false representation of a material fact is sufficient to constitute a violation of the statute. The evidence presented at the trial in this case sufficiently proves all of the essential elements of the crime charged. This assignment of error lacks merit.

ASSIGNMENT OF ERROR TWO
RIGHT TO JURY TRIAL

The defendant's second assignment of error, although entitled "right to jury trial," appears to allege that both the defendant's right to a jury trial and his right to

counsel at trial were violated. In his brief, the defendant claims he was forced to go to trial without counsel (and before the trial judge).

Right to counsel

In Louisiana, an individual accused of a crime, in every instance has a right to have the assistance of counsel. La. Code Crim. P. art. 511. A criminal defendant's right to assistance of counsel is also guaranteed by the United States and Louisiana Constitutions. See U.S. Const. amend. VI; La. Const. art I, § 13. In addition to this fundamental right to the assistance of counsel, a criminal defendant also enjoys a right under the Sixth and Fourteenth Amendments of the United States Constitution to proceed without counsel and to represent himself when he elects to do so. **State v. Dupre**, 500 So.2d 873, 876-77 (La. App. 1 Cir. 1986), writ denied, 505 So.2d 55 (La. 1987). However, before an accused can choose the right to defend himself, he must make a knowing and intelligent waiver of his right to counsel that shows he appreciates the possible consequences of mishandling the core functions that lawyers are more competent to perform. **State v. Lay**, 93-1063, pp. 3-4 (La. App. 1 Cir. 5/20/94), 637 So.2d 801, 804, writ denied, 94-2525 (La. 10/16/96), 680 So.2d 669. The accused may waive his right to counsel and exercise the right to self-representation so long as the record reflects that the waiver of counsel has been knowingly and intelligently made. **Faretta v. California**, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). The determination of whether or not there has been an intelligent waiver of the right to counsel depends upon the facts and circumstances surrounding the case, including the background, experience and conduct of the accused. **State v. Carpenter**, 390 So.2d 1296, 1298 (La. 1980).

Because the defendant was allowed to represent himself at trial, the record must reflect a knowing, intelligent, and voluntary waiver of his right to counsel. The minutes of the court reflect that, on March 19, 2002, the defendant advised the court that he wished to represent himself. In response, the trial court questioned the defendant "as to certain matters" before ruling that the defendant would be allowed to represent himself. As the defendant correctly asserts, the transcript of the proceeding wherein he waived his right to trial counsel is not part of the instant record. So, while it is clear

from the minutes that the defendant waived his right to counsel, the adequacy of the court's questioning in connection with the waiver cannot be reviewed. We note, however, that the pro se motion to designate the record reflects that the defendant did not request that the transcript of the March 19, 2002 proceeding be included in the record. Furthermore, after the pro se designation, the defendant's appellate counsel moved to have the record supplemented with certain transcripts he deemed important. The counseled supplementation also failed to mention the proceeding involving the counsel waiver. A party moving for appeal must request the portion of the proceedings necessary for review in light of the assignments of error to be urged. Only that which is in the record may be reviewed. See La. Code Crim. P. art. 914.1; **State v. Vampran**, 491 So.2d 1356, 1364 (La. App. 1 Cir.), writ denied, 496 So.2d 347 (La. 1986). The inadequacy of the record is imputable to the appellant. **Hurt v. Western American Trucking Co.**, 26,918, p. 3 (La. App. 2 Cir. 5/10/95), 655 So.2d 558, 560. Since the defendant failed to perfect this argument for appellate review by designating the transcript of the proceedings necessary for review, this portion of the assignment of error is without merit.

Jury trial waiver

Both the United States Constitution and the Louisiana Constitution expressly guarantee a criminal defendant the right to a jury trial. U.S. Const. amend VI; La. Const. art. I, §§ 16, 17. However, some criminal defendants may, pursuant to statute, waive this constitutionally guaranteed right, provided the waiver of the right is knowingly and intelligently made. La. Code Crim. P. art. 780(A).[2] It is well settled that a waiver of the right to a jury trial is valid only if the defendant acted voluntarily and knowingly. **State v. Kahey**, 436 So.2d 475, 486 (La. 1983). Furthermore, the waiver of the constitutionally guaranteed right is never presumed; "there operates, in fact, a presumption against such a waiver which must be rebutted." **State v. Cappel**, 525

[2] It is undisputed that the defendant was entitled to waive his right to a jury trial on the charged offense. See La. R.S. 14:133 & La. Code Crim. P. art. 780(A).

So.2d 335, 337 (La. App. 1 Cir.), writ denied, 531 So.2d 468 (La. 1988). Although a waiver of the right to a jury trial is generally entered at arraignment, the trial court may accept a waiver of the right at any time prior to the commencement of trial. La. Code Crim. P. art. 780(B).

In the instant case, on January 11, 2008, the State had the appeal record supplemented with the transcript of the April 10, 2006 status conference. The transcript reflects that during this proceeding, the defendant unequivocally advised the court that he wished to waive his right to a jury trial. The trial judge even advised the defendant that if he waived his jury trial right, the court was not obligated to allow him to withdraw the waiver if he changed his mind. The defendant indicated he understood this fact. The defendant specifically, and repeatedly, indicated that he wanted a bench trial. Near the conclusion of the proceeding, as the court attempted to assign a trial date, the following colloquy occurred:

> [THE DEFENDANT]: Can I ask you one question? You're setting it for a bench trial with the judge?
>
> THE COURT: That's what you wanted; right?
>
> [THE DEFENDANT]: Yes, sir.
>
> THE COURT: That's right.
>
> [THE DEFENDANT]: Thank you, your honor.

Clearly, the record reflects that the defendant waived his right to a jury trial in open court on this date. Additionally, a transcript of the proceedings held on June 20, 2006, reveals that prior to the commencement of the defendant's bench trial, the trial court specifically announced, in the defendant's presence, that the right to a jury trial had been waived. The defendant did not object or express any disagreement with this statement.

Considering the foregoing, it is clear that the defendant waived his right to a jury trial prior to trial. Although it remains the preferred method for the trial court to advise a defendant of his right to trial by jury in open court before obtaining a waiver, such a practice is not statutorily required. See La. Code Crim P. art. 780; **State v. Pierre,**

2002-2665, p. 1 (La. 3/28/03), 842 So.2d 321, 322 (per curiam). A determination of the knowing and intelligent nature of a jury-trial waiver by the trial court does not require a **Boykin**-like colloquy.[3] See **State v. Brooks**, 2001-1138, p. 8 (La. App. 1 Cir. 3/28/02), 814 So.2d 72, 78, writ denied, 2002-1215 (La. 11/22/02), 829 So.2d 1037. This assignment of error lacks merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

[3] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).