

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1685

STATE OF LOUISIANA

VERSUS

TEDRICK TERREL CHAVIS

DATE OF JUDGMENT: MAY - 2 2012

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 23849, DIV. H, PARISH OF LIVINGSTON
STATE OF LOUISIANA

HONORABLE ZORRAINE M. WAGUESPACK, JUDGE

Scott M. Perrilloux, D.A.
Leslie Burns
Livingston, Louisiana

Counsel for Appellee
State of Louisiana

Thomas Damico
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Tedrick Terrel Chavis

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: REMANDED FOR FURTHER PROCEEDINGS.

KUHN, J.

Defendant, Tedrick Terrel Chavis, was charged by bill of information with one count of armed robbery, a violation of La. R.S. 14:64. After a bench trial, defendant was found guilty as charged and sentenced to imprisonment at hard labor for a term of thirty years. After defendant was sentenced, he filed a *pro se* motion for new trial and a counseled motion for reconsideration of sentence. Both of these motions were denied by the trial court. Defendant now appeals, alleging three assignments of error. Finding merit in two of defendant's assignments of error, we remand for further proceedings.

FACTS

On December 9, 2008, shortly before midnight, three armed individuals entered the home of Donnie Wells and Theresa Goldmon in Walker, Louisiana. Two of the individuals were black males that Wells and Goldmon did not recognize. The face of the third individual was obscured by a mask and hood, but Wells and Goldmon perceived this individual to be male. According to Wells and Goldmon, the men began to ask about the location of Goldmon's brother as well as some money and drugs that they believed were stored in the home. The two unmasked individuals looked for valuables throughout the home while the masked individual gave them directions and stood guard at the front door. The perpetrators eventually fled the scene after taking some computer equipment, some car audio equipment, two cellular telephones, a digital camera, and approximately \$800.00 in cash.

An anonymous tip identified Sergio Stewart as one of the individuals who participated in the armed robbery. After his arrest, Stewart gave a confession

which implicated himself, defendant, and a third person named “Freddie”¹ as the participants in the robbery. Stewart identified defendant as the masked individual. Defendant later surrendered himself to the police and was arrested for armed robbery. After his arrest, defendant made an allegedly inculpatory statement to the investigating officers.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant asserts that the trial court erred in accepting defense counsel’s request to waive a jury trial without establishing that defendant both understood and waived his right to a jury trial.

The right to trial by jury in felony and certain misdemeanor cases is protected by both the federal and state constitutions. See U.S. Const. amend. VI; see La. Const. art. I, §§ 16, 17; *State v. Muller*, 351 So.2d 143, 145 (La. 1977). Article I, § 17(A) requires that any such waiver be “knowingly and intelligently” made. Courts must indulge every reasonable presumption against waiver of this fundamental right. See *State v. McCarroll*, 337 So.2d 475, 480 (La. 1976) (citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)); La. C.Cr.P. art. 780.

Louisiana Code of Criminal Procedure article 780(A) provides that at arraignment, a defendant shall be informed of his right to waive a trial by jury. While some Louisiana courts have noted the preferable practice to evidence a waiver is for the trial judge to require defendant to personally waive the right, either in writing or orally, the Louisiana Supreme Court has specifically refused to adopt an absolute rule that a jury waiver cannot be made by defendant’s attorney

¹ This person was later revealed to be Freddie Powell.

when defendant is considered to have understood his right and consented to such a waiver. *State v. Phillips*, 365 So.2d 1304, 1308–09 (La. 1978), cert. denied, 442 U.S. 919, 99 S.Ct. 2843, 61 L.Ed.2d 287 (1979).

In the instant case, the minutes from defendant's arraignment indicate that defendant was "advised of his legal and constitutional rights" before he pled not guilty. On April 19, 2010, the morning before defendant's trial was scheduled to begin, defendant's case was scheduled for a final pretrial conference. From the record, it appears that the subject of this pretrial conference was the potential acceptance of a plea deal by defendant. When this plea deal apparently fell apart, the trial judge set defendant's jury trial for the next morning. Shortly thereafter, defense counsel² asked to make the following statement on the record:

Yes, ma'am. Judge, I'd spoken with my client and asked that the matter be set for trial. But I need to put on the record that after we'd – after speaking with you and the D.A., it's my understanding that the plea deal we all had worked out is not going to be viable, and we'd asked that it be set for trial and it's been set for tomorrow morning. But, with that said, I'm going to ask now for a trial – for a bench trial, so we can start this today.

The trial judge then asked the prosecutor whether she had any objection to a bench trial, and the prosecutor responded that she did not. The trial judge stated that defendant's case would be set for a bench trial to commence the following morning because other court matters would keep the trial from beginning on the same day. The trial judge did not ask defendant whether he understood his right to a jury trial, or whether he wished to waive that right.

Thus, the record reflects that defendant did not personally waive his right to

² We note that defendant's retained appellate attorney is not the same person who represented defendant at trial.

a jury trial, but this fact alone is not dispositive. The requirement for a valid waiver of a jury trial is only that a defendant's waiver be knowingly and voluntarily made. See La. Const. art. I, § 17(A). Defense counsel's statement indicates that he had spoken with defendant before asking that defendant's case be set for trial in the wake of a failed plea agreement. However, this statement does not clearly reflect that defendant wished to waive his right to a jury trial. The statement made by defense counsel indicates only that defense counsel had spoken with defendant, a plea agreement could not be reached, and defendant opted to go to trial. Even in the context of the rest of his statement, defense counsel's request for a bench trial does not evince defendant's knowing and voluntary waiver of a jury trial. Instead, on its face, this request for a bench trial appears to come exclusively from defense counsel. We recognize that several off-the-record conversations took place between defense counsel and the trial judge, and between defense counsel and defendant, but those conversations are not reflected in the record before us, and we cannot presume a waiver of defendant's right to a bench trial from a silent record. See *Boykin*, 395 U.S. at 243, 89 S.Ct. at 1712.

When the record does not clearly indicate a valid waiver of the right to a jury trial, the recent trend has not been to reverse but to remand the case to the trial court for an evidentiary hearing on the issue of whether a valid jury waiver was obtained. See *State v. Nanlal*, 97-0786 (La. 9/26/97), 701 So.2d 963. In *State v. Cappel*, 525 So.2d 335, 337 n.3 (La. App. 1st Cir.), writ denied, 531 So.2d 468 (La. 1988), this court noted that when the record is insufficient to determine whether the defendant knowingly and intelligently waived his right to a jury trial,

the testimony by the defendant and defense counsel at an evidentiary hearing would certainly be relevant, if not dispositive of the issue.

Accordingly, we remand this case for the trial judge to conduct an evidentiary hearing within thirty days to determine whether defendant knowingly and intelligently waived his right to a jury trial. If the evidence shows defendant did not execute such a waiver, the trial judge is instructed to set aside the convictions and sentences and grant a new trial. We note that double jeopardy does not preclude the State from retrying a defendant whose conviction is set aside because of judicial error. See *State v. Mayeux*, 498 So.2d 701, 705 (La. 1986). If, on the other hand, the trial court concludes that defendant did waive his right to a jury trial, defendant may appeal that decision to this court if he chooses. The trial court shall supplement the appeal record with the minutes and transcript of the evidentiary hearing, which shall be filed with this court within ten days after the hearing.

ASSIGNMENT OF ERROR #2

In his second assignment of error, defendant asserts that the trial court erred in proceeding with trial without first holding an evidentiary hearing to determine the admissibility of inculpatory statements allegedly made by defendant.

Prior to his trial, defendant filed a *pro se* motion to suppress inculpatory statements that he gave to the police after his arrest. This motion averred that defendant's confession was obtained after defendant requested – and was denied – a lawyer. The motion also alleged that defendant was choked and slapped by police officers, nearly to the point of unconsciousness, before he gave his confession. This *pro se* motion was filed into the record while defendant was still

represented by the public defender's office. Approximately one month after the filing of this motion, defendant retained private counsel to represent him.

On the morning of defendant's trial, the State brought to the trial court's attention the fact that there were still several pending *pro se* motions in defendant's case. Defendant's motion to suppress was one of these pending motions. The trial judge asked defense counsel why he had not brought these pending motions to her attention previously, and defense counsel responded that he had been operating under the assumption that defendant would accept a plea agreement. The trial judge then engaged in a conversation with the prosecutor and defense counsel wherein they discussed the fact that the digital recording of defendant's confession had been lost when a police computer crashed. The trial judge noted defense counsel's objection to her ruling, allowing State witnesses to testify to the substance of defendant's allegedly inculpatory statements. Defense counsel then asked whether the trial judge wanted to hold the suppression hearing separately, or if she wanted to hear it during the course of the trial. The trial judge responded:

I'm going to need to hear the same witnesses. But it's not going to be suppressed. I'm not going to suppress it. We are here today, and we are here for trial. All of those things that you hope to prove in your motions, sir, they have to prove beyond a reasonable doubt. I'll hear the testimony from the same persons at trial that I would hear for the motions.

Defense counsel noted that he wished to call defendant at the suppression hearing, and the trial judge again asked why he failed to raise the issue sooner. Defense counsel then asked if the trial could begin, stating that he would reserve the suppression hearing for a later date.

At trial, Detective Kenneth Black of the Walker Police Department, and Lieutenant Kevin Devall of the Louisiana State Police, both testified and gave details of defendant's alleged confession. However, the trial court made no explicit ruling addressing the admissibility of defendant's statements, and defendant's trial counsel never again formally raised the suppression issue, although he did object to the admission of the statements at trial.

Before what purports to be a confession can be introduced into evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. La. R.S. 15:451. An evidentiary hearing on a motion to suppress shall be held only when the defendant alleges facts that would require the granting of relief. La. C.Cr.P. art. 703(E)(1). The defendant may testify in support of a motion to suppress without being subject to examination on other matters. *Id.* If the defendant testifies at the trial on the merits, he can be cross-examined on the whole case. See La. C.Cr.P. art. 703(E)(2).

In this case, defendant alleged in his motion to suppress that his confession was a product of the withheld assistance of legal counsel in addition to physical abuse. Thus, defendant's motion to suppress alleged facts which, if proven, would have entitled defendant to the granting of relief. Cf. *State v. Wilder*, 2009-2322 (La. 12/18/09), 24 So.3d 197, 198 (per curiam) (defendant failed to allege sufficient facts to warrant a hearing where his "motion to suppress was extremely broad and general, lacking any specificity as to the facts of this particular case."); see La. C.Cr.P. art. 703(E)(1).

Although defense counsel did not forcefully assert his right to present defendant's testimony to the court, we find that he was discouraged from doing so by the court's stated predetermination of the issue before it. See *State v. Bias*, 337 So.2d 426, 432 (La. 1976). Here, the trial court stated that defendant's alleged confession would not be suppressed even before the State had any opportunity to prove its free and voluntary nature, as required by La. R.S. 15:451. Had defendant been allowed to take the stand at a hearing to allege his specific complaints, the testimonies of Detective Black and Lieutenant Devall might not have been sufficient to rebut them. See *Bias*, 337 So.2d at 432. We find this conclusion especially true in light of the loss of the audio/video recording of defendant's purported confession due to a computer malfunction. Such a situation inherently requires a credibility determination by the trial court and, absent an evidentiary hearing in this case, defendant was unable to give testimony at trial relating to his confession without subjecting himself to cross-examination on the whole case. Thus, we cannot assume from the incomplete record before us that the State would have sustained its heavy burden of proof no matter what defendant alleged on the stand. See *Bias*, 337 So.2d at 432.

Because this error might be eliminated at a hearing on the voluntariness of defendant's confession, we do not find it necessary at this time to reverse defendant's conviction and order a new trial. Instead, we also remand this case for the trial court to conduct a hearing within thirty days on the admissibility of defendant's confession. We reserve to the trial judge the power to grant a new trial should she determine the confession to be inadmissible (a matter on the merits of which we express no opinion). If, on the other hand, the trial judge determines

that the confession was freely and voluntarily given, defendant may appeal that decision to this court if he chooses. See *State v. Kennedy*, 438 So.2d 210, 212 (La. 1983) (per curiam). The trial court shall supplement the appeal record with the minutes and transcript of this hearing, which shall be filed with this court within ten days after the hearing.

ASSIGNMENT OF ERROR #3

Defendant's third assignment of error contains two separate arguments. First, defendant asserts that the trial court erred in denying a defendant's fundamental right to present a defense by refusing to allow him to present any witnesses on his behalf. Second, defendant contends that the trial court erred by refusing to allow defense counsel to fully cross-examine one of the State's witnesses against him.

Defendant's first assertion under this assignment of error relates to the trial court's refusal to allow defense counsel to call his sister as a defense witness because of her violation of the sequestration order. Before trial began, defense counsel asked for a sequestration of witnesses. Defense counsel did not list any witnesses when the trial court asked that the potential witnesses leave the courtroom.

After the State rested its case, defense counsel attempted to call defendant's sister as a witness. The State immediately objected on the grounds that defense counsel failed to list her as a witness when he asked for the sequestration order and that she had been in the courtroom for the entirety of the trial. The trial court sustained the State's objection and refused to let defendant's sister testify.

Defense counsel objected to the trial court's ruling sustaining the State's objection, but he failed to proffer any testimony by defendant's sister.

To preserve the right to appeal a trial court ruling which excludes evidence, a defendant must make the substance of the evidence known to the trial court. La. C.E. art. 103(A)(2). Because defendant failed to make a proffer, he is barred procedurally from advancing this assignment of error on appeal. See State v. Lynch, 94-0543 (La. App. 1st Cir. 5/5/95), 655 So.2d 470, 480, writ denied, 95-1441 (La. 11/13/95), 662 So.2d 466.

Defendant's second contention under this assignment of error relates to the trial court's refusal to allow defense counsel to cross-examine one of the victims, Theresa Goldmon, about a rumor that she had taken part in an illicit affair with defendant. The State immediately objected to this question as irrelevant, and defense counsel attempted to argue that such a question went to the "truth of [the witness's] testimony." The trial court sustained the State's objection, and defense counsel did not object or make a proffer. Accordingly, defendant has waived any error based on this allegation. See La. C.E. art. 103(A)(2); La. C.Cr.P. art. 841(A).

This assignment of error lacks merit.

DECREE

For these reasons, we remand defendant's case for evidentiary hearings to determine whether defendant freely and voluntarily waived a jury trial and whether defendant's allegedly inculpatory statements should have been suppressed. If the trial court finds in favor of defendant in either instance, it must set aside defendant's conviction and sentence and grant him a new trial. If the trial court determines that defendant knowingly and voluntarily waived his right to trial

by jury and that defendant's confession was freely and voluntarily made, defendant may appeal either, or both, of those decisions to this court.

REMANDED FOR FURTHER PROCEEDINGS.