MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Victor De Leon,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 27, 2021

Court of Appeals Case No. 21A-CR-297

Appeal from the Tippecanoe Superior Court

The Honorable Kristen E. McVey, Judge

Trial Court Cause No. 79D05-1911-F6-1209

Weissmann, Judge.

[1] Victor De Leon appeals his conviction on four felony counts, arguing that his jury trial waiver was deficient under both the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution. He also asks this Court to establish a standard colloquy to protect against future deficiencies. Finding De Leon's jury trial waiver was not deficient, we affirm his conviction and decline to establish a standard colloquy.

Facts

[2] De Leon was charged with four Level 6 felonies: sexual battery, confinement, strangulation, and domestic battery. At a pre-trial hearing, he moved for a bench trial through his attorney, who established the following record of waiver:

> [COUNSEL]: So[,] Victor[,] you understand that you have the absolute right to trial by jury, you understand that?
>
> [DE LEON]: Yeah.
>
> [COUNSEL]: And if . . . And if we proceed with a jury trial that a jury of six people would have to agree unanimously on a verdict of guilty or not guilty, correct?
>
> [DE LEON]: Correct.
>
> [COUNSEL]: And you understand by waiving your right to jury trial that the judge. . . is going to decide your sentence. She'll be the one who decides guilty or not guilty, you understand that?
>
> [DE LEON]: Correct, yes.

[COUNSEL]: And after discussing with me we decided that that's what's in your best interest, correct?

[DE LEON]: Correct.

[COUNSEL]: So it's your intent to waive trial by jury and have the trial done in front of the judge, correct?

[DE LEON]: Correct.

Tr., p. 8.

[3] De Leon was convicted on all counts. He now appeals, arguing that his jury trial waiver was constitutionally deficient.

Discussion and Decision

I. Jury Trial Waiver

[4] De Leon argues his waiver of the right to a trial by jury was constitutionally defective because his counsel made a misstatement in explaining that right. Specifically, counsel advised De Leon that if he waived his right to a jury trial, the judge would decide his sentence. De Leon fails to convince us that this true statement rendered his waiver constitutionally defective.

[5] Both the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution guarantee criminal defendants a right to jury trial. A defendant may waive that right, but waiver must be "knowing, intelligent, and voluntary." *Dadouch v. State*, 126 N.E.3d 802, 804 (Ind. 2019). "A voluntary waiver occurs if the conduct constituting the waiver is the product

of a free will; a knowing waiver is the product of an informed will; an intelligent waiver is the product of a will that has the capacity to understand . . . ." *Duncan v. State*, 975 N.E.2d 838, 843 (Ind. Ct. App. 2012). De Leon bears the burden of establishing grounds on which his conviction should be set aside. *Nunez v. State*, 43 N.E.3d 680, 683 (Ind. Ct. App. 2015), *trans. denied*.

[6] In advising De Leon, trial counsel correctly stated that he had a right to a jury trial, that six of his peers would determine his guilt or innocence in a jury trial, and that the judge determines guilt in a bench trial. Had trial counsel more precisely characterized sentencing rules, De Leon would have learned that the jury does not determine sentencing. *See Wisehart v. State*, 693 N.E.2d 23, 53 (Ind. 1998) ("An Indiana jury does not impose a sentence . . . ."). Even supposing De Leon was induced to plead guilty by the promise that a judge would sentence him, this promise was fulfilled. *Cf. Kimball v. State*, 474 N.E.2d 982, 986 (Ind. 1985) (supposing that if promises made to induce waiver go unfulfilled, waiver could be invalidated). Moreover, trial counsel immediately clarified the nature of waiver after the statement in question, saying that the judge alone would determine guilt or innocence in a bench trial and limiting the impact of any "misstatement." Tr., p. 8.

[7] In addition, a defendant need not be informed of every aspect of a jury trial for waiver to stand. *See Reynolds*, 703 N.E.2d at 704. Perhaps it would have been helpful if counsel or the trial court had clarified that, under no circumstances, would the jury sentence De Leon. *See Wisehart*, 693 N.E.2d at 53. But what is helpful is not always constitutionally required. *Cf. Poore v. State*, 681 N.E.2d

204, 208 (Ind. 1997) ("While it is advantageous for a trial judge to engage a defendant in colloquy concerning the consequences of waiving trial by jury, such an exchange is 'not required by either the United States or the Indiana constitutions, or by statute.'") (citing *Hutchins v. State*, 493 N.E.2d 444, 445 (Ind. 1986)).

[8] Finally, De Leon fails to show how trial counsel's misstatement tainted his understanding of jury trial. De Leon avoids saying he was *actually* confused about his rights. Beyond implying that he *could have* believed he was waiving rights with regard to sentencing, De Leon does not attest that the misstatement left him with an uninformed will. De Leon's suppositions are inadequate to meet his burden of showing that waiver was not knowing. *Nunez*, 43 N.E.3d at 683.

[9] De Leon also alleges that waiver was not intelligent or voluntary but presents no argument that he had diminished capacity or was forced to act. We will not make his argument for him. *See* Ind. Appellate R. 46(A)(8)(a). De Leon has not met his burden of establishing that his jury trial waiver was constitutionally deficient.

II. Appellant's Proposed Standard

[10] De Leon argues that to avoid misstatements leading to violations of the jury trial right, we should establish a standard colloquy for jury trial waiver—to be led by trial courts, not defense counsel. We decline. De Leon fails to provide good reason why we should depart with our own precedent finding that a

colloquy between defendant and counsel can be constitutionally sufficient. *See Reynolds*, 703 N.E.2d at 704 ("[I]t is the message and not the messenger which is of paramount importance.").

[11] Even if we were to establish such a standard, it could not be a constitutional requirement. Our Supreme Court has already observed that, "[w]hile it is advantageous for a trial judge to engage a defendant in colloquy concerning the consequences of waiving trial by jury, such an exchange is 'not required by either the United States or the Indiana constitutions, or by statute.'" *Poore*, 681 N.E.2d at 208 (citing *Hutchins*, 493 N.E.2d at 445). We cannot adopt an understanding of the Indiana Constitution in contravention of our Supreme Court's. *See Troue v. Marker*, 253 Ind. 284, 252 N.E.2d 800, 803 (Ind. 1969) ("The action of this Court is based upon its inherent constitutional duty to act as the final and ultimate authority stating what the law in this state is.").

[12] Federal court practice is a useful comparator. Rule 23(a) of the Federal Rules of Criminal Procedure requires defendants to waive jury trial in writing. But written waiver is not constitutionally required, and its absence does not end the inquiry. *See, e.g.*, *United States v. Laney*, 881 F.3d 1100, 1107 (9th Cir. 2018) ("[T]he failure to strictly comply with [the written waiver] requirement does not constitute reversible error if the record otherwise shows that the waiver was voluntary, knowing, and intelligent."). In the Seventh Circuit, waiver must both be in writing and follow a colloquy in open court, but waiver may still be valid where neither requirement is met. *See United States v. Williams*, 559 F.3d 607, 610 (7th Cir. 2009) ("[T]he sole constitutional requirement is that the waiver be

voluntary, knowing, and intelligent. The colloquy and written waiver serve to document these qualities, but a jury waiver may be valid despite their absence."). De Leon's proposed standard would necessarily function in this manner—and would not change the result in this appeal.

[13] In summary, De Leon's waiver was not constitutionally deficient, and we refuse to adopt his proposal of a standard colloquy. The trial court is affirmed.

Mathias, J., and Tavitas, J., concur.