[Cite as *State v. Dilts*, 2010-Ohio-6143.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- WILLIAM L. DILTS Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. CT2010-0032 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2010-0080
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 9, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RON WELCH Assistant Prosecuting Attorney 27 North Fifth Street Zanesville, OH 43701	DAVID A. SAMS P.O. Box 40 W. Jefferson, OH 43162

Hoffman, P.J.

{¶1} Defendant-appellant William L. Dilts appeals his conviction in the Muskingum County Court of Common Pleas on three counts of rape. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} The Muskingum County Grand Jury indicted Appellant on three counts of statutory rape involving children under the age of ten, in violation of R.C. 2907.02(A)(1)(b). Appellant entered a plea of guilty to the charges. The trial court convicted Appellant of the charges, and sentenced him to three consecutive life terms of prison without the possibility of parole.

{¶3} Appellant filed a motion to withdraw his plea, which the trial court denied after hearing.

{¶4} Appellant now appeals, assigning as error:

{¶5} "I. THE DEFENDANT-APPELLANT'S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY UNDER ARTICLE, I SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS HE WAS NOT ADVISED OF HIS CONSTITUTIONAL RIGHT TO JURY UNANIMITY."

{¶6} In the sole assignment of error, Appellant maintains the trial court erred in denying his motion to withdraw his guilty plea. Specifically, Appellant asserts the trial court failed to advise him during the colloquy of his right to jury unanimity.

{¶7} A Criminal Rule 32.1 motion is not a challenge to the validity of a conviction or sentence, and instead only focuses on the plea. *State v. Bush,* 96 Ohio

St.3d 235, 2002-Ohio-3993. Subsequent to the imposition of a sentence, a trial court will only permit a defendant to withdraw his guilty plea in order to correct a manifest injustice. Crim.R. 32.1. A defendant bears the burden of proving a manifest injustice warranting the withdrawal of his guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261. "A manifest injustice comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through any form of application reasonably available to him." *State v. McQueen,* 7th Dist. No. 08 MA 24, 2008-Ohio-6589, at ¶ 7. See, also, *Smith,* supra at 264.

{¶8} A reviewing court will not disturb a trial court's decision to deny a motion to withdraw a guilty plea absent an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. An abuse of discretion is more than error of law or judgment; "it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶9} The Ohio Supreme Court addressed the issue raised herein in *State v. Fitzpatrick* (2004), 102 Ohio St.3d 321, holding:

{¶10} "A jury waiver must be voluntary, knowing, and intelligent. Crim.R. 23; *State v. Ruppert* (1978), 54 Ohio St.2d 263, 271, 8 O.O.3d 232, 375 N.E.2d 1250. Waiver may not be presumed from a silent record. However, if the record shows a jury waiver, the conviction will not be set aside except on a plain showing that the defendant's waiver was not freely and intelligently made. *Adams v. United States ex rel. McCann* (1942), 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268. Moreover, a written waiver is presumptively voluntary, knowing, and intelligent. *United States v. Sammons*

(C.A.6, 1990), 918 F.2d 592, 597. See, generally, *State v. Bays* (1999), 87 Ohio St.3d 15, 19, 716 N.E.2d 1126.

{¶11} "***

{¶12} "Fitzpatrick contends that his waiver was not knowing and intelligent, because the trial court did not advise him that a jury's verdict must be unanimous, both to convict and to impose the death penalty.

{¶13} " 'A waiver is the intentional relinquishment of a known right or privilege. * * * Hence, a defendant must have some knowledge of the nature of the jury trial right to make a valid waiver.' *Bays,* 87 Ohio St.3d at 19-20, 716 N.E.2d 1126. However, '[t]here is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial.' *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus; accord *Spytma v. Howes* (C.A.6, 2002), 313 F.3d 363, 370 (colloquy not constitutionally required). 'The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel.' *Jells,* 53 Ohio St.3d at 26, 559 N.E.2d 464.

{¶14} "Moreover, a defendant need not have a complete or technical understanding of the jury-trial right in order to waive it. *United States v. Martin* (C.A.6, 1983), 704 F.2d 267, 273. According to the Sixth Circuit, '[a] defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and * * * a judge alone will decide guilt or innocence should he waive his jury trial right.' Id. Furthermore, *Martin*'s 'statement that this

knowledge is *sufficient* is not, of course, equivalent to a statement that it is constitutionally required.' (Emphasis sic.) *United States v. Sammons,* supra, 918 F.2d at 597."

{¶15} The Ohio Supreme Court again addressed this issue in *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, wherein the Court reviewed a defendant's claim the trial court did not adequately inform him of his right to jury unanimity. The Court held there was no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial, and explained the trial court was not required to specifically advise the defendant on the need for jury unanimity.

{¶16} This Court has followed the holding of *State v. Fitzpatrick* in *State v. Hale,* 2009-Ohio-3110, and the holding in *Ketterer* in *State v. McLaurin* (June 23, 2009), Muskingum App. No. CT2008-0052, finding there is no requirement a trial court inform a defendant of his right to a unanimous verdict. See also, *State v. Dooley,* Muskingum App. No. CT2008-0055, 2009-Ohio-2095; *State v. Hamilton,* Muskingum App. No. CT2008-0011, 2008-Ohio-6328; *State v. Smith,* Muskingum App. No. CT2008-0001, 2008-Ohio-3306; *State v. Williams,* Muskingum App. No. CT2007-0073, 2008-Ohio-3903.

{¶17} Upon review of the record, we find the trial court and the plea form adequately advised Appellant of his constitutional rights, and the trial court did not abuse its discretion in denying his motion to withdraw his plea.

{¶18} The sole assignment of error is overruled.

{¶19} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
WILLIAM L. DILTS	:	
	:	
Defendant-Appellant	:	Case No. CT2010-0032

For the reason stated in our accompanying Opinion, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ John W. Wise
HON. JOHN W. WISE