

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 10CA009796

Appellee

v.

JOSE F. LUGO

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 07CR075072

Appellant

DECISION AND JOURNAL ENTRY

Dated: February 7, 2011

CARR, Presiding Judge.

{¶1} Appellant, Jose Lugo, appeals the judgment of the Lorain County Court of Common Pleas. This Court vacates the trial court’s judgment.

I.

{¶2} This case stems out of an altercation which occurred on October 26, 2007, between Lugo and his girlfriend, Ashley McCormack.

{¶3} On January 17, 2008, the Lorain County Grand Jury indicted Lugo on one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. On January 24, 2008, Lugo was arraigned and entered a plea of not guilty by reason of insanity. A bench trial commenced on June 3, 2009. On November 9, 2009, the trial court issued a journal entry indicating it found Lugo guilty of felonious assault in violation of R.C. 2903.11. Lugo was subsequently sentenced to a four-year term of incarceration and ordered to pay restitution in the

amount of \$35,000. On March 31, 2010, the trial court issued a corrected judgment entry of conviction and sentence. On April 2, 2010, Lugo filed a notice of appeal.

{¶4} On appeal, Lugo raises seven assignments of error.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT WAS WITHOUT JURISDICTION TO CONDUCT A BENCH TRIAL BECAUSE THE REQUIREMENTS OF R.C. 2945.05 WERE NOT STRICTLY FOLLOWED[.]”

{¶5} In his first assignment of error, Lugo argues that the trial court was without jurisdiction because it did not follow the statutory requirements set forth in R.C. 2945.05. This Court agrees.

{¶6} Pursuant to Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” To constitute plain error, the error must be obvious and have a substantial adverse impact on both the integrity of, and the public’s confidence in, the judicial proceedings. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. A reviewing court must take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶12. This Court may not reverse the judgment of the trial court on the basis of plain error, unless appellant has established that the outcome of trial clearly would have been different but for the alleged error. *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166.

{¶7} In support of his assignment of error, Lugo argues that the trial court committed plain error by conducting a bench trial when he had not waived his right to a jury trial pursuant to R.C. 2945.05. Lugo asserts that a written jury waiver was never executed and made part of

the record and that the required colloquy in open court never took place. Lugo contends that these errors resulted in obvious defects in the proceedings whereby he was denied his constitutional right to a jury trial.

{¶8} “The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees an accused the right to trial by jury.” *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, at ¶6, citing *Duncan v. Louisiana* (1968), 391 U.S. 145. Section 5, Article I of the Ohio Constitution states that the “right to a trial by jury shall be inviolate.” Pursuant to Crim.R. 23(A), “[i]n serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury.” A criminal defendant may waive his right to a jury trial by complying with R.C. 2945.05, which states:

“In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in the substance as follows: “I _____, defendant in the above cause, hereby voluntarily waive and relinquish my right to trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to trial by jury.

“Such waiver of trial by jury must be made in open court after defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.”

{¶9} The Supreme Court of Ohio has determined that five requirements must be met in order for a waiver to be validly entered under R.C. 2945.05. The waiver “must be (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court.” *Lomax* at ¶9. The trial court must strictly comply with the requirements of R.C. 2945.05. *State v. Pless* (1996), 74 Ohio St.3d 333, 337. “In the absence of strict compliance with R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury.” *Id.*

{¶10} In this case, the State does not dispute that the trial court erred by conducting a bench trial because Lugo had not properly waived his right to trial by jury pursuant to R.C. 2945.05. The State concedes in its merit brief that because the trial court was without jurisdiction to conduct a bench trial, the proper remedy is for this Court to vacate Lugo's conviction and remand this case for a new trial. A review of the record indicates that a signed jury trial waiver was not made part of the trial court record as required by R.C. 2945.05. Furthermore, it does not appear that Lugo waived his right to a jury trial in open court prior to the commencement of trial. Therefore, Lugo's conviction must be vacated. On remand, Lugo has a right to a jury trial unless he waives that right and the trial court strictly complies with R.C. 2945.05.

{¶11} Lugo's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A HEARING ON HIS COMPETENCY IN ACCORDANCE WITH R.C. 2945.37[.]"

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT RELIED ON AN EXPERT'S REPORT WITHOUT CALLING THE EXPERT AS A WITNESS OR ALLOWING CROSS-EXAMINATION OF THE WITNESS."

ASSIGNMENT OF ERROR IV

"DEFENDANT-APPELLANT WAS DENIED HIS RIGHT, UNDER OHIO EVIDENCE RULE 404(B) TO EXCLUDE HIS PRIOR CRIMES, WRONGS, OR ACTS AND WAS PREJUDICED THEREBY."

ASSIGNMENT OF ERROR V

"DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO MAKE HIS DEFENSE WHEN HE WAS DENIED THE OPPORTUNITY TO MAKE A CLOSING ARGUMENT[.]"

ASSIGNMENT OF ERROR VI

“MR. LUGO’S CONVICTION OF FELONIOUS ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]”

ASSIGNMENT OF ERROR VII

“DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO A NUMBER OF ERRORS IN THE CASE.”

{¶12} Lugo raises six additional assignments of error. Because our resolution of the first assignment of error is dispositive of this appeal, this Court declines to address Lugo’s remaining assignments of error as they are rendered moot. See App.R. 12(A)(1)(c).

III.

{¶13} Lugo’s first assignment of error is sustained. This Court declines to address Lugo’s remaining assignments of error. The judgment of the Lorain County Court of Common Pleas is vacated, and the cause remanded for further proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

ALLISON L. MANNING, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.