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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SUZANNE GILREATH,

Defendant and Appellant.

B234123

(Los Angeles County
Super. Ct. No. LA061894)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barry Taylor, Judge. Reversed.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Suzanne Gilreath appeals from the judgment entered following her conviction for grand theft by embezzlement following a court trial. (Pen. Code, § 487 subd. (a).)¹ Defendant contends that her conviction must be reversed because she did not waive her right to a jury trial in the manner required by article I, section 16 of the California Constitution. She also contends that if her conviction is affirmed, the matter must be remanded for a new sentencing hearing because the court failed to consider a complete presentence probation report. We conclude that defendant did not expressly waive her right to a jury trial and reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY²

The following evidence was presented at defendant's preliminary hearing. The preliminary hearing transcript was admitted into evidence at the court trial.

Defendant was employed by All American Kitchens as a bookkeeper from May 2005 through April 2008. She was responsible for all accounting duties. Her responsibilities included preparing checks used to pay company employees and the company's vendors. All American Kitchens maintained separate bank accounts for payroll and operating expenses. Defendant was never authorized to issue checks to herself, to pay personal bills or expenses through the company's account, or to issue checks made out to "cash."

In April 2008, Christopher Zepatos, the owner of All American Kitchens, asked defendant to transfer funds from the operating account to the payroll account. A short time later, Zepatos received a call from the bank informing him that he did not have sufficient funds in the operating account to make the transfer. Zepatos thought it was odd that defendant did not know how much money was in the operating account and decided

¹ All further undesignated statutory references are to the Penal Code.

² As defendant does not challenge the sufficiency of the evidence, we set forth an abbreviated version of the facts.

to bring in an additional bookkeeper to check defendant's bookkeeping. Zepatos informed defendant that he was bringing in an additional bookkeeper. An hour later, defendant told Zepatos that she needed to leave work because her husband was having a heart attack. Defendant left the office and never returned.

The next day, the other bookkeeper went over the accounts and discovered several discrepancies. Zepatos then hired a new bookkeeper to replace defendant. The new bookkeeper reviewed the accounts from the time defendant began working for the company and found 35 unauthorized checks from the payroll account issued to defendant. In addition, the bookkeeper discovered that funds designated in 34 unauthorized checks had been periodically withdrawn from the operating account between June 2005 and October 2007. These 34 unauthorized checks were either made payable to defendant or to "cash." Zepatos identified all of the unauthorized checks as ones drawn from the accounts of his business.

On February 28, 2011, the court held a scheduling hearing to determine the trial date. At the hearing, defense counsel informed the court, "we'd like to do a court trial." This statement was followed by a brief discussion regarding scheduling. The court then took defendant's waiver of her right to have a trial by jury as follows:

"The Court: . . . Miss Gilreath, you do have a right to have a jury trial. A jury trial is we call 12 people. They're sworn. They listen to the evidence. They all have to agree whether you're either found guilty or not guilty. If you waive your right to a jury trial, we can have a court trial, which means I will hear the evidence by myself, and I'll hear it all, I'll make the decisions. I still have to be convinced beyond a reasonable doubt that the People have proved their case, but it will just be me doing it. Do you understand?

"The Defendant: Yes.

"The Court: Counsel join?

"[Defense counsel]: I do.

"The Court: People join?

"[Prosecutor]: Yes, Your Honor."

The court trial was scheduled for March 21, 2011, and it began on March 28, 2011. Defendant testified on her own behalf. On March 29, 2011, the court found defendant guilty as charged. The court then continued the matter for sentencing and ordered defendant to go to the probation department in order for the department to prepare a presentence probation report.

On June 23, 2011, at the sentencing hearing, imposition of sentence was suspended and defendant was granted three years of formal probation on the condition that she serve 365 days in county jail. The court imposed a restitution fine of \$200 (§ 1202.4, subd. (b)), a parole revocation fine of \$200 (§ 1202.45), which was stayed, a court security fee of \$40 (§ 1465.8, subd. (a)(1)), and victim restitution of \$112,646 (§ 1202.4, subd. (f)).

Defendant filed a timely appeal.

DISCUSSION

Defendant contends her conviction must be reversed because she did not expressly waive her right to a jury trial in open court. We agree.

Under article I, section 16 of the California Constitution, “[a] jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant’s counsel.” (Cal. Const., art. I, § 16.) A defendant’s waiver of the right to a trial by jury must be expressed personally through the use of language and will not be implied from conduct alone. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444 (*Holmes*).) Although a defendant’s waiver cannot be inferred and language must be used, no particular language is necessary as long as the words employed disclose in their ordinary meaning the defendant’s intention to be tried by the court without a jury. (*People v. Di Blasi* (1961) 198 Cal.App.2d 215, 223.) If a defendant is advised that he or she has the choice between the two types of trial and selects trial by the court instead of trial by jury, then he or she has just as effectively waived trial by jury as if he or she had said specifically, “I waive trial by jury.” (*Id.* at p. 222.)

Citing *Holmes*, defendant asserts she did not expressly waive her right to a jury trial. In *Holmes*, the defendant was asked whether he understood that he had a right to a jury trial with respect to the underlying charge and the allegation he had suffered a prior conviction. The defendant twice answered, “Yes.” The defendant’s counsel responded affirmatively when asked if he joined in the waiver. (*Holmes, supra*, 54 Cal.2d at p. 443.) In agreeing with the defendant’s contention that he had not waived a trial by jury in the manner required by the California Constitution, the Supreme Court determined that the “[d]efendant did not express in words a waiver of his right to a jury trial, and it has been uniformly held that the waiver must be so expressed and will not be implied from a defendant’s conduct.” (*Id.* at pp. 443-444.)

The Attorney General argues that “[i]n the context of the colloquy in the instant case, [defendant’s] answer of ‘Yes’ to the question of whether she understood what she was giving up and that the trial court would be determining the outcome of her case, constituted an express waiver of her right. In other words, [defendant] clearly confirmed by words that she understood that instead of a jury of 12, the court would try the case.” We are not persuaded that defendant’s response to the trial court’s question constituted an express waiver of a jury trial.

We see little difference between the defective waiver in *Holmes* and the one here. In both cases, the defendants were asked whether they understood their right to a jury trial. Although we acknowledge that the trial court in the instant case took greater pains to explain the difference between a jury and a court trial, the fact remains that at no time did defendant affirmatively choose a court trial over the alternative. She merely indicated that she understood the procedural differences between the two types of trials. Thus, in order to find a jury waiver in this case, we would have to imply that defendant waived her right to a jury trial by participating in the court trial without objection. As discussed, the *Holmes* court deemed such a waiver insufficient to meet the Constitution’s requirement that a jury waiver be expressed personally through the use of language.

Under the circumstances of this case, we recognize that our conclusion exalts form over substance. There is no question defendant willingly took part in the court trial, fully

understanding that the judge would be evaluating the evidence and rendering judgment. Nonetheless, “[w]hen the constitutional right to jury trial is involved, we have required an express waiver even in cases in which the circumstances make it apparent that all involved—the trial court, the prosecutor, defense counsel, and the defendant—assumed that the defendant had waived or intended to waive the right to a jury trial.” (*People v. French* (2008) 43 Cal.4th 36, 47.) The judgment must be reversed. As a result, we need not address defendant’s issue with the sentencing hearing.

DISPOSITION

The judgment is reversed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.