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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD DARNELL,

Defendant and Appellant.

2d Crim. B277486
(Super. Ct. No. 16PT-00227)
(San Luis Obispo County)

Edward Darnell appeals an order sustaining a petition for recommitment as a mentally disordered offender (MDO). (Pen. Code, § 2970.)[1] He contends that because the trial court failed to advise him of his right to a jury trial, his waiver of jury was ineffective. (See *People v. Blackburn* (2015) 61 Cal.4th 1113, 1123-1124 (*Blackburn*).) We conclude the trial court's acceptance of appellant's "personal waiver of a jury trial" without an express advisement was harmless as the record affirmatively shows, based on the totality of the circumstances, that appellant's

[1] All further statutory references are to the Penal Code.

waiver was knowing and voluntary. (See *id.* at pp. 1136-1137.) Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Appellant was convicted of arson of property. (§ 451, subd. (d).) In 2004, he was certified as an MDO, and later admitted to Coalinga State Hospital for treatment. Before his involuntary treatment was set to expire on September 11, 2016, the People petitioned to extend the commitment pursuant to section 2970.

The trial court scheduled the petition for a jury trial. At the pretrial readiness conference, appellant agreed "to do a personal waiver of a jury trial and proceed by way of court trial." Following trial, the court found that appellant has a severe mental disorder that is not in remission or cannot be kept in remission and represents a substantial danger of physical harm to others. The court ordered continued treatment for one additional year. (See § 2972.)

DISCUSSION

Citing *Blackburn*, appellant contends that he was deprived of a personal advisement and waiver of his jury trial right and that this deprivation requires reversal. We disagree.

In *Blackburn*, the MDO defendant's counsel waived the defendant's right to a jury trial in a recommitment proceeding. The Supreme Court concluded that the decision to waive the right to a jury trial "belongs to the defendant in the first instance." (*Blackburn*, *supra*, 61 Cal.4th at p. 1127.) In so ruling, it determined that the trial court "must advise the defendant of the right to counsel and the right to a jury trial. And the court must make this advisement to 'the person,' not to his or her attorney." (*Id.* at p. 1123.) Specifically, the Court held that "section 2972(a) requires the trial court to directly advise the

MDO defendant on the record in a court proceeding." (*Id.* at p. 1124.)

Next, the Supreme Court construed the waiver provision of section 2972, subdivision (a) "to establish a default rule that a [trial] court must obtain a personal waiver of the defendant's right to a jury trial before holding a bench trial. But when the trial court finds substantial evidence that defendant lacks the capacity to make a knowing and voluntary waiver, control of the decision shifts to defense counsel." (*Blackburn*, *supra*, 61 Cal.4th at p. 1125.)

Here, defense counsel did not waive a jury on appellant's behalf. Nor is there any issue regarding appellant's capacity to make a knowing and voluntary waiver. The issue is whether the trial court made the requisite advisement and obtained a personal waiver from appellant before proceeding with a bench trial. (*Blackburn*, *supra*, 61 Cal.4th at pp. 1123-1125.) At the August 24, 2016 readiness conference, the following colloquy occurred:

"THE COURT: This is 16PT-00227. [Appellant] is present, in custody, with [defense counsel] appearing on his behalf, and [the prosecutor] appearing for the People. The matter is set today for a readiness conference with a jury trial currently scheduled for August 29th.

"[DEFENSE COUNSEL:] Yes, Your Honor. And I spoke with [appellant] this morning. He is indicating that he is willing to do a personal waiver of a jury trial and proceed by way of court trial.

"THE COURT: Your attorney is indicating you are agreeable to having your matter decided by a judge. Is that correct?

"[APPELLANT:] Yes, Your Honor."

Although appellant agreed to "a personal waiver of a jury trial," the trial court did not expressly advise him of his right to a jury trial. *Blackburn* clarified, however, that "a trial court's failure to properly advise an MDO defendant of the right to a jury trial does not by itself warrant automatic reversal. Instead, a trial court's acceptance of a defendant's personal waiver without an express advisement may be deemed harmless if the record affirmatively shows, based on the totality of the circumstances, that the defendant's waiver was knowing and voluntary. [Citations.] In both scenarios, the requirement of an *affirmative* showing means that no valid waiver may be presumed from a silent record. [Citation.]" (*Blackburn*, *supra*, 61 Cal.4th at pp. 1136-1137.)

Because the record in *Blackburn* was silent regarding whether the defendant knowingly and voluntarily waived his right to a jury trial, the Supreme Court instructed the Court of Appeal to remand the matter "to the trial court so that the district attorney may submit evidence, if any, that [the defendant] personally made a knowing and voluntary waiver . . . at the time of counsel's waiver." (*Blackburn*, *supra*, 61 Cal.4th at p. 1137.) The Court advised that "[i]f the trial court finds by a preponderance of the evidence that [the defendant] made a knowing and voluntary waiver, or if it finds substantial evidence that he lacked that capacity at the time of counsel's waiver, then the court shall reinstate the extension order." (*Id.* at p. 1137.)

Unlike in *Blackburn*, a remand here is not warranted. The record affirmatively shows that appellant personally, knowingly and voluntarily waived his right to a jury trial after the trial court advised him in open court that his matter was set for a jury trial on August 29, 2016. Defense

counsel informed the court, in appellant's presence, that appellant "is indicating that he is willing to do a *personal waiver of a jury trial* and proceed by way of court trial." (Italics added.) Both the trial court's and counsel's statements were clear indications that, but for appellant's "personal waiver of a jury trial," a jury trial would occur. Nothing in the record suggests that appellant was unable to hear or understand those statements. To the contrary, when the court asked appellant whether he was "agreeable to having [the] matter decided by a judge," he responded, "Yes, Your Honor."

We conclude, based on the totality of the circumstances, that appellant knowingly and voluntarily waived his right to a jury trial, and that any failure by the trial court to expressly advise him of that right was harmless. (See *Blackburn*, *supra*, 61 Cal.4th at pp. 1136-1137.)

The judgment (order of recommitment) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge
Superior Court County of San Luis Obispo

Christopher L. Haberman, under appointment by the Court of Appeal, for Defendant and Appellant.

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