Cite as 2010 Ark. App. 2

ARKANSAS COURT OF APPEALS

DIVISIONS II AND III
No. CACR09-165

RAFAEL G. GONZALEZ APPELLANT	**Opinion Delivered** January 6, 2010 APPEAL FROM THE SEVIER COUNTY CIRCUIT COURT [NO. CR-2007-151-1]
V.	HONORABLE TED C. CAPEHEART, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was tried by a jury and convicted of being an accomplice to aggravated robbery. On appeal, he argues that the trial court erred in failing to obtain a personal waiver from him before he was tried by a panel of only eleven jurors. We find no error, and we affirm.

Article 2, section 7 of the Arkansas Constitution guarantees a defendant's right to a jury trial. This article has been held to mean that a defendant has the right to be tried by a twelve-member jury unless such right is waived in the manner prescribed by law. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996). It is the trial court's burden to ensure that any waiver of the defendant's right to trial by jury is in accordance with the Arkansas Constitution and Rules of Criminal Procedure. *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995). Waiver may be accomplished by the defendant personally, in writing or in open

court, or through counsel if the waiver is made in open court in the presence of the defendant. Ark. R. Crim. P. 31.2.

At the conclusion of jury selection, the following colloquy regarding the selection of alternate jurors occurred in open court:

> THE COURT: That should be twelve, according to my figures. Now, do y'all want an alternate?
>
> PROSECUTOR: Judge, we would certainly go with eleven in the event something happens. It's going to be a very short case, I think.
>
> THE COURT: Will you all go with eleven if we have an emergency or somebody gets sick?
>
> PROSECUTOR: We would, your Honor.
>
> THE COURT: You don't have to. It's no problem to get an alternate.
>
> DEFENSE COUNSEL: We'll be fine with that panel.
>
> THE COURT: Okay. Let's get them in here and swear them in and I'll let everybody else go.

Subsequently, one of the jurors approached the bench and was excused after explaining that she just realized that she worked with appellant's mother. At the bench, appellant's counsel told the trial court: "I'll explain to him. We'll go with eleven." Appellant now argues that this was not a valid waiver because it was made at the bench rather than in open court.

We find no error because, without regard to counsel's statement at the bench, the initial colloquy quoted above was a sufficient waiver in open court to satisfy the Arkansas

Constitution and Rule 31.2. The trial judge asked both attorneys whether they would agree to proceed without alternates, noting that doing so would give rise to the possibility of trial by fewer than twelve jurors. After the prosecutor agreed—twice—to do so, the trial judge persisted until he received the assent of appellant's attorney. In a recent case involving similar circumstances, we held that an attorney's agreement to proceed without an alternate juror, made in the presence of the defendant in open court, constituted a valid waiver of trial by twelve jurors, stating that a defendant "cannot sit idly by while counsel agrees to a trial without alternates." *Marshall v. State*, 102 Ark. App. 175, 178, 283 S.W.3d 597, 600 (2008).

Affirmed.

GLADWIN, KINARD, GLOVER, and BROWN, JJ., agree.

BAKER, J., dissents.

BAKER, J., dissenting. The right to a twelve-person jury is a fundamental right guaranteed by the Arkansas Constitution. Ark. Const. art. 2, § 7. This right to a twelve-person jury is "inviolate." Our supreme court in *Byrd v State*, 317 Ark. 609, 879 S.W.2d 435 (1994), held that the guarantee of a defendant's right to a jury trial meant the right to be tried by a twelve-member jury and that such right must be waived by the defendant "in the manner prescribed by law."

In *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993), the supreme court held that "while a defendant who desires to waive his right to a jury trial under Rule 31.2 must do so either in writing or in open court, his or her attorney may also make such a waiver ***so long***

***as the defendant has acknowledged he or she had been informed of the right and the attorney waives the right in open court, on the record and in the defendant's presence.*"** *Id.* at 390, 862 S.W.2d at 843 (emphasis added). A waiver must rest on an adequate preliminary statement of the trial court delineating the rights of the accused and the consequences of the proposed waiver with the implication, at least tacit, that the accused should reasonably comprehend his position and appreciate the possible effects of the choice. *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001). Here, appellant did not acknowledge he had been informed of the right to a twelve-person jury, and the question by the trial judge was insufficient to apprise him that his attorney was agreeing to try the case to something less than the jury he is guaranteed by the Arkansas Constitution. Anything less than a knowing, intelligent, and voluntary waiver of a fundamental right is not a waiver. *Burrell v. State*, 90 Ark. App. 114, 204 S.W.3d 80 (2005).

The trial court's question was: "Will y'all go with 11 if we have an emergency or somebody gets sick?" This question by the trial court was an inadequate preliminary statement and did not meet the requirements for a knowing, intelligent, and voluntary waiver. Additionally, the conditions outlined by the trial judge's query did not occur. There was no "emergency" and no one "got sick." Instead, a juror was excused because she knew appellant's mother. Appellant was not even informed of this in open court, although his attorney said at the bench conference that he would "explain it to him."

I do not find an adequate waiver of appellant's right to a jury trial in this case. Without an adequate waiver, this court's affirmance of a criminal conviction by a jury of fewer than twelve members violates this defendant's constitutional right to a jury trial. It is my duty to support the Constitution of the State of Arkansas. A judge's duty to support the Constitution is articulated clearly and simply in the words of the oath of office judges take before assuming their judicial duties:

> I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of Arkansas, and that I will faithfully discharge the duties of the office of _____, upon which I am now about to enter.

Ark. Const. art. 19, § 20.

Our right to self-government, a government by the people and for the people, is directly dependent upon our duty to defend our Constitution. One of the first cases published in our State explained the correlation between keeping our constitutional principles inviolate and maintaining our independence for the common good:

> An American Constitution, according to the theory and practice of our peculiar systems, is the supreme, original, and written will of the people, acting in their highest sovereign capacity, creating and organizing the form of government, assigning to the different departments their respective powers and duties, and restraining each and all of them within their own proper and peculiar spheres. The powers which are conferred, the restrictions which are imposed, the authorities which are exercised, and the organization and distribution of them, are all intended for the common benefit, and they are as essential to the maintenance and security of the entire plan, as they are to the protection and preservation of liberty itself. The principles which are thus declared by the sovereign will, must of necessity forever remain inviolate and fundamental, so long as the form of government under which they are established exists; or written Constitutions, with all their boasted excellencies, are mere idle ceremonies or useless inventions. To deny their sovereignty and inviolability, is at once

> to impeach the right of self-government, and to destroy the only means by which that blessing can be perpetuated. The Constitution of the State is, then, the supreme, paramount law of the land, except it comes in conflict with the Constitution of the United States, or with the laws and treaties of the general government, made in pursuance of its authority; and the courts are bound so to treat and consider it. We are not aware that this doctrine has ever been impugned or denied by any respectable authority, since the decision in the case of *Marbury v. Madison*. The Chief Justice of the United States then placed it upon such a high and unquestionable ground, that since that time it never has been attempted to be shaken, and it is now universally acquiesced in, and admitted by every intelligent man in the community. There is certainly a wide and striking difference between the Constitution of the United States and of a State government. The one is an enumeration and a delegation of certain specified powers, granted by the States, or the people of the States, for national purposes and objects. Hence, Congress can exercise no power that is not specifically granted by the Constitution, or incidentally included among some of its enumerated powers. By an inspection and examination of all the State Constitutions of our own country, they will be found to be nothing more or less than so many bills of rights, declaratory of the great and essential principles of civil and political justice, imposed as so many duties, and enjoined as so many restrictions, both upon the departments of the government, and upon the people.

State v. Ashley, 1 Ark. 513, 537–38, 1839 WL 101 (1839).

I cannot ignore this duty. Our essential principles of civil and political justice depend upon it. Accordingly, I dissent.