

No. 87535

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

SCOTT D. BAXTER,

Appellant.

**Appeal from the Circuit Court of Dade County, Missouri
28th Judicial Circuit
The Honorable James R. Bickel, Judge**

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions of the class C felony of arson in the second degree, ' 569.050, RSMo 2000, and the class C misdemeanor of assault in the third degree, ' 565.070, RSMo 2000, obtained in the Circuit Court of Dade County, the Honorable James R. Bickel presiding. Appellant was sentenced to serve six years in the Missouri Department of Corrections for the arson, and fifteen days in the county jail for the assault. This Court sustained respondent=s application for transfer; thus, the Court has jurisdiction. MO. CONST., Art. V, ' 10.

STATEMENT OF FACTS

On December 3, 2002, Appellant, Scott D. Baxter, was charged, as a prior offender, with two offenses: the class B felony of arson in the first degree, ' 569.040, RSMo, and the class C misdemeanor of assault in the third degree, ' 565.070, RSMo (L.F. 11).¹ On May 27, 2004, in exchange for appellant=s waiver of jury trial, the state filed an amended information that removed the prior-offender allegation and reduced the first count of the information to the class C felony of arson in the second degree, ' 569.050, RSMo (L.F. 13; Tr. 5-6; *see* Sent.Tr. 10).

¹ The record on appeal consists of four separately paginated transcripts and three legal files; respondent will cite to them as follows: the suppression hearing (Supp.Tr.), the trial transcript (Tr.), sentencing on Count I (Sent.Tr.), sentencing on Count II (2nd Sent.Tr.), the legal file originally filed in appellant=s first direct appeal, Case No. SD26464 (L.F.), the legal file filed in this case (2nd L.F.), and the supplemental legal file filed in this case (Supp.L.F.).

On June 2, 2004, the court held a bench trial (Tr. 1). Appellant does not contest the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the facts were as follows:

On September 29, 2002, appellant was with Brittany Tucker, his occasional sexual partner, at an apartment in Greenfield, Missouri (Tr. 82). They drank some Kentucky Deluxe whiskey and took some Clonapam pills (Tr. 83). After a while, Tucker suggested they go over to Melinda Bennett=s apartment (Tr. 85). Bennett was also an occasional sexual partner of appellant=s, and appellant had recently come to believe that Bennett had Asnitched@ on him to law enforcement about some robberies (Tr. 39, 43-44, 80-81).²

No one was home at Bennett=s apartment, but appellant and Tucker entered the home anyway (Tr. 87). Once inside, Tucker went to the refrigerator in search of something to eat; she found a Aring pop@ (Tr. 90). She then saw that appellant had started a fire in the other room; appellant was standing next to the burning bed with a Bic lighter in his hand (Tr. 90-91). Tucker Afreaked out,@ ran back and forth, and said, AWe have got to go! We have got to go!@ (Tr. 91). But appellant simply said ASh-h-h-h@ (Tr. 92). Tucker ran from the apartment; appellant eventually followed (Tr. 92, 124).

² Appellant=s philandering was apparently of little or no concern to either Tucker or Bennett (Tr. 39, 79-80).

On the street, Tucker saw Bennett riding in a van; Tucker flagged down the van and told Bennett that she had seen smoke coming out of Bennett=s apartment (Tr. 37-38, 94-95). Bennett went to her apartment and saw smoke coming from the door (Tr. 40). Bennett then saw Deputy Sheriff Max Huffman standing on the square; she ran to him and reported the fire (Tr. 41, 54).³

As Bennett stood on the square, appellant approached her (Tr. 42). They talked about getting together and drinking later that night (Tr. 42). Appellant then put a little pocket knife to Bennett=s throat and said that if he Awanted [her] dead, he would have already killed [her]@ (Tr. 42). Bennett was frightened, and after appellant had left, she reported the incident to law enforcement (Tr. 42, 46, 58).

Deputy Huffman went looking for appellant and eventually found him (and Tucker) in the parking lot of the sheriff=s office (Tr. 58-59). It was about 10:30 p.m. (Tr. 59). Deputy Huffman asked appellant if he had any weapons, and when appellant reached for his pocket, Huffman and another deputy secured appellant and removed two knives from his pocket (Tr. 60-61). Appellant was placed under arrest and advised of the *Miranda* warnings (Tr. 61-62).

When told that he was under arrest for assaulting Bennett, appellant said, AThat=s

³ The fire burned for about fifteen minutes, causing over \$16,000 in damage to the apartments (Tr. 15, 31).

bulls---@ (Tr. 62-63). Appellant also said that before the fire he had been walking around, but he would not say whether he had been to the apartment (Tr. 63). Appellant then terminated the interview (Tr. 64). The officers noted some black smudges on appellant=s right foot and leg (Tr. 64-65). The officers also noted a tattoo on appellant=s left hand that said ATorch@ (Tr. 66). Tucker was also questioned, and she implicated appellant (Tr. 101, 135).

The next day, September 30, appellant requested to speak with officers (Tr. 66). When asked if he had gone into the apartment, appellant said, AF---, no@ (Tr. 67). When told that other people had placed him in the apartment, appellant said, AI might have knocked on the door@ (Tr. 67-68). When asked if the door was locked, appellant said, AYes, but you can open it with a card@ (Tr. 68). When asked if he had gone inside, appellant did not respond (Tr. 68). Appellant then became agitated and started Asquirming around@ (Tr. 68). He said, ASo you believe that b---- pricked me now@ (Tr. 68). Appellant then implicated Bennett in crimes such as trading an Aeight ball of dope@ for a gun, and giving him stolen property (Tr. 69).

At trial, on June 2, 2004, appellant did not testify, but he presented the testimony of his mother and Deputy Chris Blunt, in an attempt to discredit Tucker=s testimony (Tr. 128, 132).⁴ Appellant=s mother said that Tucker had admitted to taking some jewelry from

⁴ Tucker testified against appellant pursuant to an agreement with the state (Tr. 102). For its part, the state agreed to dismiss the charges against Tucker, who had been charged as an accomplice (Tr. 102).

Bennett=s apartment (a fact that Tucker denied) (Tr. 129). Deputy Blunt testified that Tucker had initially denied going inside Bennett=s apartment (Tr. 134).

The judge found appellant guilty of arson in the second degree (Count I) and assault in the third degree (Count II) (Tr. 153). On August 9, 2004, appellant was sentenced on Count I to serve six years in the Missouri Department of Corrections (Sent.Tr. 10).

Appellant appealed, and the Court of Appeals dismissed the appeal for lack of jurisdiction (inasmuch as the trial court had failed to sentence appellant on Count II).⁵ On January 31, 2005, the trial court sentenced appellant to fifteen days in the county jail on Count II (2nd Sent.Tr. 5).

On January 26, 2006, the Court of Appeals reversed and remanded appellant=s case for a new trial, holding that the trial court had plainly erred in failing to ascertain whether appellant=s waiver of jury trial was valid. Thereafter, on April 11, 2006, this Court sustained respondent=s application for transfer.

⁵ Appellant=s first appeal was in Case No. SD26464.

ARGUMENT

I.

Because appellant expressly waived his right to a jury trial (as part of a negotiated agreement with the state in which appellant received a reduced charge), and because he did not object to proceeding without a jury and did not at any time suggest that he desired to exercise his right to a jury trial, this Court should decline to review appellant=s belated claim that the trial court plainly erred in proceeding without a jury. But in any event, the trial court did not plainly err.

Appellant contends that the trial court plainly erred in proceeding to trial without a jury (App.Sub.Br. 11). He points out that there was no written waiver of his right to jury trial, and that the trial court did not examine him personally (App.Sub.Br. 11). Thus, he asserts that there is absolutely no basis in the record to determine >with unmistakable clarity= that [he] knowingly, intelligently and voluntarily waived his fundamental right to trial by jury@ (App.Sub.Br. 11).

But because appellant did not object to proceeding without a jury or ever suggest that he wanted to exercise his right to jury trial, and inasmuch as his waiver of jury trial was part of a negotiated agreement with the state, whereby he received a reduced charge, this Court should decline to review appellant=s belated plain-error claim. Alternatively, this Court should not convict the trial court of plain error, both because appellant=s waiver was entered in compliance with Rule 27.01 and because appellant has not proved manifest injustice.

A. Where Defense Counsel Expressly Informs the Trial Court that the Defendant

is Waiving Jury Trial, the Defendant has Affirmatively Waived a Subsequent Claim that the Trial Court Plainly Erred in Proceeding to Trial Without a Jury.

Before trial, appellant=s case was continued several times. A review of the various trial settings reflected in the docket sheets reveals the following:

January 13, 2003 B case set for jury trial;

June 16, 2003 B case set jury trial;

October 17, 2003 B case set for jury trial; and

March 15, 2004 B case set for bench trial on June 2, or jury trial on June 24;

(L.F. 3-4, 6-7). From these entries it appears that appellant=s waiver of jury trial was first discussed as an option on March 15, 2004 (or sometime between October 17, 2003 and March 15, 2004). That appellant ultimately opted to have a bench-trial is borne out by the record.

On June 2, 2004, after the court noted that the charge on Count I had been reduced to a class C felony (from the previously charged class B felony), the prosecutor stated: AThe agreement in this case was that [appellant] would waive a jury trial and have a bench trial, upon my reduction of the charge to a class C felony, arson in the second degree@ (Tr. 6). The prosecutor then requested, in appellant=s presence: AI would ask that [appellant] acknowledge that on the record, so he cannot later complain that he did not have a jury trial@ (Tr. 6).

The trial court then addressed defense counsel and asked if there was a waiver of jury trial (Tr. 6). Defense counsel said, AYes, Your Honor@ (Tr. 6). A docket entry on June 2,

2004, confirmed that appellant had waived jury trial (L.F. 8, ΔΔ waives jury trial & announces ready to proceed w/ trial to the Court.@). Again, appellant was present for these proceedings (Tr. 2). The trial then commenced and was concluded without any objection or complaint from appellant.

Consistent with his earlier waiver, at sentencing, even after the trial court referred to the fact that there had been an agreement regarding the waiver of jury trial, appellant voiced no complaint (Sent.Tr. 10, 13-15). Indeed, while appellant voiced some dissatisfaction with counsel, he mentioned only two complaints: first, that none of his attorneys had sought to have his clothing tested for smoke residue; and second, that his request for a different attorney had been ignored (Sent.Tr. 14-15).⁶ Thus, while appellant had the opportunity to complain about the absence of a jury, he never did.⁷

Under such circumstances, appellant affirmatively waived appellate review of this

⁶ Appellant also mentioned his request for a change of venue, but then he corrected himself and mentioned that he had made a request for a different attorney (Sent.Tr. 14). A change of venue *was* requested by the defense, but that request was withdrawn (L.F. 3).

⁷ Appellant=s silence on that point is significant in light of his previous brush with the criminal justice system. He has a prior felony conviction for arson in the second degree (*see* L.F. 11; Sent.Tr. 5-6), and, accordingly, there is no reason to believe that appellant is unfamiliar with his basic right to a jury trial.

claim. AConstitutional claims are deemed to be waived if not presented to the trial court at the first opportunity.@ *State v. Mann*, 35 S.W.3d 913, 916 (Mo.App. S.D. 2001); *State v. Martin*, 940 S.W.2d 6, 9 (Mo.App. W.D. 1997). Moreover, where Acounsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence,@ even plain error review is waived. *State v. Mead*, 105 S.W.3d 552, 556 (Mo.App. W.D. 2003). AWhen a party affirmatively states that it has no objection to evidence an opposing party is attempting to introduce, for instance, plain error review is unavailable.@ *Id.*

Here, while this case does not deal with an evidentiary question, defense counsel Aaffirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence.@ Indeed, as the record shows, counsel affirmatively assured the trial court that appellant was waiving his right to jury trial (Tr. 6). And, accordingly, it should be concluded that review of this claim was waived.

In *State v. Martin*, for example, the defendant raised a claim that was virtually identical to the claim raised here. He argued Athat the trial court plainly erred in failing to ascertain on the record whether Martin knowingly, intelligently and voluntarily waived his right to a trial by jury, in violation of Missouri Supreme Court Rule 27.01(b).@ *State v. Martin*, 940 S.W.2d at 9. He argued that Ahis rights to a jury trial and due process of law . . . were violated, because the record does not reflect with unmistakable clarity an affirmative waiver . . . of his right to a jury trial.@ *Id.* The Court observed that the claim had not been properly preserved for review and declined the defendant=s request for plain error review. *Id.*

at 9-10. The Court further observed that the defendant had failed to prove manifest injustice, and stated that A[f]ailure to raise the issue sooner in the proceedings is tantamount to waiver of appellate review.@ *Id.* So, too, in the case at bar. In fact, in light of counsel=s express assurance that appellant was waiving his right to jury trial, the waiver in this case was even stronger than the waiver in *Martin*.

In fact, it should also be noted that the waiver in this case was apparently a part of a reasonable trial strategy. The defense in this case was that Brittany Tucker had started the fire and then blamed appellant. As part of that defense, defense counsel specifically elicited from Tucker that she knew about appellant=s prior conviction and imprisonment for arson (Tr. 105-106). Then, in closing argument, counsel argued that Tucker, knowing of appellant=s criminal history, had shifted the blame to appellant; counsel argued:

there was a rush to suspect [appellant] in this case and Deputy Huffman told you that. He suspected [appellant] from the get-go. And we have a pretty girl, Brittany, to put together a pretty good sob story, even though it wasn=t true. And we know it wasn=t all true and that was good enough to shift the blame, because no matter how much Brittany wanted to show Melinda that she was in control of [appellant], she sure didn=t want take to take a hit on a case like this. And so, she was willing to say what she had to say, to do that.

And Brittany believed that, if she didn=t say what she needed to say, she knew that [appellant] had a history. She knew the story that would get her off and she knew that if she didn=t say the right story, she was going to go to

prison. That was her testimony and so, she has every motive to blame [appellant].

(Tr. 149). As is evident, the defense sought to show that appellant was both wrongly suspected and accused, at least in part, because of his prior conviction for arson, his history. This was, quite understandably, a theory and argument that the defense felt more comfortable presenting to a judge.

In sum, this Court should decline to review appellant's claim that the trial court plainly erred in proceeding without a jury. As the record shows, immediately after the prosecutor asked for a waiver so that this claim could not be later asserted on appeal, defense counsel affirmatively assured the trial court that appellant was B as part of his agreement with the state B waiving his right to jury trial. This affirmative waiver, and the concomitant lack of objection (and the lack of any objection at any time thereafter), should preclude appellate review of this claim. However, in the event that this Court exercises its discretion to review for plain error, respondent will address appellant's claim.

B. The Standard of Review

Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom. Rule 30.20. Under this standard, a defendant is not entitled to a new trial unless the plain error was outcome determinative. See *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002); see generally *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) (To affect substantial rights, . . . an error must have substantial and injurious

effect or influence in determining the . . . verdict. = @); *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (discussing when and under what circumstances relief should be granted on claims of plain error under Federal Rule 52(b)). Moreover, the defendant bears the burden of establishing manifest injustice. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001).

C. Because the Trial Court Complied with Rule 27.01(b), and Because Appellant's Waiver was Valid, the Trial Court did not Plainly Err in Proceeding Without a Jury

A criminal defendant has a fundamental right to a trial by jury. Indeed, it is a right guaranteed by both the United States and Missouri Constitutions. U.S. CONST., Amends. VI and XIV; MO. CONST., Art. I, ' 18(a). But while the right is termed a violate by the Missouri Constitution, any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury. MO. CONST., Art. I, ' 22(a). *See Patton v. United States*, 281 U.S. 276, 312-313 (1930) (holding that a defendant may waive his Sixth Amendment right to trial by jury).

1. The trial court complied with Rule 27.01(b)

In Missouri, a waiver of jury trial must be made according to the provisions of Rule 27.01(b), which provides:

The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have

the force and effect of the verdict of a jury. In felony cases such waiver by the defendant shall be made in open court and entered of record.

It is, of course, true that a waiver must be knowing, intelligent, and voluntary, but Rule 27.01(b) does not require any specific litany or any particular procedure for the entry of such waivers. Thus, the first question in this case is whether the entry of appellant=s waiver complied with Rule 27.01(b).

Here, as outlined above, the prosecutor explained, in appellant=s presence, that the reduction in appellant=s charge was part of an agreement between the parties (Tr. 6). The prosecutor explained that appellant, for his part, had agreed to waive jury trial, and the prosecutor requested that appellant confirm the waiver on the record (Tr. 6). Defense counsel then confirmed, in open court, that appellant was, in fact, waiving his right to jury trial as contemplated by the agreement (Tr. 6). This waiver was then entered of record in the docket sheets (L.F. 8). As is evident, the terms of Rule 27.01(b) were satisfied B appellant=s waiver was made in open court, and it was entered of record. The plain language of Rule 27.01(b) requires nothing more than this, and the trial court should not be convicted of plain error for failing to take additional steps.

2. Appellant=s waiver was valid

Appellant nevertheless argues that the trial court plainly erred and failed to comply with the mandate of Rule 27.01. Citing *State v. Bibb*, 702 S.W.2d 462 (Mo. banc 1985), he asserts that a waiver must Aappear in the record > with unmistakable clarity=@ (App.Sub.Br. 14). And, citing *Luster v. State*, 10 S.W.3d 205 (Mo.App. W.D. 2000), he asserts that the

purpose of Rule 27.01 is to ensure that the defendant's waiver is not allowed until the trial court is satisfied that the waiver is knowingly, voluntarily and intelligently made (App.Sub.Br. 14). Finally, citing *United States v. Robertson*, 45 F.3d 1423 (10th Cir. 1995), appellant asserts that defendants should be informed that (1) twelve members of the community compose a jury; (2) the defendant may take part in jury selections; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial (App.Sub.Br. 14).

But, while each of these cases discusses principles that are undoubtedly relevant in determining whether a waiver *has*, in fact, been made and *is*, in fact, valid, none of them compel reversal in this case. First, it must be noted that appellant is not, in fact, asserting that he did not waive his right to jury trial or that he did not make a knowing, intelligent and voluntary waiver of his right to jury trial. Rather, he is simply asserting that the trial failed to ascertain that appellant's waiver was knowingly, voluntarily and intelligently made (App.Sub.Br. 15). In other words, he is simply citing a lack of additional record to support the trial court's acceptance of the waiver. Thus, he argues: How can the trial court ascertain that the waiver is knowing and voluntary without personally examining the defendant, such as is required for waiver of counsel or waiver of trial altogether upon a plea of guilty? (App.Sub.Br. 15, footnotes omitted). But the mere absence of additional record does not establish plain error. *Cf. State v. Sharp*, 533 S.W.2d 601, 606 (Mo. banc 1976) (jury waiver was invalid because, as shown by the record, A[the defendant], and his attorney, believed that if the trial court decided to refuse parole, he would be given the opportunity to withdraw his

waiver of trial by jury@); *cf. also Miller v. Dormire*, 310 F.3d 600, 602 (8th Cir. 2002) (evidence credited by the hearing court showed that the defendant had not been advised of his right to jury trial, and that the defendant did not know that he could exercise his right to jury trial despite counsel=s decision to waive jury trial).

Second, while a defendant=s waiver must be unmistakably clear under this Court=s precedents, and while a waiver must be knowing, intelligent and voluntary, the record here shows that appellant=s waiver was all of these things B even in the absence of personally addressing appellant B or, at the very least, that appellant has not shown otherwise, as he is required to do to establish plain error. In particular, unlike the purported waiver in *Bibb*, defense counsel in this case made it unmistakably clear that appellant was waiving his right to jury trial. When asked if there was a waiver of jury trial (as part of the agreement outlined by the prosecutor), defense counsel stated unequivocally, AYes, your Honor@ (Tr. 6). *Cf. State v. Bibb*, 702 S.W.2d at 465 (defense counsel stated: AJudge, that wouldn=t be a final decision. We could change that at a later time. I don=t think we=d waive any right on a Judge or jury today. I mean he=s made a decision. Either way he goes I believe he could change that before the time came up.@).

As for the validity of appellant=s waiver, although appellant was not personally examined (it should be noted that Rule 27.01(b) does not require such inquiry), several factors indicate that the waiver was, in fact, knowing, intelligent and voluntary. First, as stated above, appellant has never yet alleged that his waiver was not valid. Second, the waiver (and the agreement that it was a part of) was discussed and entered in appellant=s

presence without any objection or complaint by appellant. Third, appellant was represented by counsel who, presumably, fully discussed the agreement and waiver with appellant. Fourth, the waiver was consistent with a reasonable trial strategy (of which appellant was presumably advised). Fifth, appellant, who had a prior felony conviction, was not unacquainted with the criminal justice system. And sixth, appellant made no complaint at sentencing, despite the fact that he raised other complaints. *See United States v. Leja*, 448 F.3d 86, 93-94 (1st Cir. 2006) (holding that a waiver, in the absence of personally addressing the defendant, was valid based on various factors, including: representations by defense counsel concerning the waiver, a defendant's presence in the courtroom at times when waiver was discussed, and the extent of the particular defendant's ability to understand courtroom discussions regarding jury waiver); *United States v. Page*, 661 F.2d 1080, 1082-1083 (5th Cir. 1981) (upholding a jury waiver where (1) the defendant's counsel told the trial court, in a chambers conference out of the defendant's presence, that he and his client waived a jury; (2) after the chambers conference, the trial court said in the defendant's presence that he understood the defendant wished to waive jury, and defense counsel, but not the defendant, responded affirmatively; (3) the defendant did not object or express any surprise when the district court accepted the waiver; and (4) the defendant was a learned, articulate man suffering neither language nor perceptible difficulty); *Cf. United States v. Robertson*, 45 F.3d at 1433 (jury waiver was invalid where the record was silent regarding the defendant's knowing, voluntary, and intelligent waiver of a jury trial and no discussion was ever held in the presence of [the defendant] regarding her decision to waive the right to trial by jury).

It is, of course, true that the trial court did not specifically inquire about appellant's understanding of certain particular incidents of his right to jury trial, e.g., whether appellant understood that he would be able to assist in jury selection. But such detailed questioning (while certainly informative and, perhaps, helpful in ascertaining whether a defendant has made a valid waiver) is simply not required. The requirement that a criminal defendant be made aware of all of his rights does not contemplate a necessity for the use of any specific terminology nor that an accused must have the same appreciation of such rights as do members of the legal profession. See *Cole v. State*, 690 S.W.2d 195, 197 (Mo.App. E.D. 1985); see also *Iowa v. Tovar*, 124 S.Ct. 1379, 1389 (2003) (observing that "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances even though the defendant may not know the specific detailed consequences of invoking it.").⁸

Thus, here, the question is not whether appellant understood every incident of his right to a jury trial. Rather, the question is whether appellant understood the nature of the right and how it would likely apply in general. And, for the reasons discussed above, there is no basis to conclude that appellant did not have such an understanding. To the contrary,

⁸ That the trial court is not required to question the defendant is not unheard of in dealing with personal, fundamental rights. For instance, a trial court need not personally question a defendant about his decision to testify or refrain from testifying at trial.

appellant was represented by counsel, appellant=s waiver (and the agreement that occasioned the waiver) were discussed in appellant=s presence, and appellant had previous experience with the criminal justice system. Indeed, in today=s climate, it would be a rare individual who had no understanding of juries and their role in criminal trials.

In sum, in light of the clear waiver of jury trial that was made on appellant=s behalf by defense counsel (in appellant=s presence), in light of the fact that there was no reason to doubt appellant=s understanding of the waiver, and in light of the fact that appellant has never alleged that his waiver was, in fact, invalid, appellant has failed to carry his burden of establishing plain error. In short, appellant=s waiver was accepted in accordance with the requirements of Rule 27.01(b), and there is simply no basis to conclude that appellant=s waiver of jury trial was invalid.

D. Appellant has Failed to Establish Manifest Injustice

Finally, even if the trial court should have engaged in additional steps to ascertain whether appellant=s waiver was knowing, intelligent and voluntary, appellant has failed to establish manifest injustice. As set forth above, on plain-error review, to show manifest injustice, appellant must show that the error was Aoutcome determinative.@ *See Deck v. State*, 68 S.W.3d at 427. AThe burden of proving manifest injustice or miscarriage of justice is on the defendant.@ *State v. Seibert*, 103 S.W.3d 295, 298 (Mo.App. S.D. 2003).

Under this standard, appellant has failed to carry his burden. It is of course *possible* that a different finder of fact *might* have resolved the facts differently in appellant=s case, but that speculative possibility of a different result falls short of proving manifest injustice. *See*

generally *Strickland v. Washington*, 466 U.S. 668, 694-695 (1984) (The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.). Manifest injustice requires a showing of outcome-determinative error, a showing that is more demanding than that imposed by *Strickland*. See *Deck v. State*, 68 S.W.3d at 427-428.

Eschewing any reliance upon the outcome-determinative test, appellant ultimately makes no claim that the alleged error was outcome determinative, i.e., that a jury would have reached a different result in his case (App.Sub.Br. 17-18). Instead, after noting certain infirmities in Brittany Tucker=s testimony (all of which were presented to the trial court), he asserts that he does not have to establish that he would have been acquitted by a jury (App.Sub.Br. 18).⁹ Rather, appellant asserts that the error was structural, and that it is not subject to harmless-error analysis. (App.Sub.Br. 17-18).

⁹ This represents a slight change from the argument appellant asserted in the Court of Appeals (see App.Br. 14, Who knows how a jury would have viewed [Tucker=s] snitch testimony?).

But the problem with this argument is twofold. First, this Court has subjected such claims to a type of harmless-error analysis. As this Court held in *State v. Hatton*, 918 S.W.2d 790, 795 (Mo. banc 1996) B in analyzing a similar claim B there was no manifest injustice because the defendant admitted his guilt (or, in other words, there was overwhelming evidence of the defendant=s guilt). *See also State v. Seibert*, 103 S.W.3d at 298 (the defendant also admitted his guilt). Indeed, appellant acknowledges these two cases (and the apparent harmless-error analysis that was put to use) when he argues that A[t]his Court did not decline plain error review, as the state seems to urge in its transfer application, but simply found no miscarriage of justice@ (App.Sub.Br. 18).¹⁰

Second, inasmuch as this claim was not raised at trial or preserved in any fashion, it is questionable whether it should be analyzed as Astructural error.@ The terms of Rule 30.20 govern review of this claim; thus, appellant should be bound to show both plain error and

¹⁰ Respondent did not attempt in its transfer application to suggest that *Hatton* and *Seibert* were examples of courts declining to engage in plain error review. To the contrary, these cases were cited as examples of how Athe appellant must ordinarily show that the error was >outcome determinative.=@ Resp.Trans.App. at 5.

manifest injustice or a miscarriage of justice. *See Johnson v. United States*, 520 U.S. at 466-467 (discussing when and under what circumstances relief should be granted on claims of plain error under Federal Rule 52(b), even where the defendant alleged a purported structural error). Indeed, because appellant failed to object at a point where the alleged error could have been remedied (and because defense counsel expressly assured the trial court that there was, in fact, a waiver), appellant should not be entitled to an automatic reversal. *See generally Neder v. United States*, 527 U.S. 1, 34-35 (1999) (*Johnson v. United States*, 520 U.S. 461] stands for the proposition that, just as the absolute right to trial by jury can be waived, so also the failure to object to its deprivation at the point where the deprivation can be remedied will preclude automatic reversal.) (Scalia, J., dissenting).

In sum, because this claim was not preserved, it should be reviewed in accordance with this Court's previous precedents, i.e., appellant should be required to show outcome-determinative error. And, inasmuch as appellant has not made such a showing, this claim should be denied.

E. Even if Appellant's Claim Asserts Structural Error, Appellant Cannot Show Plain Error and Manifest Injustice

Citing *Rose v. Clark*, 478 U.S. 570 (1986), appellant argues that the outcome-determinative test is not the correct test to apply to this claim (App.Sub.Br. 17-18). In that case, while analyzing a different type of claim, the Court stated: "Where [the right to a jury trial] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity

judged the defendant guilty. @ *Id.* at 578. And, as appellant points out, the Court of Appeals has adopted this approach in several cases, even when reviewing for plain error. See *State v. Ramirez*, 143 S.W.3d 671, 676 (Mo.App. W.D. 2004); *State v. Mitchell*, 145 S.W.3d 21, 25 (Mo.App. S.D. 2004); *State v. Rulo*, 976 S.W.2d 650, 653 (Mo.App. S.D. 1998).

But even if that is the appropriate test to apply in this case, appellant is still not entitled to relief. To show plain error and manifest injustice under that standard, appellant must prove both (1) that his waiver was not voluntarily, knowingly and intelligently made, keeping in mind that he bore the burden of showing essential unfairness not as a matter of speculation but as a demonstrable reality; and (2) that, had he been adequately apprised of his right to trial by jury, he would have insisted on having his guilt or innocence determined by a jury, rather than the trial court. = @ *State v. Ramirez*, 143 S.W.3d at 677 (citing *State v. Sharp*, 533 S.W.2d at 605); but see *State v. Mitchell*, 145 S.W.3d at 24 (finding manifest injustice despite the fact that the defendant does not argue that he intended to exercise his right to a jury trial and was unable to do so @).

These are both required showings, because only if the waiver was invalid could Appellant's constitutional right to trial by jury have been abridged, and only if Appellant would otherwise have insisted on being tried by a jury could he have been prejudiced by having his guilt or innocence determined by a fact-finder he did not voluntarily choose. @ *State v. Ramirez*, 143 S.W.3d at 677; see *State v. Sharp*, 533 S.W.2d at 605 (If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have

the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.@); *see also State v. Hatton*, 918 S.W.2d at 795 (the defendant claimed that the trial court should have ascertained whether he intentionally relinquished his right to jury trial, but he did not argue that he intended to exercise his right to a jury trial).

In other words, it is not merely a lack of record that demonstrates whether the right to jury trial has been Aaltogether denied,@ and whether there has been a manifest injustice. Rather, a manifest injustice or miscarriage of justice only results where a defendant is, in fact, denied his or her right to a jury trial, e.g., where a defendant who otherwise would have chosen to have a jury trial does not validly waive his or her right to jury trial. For it is *only* in such cases that the wrong finder of fact, in contravention of the constitutional guarantee, has decided the defendant=s guilt. *See State v. Ramirez*, 143 S.W.3d at 677.

In the case at bar, appellant has failed to make either of the required showings. In arguing this point, appellant never once makes the allegation that he did not, in fact, waive his right to a jury trial, or that his waiver was not a knowing, intelligent, and voluntary waiver (App.Sub.Br. 11-19). He also does not assert that he would have insisted upon having a jury trial if he had been advised of his right to a jury (App.Sub.Br. 11-19). Instead, he focuses on the general need for knowing, intelligent, and voluntary waivers when constitutional rights are involved, and the lack of a record regarding, or inquiry concerning, his waiver in the case at bar (App.Sub.Br. 11-19). There is simply no allegation that appellant did not understand his right to a jury trial, that appellant did not understand the role of juries in the criminal justice system, or that appellant did not choose to forego his right to a jury

trial (App.Sub.Br. 11-19). There is also no allegation that appellant did not knowingly waive his right, e.g., due to the influence of drugs or alcohol, or that appellant did not voluntarily waive, e.g., that he was threatened or induced by promises (App.Sub.Br. 11-19).

In short, under the circumstances of this case B where it is apparent that a bench trial was contemplated well before trial, and where it is apparent that appellant was well acquainted with the criminal justice system B appellant has failed to prove that he did not waive his right to a jury trial, or that he did not validly do so. *See State v. Ramirez*, 143 S.W.3d at 677 (AAppellant does not allege that he did not voluntarily waive his right to a jury trial (e.g., that he was threatened or induced by false promises to do so); that he did not knowingly waive it (e.g., that he was under the influence of drugs or alcohol when he did so); or that he did not intelligently waive it (e.g., that he did not understand what he was giving up).@); *Cf. State v. Sharp*, 533 S.W.2d at 606 (jury waiver was invalid because, as shown by the record, A[the defendant], and his attorney, believed that if the trial court decided to refuse parole, he would be given the opportunity to withdraw his waiver of trial by jury@).

And, finally, even assuming that appellant did not understand the right that he was giving up, appellant has failed to prove that he would have exercised his right if he had been fully informed. Indeed, appellant never once asserts or even hints that he would have exercised his right to jury trial; rather, he merely stresses that no record was made as to his waiver or its validity (App.Sub.Br. 11-14). But, as set forth above, appellant must show that he would *not* have waived and would have exercised his right to a jury trial. This appellant has failed to do. And, in light of appellant=s strategy at trial, it seems evident that appellant

did not want to have a jury trial.

In sum, appellant has failed to show that his waiver was invalid, or that he would have chosen to have a jury trial if the trial court had paused to ask him personally. Indeed, appellant merely points out that the record does not disclose whether he understood his right to a jury trial (App.Sub.Br. 19). But he never asserts that he did not understand his right, or that he would have exercised his right. And without any allegation that appellant *did not* understand his basic right to a jury trial, and that appellant *was not* waiving his right to a jury trial, appellant's claim of manifest injustice is only a matter of speculation and not a demonstrable reality. See *State v. Sharp*, 533 S.W.2d at 605. This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant=s convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 7,301 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of June, 2006,

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