

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0419

STATE OF LOUISIANA

VERSUS

CHARLES RICHARDSON

Judgment rendered: September 20, 2006

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Case Number 02-05-0594; Sec. III
The Honorable Michael R. Erwin, Judge Presiding**

**Hon. Doug Moreau
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Dylan C. Alge
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**Counsel for Appellee
State of Louisiana**

**John S. McLindon
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Baton Rouge, LA**

**Counsel for Defendant/Appellant
Charles Richardson**

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Dr. Pettigrew J. concurs with Results

*RAA
②*

DOWNING, J.

The defendant, Charles Richardson, was charged by bill of information with stalking, a violation of La. R.S. 14:40.2. He pled not guilty. Following a bench trial, the defendant was found guilty as charged. The trial judge deferred imposition of sentence under La. Code Crim. P. art. 894 and placed the defendant on supervised probation for one year with specific conditions that the defendant participate in counseling, avoid any contact with the victim and pay a fine of \$250.00 plus court costs. The defendant now appeals, urging three assignments of error as follows:

1. The trial judge erred in finding the defendant guilty of the crime of stalking, where there was no evidence presented of malice as required by the pertinent statute (La. R.S. 14:40.2);
2. The trial judge erred in finding the defendant guilty of the crime of stalking, when the only evidence of actions allegedly committed by defendant constituted “constitutionally protected activity” of the type specifically and statutorily excepted from the definition of “stalking” by La. R.S. 14:40.2(C)(2);
3. The trial judge erred in application of the “reasonable person” standard of the statute in question (La. R.S. 14:40.2(C)(1)),¹ by wrongly (and admittedly) considering facts and circumstances personally applicable and unique to the alleged victim in this case, and the effect of the defendant’s alleged actions upon her in particular.

We pretermitted discussion of the assignments of error and remand for an evidentiary hearing on the question of whether the defendant waived his right to a jury trial. A crucial procedural issue must be addressed herein before we reach the merits of the assigned errors. Therefore, this court will address only one issue -- the apparent lack of the defendant’s waiver of the right to a trial by jury. The counsel for the defendant has not filed any assignments of error on this issue. However, the jury trial issue will be

¹ We note that La. R.S. 14:40.2A mentions the “reasonable person” standard.

considered since it is “discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.” La. Code Crim. P. art. 920(2).

Louisiana Code of Criminal Procedure art. 780 provides, in pertinent part:

A. A defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. At the time of arraignment, the defendant in such cases shall be informed by the court of his right to waive trial by jury.

B. The defendant shall exercise his right to waive trial by jury in accordance with the time limits set forth in Article 521. However, with permission of the court, he may exercise his right to waive trial by jury at any time prior to the commencement of trial.

Thus, if a defendant is tried and convicted by a judge when he is clearly entitled to a trial by jury, the record must show that a jury trial was knowingly and intelligently waived. The waiver of a criminal defendant’s right to trial by a jury is not presumed; there operates, in fact, a presumption against such a waiver, which must be rebutted. *State v. Cappel*, 525 So.2d 335, 337 (La. App. 1 Cir. 1988); *State v. Suggs*, 432 So.2d 1016, 1017 (La. App. 1 Cir. 1983); see also *State v. Verdin*, 496 So.2d 641, 643 (La. App. 1 Cir. 1986).

Although first offense stalking is a misdemeanor, the defendant in this case was entitled to a jury trial under La. Code Crim. P. art. 779(A), which allows for jury trials in misdemeanor cases where the potential penalty exceeds imprisonment for more than six months or a fine of more than one thousand dollars. The period of imprisonment for the crime of stalking where none of the aggravating factors of the statute are applicable is a maximum of one year. See La. R.S. 14:40.2(B)(1)(a). The record herein, as it now stands, does not show that the defendant executed a jury trial waiver.

However, the defendant was represented by counsel at trial and the record does not contain any defense objection regarding the defendant being tried by a judge and not a jury.

Under the present circumstances, wherein the defendant had competent counsel and was tried without objection by a judge, we believe that the interests of justice are better served by a remand instead of reversal. See *State v. James*, 94-720 (La. App. 5 Cir. 5/30/95), 656 So.2d 746; *State v. James*, 99-1047 (La. App. 5 Cir. 1/25/00), 751 So.2d 419; see also *Cappel*, 525 So.2d at 337.

DECREE

Accordingly, we remand this case for the trial court to conduct an evidentiary hearing within thirty days of the issuance of this opinion to determine whether the defendant knowingly, intelligently, and in accordance with law, waived his right to a jury trial. If the evidence shows the defendant did not execute such a waiver, the district judge is instructed to set aside the conviction and sentence and grant a new trial. We note that double jeopardy does not preclude retrial. The minutes and transcript of the evidentiary hearing shall be filed with this court within ten days after the hearing so that the defendant's appeal can continue to final disposition.

REMANDED FOR EVIDENTIARY HEARING