## MEMORANDUM DECISION




ATTORNEY FOR APPELLANT

Sean C. Mullins
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Darren Lavar Taylor,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

July 27, 2022

Court of Appeals Case No. 21A-CR-2371

Appeal from the Lake Superior Court

The Honorable Diane Ross Boswell, Judge

The Honorable Kathleen B. Lang, Judge Pro Tempore

Trial Court Cause No. 45G03-1903-MR-11

**Najam, Judge.**

## Statement of the Case

[1] Following a jury trial, Darren Lavar Taylor was convicted of two counts of murder, a felony, and one count of armed robbery, a Level 3 felony. During the enhancement phase of the trial, Taylor was tried to the bench on an additional use-of-a-firearm sentence enhancement charge, and the trial court found that Taylor had used a firearm when he committed the offenses. Taylor appeals the court's enhancement finding, raising one issue for our review, which we restate as whether Taylor personally waived his right to a jury trial for the use-of-a-firearm sentence enhancement phase of his trial.

[2] We reverse and remand for a new trial.

## Facts and Procedural History

[3] In March 2019, Temia Haywood ("Temia") lived in a house in Gary with her sixteen-year-old daughter, N.H., N.H.'s two older sisters, and N.H.'s thirteen-year-old brother, Lavell Edmond ("Lavell"). Temia had been in an on-again, off-again relationship with Taylor's father for approximately five years, but, by March 2019, their relationship had ended.

[4] On the evening of March 23, Temia was at her home with N.H. and Lavell. Temia was downstairs, and N.H. and Lavell were upstairs. N.H.'s sisters had traveled out of town. N.H. overheard her mother talking on the phone, and, approximately ten minutes after the call ended, N.H. heard a knock on the door. Taylor had picked up Nelson Gains, an acquaintance, and had driven to Temia's home. Temia opened her front door, and Taylor and Gaines entered

her home. Gaines walked into the living room and sat down on the couch. Taylor and Temia entered another room in the house and closed the door.

[5] Shortly after the men entered the home, N.H. heard gunshots. Lavell, who was standing near N.H., told N.H. that "Mommy got shot." Tr. Vol. 3 at 136. N.H. ran to a nearby bedroom, jumped out of the bedroom window and into the backyard, climbed a fence, ran to and hid behind a neighbor's shed, and then called 9-1-1.

[6] Meanwhile, Gaines heard a gunshot. He then saw Taylor exit the room he had occupied with Temia and go "directly upstairs" with a gun in his hand. Tr. Vol. 4 at 163. Gaines heard "a little kid's voice scream 'No,'" and then "heard another gunshot." *Id.* at 164. Taylor descended the stairs, pointed his gun at Gaines, and told Gaines to "grab the TV." *Id.* Taylor announced that he "got [Temia's cell] phone." *Id.* at 165. Video from the home's doorbell surveillance system showed Taylor and Gaines exit Temia's house just after 8:02 p.m. Gaines placed the television in the back of Taylor's vehicle and then returned to the front door to wipe their fingerprints from the door handles. The two men then drove to a gas station, where Taylor stomped on Temia's phone "and then threw it in the trash." *Id.* at 168. Taylor eventually dropped Gaines off "down the street" from Gaines' house, and he told Gaines not to say anything about the crime. *Id.* at 172.

[7] Corporal Jay Johnson, with the Gary Police Department, was dispatched to Temia's home, and he arrived between five and ten minutes after N.H. placed

her call to 9-1-1. When Corporal Johnson arrived, N.H. emerged from the side of the house, ran to his vehicle, and told him that a man had shot her mother and her brother. Corporal Johnson and other officers entered the house and found Temia lying on the floor near her bedroom door. She had been shot in the head and was deceased. The officers went upstairs and saw blood seeping from under a door. The officers found Lavell "[seated] behind the door[,] as if he [had been] hiding." Tr. Vol. 3 at 78. Lavell, who was also deceased, had suffered gunshot wounds to his head and to his right and left arms.

[8] The State charged Taylor with two counts of murder, two counts of felony murder, Level 3 felony armed robbery, Level 5 felony robbery, and Class A misdemeanor theft. The State added a use-of-firearm sentence enhancement charge, alleging that Taylor used a firearm when he committed each of the felony offenses. The court held a jury trial between August 16 and 23, 2021. At the conclusion of the trial, the jury found Taylor guilty of all counts except theft, on which the jury deadlocked.[1]

[9] Following the guilty verdict, the court proceeded to the use-of-a-firearm sentence enhancement phase of the trial and asked Taylor's counsel whether it was Taylor's "preference that [the] enhancement go before the jury[.]" Tr. Vol. 6 at 19. Taylor's counsel answered, "No, Your Honor," and the following exchange occurred:

---

[1] The State subsequently filed, and the trial court granted, a motion to dismiss the theft count.

THE COURT: No?

[DEFENSE COUNSEL]: No. Before the jury?

THE COURT: Does he want it to go before the jury or the Court?

[DEFENSE COUNSEL]: Let me make sure.

([Defense Counsel] confers with the defendant.)

THE COURT: Or he can stipulate, whichever one.

([Defense Counsel] confers with the defendant.)

[DEFENSE COUNSEL]: Your Honor, we'll do it before the judge.

THE COURT: Before the judge?

[DEFENSE COUNSEL]: Yes.

THE COURT: All right. Then I will take a few minutes and I'll release the jury[.]

*Id.* Following the presentation of the evidence, the court found the evidence sufficient to support the enhancement.

[10] At sentencing, the court vacated Taylor's convictions for felony murder and his convictions for Level 3 and Level 5 felony robbery. The court then sentenced

Taylor to sixty years each for the two murder convictions and ten years for the Level 3 felony armed robbery conviction. The court imposed a ten-year use-of-a-firearm sentencing enhancement for each murder count and ordered all the sentences to be served consecutively, for an aggregate sentence of 150 years executed in the Indiana Department of Correction. This appeal ensued.

## Discussion and Decision

[11] Taylor contends that he did not personally waive his right to a jury trial for the use-of-a-firearm sentence enhancement phase of his trial and that his firearm-enhancement adjudication must therefore be vacated and his case remanded for a new trial on that charge. The State argues that, even though Taylor's counsel expressed to the trial court Taylor's decision to forego a jury trial, the "record [was] not devoid of a personal waiver[.]" Appellee's Br. at 10. According to the State, the "totality of [the] circumstances show[ed] that Taylor was aware of his right to have a jury decide this issue, he was consulted about what his choice was in the courtroom, and the final decision reflected [Taylor's] own decision, not his attorney's." *Id.* We cannot agree with the State's argument.

[12] "The jury trial right is a bedrock of our criminal justice system, guaranteed by both Article I, Section 13 of the Indiana Constitution and the Sixth Amendment to the United States Constitution." *Horton v. State*, 51 N.E.3d 1154, 1158 (Ind. 2016). Under Indiana constitutional jurisprudence, "in a felony prosecution, waiver [of the jury trial right] is valid only if communicated *personally* by the defendant[.]" *Id.* (emphasis original). Personal waiver of the

right to a jury trial may be either in writing or in open court. *Id.* at 1159. Indiana has rejected the purported waiver of a right to a jury trial where such waiver is communicated solely by a defendant's counsel. *Id.* at 1158-59 (citing, *inter alia*, *Kellems v. State*, 849 N.E.2d 1110, 1113-14 (Ind. 2006); *Good v. State*, 267 Ind. 29, 366 N.E.2d 1169 (1977)). In other words,

> [a] defendant is presumed not to waive his jury trial right unless he affirmatively acts to do so. It is fundamental error to deny a defendant a jury trial unless there is evidence of a knowing, voluntary, and intelligent waiver of the right. The defendant must express his personal desire to waive a jury trial and such a personal desire must be apparent from the court's record, whether in the form of a written waiver or a colloquy in open court . . . .

*Pryor v. State*, 949 N.E.2d 366, 371 (Ind. Ct. App. 2011) (internal citations and quotations omitted). And the failure to confirm a defendant's personal waiver before proceeding to bench trial constitutes fundamental error. *Horton*, 51 N.E.3d at 1160.

[13] In *Horton*, the State charged the defendant with Class A misdemeanor domestic battery, which it sought to elevate to a Class D felony based on Horton's prior domestic-battery conviction. The trial was bifurcated. After Horton was found guilty of Class A misdemeanor domestic battery, and while the jurors were still seated in the box, the trial court asked defense counsel how counsel intended to proceed on the Class D felony enhancement. Counsel responded, "as a bench trial." *Id.* at 1156. Our Supreme Court held that, without Horton's personal waiver of the jury trial right, "failure to confirm Horton's personal waiver

before proceeding to bench trial was fundamental error[,]" and this was so even where the circumstances appeared to "imply waiver was the defendant's choice." *Id.* at 1159-60. Similarly, in *Kellems*, our Supreme Court held that even where Kellems had been advised of his right to a jury trial and his option to waive that right—and had subsequently responded that he did not have any questions regarding his rights—counsel's communication of waiver was not enough. 849 N.E.2d at 1113-14. Simply put, absent questioning of the defendant or a signed writing indicating intent to waive a jury trial, no waiver may be deemed to have occurred. *See id.*

[14] Here, there is no evidence that Taylor personally waived his right to a jury during the use-of-a-firearm sentence enhancement phase of his trial. Instead, the record shows that Taylor's counsel "conferred" with Taylor and then *counsel* told the court, "Your Honor, we'll do it before the judge." Tr. Vol. 6 at 19. Taylor did not *personally* express a desire to waive his right to a jury trial. Therefore, the waiver by Taylor's counsel was invalid, and the court's failure to confirm Taylor's personal waiver before proceeding to a bench trial was fundamental error. *See Anderson v. State*, 833 N.E.2d 119, 122 (Ind. Ct. App. 2005) (holding waiver invalid where defendant neither signed written waiver nor expressed personal desire to waive right to jury trial in open court); *see also Horton*, 51 N.E.3d at 1160.

## Conclusion

[15] We hold that Taylor did not personally waive his right to trial by jury during the use-of-a-firearm sentence enhancement phase of his trial and that the trial court erred by conducting a bench trial. We reverse the court's firearm-enhancement adjudication and remand with instructions to proceed to a new trial limited to the enhancement charge.

[16] Reversed and remanded for a new trial.

Bradford, C.J., and Bailey, J., concur.