## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Robert Robinson,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

March 13, 2023

Court of Appeals Case No. 22A-CR-1631

Appeal from the Marion Superior Court

The Honorable Amy M. Jones, Judge

Trial Court Cause No. 49D34-2012-F6-37283

**Memorandum Decision by Judge Foley**
Judges Robb and Mathias concur.

**Foley, Judge.**

[1] Robert Robinson ("Robinson") was convicted after a bench trial of criminal recklessness[1] as a Level 6 felony. He appeals his conviction and raises two issues on appeal:

I. Whether the State presented sufficient evidence to support his conviction for criminal recklessness; and

II. Whether the evidence showed that Robinson personally waived his right to a jury trial.

[2] We affirm.

## Facts and Procedural History

[3] On October 16, 2020, Phyllis Braden ("Braden") was getting ready to go outside to walk with her adult daughter, Vasha Braden ("Vasha"), who had already gone outside. Vasha had two children, a son in common with Robinson and another son who was Robinson's stepson. When Braden stepped outside, she heard screaming and saw Vasha trying to break up a fight between Robinson and Vasha's two sons. Braden intervened to pull them apart and told Robinson to get in his car and leave, but he refused. Braden told Robinson multiple times to leave, and Robinson told her "I'm not scared of you." Tr. Vol. 2 p. 44. Robinson pushed her back, and she grabbed on to his shirt to keep her balance.

[1] Ind. Code § 35-42-2-2(a), (b)(1)(A).

[4] Braden continued to hold onto Robinson's shirt and "put" him into his car, which was running at the time, but her actions were not "hard or violen[t]." *Id.* at 44, 53. Robinson was in the driver's side seat of the car, and as Braden put Robinson in the car, she fell into the car and landed laying over Robinson's leg. Her left hand was on the floor of the car between the gas pedal and seat, and her right hand was on the seat. Braden's body was in the car "quite a bit," and she attempted to get her balance and get up. *Id.* at 45. As she was halfway up, Robinson intentionally put his foot on the gas pedal and accelerated. Robinson then drove down the street, dragging Braden as she was hanging out of the car. The car door remained open as Robinson drove with her hanging out of the car. People yelled "she's on the car" at Robinson as he drove down the street dragging Braden. *Id.* at 75. Robinson dragged Braden almost to the end of the street, where she fell to the ground. The only way Braden was able to remove herself from the car was by eventually falling out of it. After she fell to the ground, Robinson continued driving, and Braden lost consciousness for "like a minute to three minutes." *Id.* at 45. Braden suffered scrapes on her knees, head, feet, and hands from being dragged down the street.

[5] A bystander, who was visiting a friend who lived across the street from Braden, came outside during these events and witnessed the events and saw Robinson's car drive off with the door open, dragging Braden down the street. The bystander testified that Robinson then turned the car around and drove back down the road as Braden was still in the street "like he was going to run over

her again." *Id*. at 74. Robinson then pulled over to the curb and argued with one of Braden's grandsons.

[6] On December 15, 2020, the State charged Robinson with Level 6 felony criminal recklessness and Class A misdemeanor battery. On March 14, 2022, Robinson appeared at a pretrial hearing with counsel. Robinson's counsel stated: "I can offer to the court if I may that the State has been active in offering—making me an offer which I appreciate. But having spoken with Mr. Robinson about that offer, I think our inclination is to waive to jury and set us for bench trial." *Id*. at 34. The following colloquy then occurred:

> THE COURT: Let me ask him some questions but I would want you to follow it up with a written waiver.
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: Mr. Robinson, you hear what your attorney is saying, right?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you are charged with a Level 6 Felony in this case which means that you automatically have a right to jury trial; do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you know what a jury trial is?
>
> THE DEFENDANT: Yes, sir.

THE COURT: And tell me what that is.

THE DEFENDANT: Where I pick 12 jurors of my peers to decide the case.

THE COURT: They come in and they decide whether you're guilty or innocent, is that right?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If you waive jury, that takes the jury out of the picture, so the Judge basically becomes the jury, is that they way that you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And, uh, once you give up that right, uh, you don't necessarily—you can't necessarily ask for it back; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And is it your intent to waive jury after discussing it with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Okay. And if you've got a form to follow up . . . that would be great.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: I will go ahead and set this for a bench trial then.

*Id*. at 34–36.

[7] The trial court then discussed dates for the bench trial with Robinson's counsel, during which time Robinson was still present. A bench trial was subsequently held on May 16, 2022, and at the conclusion of the bench trial, the trial court found Robinson guilty of Level 6 felony criminal recklessness but not guilty of the Class A misdemeanor battery. The trial court sentenced Robinson to 545 days, with the first 180 days to be served on home detention, followed by 365 days suspended to supervised probation. Robinson now appeals.

## Discussion and Decision

### I. Sufficiency of the Evidence

[8] Robinson argues that the State failed to present sufficient evidence to support his conviction for criminal recklessness. When there is a challenge to the sufficiency of the evidence, "[w]e neither reweigh evidence nor judge witness credibility." *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016), *reh'g denied*, *cert. denied*. Instead, "we consider only that evidence most favorable to the judgment together with all reasonable inferences drawn therefrom." *Id*. (internal quotation marks, bracket, and ellipses omitted). "We will affirm the judgment if it is supported by substantial evidence of probative value even if there is some conflict in that evidence." *Id.* (internal quotation marks, ellipses, and brackets omitted). Further, "[w]e will affirm the conviction unless no

reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017).

[9] To convict Robinson of Level 6 felony criminal recklessness, the State was required to prove that Robinson recklessly, knowingly, or intentionally performed an act that creates a substantial risk of bodily injury to another person and that the offense was committed while armed with a deadly weapon. Ind. Code § 35-42-2-2(a), (b)(1)(A). An automobile can be considered a deadly weapon. *DeWhitt v. State*, 829 N.E.2d 1055, 1064 (Ind. Ct. App. 2005)*, trans. denied*.

[10] Robinson first contends that the State failed to establish that he engaged in any voluntary conduct as required under Indiana Code section 35-41-2-1(a). He contends that the State's evidence did not show that he voluntarily stepped on the gas pedal as opposed to accidentally doing so while the struggle between him and Braden occurred, nor did it show that Braden's own body did not exert force on the gas pedal. "A person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense." I.C. § 35-41-2-1(a). "Once evidence in the record raises the issue of voluntariness, the State must prove beyond a reasonable doubt that the defendant acted voluntarily." *O'Connell v. State*, 970 N.E.2d 168, 170 (Ind. Ct. App. 2012). In that situation, if the State fails to prove that a defendant's conduct was voluntary, it has not proved every element of the offense. *Id*. Here, no evidence was presented at trial to raise the issue of the voluntariness of Robinson's actions. No evidence was presented to suggest that Robinson had

not acted voluntarily. Robinson's speculation about what else could have caused him to press down on the gas pedal is merely a request to reweigh the evidence, which we will not do. *Gibson*, 51 N.E.3d at 210.

[11] Robinson next argues that the evidence was not sufficient to support his conviction because the State failed to prove that he acted recklessly. He contends that the evidence, at most, showed that he panicked when he was under attack in his own car and in that process stepped on the gas pedal. A person acts "recklessly" if "he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." I.C. § 35-41-2-2(c).

[12] Here, the evidence most favorable to the judgment showed that, after Braden intervened in the argument between Robinson and her grandsons, she put Robinson into the driver's seat of his car while maintaining a hold on Robinson's shirt. Robinson's car was already running, and when Braden put Robinson into the car, she fell into the car, landing essentially in Robinson's lap. Braden's left hand was on the floor between the gas pedal and seat, and her right hand was on the seat. As she tried to get out of the car, she observed Robinson intentionally put his foot on the gas pedal and press down, which caused the car to accelerate. Robinson then drove down the street, dragging Braden as she was hanging out of the car. Robinson dragged Braden almost to the end of the street, where she fell to the ground. After she fell to the ground, Robinson continued driving. Braden lost consciousness and suffered scrapes on

her knees, head, feet, and hands from being dragged down the street. This evidence supported a reasonable inference that Robinson was aware that Braden was hanging out of the car and, "in plain, conscious, and unjustifiable disregard of harm that might result," he pressed the gas pedal and drove down the street. *See* I.C. § 35-41-2-2(c). There was no evidence that Robinson ever slowed down or attempted to stop his car. Instead, Braden was only able to escape from the car because she fell out and onto the ground. Even after Braden fell to the ground, Robinson did not stop, and instead, continued driving down the street. This evidence was sufficient to support Robinson's conviction for Level 6 felony criminal recklessness. His arguments to the contrary are requests for us to reweigh the evidence.

## II. Jury Trial Waiver

[13] Robinson asserts that the trial court committed fundamental error because it denied him his right to a jury trial because he never personally waived his right to a jury trial either in writing or in open court. "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 repeatedly 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.

[14] In *Horton,* defense counsel made an assertion in open court that the defendant waived his right to a jury trial for a bifurcated portion of his trial, but the defendant remained silent. *Id*. at 1156. On appeal, our Supreme Court refused to find an exception to the personal waiver requirement and concluded that the record was devoid of any personal waiver by the defendant and that the trial court's "failure to confirm [defendant's] personal waiver" before proceeding to bench trial was fundamental error. *Id.* at 1159–60.

[15] Here, Robinson personally waived his right to a jury trial in open court, and there was no failure to confirm this waiver as in *Horton*. During the pretrial

hearing, Robinson personally waived his right to jury trial orally in his colloquy with the trial court. Defense counsel stated that she had discussed the State's offer of a plea with Robinson, and in the same sentence, stated "*our* inclination" to waive jury trial. Tr. Vol. 2 p. 34 (emphasis added). The trial court then inquired to Robinson if he heard what his counsel said, and Robinson replied "yes, sir." *Id*. at 34–35. The trial court advised Robinson he had the right to a jury, and when asked if he understood what that meant, Robinson was able to do so in his own words. The trial court then confirmed that it was Robinson's "intent to waive jury after discussing it with your attorney[,]" to which he replied "yes, sir." *Id*. at 35.

[16] At the time the trial court asked Robinson whether it was his intent to waive his right to a jury trial, his defense counsel had already informed the trial court that counsel and Robinson had discussed the proffered plea and that it was their inclination to waive jury trial, and Robinson confirmed with the trial court that he had heard that statement by defense counsel. In this context, it is clear that Robinson stated his intent to waive his right to jury trial after discussing the matter with his counsel. We, therefore, find no merit to Robinson's argument that his waiver was ambiguous because he could have intended to say that he would waive his right to a jury trial in the future after discussing it with his attorney. The statement by defense counsel that she and Robinson had a previous discussion, and it was their inclination to waive jury trial coupled with the colloquy between the trial court and Robinson show that there was no ambiguity in Robinson's waiver. We conclude that the record clearly

demonstrated that Robinson personally waived his right to jury trial in open court.

[17] Affirmed.

Robb, J., and Mathias, J., concur.