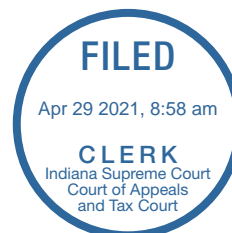


MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Angel Mack,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 29, 2021

Court of Appeals Case No.
20A-CR-2140

Appeal from the Johnson Superior
Court

The Honorable Peter D. Nugent,
Judge

Trial Court Cause No.
41D02-1911-F6-732

Mathias, Judge.

[1] Angel Mack was convicted of Level 6 felony theft in Johnson Superior Court in a bifurcated proceeding. After a jury found Mack guilty of Class A

misdemeanor theft, the trial court entered a judgment of conviction as a Level 6 felony because Mack had a prior conversion conviction. Mack appeals, arguing that her Level 6 felony conviction must be vacated because she did not waive her right to have a jury determine whether she was guilty of Level 6 felony theft. The State agrees.

[2] We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

[3] In November 2019, the State charged Mack with Level 6 felony theft alleging that she stole a wristwatch from a Kohl's Department store in Franklin, Indiana. The State charged the theft as a Level 6 felony, and not a Class A misdemeanor, because Mack had a 2019 conversion conviction.

[4] On September 29, 2020, Mack's jury trial commenced. In its case-in-chief, the State presented evidence that Mack stole the wristwatch from Kohl's. The jury was instructed on the elements of theft as a Class A misdemeanor. And the jury was asked to find Mack guilty or not guilty of Class A misdemeanor theft. While the jury was deliberating, the trial court instructed the parties that "[i]f there is a guilty finding, this was a level 6 because of a prior." Tr. p. 125. The court then asked defense counsel if Mack would stipulate to the prior conviction. *Id.* And counsel responded that Mack was "willing to stipulate." *Id.* at 126.

[5] The jury found Mack guilty of Class A misdemeanor theft. The trial court released the jury and then reiterated its understanding that Mack would

stipulate to the prior conversion conviction. After confirming that Mack had a prior qualifying conviction, the trial court entered a judgment of conviction for theft as a Level 6 felony. *Id.* at 127. The court sentenced Mack to 400 days executed in the Department of Correction. Mack now appeals.

Discussion and Decision

- [6] Mack argues that her Level 6 felony theft conviction must be vacated because she did not waive her right to have a jury decide whether she was guilty of the elevated offense. The State agrees.
- [7] Our supreme court recently reiterated that 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).

In broad view, federal and Indiana constitutional jury trial rights guarantee the same general protection—a criminal defendant must receive a jury trial, unless he waives it. Waiver of the Sixth Amendment jury trial right must be “express and intelligent,” and waiver of the Indiana constitutional jury trial right must be “knowing, voluntary[,] and intelligent.”

Id. (cleaned up). A defendant’s right to a jury trial under the Indiana Constitution “provides greater protection because, in a felony prosecution, waiver is valid only if communicated *personally* by the defendant[.] *Id.*; see also [Ind. Code § 35-37-1-2](#); *Kellams v. State*, 849 N.E.2d 1110, 1112–13 (Ind. 2006)

(rejecting the State’s argument that the defendant may be bound by counsel’s waiver of the right to a jury trial).

[8] In *Horton*, our supreme court held that a defendant must personally waive his right to a jury trial in both phases of a bifurcated trial. [51 N.E.3d at 1160](#). In doing so, we rejected the State’s argument that counsel’s waiver of a jury trial during the second phase of trial was sufficient because “Horton had just experienced a jury trial and thus was probably ‘aware’ of the right his attorney waived on his behalf.” *Id.* at 1159. Our supreme court concluded that “failure to confirm Horton’s personal waiver before proceeding to bench trial was fundamental error.” *Id.* at 1160. And the court reversed Horton’s conviction and remanded for a new trial on the Class D felony domestic battery charge.

[9] Here, Mack argues, and the State agrees, that Mack never personally waived her right to a jury trial for the second phase of the trial proceedings.

Conclusion

[10] The trial court’s failure to confirm Mack’s personal waiver of her right to a jury trial on theft as a Level 6 felony was fundamental error. We therefore reverse Mack’s conviction and remand this case for a new trial on the Level 6 felony charge.

[11] Reversed and remanded for proceedings consistent with this opinion.

Riley, J., and Crone, J., concur.