

Richard Scott Snyder was convicted of operating a vehicle while intoxicated¹ as a Class D felony and was sentenced to three years, with all but 547 days suspended. He appeals, raising the following three restated issues:

- I. Whether Snyder knowingly, voluntarily, and intelligently waived his right to a jury trial for the second phase of his bifurcated trial when only his attorney informed the trial court that Snyder wished to have a bench trial;
- II. Whether sufficient evidence was presented to support Snyder's conviction for operating a vehicle while intoxicated as a Class D felony; and
- III. Whether the trial court abused its discretion when it gave a final jury instruction relating to Indiana's implied consent law.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of December 3, 2006, Sergeant Brian Niec of the Hamilton County Sheriff's Department was patrolling near the Geist area in Hamilton County. As he was traveling westbound on Fall Creek Parkway, he observed a gold SUV, traveling in the opposite direction, cross the center line and nearly strike his patrol car. Sergeant Niec swerved to avoid the collision and turned around to follow the SUV. While following the SUV, Sergeant Niec again saw the SUV cross the centerline with both of its driver's side tires. He then initiated a traffic stop of the SUV.

When Sergeant Niec approached the SUV, he smelled alcohol and observed that the driver, who was later identified as Snyder, had red and bloodshot eyes. When asked to

¹ See Ind. Code §§ 9-30-5-2, -3(a)(1).

produce his license and registration, Snyder dropped his wallet in his lap and failed to produce the vehicle's registration for inspection. Sergeant Niec asked Snyder to exit the SUV so the officer could administer field sobriety tests. Sergeant Niec administered three tests, and Snyder failed all three. The officer also administered a portable breath test and offered Snyder a certified breath test. Snyder initially agreed to submit to the certified breath test, but after Sergeant Niec placed Snyder under arrest, Snyder refused to take the test.

The State charged Snyder with: Count I, operating a vehicle while intoxicated as a Class A misdemeanor; Count II, operating a vehicle while intoxicated with a prior conviction within the previous five years as a Class D felony; and Count III, alleging Snyder to be an habitual substance offender. A bifurcated jury trial was held on June 30, 2008, and the jury found Snyder guilty of Class A misdemeanor operating a vehicle while intoxicated. After the jury verdict in phase one of the trial, Snyder's counsel informed the trial court that Snyder wished to waive his right to a jury trial as to Counts II and III. The State then moved to dismiss Count III, and, in phase two of the trial, the trial court continued to hear evidence on Count II. At the conclusion of the bench trial, the trial court found Snyder guilty of operating a vehicle while intoxicated as a Class D felony. At the sentencing hearing, the trial court sentenced Snyder on Count II to three years with all but 547 days suspended. Snyder now appeals.

DISCUSSION AND DECISION

I. Waiver of Jury Trial

“A fundamental linchpin of our system of criminal justice is the right to a trial by jury.” *Kellams v. State*, 849 N.E.2d 1110, 1112 (Ind. 2006) (citing U.S. Const. amend. VI; Ind. Const. art. 1, § 13). Although this right may be waived, we have concluded that the statutory requirement that a defendant assent to a waiver of his right to jury trial means that an assent by the defendant be personally reflected in the record before the trial begins either in writing or in open court. *Id.* This is to assure that the waiver is made in a knowing, intelligent, and voluntary manner, with sufficient awareness of the surrounding circumstances and the consequences. *Id.* (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)). Therefore, it is the duty of the trial court to assume in a criminal case that the defendant will want a trial by jury, unless the defendant personally indicates a contrary desire in writing or verbally in open court. *Id.* (citing *Perkins v. State*, 541 N.E.2d 927, 928 (Ind. 1989)). This waiver must be made a part of the record so that the question of an effective waiver may be reviewed even when no objection was made at the trial. *Id.* Additionally, Indiana courts have specifically held that a lawyer’s statement that his client agrees to a bench trial is not sufficient to waive the defendant’s right to a jury trial. *Id.* (citing *Shady v. State*, 524 N.E.2d 44, 45 (Ind. Ct. App. 1988)).

Snyder argues that he did not knowingly, intelligently, and voluntarily waive his right to a jury trial for the second phase of his bifurcated trial. He contends that only his attorney assented to the waiver of a jury trial and that this was not insufficient to establish his assent

to a waiver of his right to a jury trial because there was no personal declaration from him. Snyder asserts that because the trial court did not address him personally and his attorney never engaged him on the record to obtain his personal assent to waive a jury trial, there was no proper waiver and he was deprived of fundamental due process.

Here, when the jury was excused after returning a conviction for Count I, the following exchange occurred:

Court: Please be seated.

Defense: We would be glad to waive the phase 2 and phase 3.

Court: Waive the jury trial?

Defense: Yes.

Court: Stipulate to the facts or how do I do that?

Defense: I can't stipulate to the fact but have them prove it to the Court instead of the jury.

Court: Okay. Is the State ready to proceed uh does the State want to waive jury as to Counts II and III?

State: Yes, Your Honor.

Court: And the Defendant is waiving his right to a jury on Counts II and III, is that right?

Defense: Yes, Your Honor.

Tr. at 200-01. The State then dismissed Count III, and the trial court conducted a bench trial as to Count II in the second phase of the trial. At the conclusion of the bench trial, Snyder was found guilty.

We conclude that this exchange did not constitute a proper waiver of Snyder's right to a jury trial. There was no personal assent by Snyder to the waiver of his right to a jury trial, either in writing or in open court, reflected in the record. The record reflects only that Snyder's attorney indicated that the defense wished to waive a jury trial as to Counts II and III, and this is not sufficient. Our Supreme Court has held that, "a knowing, voluntary, and intelligent waiver of the right to a jury trial requires assent to a bench trial 'by defendant personally, reflected in the record before the trial begins either in writing or in open court.'" *Kellams*, 849 N.E.2d at 1113. No such personal waiver occurred in the present case. Therefore, Snyder did not properly waive his right to a jury trial, and the trial court erred in finding that he had. Snyder's conviction as to Count II is reversed and remanded for a new trial.²

II. Sufficient Evidence

"A defendant who succeeds in having his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction may be retried so long as there was sufficient evidence to support the conviction." *Sapen v. State*, 869 N.E.2d 1273, 1279 (Ind. Ct. App. 2007), *trans. denied* (citing *Lehman v. State*, 777 N.E.2d 69, 73 (Ind. Ct. App. 2002)). Therefore, we must determine if sufficient evidence supported Snyder's conviction for operating a vehicle while intoxicated as a Class D felony. Our standard of review for sufficiency claims is well settled. We do not reweigh the

² As the insufficient waiver of the right to a jury trial only applies to the second phase of Snyder's bifurcated trial, we remand only for a new trial as to phase two, and Snyder's conviction for operating a vehicle while intoxicated as a Class A misdemeanor, which was rendered after a jury trial, still stands.

evidence or judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id.*; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Williams*, 873 N.E.2d at 147; *Robinson*, 835 N.E.2d at 523.

Snyder argues that the evidence presented to the trial court was not sufficient to support his conviction for operating a vehicle while intoxicated as a Class D felony. He contends that the three exhibits that the State submitted were not enough to support its allegation that he had a prior conviction for operating a vehicle while intoxicated in Miami County in 2005. In order to convict Snyder of operating a vehicle while intoxicated as a Class D felony, the State was required to prove that Snyder had operated a vehicle while intoxicated in a manner that endangered a person and that he had a previous conviction of operating while intoxicated that occurred within the five years immediately preceding the present offense. Ind. Code §§ 9-30-5-2, -3(a)(1).

Here, the State admitted three documents during Snyder's bench trial. The first was a plea agreement between the State and "Richard S. Snyder," which contained the cause number 52D01-0501-FD-9 and stated that the defendant was pleading guilty to "Count 1 - Possession of Methamphetamine, a Class D Felony and Count 4 - Operating a Vehicle While Intoxicated Endangering a Person, a Class A Misdemeanor." *State's Ex. 1*. The second was an order by the Miami Superior Court under cause number 52D01-0501-FD-9

acknowledging that “Richard Snyder” entered a plea of guilty to “Counts I and IV pursuant to a plea agreement” and that the trial court found the defendant guilty of “Counts I and IV.”

State’s Ex. 2. The third was an abstract of court record from the Bureau of Motor Vehicles for “Richard S. Snyder,” again under cause number 52D01-0501-FD-9, which contained Snyder’s address, date of birth, and driver’s license number. *State’s Ex. 3.* During Snyder’s jury trial on the instant charge of operating a vehicle while intoxicated, Sergeant Niec testified as to Snyder’s address, date of birth, and driver’s license number. This information, which was obtained from Snyder during the traffic stop, was identical to the information on the document admitted at the bench trial. All three documents contained the same cause number, and when viewed as a whole, they established that Snyder had a previous conviction for operating a vehicle while intoxicated in the five years prior to the current offense. Sufficient evidence was presented to support Snyder’s conviction, and double jeopardy does not bar a retrial.

III. Jury Instruction

The manner of instructing a jury is left to the sound discretion of the trial court. *Rogers v. State*, 897 N.E.2d 955, 962 (Ind. Ct. App. 2008). We will not reverse the trial court’s ruling unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. *Id.* Jury instructions must be considered as a whole and in reference to each other, and even an erroneous instruction will not constitute reversible error if the instructions, taken as a whole, do not misstate the law or otherwise mislead the jury. *Id.* In reviewing a trial court’s decision to give or refuse a tendered instruction, we

consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other given instructions. *Id.*

Snyder argues that the trial court abused its discretion when it gave a final jury instruction on Indiana's implied consent law. He contends that the instruction was an incorrect statement of the law, it confused and misled the jury because it suggested that he violated Indiana law by refusing the certified breath test, and it unduly emphasized a particular piece of evidence. Snyder also claims that giving the instruction was not harmless error because it could have caused the jury to make the inference that his "non-compliance with the implied consent law dictated his guilt on the charge of operating while intoxicated." *Appellant's Br.* at 12.

Here, the trial court gave the jury the following final instruction over Snyder's objection:

A person who operates a vehicle impliedly consents to submit to a chemical test as a condition of operating a vehicle in Indiana.

A law enforcement officer who has probable cause to believe that a person has committed an offense of Operating While Intoxicated shall offer the person the opportunity to submit to a chemical test.

A person must submit to each chemical test offered by a law enforcement officer in order to comply with the implied consent law of this state.

Appellant's App. at 84.

"Indiana's implied consent laws require a person to 'submit to each chemical test offered by a law enforcement officer' who has probable cause to believe that person had

operated a vehicle while intoxicated.” *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005) (quoting Ind. Code § 9-30-6-2(a)(d)). If that person refuses to submit to a chemical test, then the refusal is admissible into evidence in a later proceeding for operating a vehicle while intoxicated. Ind. Code § 9-30-6-3(b). The instruction given by the trial court was almost a verbatim recitation of Indiana’s implied consent law statute and was, therefore, a correct statement of law.

Additionally, there was evidence in the record that supported giving the instruction as Sergeant Niec testified that Snyder had initially agreed to submit to the certified breath test when first asked, but later refused after he was placed under arrest. As previously stated, a person’s refusal to submit to such a test is admissible into evidence at his or her trial for operating while intoxicated. *See id.* Further, the substance of this instruction was not covered by any of the other given instructions.

Snyder relies on *Ham* for his contention that the instruction given by the trial court was confusing and misleading to the jury because it unduly focused on a particular piece of evidence. In that case, the trial court gave an instruction, which stated, “[a] Defendant’s refusal to submit to a chemical test may be considered as evidence of intoxication.” *Ham*, 826 N.E.2d at 641. The defendant argued on appeal that the instruction misled the jury by unnecessarily emphasizing a specific piece of evidence. *Id.* Our Supreme Court held that the instruction was given in error because an instruction that informs the jury that a refusal to submit to a chemical test is evidence of intoxication misleads the jury by unnecessarily

emphasizing one evidentiary fact.³ *Id.* at 642. The Court stated that whether “a defendant’s refusal to submit to a chemical test is evidence of intoxication or merely that the defendant refused to take the test is for the lawyers to argue and the jury to decide.” *Id.*

We find the present case to be distinguishable from *Ham*. Here, unlike in *Ham*, the instruction given by the trial court did not require the jury to infer guilt as to Snyder’s charge of operating a vehicle while intoxicated based on his refusal to submit to a chemical test. Instead, it merely stated Indiana’s implied consent law and that a person must submit to a chemical test in order to comply with such law, but makes no reference as to how this evidence affects or applies to the crime of operating a vehicle while intoxicated. Such an instruction did not mislead or confuse the jury. We therefore conclude that the trial court did not abuse its discretion in giving such a final jury instruction.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and MATHIAS, J., concur.

³ Although our Supreme Court found that it was error for the trial court to give the jury such an instruction, it ultimately held that giving the instruction was harmless error “in light of the evidence that the State produced of [the defendant’s] guilt.” *Ham v. State*, 826 N.E.2d 640, 642 (Ind. 2005).