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ATTORNEY FOR APPELLANT:

DAVID PARDO
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LOUIS JENKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0901-CR-41
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Certo, Judge
Cause No. 49G21-0810-FD-243199

SEPTEMBER 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

Louis Jenkins appeals his conviction in a bench trial for invasion of privacy as a class D felony. We reverse and remand.

Jenkins raises two issues for our review:

I. Whether Jenkins waived his right to a jury trial; and

II. Whether he can be retried.

In May 2007, Margaret Burnett received a protective order against Jenkins that prohibited him from harassing, annoying or threatening her, or committing acts of family or domestic violence. The order also required Jenkins to stay away from Burnett's home except for parenting-time exchanges. A process server attempted personal service of the protective order at Jenkins' mother's home where Jenkins was residing at the time. The server left a copy of the order at the address, but did not follow up by mailing Jenkins a copy. Jenkins violated the order in April 2008 and was convicted of invasion of privacy.

In October 2008, Jenkins violated the order again, and the State charged Jenkins with invasion of privacy as a class D felony for going to Burnett's house. At the initial hearing, Jenkins received and signed the initial hearing rights form. The form contained a clause that informed Jenkins that he had a right to a jury trial. At the November 2008 pretrial conference, Jenkins' counsel explained that Jenkins was undecided as to whether he was going to waive his right to a jury trial. According to counsel, Jenkins did not want to make a decision until he had seen all of the discovery. The trial court convicted Jenkins of invasion of privacy as a class D felony in December 2009. Jenkins appeals.

He concedes that he knew the protective order existed, had discussed the order with Burnett, and had previously been convicted of violating the order.

Jenkins first contends that the trial court violated his right to a jury trial. The State concedes that Jenkins is correct. Both the United States and Indiana Constitutions guaranty a defendant the right to a jury trial. *Jones v. State*, 810 N.E.2d 777, 779 (Ind. Ct. App. 2004). A person charged with a felony has an automatic right to a jury trial, and is presumed not to waive this right unless he affirmatively acts to do so. *Id.* 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. *Id.* The defendant must express his personal desire to waive a jury trial and such a personal desire must be apparent on the court's record whether in the form of a written waiver or a colloquy in open court. *Id.* Here, we find no such personal desire apparent on the court's record. We therefore reverse Jenkins' conviction, vacate the sentence imposed thereon, and remand to the trial court for further proceedings consistent with this opinion.

Jenkins further argues that he cannot be retried because there is insufficient evidence to support his conviction. To convict Jenkins of invasion of privacy, the State was required to prove beyond a reasonable doubt that he knowingly violated a protective order issued under Indiana Code chapter 34-26-5. Our standard of review for sufficiency of the evidence is well settled. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the

judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id.* If there is substantial evidence or probative value to support the conviction, we will not set it aside. *Id.*

Jenkins first argues that there is insufficient evidence to support his conviction because there is insufficient evidence that he received the protective order. The gravamen of Jenkins' argument appears to be that Indiana Trial Rule 4.1(B) required the process server to mail a copy of the protective order to Jenkins after the server left a copy of the order at Jenkins' last known address.

First, Trial Rule 4.1 (B) applies to the service of a summons and a complaint, and is therefore inapplicable to the facts of this case. Further, even if the rule was applicable in this case, this court has previously held that the failure to mail a copy of the summons as required by T.R. 4.1(B) is not fatal to an attempt to serve a defendant when the defendant does not dispute that he received the complaint and summons. *See Munster v. Groce*, 829 N.E.2d 52, 57 (Ind. Ct. App. 2005). Here, Jenkins confirmed he received the protective order. We find no error.

Jenkins also argues that there is insufficient evidence to support his conviction because there is insufficient evidence that he knew the terms of the order. However, Jenkins knew about the protective order, had discussed its terms with Burnett, and had previously been convicted of violating it. Under these circumstances, we agree with the

State that the trial court could reasonably infer that Jenkins knew the terms of the order. We therefore find sufficient evidence to support Jenkins' conviction.

Lastly, Jenkins appears to argue that there is insufficient evidence to support his conviction because Burnett consented to his presence at her house. However, we have previously explained that lack of consent is not an element of invasion of privacy, and there is no element of that offense that Burnett's consent would negate. *See Dixon v. State*, 869 N.E.2d 516, 520 (Ind. Ct. App. 2007). Because there is sufficient evidence to support Jenkins' conviction, there is sufficient evidence to retry him if necessary.

Reversed and remanded.

BARNES, J., and BRADFORD, J., concur.