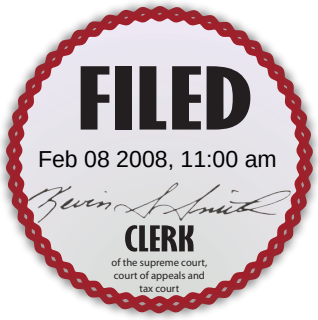

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IN THE
COURT OF APPEALS OF INDIANA

DEDE MARIE CHEFFER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0705-CR-249
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Natalie Bokota, Judge Pro Tempore
Cause No. 45G04-0611-FB-113

February 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Dede Marie Cheffer challenges her convictions of battery as a Class B felony[1] and as a Class C felony,[2] arguing she did not personally waive her right to a jury trial. We reverse and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

Cheffer's case was set for jury trial on February 26, 2007. On that date, the trial court informed the State and defense counsel that, by mistake, no jury had been summoned. The trial court told the parties they could have a bench trial beginning the next day or continue the jury trial "for a couple weeks." (Tr. at 4.) The following conversation took place:

> BY THE COURT:
>
> Ms. Beck [prosecutor] have you had an opportunity to consult with your supervisor or supervisors?
>
> BY MS. BECK:
>
> Yes, I have, and we would agree to a bench trial, if that's what's necessary . . . .
>
> BY THE COURT:
>
> * * * * *
>
> Ms. Lake [defense counsel], are you and your client prepared to waive a jury trial and proceed to bench trial?
>
> BY MS. LAKE:
>
> Yes, Your Honor.
>
> BY THE COURT:
>
> All right, we'll show both state and defense waive jury trial so we can proceed to bench trial.

(*Id*. at 4-5.) The trial court did not secure a written waiver from Cheffer or question her personally. Cheffer's case was tried to the court, and she was found guilty as charged.

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[1] Ind. Code § 35-42-2-1.5.
[2] I.C. § 35-42-2-1.

DISCUSSION AND DECISION

We must set aside Cheffer's convictions and grant a new trial because the trial court did not secure her personal waiver of her right to a jury trial. The United States and Indiana Constitutions guarantee the right to trial by jury. U.S. Const. amend. VI; Ind. Const. art. I, § 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 "mean[s that] an assent by [the] defendant [be] personally reflected in the record before the trial begins either in writing or in open court." 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." Thus, 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. This waiver must be made part of the record "so that the question of an effective waiver can be reviewed even though no objection was made at trial."

Kellems v. State, 849 N.E.2d 1110, 1112 (Ind. 2006) (citations omitted).

The trial court asked Cheffer's counsel whether Cheffer wished to waive her right to a jury trial, but did not question Cheffer. A waiver of the right to a jury trial must be "personally expressed by [the defendant] *viva voce* or in writing, and memorialized on the court's record." *Zakhi v. State*, 560 N.E.2d 683, 684 (Ind. Ct. App. 1990). We found Zakhi had not waived his right to a jury trial because the record indicated only that he was present when counsel stated, "Your Honor, we will waive a jury trial." *Id*. at 685. We found the record "devoid of any indication that Zakhi was adequately informed by court or counsel of the ramifications of the waiver." *Id*. The State claims Cheffer had the

opportunity to consult with counsel; however, the record does not reflect Cheffer was informed she had a right to a jury trial or that she understood that right.

The State argues this case is similar to *Goody v. State*, 587 N.E.2d 172 (Ind. Ct. App. 1992). We found Goody had waived his right to a jury trial because the record contained an entry that stated, "Both the prosecutor and the defendant in person now informs [sic] the Court they desire to waive trial by jury previously scheduled and to submit this cause to the Court as a bench trial." *Id*. at 172. We held a colloquy was not required. *Id*. at 173.

The State directs us to the court's entry on the chronological case summary for February 26, 2007, which states, "State and defendant waive JT." (Appellant's App. at 5.) This statement is simply the trial court's reiteration of its conclusion that jury trial had been waived. (*See* Tr. at 5.) Unlike *Goody*, where there was no conflicting record, the record in Cheffer's case demonstrates the trial court did not obtain her personal waiver. We will not rely on a chronological case summary entry while ignoring the insufficient colloquy demonstrated by the transcript.

Nevertheless, the State argues Cheffer should be bound by defense counsel's statement because she did not object when the trial court proceeded to conduct the trial. Our Supreme Court rejected a similar argument in *Kellems*, 849 N.E.2d at 1112-13:

> The State argues that Kellems should be bound to the waiver articulated by his attorney as he had been made aware of his right to a jury trial at the March hearing and "did nothing but 'sit idly by' as the trial court conducted a bench trial. . . ." Br. of Appellee at 12. . . .
>
> [T]he State's argument has force on the facts of this particular case. We are able to discern from the record in this case that (1) Kellems was

> advised of his right to a jury trial and personally indicated to the judge that he understood that right and (2) Kellems was present in court when his lawyer told Judge McEntarfer that Kellems assented to a bench trial. In this respect, the facts of this case differ from all of those described above. The two closest to this one, [*Shady v. State*, 524 N.E.2d 44 (Ind. Ct. App. 1988)] and [*Smith v. State*, 451 N.E.2d 57 (Ind. Ct. App. 1983)], in which the Court of Appeals held that the waivers expressed by defense counsel to have been ineffective are both distinguishable in the following respects. In *Shady*, the defendant was not present when his lawyer requested a bench trial. 524 N.E.2d at 45. In *Smith*, the record did not disclose whether the defendant was present at the time his counsel requested a bench trial. 451 N.E.2d at 59. As such, it would be possible for us to hold, as the State requests, that where a defendant has previously been advised of his right to a jury trial and personally indicated to the judge that he understood that right, his standing by in silence when his trial counsel requests or agrees to a bench trial constitutes a knowing, voluntary, and intelligent waiver of the right to a jury trial.
>
> Upon reflection, however, we adhere to the general principle enunciated in [*Doughty v. State*, 470 N.E.2d 69 (Ind. 1984)]: Indiana Code Section 35-37-1-2 (2004), dictates 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. The record reflection must be direct and not merely implied. It must show the personal communication of the defendant to the court that he chooses to relinquish the right." 470 N.E.2d at 70 (*citing Rodgers v. State*, 275 Ind. 102, 415 N.E.2d 57 (1981), and *Good v. State*, 267 Ind. 29, 366 N.E.2d 1169 (1977)).

We decline to depart from this well-established rule, especially when it has not been shown Cheffer was advised of her right to a jury trial. Therefore, we reverse and remand for a new trial.

Reversed and remanded.

KIRSCH, J., and RILEY, J., concur.