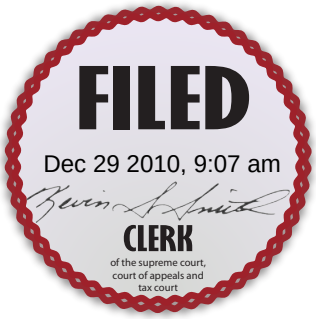

ATTORNEY FOR APPELLANT:

TIMOTHY P. BRODEN
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

WADE JAMES HORNBACHER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LESLIE J. EDWARDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1006-CR-758
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0809-FD-44

December 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Leslie J. Edwards appeals his convictions for possession of marijuana, as a Class D felony, and possession of paraphernalia, as a Class D felony. Edwards raises two issues for our review:

1. Whether he received ineffective assistance from his trial counsel when his counsel did not tender a jury instruction on the defense of necessity.

2. Whether Edwards personally waived his right to a jury trial for the second phase of his bifurcated trial.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

On April 25, 2008, West Lafayette Police Department officer Jeff Dunscomb was on patrol when he observed a pickup truck being driven with a defective exhaust and no license plate light. Officer Dunscomb initiated a traffic stop, and, as he approached the vehicle, he smelled burnt marijuana. Edwards, the driver and sole occupant of the vehicle, rolled down the driver's side window, and Officer Dunscomb observed an open, forty-ounce bottle of beer. Officer Dunscomb searched Edwards' truck. In doing so, the officer discovered a partially smoked joint and an unsmoked joint, as well as forceps used for smoking marijuana. Officer Dunscomb arrested Edwards. Dispatch also informed Officer Dunscomb that Edwards was driving with a suspended license.

On September 15, the State charged Edwards as follows: possession of marijuana, as a Class A misdemeanor; possession of paraphernalia, as a Class A misdemeanor; maintaining a common nuisance, a Class D felony; possession of marijuana, as a Class D felony; and possession of paraphernalia, as a Class D felony. The last two felony charges

were predicated on the allegation that Edwards had prior convictions for similar crimes in November of 1997. As such, the parties agreed to have the misdemeanor charges and the common nuisance charge combined and tried to the jury in "Phase I" of the trial. After the jury's verdict on those charges, the parties would then proceed to "Phase II" for consideration of the other two felony charges.

The court held the bifurcated trial on March 11, 2010. During Phase I, Edwards testified in his own defense, stating that the marijuana did belong to him and that he used it for medical and religious reasons. Specifically, Edwards testified on direct examination as follows:

> Q [D]id you make the decision to try marijuana in terms of relief [for pain]?
>
> A Yes, sir.
>
> Q And how did that perform for you?
>
> A It worked well. . . .
>
> Q At some point in time did you attempt to get or did you get a prescription for medical marijuana?
>
> A Yes, I did. I went to California and I located a doctor—actually I got it off the Internet and I was able to get my legal prescription.
>
> Q Okay. You understand that that prescription is not valid in the State of Indiana?
>
> A Yes, sir, I do.
>
> Q Okay. Beyond the medical issues that you have, do you have some philosophical or religious feelings with regard to marijuana use?
>
> A Yes, I do. [D]uring the course of this case I did my research and one of the things I researched—or actually when I was in California I was able to join a—basically a church and one of the things that in our bible there's a

> word called canabosum [sic] and it's mistranslated into calimus [sic] and it's nine—it took about nine pounds of it to make the ancient anointing oil. Okay, if we call ourselves Christians his name comes back to anointed one. And for us to criminally prosecute marijuana users is anti-Christian if you really take the facts into consideration.
>
> Q Okay.
>
> A And I'm—that's my religious belief and I think under the First Amendment of the Constitution we can pretty much guarantee that, it's like an inalienable right that God gives us[,] right?

Transcript at 47-48. During the discussion of final instructions, Edwards' counsel did not proffer an instruction on the defense of necessity, and he raised no objections to the instructions tendered to the jury.

During the jury's deliberations following the close of Phase I, Edwards' counsel informed the court that Edwards would stipulate that he committed the additional felony allegations, which were to be tried in Phase II, if the jury convicted him of the misdemeanor allegations. The trial court did not inquire further with Edwards personally. The jury found Edwards guilty of the two misdemeanor allegations and not guilty on the common nuisance charge. The trial court then "enter[ed] judgment against the defendant on [the felony possession counts], which were not presented to the jury . . . , as [to] which defendant has stipulated." Id. at 67. The court later sentenced Edwards to an aggregate term of two years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Defense of Necessity Instruction

Edwards first contends that his trial counsel rendered ineffective assistance when he did not proffer a jury instruction on the defense of necessity. A claim of ineffective

assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Further, the instruction of the jury is within the discretion of the trial court and it is reviewed only for an abuse of discretion. VanPelt v. State, 760 N.E.2d 218, 224 (Ind. Ct. App. 2003), trans. denied. The test applied to review a trial court's decision to give an instruction is: 1) whether the instruction correctly states the law; 2) whether there is evidence in the record to support giving the instruction; and 3) whether the substance of the instruction is covered by other instructions which are given. Id. Jury instructions are to be considered as a whole and in reference to each other. Hancock v. State, 737 N.E.2d 791, 794 (Ind. Ct. App. 2000). Error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. Id. Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights. Id. "This well-settled standard by which we review challenges to jury instructions affords great deference to the trial court." Randolph v. State, 802 N.E.2d 1008, 1011 (Ind. Ct. App. 2004), trans. denied.

The defense of necessity is a common law defense in Indiana. Patton v. State, 760 N.E.2d 672, 675 (Ind. Ct. App. 2002) (discussing Toops v. State, 643 N.E.2d 387 (Ind. Ct. App. 1994). In particular,

> [T]he following requirements have traditionally been held to be prerequisites in establishing a necessity defense: (1) the act charged as criminal must have been done to prevent a significant evil; (2) there must have been no adequate alternative to the commission of the act; (3) the harm caused by the act must not be disproportionate to the harm avoided; (4) the accused must entertain a good-faith belief that his act was necessary to prevent greater harm; (5) such belief must be objectively reasonable under all the circumstances; and (6) the accused must not have substantially contributed to the creation of the emergency.

Id. (quotation omitted; alteration original). "Necessity involves a choice between two admitted evils." Id. at 676 (quotation omitted).

Edwards does not suggest on appeal that he had a constitutional right to smoke marijuana, whether for religious reasons or otherwise. Rather, after reciting his testimony and general legal principles, Edwards' argument on this issue is as follows: "Edwards contends that his testimony as to the medical necessity of his marijuana use arguably meet[s] the [six] requirements of a defense of necessity as set forth . . . . As such, Edwards contends that his trial counsel was ineffective in failing to tender an instruction as to that defense . . . ." Appellant's Br. at 4.

Our General Assembly has declared that marijuana, as a Schedule I controlled substance, "has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." Ind. Code § 35-48-2-3. Edwards' meager argument on appeal does not explain why that determination should not apply to him, which facts support which of the six requirements of the defense of

necessity, whether the purported instructional error prejudiced his substantial rights, or whether the result of his trial would have been different but for the purported error. That is not argument supported by cogent reasoning. See Ind. Appellate Rule 46(A)(8)(a). As such, this argument is waived. Waiver notwithstanding, nothing in the record or briefing convinces us that the result of the proceeding would have been different had the jury received an instruction on the defense of necessity. See Strickland, 466 U.S. at 694.

Issue Two: Phase II Jury Waiver

Edwards also contends that he did not personally waive his right to a jury trial for Phase II of his trial. The State concedes this issue. To waive the right to a jury trial, a defendant must do so personally, as reflected in the record before the trial begins, either in writing or in open court. Garcia v. State, 916 N.E.2d 219, 221 (Ind. Ct. App. 2009), trans. denied. That did not happen here, and counsel cannot waive the defendant's right on his behalf. See id. As such, we vacate Edwards' convictions for felony possession of marijuana and paraphernalia and remand with instructions that the court retry him on those two counts.

Affirmed in part and reversed and remanded in part.

DARDEN, J., and BAILEY, J., concur.