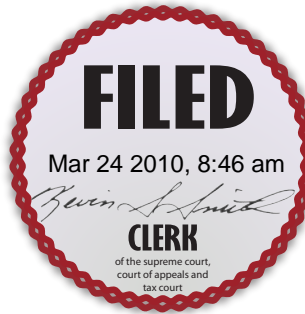


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY PARISH,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 02A04-0912-CR-739
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0903-FA-19

March 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Anthony Parish was convicted of Class A felony Attempted Murder,¹ Class C felony Carrying a Handgun Without a License,² and Class D felony Pointing a Firearm,³ for which he received an aggregate sentence of fifty years in the Department of Correction. Upon appeal Parish challenges his attempted murder conviction by claiming that the trial court improperly instructed the jury and that there was insufficient evidence to support this conviction. We affirm.

FACTS AND PROCEDURAL HISTORY

Just after 11:00 p.m. on August 6, 2008, Dennis Salley left his home in Fort Wayne to find something to eat. As Salley walked toward his restaurant of choice, he decided to stop by his friend Lance's home at the intersection of Suttentfield and Caroline Streets. As Salley approached the home, he noticed two groups of young males standing in the vicinity. Salley asked them whether Lance was there and was told he was not. As Salley walked past another group of males, one male asked him, "What do you need, old school?" Tr. p. 128. Salley stated, "I'm straight." Tr. p. 128. A member of the group then stated, "Well, get your punk a** off the block then." Tr. p. 128. Salley turned to face the person he believed had said this and responded, "I ain't no punk." Tr. p. 128. An argument ensued between Salley and this person, who Salley later identified as Parish. Parish shot Salley in the chest, stomach, and side. Salley turned to run away, but Parish pursued him and shot him in the leg and calf. Salley stumbled but was able to run

¹ Ind. Code §§ 35-42-1-1 (2008); 35-41-5-1 (2008).

² Ind. Code §§ 35-47-2-1 (2008); 35-47-2-23 (2008).

³ Ind. Code § 35-47-4-3 (2008).

another half block to someone's house for help. Salley was subsequently transported to Parkview Hospital where he was treated for gunshot wounds to the stomach, back, thigh, and calf. As a result of his gunshot wounds, Salley lost his right kidney, suffered a severed liver, and sustained damage to his right leg.

Over a span of approximately two and one-half months, authorities showed Salley a series of photographic arrays. Salley identified several individuals pictured in the arrays as persons present at the time of the shooting but did not identify these persons to be the shooter. On November 3, 2008, Salley identified Parish, who was pictured in a photographic array, as his shooter.

Authorities investigating the scene found four shell casings in the vicinity. Subsequent testing demonstrated that the casings were a "40 Smith and Wesson" caliber and had been fired from a semiautomatic weapon rather than from a revolver. Tr. p. 257. Witness Rico Parrish⁴ claimed to have seen Parish in possession of a "glock type weapon," specifically not a revolver, on the day in question. Tr. p. 195.

On March 11, 2009, the State charged Parish with Class A felony attempted murder (Count I), Class B felony aggravated battery (Count II), Class C felony carrying a handgun without a license (Count III), and Class D felony pointing a firearm (Count IV). The trial court held a jury trial on July 14 and 15, 2009. During the trial, the State proposed the following jury instruction: "Intent may be inferred from the use of a deadly weapon in a manner likely to cause death, or serious bodily injury." App. p. 38. Parish objected to this instruction on the ground that it was adequately covered by the court's

⁴ Parrish and Parish are not related.

proposed final instructions. The trial court overruled Parish's objection and gave the proposed instruction as Jury Instruction 9. The jury found Parish guilty as charged, and the trial court entered judgment of conviction on each count. At an August 7, 2009 sentencing hearing, the trial court vacated Parish's conviction in Count II and sentenced him to concurrent sentences of fifty years in the Department of Correction for Count I, eight years for Count III, and three years for Count IV. This appeal follows.

DISCUSSION AND DECISION

I. Jury Instruction 9

Parish first claims that the evidence did not support the trial court's giving Jury Instruction 9. The State responds by arguing that Parish has waived this claim because he failed to lodge an objection on this particular ground at trial. If a defendant fails to make "a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objection," the claim of error is waived. *Luna v. State*, 758 N.E.2d 515, 518 (Ind. 2001) (quoting *Scisney v. State*, 701 N.E.2d 847, 849 (Ind. 1998)). Here, defense counsel objected to Jury Instruction 9, which at that time was a proposed instruction by the State, only on the basis that it was covered by the trial court's proposed final instructions, which defense counsel had no objection to. In raising only this objection, defense counsel did not allege that the content of the instruction contained a flaw. As a result, the trial court's attention would have been drawn away from the error Parish now claims. Accordingly, we conclude Parish's claim is waived. *See id.* (finding appellate challenge relating to legal accuracy of jury instruction waived where trial

counsel objected only on grounds that instruction was already covered by other instructions).

Waiver notwithstanding, we find no error in the trial court's submitting Jury Instruction 9 to the jury. "The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003). "Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion." *Id.* at 1163-64. In reviewing a trial court's decision to give or refuse tendered jury instructions, this court considers the following: (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 not covered by the other instructions given. *See id.* at 1164.

According to Parish, in order to establish inferred intent from the use of a deadly weapon as provided for in Jury Instruction 9, the State was required to provide expert evidence that the use of the deadly weapon was in a manner likely to cause death or serious bodily injury. As the State points out, the language of Jury Instruction 9 has often been endorsed as a correct statement of law by the Indiana Supreme Court. *See Wilson v. State*, 697 N.E.2d 466, 476 (Ind. 1998) ("[T]his Court has repeatedly stated that the use of a deadly weapon in a manner likely to cause death or great bodily harm is sufficient to show the requisite intent to kill."). In addition, the Supreme Court has specifically declined to find error in attempted murder jury instructions using this language. *See*

Bethel v. State 730 N.E.2d 1242, 1246 (Ind. 2000), *cited in McDowell v. State*, 885 N.E.2d 1260, 1263-64 (Ind. 2008). Further, Parish provides no authority that this jury instruction requires expert evidence. To the contrary, the particular manner in which a weapon is used, and the inference of intent—if any—this supports, is routinely a jury question. *See Richeson v. State*, 704 N.E.2d 1008, 1010 (Ind. 1998) (emphasizing role of jury to evaluate facts in determining culpability in attempted murder prosecutions). Here, the evidence at trial was that, during their argument, Parish shot Salley multiple times, including in the chest and stomach, from a relatively close range. This evidence was sufficient to support the giving of Jury Instruction 9.

II. Sufficiency of the Evidence

Parish contends that the evidence is insufficient to support the “specific intent to kill” element of his attempted murder conviction. In evaluating the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

In order to sustain a conviction for attempted murder, the State was required to prove that Parish, while acting with the specific intent to kill Salley, discharged a firearm at and/or against Salley's body, which was conduct constituting a substantial step toward the commission of the intended crime of killing Salley.

The use of a deadly weapon in a manner likely to cause death or great bodily harm is sufficient to show the requisite intent to kill. *Wilson*, 697 N.E.2d at 476. Here, while engaged in a confrontation with Salley, Parish shot him multiple times, including in the chest and stomach. As a result, Salley lost a kidney and suffered a severed liver, among other medical problems. Given the number and placement of Parish's gunshots, which targeted and injured Salley's vital organs, Parish's claim that his actions showed no specific intent to kill defies credulity. Having concluded that the evidence supports a reasonable inference of specific intent to kill, we conclude that there was sufficient evidence to support Parish's conviction for attempted murder.

The judgment of the trial court is affirmed.

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