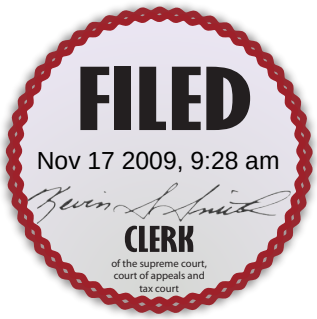

ATTORNEY FOR APPELLANT:

PAULA M. SAUER
Danville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DUANE R. DAWSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-0903-CR-151
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT NO. 4
The Honorable Mark A. Smith, Judge
Cause No. 32D04-0712-FC-24

November 17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Duane R. Dawson (Dawson), appeals his conviction and sentence for pointing a firearm, a class D felony, Ind. Code § 35-47-4-3 and the trial court's Order of restitution.

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

ISSUES

Dawson raises three issues for our review, which we restate as:

(1) Whether his trial counsel provided ineffective assistance of counsel by eliciting the only evidence which supports his conviction for pointing a firearm, and by failing to proffer an instruction on self-defense for the charge of pointing a firearm;

(2) Whether the trial court abused its sentencing discretion by ordering Dawson to be placed on probation for a period that exceeded the release date for the maximum possible sentence for his crime; and

(3) Whether the trial court abused its discretion when ordering restitution in the amount of $450 to be paid to the victim.

FACTS AND PROCEDURAL HISTORY[1]

On December 1, 2007, Danny Laudig (Laudig) called Dawson, his neighbor who lived across the street in Brownsburg, Indiana. Laudig and Dawson had known each other for over

[1] The State presents a one-sided version of the facts in its Appellee's Brief, ignoring all of the evidence in the record which supported the jury's verdict acquitting Dawson of the majority of the charges filed by the State. The State's version of the facts was apparently found to be incredible by the jury, and it is inappropriate for the State to ignore the substantial evidence favoring the jury's verdict now.

thirty years. They had lived in the neighboring homes as children, moved away as young adults going their separate ways, but both moved back to their respective childhood homes later in life. The December 1, 2007 phone call was the first time that they had talked in a long time. Approximately three years earlier they had gotten into a physical altercation, and avoided each other since that fight. Laudig had been the aggressor in the prior altercation.

During the phone call, Laudig made amends for the prior altercation and promised that nothing like that would ever happen again. Laudig informed Dawson that the company where he was employed had a job opening for which Dawson was well suited. After the phone call Laudig walked over to Dawson's home, bringing a mixed alcoholic drink with him. The men then drove to get cigarettes and beer. When they returned to Dawson's home, they smoked some marijuana outside prior to going inside to sit and watch television while drinking beer in the basement.

After the men had been drinking for hours, Dawson began showing Laudig songs that he had on his computer. One of the songs which Dawson had was "Every Rose Has Its Thorn." Dawson had labeled the electronic music file as being by the artist "Guns 'n Roses," but Laudig corrected Dawson, stating that the artist was Poison.[2] Laudig said, "I'll put fifty dollars on it to prove that I am correct." (Transcript p. 252).

Laudig began demanding the money, and Dawson asked him to leave. Laudig became enraged and grabbed the much smaller Dawson and dragged him across the coffee table.

[2] "Every Rose Has Its Thorn" is a song by glam metal band Poison, which was released on October 12, 1988. *See* http://en.wikipedia.org/wiki/Every_Rose_Has_Its _Thorn (last visited October 29, 2009).

Dawson broke free and maneuvered away from Laudig. Laudig chased Dawson around the basement, prevented him from going up the stairs, and then cornered Dawson in front of an entertainment center. Dawson looked for something to pick up to defend himself with. He saw a shotgun resting close by and grabbed it. He told Laudig he was not afraid to shoot the gun in the basement, but Laudig kept coming at Dawson. Dawson fired a shot down at the ground, shredding a rug and pellets ricocheted off the concrete below into the lower part of the entertainment center. Laudig was not deterred by the shot and stated "he didn't care if [Dawson] shot him or not." (Tr. p. 494). Laudig "backed" Dawson around the pool table, and when Dawson got close to the stairs, Laudig "started acting like he was going to come over the pool table." (Tr. p. 494). Dawson fired another shot downward toward the pool table leg, but Laudig came around the side of the pool table. Dawson "sideswiped" Laudig as he approached, which caused Laudig to fall to the ground. (Tr. p. 497). Dawson tried to step over Laudig to get to the stairs, but Laudig grabbed Dawson's leg and started saying "I'm going to kill you, I'm going to F' you up." (Tr. p. 497). Dawson turned around and hit Laudig in the mouth with the butt of the shotgun, breaking Laudig's jaw and displacing several of his teeth, which "end[ed] the fight." (Tr. p. 498). Laudig got up and walked up the stairs and out of the house, with Dawson behind him. As the men were walking up the basement stairs, Dawson's mother opened the door and asked what was going on. Dawson told her to go back to bed. Laudig walked across the street to his home and called 911. The police came, and after a short investigation, placed Dawson under arrest.

On December 3, 2009, the State filed an Information charging Dawson with: Count I, battery resulting in serious bodily injury, I.C. § 35-42-2-1(a)(3); Count II, criminal recklessness with a deadly weapon, a Class D felony, I.C. § 35-42-2-2;[3] and Count III, pointing a firearm, a Class D felony, I.C. § 35-47-4-3. On February 19, 2008, the State amended the Information by adding: Count IV, battery with a deadly weapon, a Class C felony, I.C. § 35-42-2-1(a)(3); and Count V, use of a firearm in the commission of a felony, for an additional fixed term of imprisonment of up to five years, I.C. § 35-50-2-11.

The trial court conducted a three-day jury trial beginning on January 14, 2009. During the trial Laudig testified that he did nothing to provoke Dawson's violent acts. He testified that the men came to a disagreement about the song, and Dawson began yelling, "f[] you, get the f[] out of my house, f[] you, f[] your job." (Tr. p. 252). According to Laudig, he then went to put on his jacket to leave, turned, and Dawson hit him in the mouth with the butt of the shotgun breaking his jaw. Further, Laudig testified that while he was reeling from the blow to his mouth, Dawson fired two shots in his direction, one on either side of his legs. Dawson, however, testified that Laudig was the aggressor, and that his use of the shotgun was in self-defense. He testified that he suffered an injured shoulder and scraped leg from Laudig dragging him across the coffee table.

At the close of evidence, the trial court instructed the jury on charges which Dawson faced and self-defense, among other things. The jury deliberated and returned a verdict of

[3] On January 12, 2009, the State amended the portion of the Information charging this crime to reflect the proper subsection for the statutory citation.

guilty of pointing a firearm as a Class D felony, but not guilty on all other charges. On February 24, 2009, the trial court conducted a sentencing hearing and ordered the following sentence: 1095 days to be served at the Indiana Department of Correction, with 64 days of credit for time which Dawson had served while awaiting trial, with the remainder 1031 days suspended. In addition, the trial court ordered that Dawson be placed on probation for 1095 days, pay a fine of one dollar, court costs of $164, a public defender fee of $100, a substance abuse fee of $100, and restitution of $450 to Laudig.

Dawson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Effectiveness of Counsel*

Dawson contends that his trial counsel was ineffective by eliciting the only evidence which supports his conviction for pointing a firearm, and by failing to request that the final jury instruction for that charge include language conveying that the State must disprove that he acted in self-defense. In order to demonstrate ineffective assistance of counsel, Dawson must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*. *Lee v. State*, 880 N.E.2d 1278, 1280 (Ind. Ct. App. 2008). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* (citing *Strickland*, 466 U.S. at 690). "Failure to

satisfy either prong will cause the claim to fail." *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). Because all criminal defense attorneys will not agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Bieghler v. State*, 690 N.E.2d 188, 199 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998). Thus, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*. "Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone." *French*, 778 N.E.2d at 824.

A. *Evidence of Pointing a Firearm*

Dawson first claims his trial counsel was ineffective because he elicited the only evidence that could support his conviction for pointing a firearm. Specifically, Dawson contends "the only evidence that [he] pointed the firearm at Laudig" was the following statement elicited by his counsel during the cross-examination of Laudig: "Dawson's Counsel: [Dawson] didn't ever point a gun at you, did he? [Laudig]: Yes." (Appellant's Br. p. 8 (citing Tr. p. 291)).

The first problem we notice with Dawson's contention is his interpretation of Laudig's testimony. By responding to the assertion that Dawson did *not* ever point a gun at him by stating "yes," Laudig literally testified that Dawson did not point a gun at him. Therefore, we conclude that Dawson's counsel did not elicit evidence supporting Dawson's conviction for

pointing a firearm and could not have performed deficiently as Dawson now contends. However, if we ended the analysis of Dawson's contention with this conclusion, it would beg the question as to what evidence did support Dawson's conviction of pointing a firearm.

First, we note that no one had to stand before the jury and directly state that Dawson pointed a firearm at Laudig. Our standard of review for considerations of sufficiency of evidence to prove the elements of a crime is as follows:

> In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. A conviction may be based upon circumstantial evidence alone. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 212-13 (Ind. Ct. App. 2007), *trans. denied* (internal citations omitted). Therefore, evidence which supported a reasonable inference that Dawson pointed a firearm at Laudig would be sufficient to sustain his conviction.

Our legislature has defined the elements of "[p]ointing a firearm at another person" as follows: "A person who knowingly or intentionally points a firearm at another person commits a Class D felony." I.C. § 35-47-4-3. Laudig testified that Dawson fired the shotgun in his direction causing him to feel "air and stuff off from the gun" move his pant leg making him think that he may have been shot. (Tr. p. 256). This testimony creates a reasonable inference that Dawson knowingly or intentionally pointed a firearm at Laudig, which in turn supports the jury's verdict. In addition, Laudig testified that Dawson escorted him up the

stairs after the fight was done while brandishing the shotgun. This testimony as well supports a reasonable inference that Dawson pointed a firearm at Laudig. Therefore, Dawson's contention that his trial counsel was ineffective for eliciting the only evidence supporting his conviction for pointing a firearm fails for two reasons: (1) his counsel did not elicit evidence supporting his conviction; and (2) other evidence supported his conviction.

B. *Self-Defense Instruction*

Dawson also contends that his trial counsel was ineffective for failing to request that the trial court provide an instruction on self-defense in conjunction with its instruction on pointing a firearm. The relevant instructions to our analysis are Final Instructions Nos. 5-9. Final Instruction No. 5 stated:

> It is an issue in this case whether the Defendant acted in self-defense. A person may use reasonable force against another person to protect himself from what he reasonably believes to be the imminent use of unlawful force.
>
> A person is justified in using deadly force, and does not have a duty to retreat, only if he reasonably believes that deadly force is necessary to prevent serious bodily injury to himself or to prevent the commission of a felony.
>
> However, a person may not use force if: 1) he provokes a fight with another person with intent to cause bodily injury to that person; or 2) he has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight.
>
> The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense.

(Appellant's App. p. 180). Final Instructions Nos. 6, 7, and 9 informed the jury that before it could convict Dawson of either battery or criminal recklessness under Counts I, II, or IV, it

had to find that he "was not acting in self-defense." (Appellant's App. pp. 180-81). However, the trial court's instruction on "pointing a firearm," Final Instruction No. 8, did not include a statement that the State had to prove that Dawson was not acting in self-defense. (Appellant's App. p. 181). Therefore, Dawson's argument is properly characterized as follows: his trial counsel was ineffective for failing to request that Final Instruction No. 8 include a statement that the State was required to disprove he was acting in self-defense, despite the fact that another instruction informed the jury on the availability and bounds of a claim of self-defense including the State's burden of proof.

Jury instructions are solely within the trial court's discretion; however, "a defendant is entitled to an instruction on any defense which has some foundation in the evidence, even when that evidence is weak or inconsistent." *Smith v. State*, 777 N.E.2d 32, 34 and 37 (Ind. Ct. App. 2002). The trial court clearly acknowledged that self-defense was an issue in the case, and directly instructed the jury to that fact by giving Final Instruction No. 5.

Here, Dawson has not established that he was prejudiced because jury instructions are read as a whole. *See Atwood v. State*, 905 N.E.2d 479, 485 (Ind. Ct. App. 2009). One of the tests to determine whether a trial court has erred when refusing a tendered instruction is whether the substance of the instruction is covered by the other instructions. *Hubbard v. State*, 742 N.E.2d 919, 921 (Ind. 2001). Here, Final Instruction No. 5 informed the jury sufficiently on the issue of self-defense including the State's burden to disprove that Dawson acted in self-defense beyond a reasonable doubt. Therefore, none of the other instructions needed to include that language and Dawson has not demonstrated any prejudice.

Additionally, we cannot find prejudice by Dawson's counsel's failure to request the inclusion of a self-defense instruction in Final Instruction No. 8 because we cannot be certain that the jury viewed his act of pointing a firearm as reasonable force worthy of self-defense treatment. For a self-defense claim to be valid, "[t]he amount of force used to protect oneself must be proportionate to the urgency of the situation." *Hollowell v. State*, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999). It was undisputed at trial that Laudig never had a weapon of any sort. Therefore, it is possible that the jury concluded Dawson was not using reasonable force when he pointed the shotgun at Laudig and that deadly force was not justified. For both of these reasons, Dawson has not established that he suffered any prejudice by his trial counsel's failure to request a statement regarding self-defense in Final Instruction No. 8.

We acknowledge that since the instructions on battery causing serious bodily injury, criminal recklessness, and battery by means of a deadly weapon each contained a separate instruction that the State had to prove that Dawson was not acting in self-defense, it may have been a good trial strategy for Dawson to urge the inclusion of that same language in the instruction on pointing a firearm. However, because we conclude that Dawson has not demonstrated prejudice, we need not determine whether his counsel performed deficiently by failing to request the inclusion of a statement regarding self-defense within the pointing a firearm instruction.

II. *Probation Period*

Dawson contends that the trial court erred by ordering him to serve 1095 days on probation. Specifically, he contends that since the maximum penalty for his crime is three

years, or 1095 days, and at the time of sentencing he had accumulated 64 days worth of credit time, the trial court ordered him to be on probation for period which extended beyond the date his maximum possible sentence would expire, in violation of Indiana Code section 35-50-2-2(c). The State does not respond to Dawson's argument on this issue.

Dawson was convicted of pointing a firearm, as a Class D felony. The maximum sentence for a Class D felony is three years, or 1095 days. I.C. § 35-50-2-7. Indiana Code section 35-50-2-2(c) provides in pertinent part, "whenever the court suspends a sentence for a felony, it shall place the person on probation under IC 35-38-2 for a fixed period to end not later than the date that the maximum sentence that may be imposed for the felony will expire." Because Dawson had accumulated 64 days of credit time, the trial court's order that he be placed on probation for 1095 days is in error. Therefore, we reverse and remand for the trial court to order Dawson be placed on probation for a total period of 1031 days.

III. *Restitution*

Dawson contends that the trial court abused its discretion when it ordered him to pay $450 in restitution. Specifically, Dawson contends that the State did not prove that Laudig lost wages when preparing for and participating in the trial in the amount of $450.

An order of restitution is within the trial court's discretion, and it will be reversed only upon a finding of an abuse of that discretion. *Bockler v. State*, 908 N.E.2d 342, 348 (Ind. Ct. App. 2009). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effects of the facts and circumstances before it. *Bennett v. State*, 862 N.E.2d 1281, 1286 (Ind. Ct. App. 2007). "The purpose of a restitution order is to impress upon the

criminal defendant the magnitude of the loss he has caused and to defray costs to the victim caused by the offense." *Wittl v. State*, 876 N.E.2d 1136, 1138 (Ind. Ct. App. 2007), *trans. denied*.

Indiana Code section 35-50-5-3(4) permits a trial court to award restitution for "earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime." The trial court's Sentencing Order included the following statement:

> The Court orders the defendant to pay Danny Laudig restitution in the amount of $450.00 for approximately 36 hours time spent attending court proceedings, depositions, and meeting with the prosecutor's office. This is time the victim had to take off from work for which he was not paid. He was earning $12.50 per hour at the time.

(Appellant's App. p. 215).

Dawson stated his primary contentions regarding the restitution order as follows:

> No testimony was given concerning his actual work schedule or precisely how many hours of work he missed due to trial preparation and attendance at trial. There is no documentation in the record that the lost wages claimed by Laudig were for work absences occasioned by trial preparation or the trial itself. Further, although Laudig testified that he was not even employed when he was deposed, the restitution order included reimbursement for lost wages while he was in deposition.

(Appellant's Br. p. 20).

Dawson testified at the sentencing hearing that he attended all three days of trial, met with the prosecutor for five hours the day prior to the beginning of the trial to prepare, and another day Laudig went to the prosecutor's office to fill out paperwork including releases for the State to obtain medical records. He was not compensated by his employer for any of

this time. In addition, Laudig spent four hours attending a deposition on another day; however, he clarified that he was not employed the day of the deposition.

Because Laudig was not employed the day that he was deposed, we must agree with Dawson that no restitution based on lost earnings or wages can be awarded to Laudig for that day. Nevertheless, we conclude that the trial court acted within its discretion when calculating that Laudig missed approximately 36 hours of work during the three days of trial and preparation before. The evidence presented by the State was not highly precise, but the trial court's decision of restitution is one of discretion, and, based upon Laudig's testimony, we cannot say that the trial court's estimate of 36 hours is "clearly against the logic and effects" of the facts before the trial court. *See Bennett*, 862 N.E.2d 1286.

CONCLUSION

Based on the foregoing, we conclude that Dawson's trial counsel did not provide ineffective assistance of counsel, the trial court erred when placing Dawson on probation for 1095 days, and the trial court did not abused its discretion when it ordered Dawson to pay $450 in restitution.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and FRIEDLANDER, J., concur.