

STATEMENT OF THE CASE

Timothy L. Wilson appeals his conviction of class B felony aggravated battery.¹

We affirm.

ISSUES

1. Whether sufficient evidence exists to support Wilson's conviction.
2. Whether the trial court abused its discretion when it instructed the jury that in order to prevail on a claim of self-defense, Wilson was required to prove that he had a reasonable fear or apprehension of death or serious bodily injury when he used force against the victim.

FACTS

In April of 2007, Wilson resided at 2111 S. Elm Street in Muncie, Indiana, with his girlfriend, Brandy Lawson ("Lawson"), and their friend, Emily Smith ("Smith"). On April 8, 2007, Smith and her boyfriend, Michael Henderson ("Henderson"), went to a movie and returned to the Elm Street residence at approximately 5:00 p.m. Feeling that Henderson had, on prior occasions, shown a lack of respect for his home, Wilson became angry that Henderson was in his house. An argument ensued in the residence and spilled outside to the lawn.

During the argument, Wilson told Henderson that he was a gang member and stated, "I'll kill you. I don't care. I'll kill you." (Tr. 78). Smith and Henderson turned away and began walking to their car. Wilson retrieved a shovel from the side of the house, strode toward Henderson, and swung the shovel like a baseball bat, hitting the left

¹ Indiana Code § 35-42-2-1.3.

side of Henderson's head. Henderson immediately fell to the ground, unconscious and bleeding profusely.

Smith rushed into the house to call 911. Wilson followed her and pulled the telephone cord, interrupting the call after it had rung once. Smith then ran from the house and knocked at the neighbor's door. Finding no one at home, Smith returned to Henderson's side, helped him into their vehicle, and drove toward the hospital. Within a block and a half of the residence, Smith encountered a police officer, who was responding to the interrupted 911 call. She flagged him down, and the officer called for an ambulance to transport Henderson to the hospital.

At the hospital, medical personnel observed that a flap of Henderson's scalp was separated from his skull. Henderson was treated for a large, J-shaped scalp laceration, a depressed underlying skull fracture, and a contusion to his left hand. Emergency room physicians closed the laceration with approximately fourteen staples and admitted Henderson for observation to ensure that he did not experience life-threatening swelling of his brain. After the laceration healed, Henderson was left with permanent scarring. He did not, however, suffer any loss of brain function.

On April 25, 2007, the State charged Wilson with attempted murder as a class A felony.² He was tried before a jury from November 26-29, 2007. On November 29, 2007, he took the stand, testifying, in part, that he struck Henderson with the shovel because Henderson "was coming at [him]" and "running up behind [him]." (Tr. 344). At

² Indiana Code § 35-42-1-1(1).

the close of the evidence, in a hearing outside the presence of the jury, Wilson's counsel objected to the trial court's final jury instruction numbers nine and eleven, pertaining to the law of self-defense. The trial court overruled counsel's objection and gave both instructions over counsel's objection. The jury convicted Wilson of the lesser-included offense of class B felony aggravated battery. On February 25, 2008, the trial court imposed a ten-year executed sentence, to be served in the Department of Correction. Wilson now appeals.

Additional facts will be provided as necessary.

DECISION

Wilson first challenges the sufficiency of the evidence to support his conviction. He also contends that the trial court gave a final jury instruction that misstated the law with regard to the law of self-defense.

1. Sufficiency of Evidence

In considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence; therefore, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and must affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.* The uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. *Id.*

Wilson argues that his conviction cannot stand because the State failed to prove that his actions posed a substantial risk of death to Henderson. We cannot agree.

In order to convict Wilson of class B felony aggravated battery, the State was required to prove beyond a reasonable doubt that Wilson knowingly or intentionally inflicted injury on Henderson in a manner that created a substantial risk of death or caused serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. Indiana Code § 35-42-2-1.5.

Because the language of Indiana Code section 35-42-2-1.5 is written in the disjunctive, the State was required to prove either that (1) Wilson's actions created substantial risk of death to Wilson, or (2) that his actions caused one of the following: serious permanent disfigurement or protracted loss/impairment of the function of a bodily member/organ. Thus, in order to sustain Wilson's conviction for class B felony aggravated battery, we need only find that the State proved one of these elements.

At trial, Smith and Henderson testified that Wilson struck the left side of Henderson's head with the sharp metal edge of a shovel blade. Emergency room physician Dr. Dunnington testified that at the site of Henderson's injury, a "flap" of his scalp "was separated from the underlying skull." (Tr. 294). Henderson also suffered a depressed skull fracture. The record contains photographs depicting a large J-shaped gash held closed with approximately fourteen staples. (Ex. 8-10). The record also reveals that at trial, Henderson showed his scarring to the jury. Dr. Dunnington testified further that in his medical opinion, Henderson's scarring constituted serious permanent

disfigurement. Wilson does not dispute that Henderson suffered permanent scarring as a result of this incident.

From this evidence, the jury could reasonably conclude that Wilson knowingly or intentionally inflicted injury on Henderson in a manner that caused serious permanent disfigurement. Thus, we find that the evidence is sufficient to support his conviction.

2. Jury Instruction

Jury instructions are meant 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. Instruction of the jury is left to the sound judgment of the trial court and will not be disturbed absent an abuse of discretion. Jury instructions are not to be considered in isolation, but as a whole and in reference to each other. The instructions must be a complete, accurate statement of the law which will not confuse or mislead the jury. Still, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise.

Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008), (internal citations and quotations omitted). In reviewing a challenge to a jury instruction, we consider (1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court. *Boney v. State*, 880 N.E.2d 279, 293 (Ind. Ct. App. 2008), *trans. denied*. When the challenge to a jury instruction is that it does not correctly state the law, we review the instruction de novo. *Phillips v. State*, 875 N.E.2d 480, 482 (Ind. Ct. App. 2007), *trans. denied*.

Wilson argues that he is entitled to a new trial because the trial court misstated Indiana law on self-defense and in so doing, “deprive[d] [him] of the defense of self-defense altogether.” Wilson’s Br. at 10. We disagree.

“A valid claim of self-defense is a legal justification for an otherwise criminal act.” *Henson v. State*, 786 N.E.2d 274, 277 (Ind. 2003). Indiana Code section 35-41-3-2 defines self-defense as follows:

- (a) A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
 - (1) is justified in using deadly force: and
 - (2) does not have a duty to retreat;if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

I.C. § 35-41-3-2.

The trial court gave the following instructions regarding self-defense³ to the jury:

FINAL INSTRUCTION NUMBER EIGHT
[(Pattern Instruction No. 10.03, I.C. § 35-41-3-2)]

The defense of self-defense is defined by law as follows:

A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that that force is necessary to prevent serious bodily injury to himself or a third person or the commission of a felony. No person in this State shall be placed in

³ Wilson tendered a self-defense instruction to the trial court (Tr. 383), but has failed to include the text in his appendix. The record reveals that he deferred to the trial court’s instruction, conceding that it was better than his proffered one.

legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary.

A person is not justified in using force if:

1. he is committing or is escaping after the commission of a crime;
2. he provokes unlawful action by another person with intent to cause bodily injury to the other person; or
3. he has entered into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates to the other person his intention to do so and the other person nevertheless continues or threatens to continue unlawful action.

The State has the burden of disproving this defense beyond a reasonable doubt.

FINAL INSTRUCTION NUMBER NINE

To prevail on a claim of self-defense, the defendant must show the following:

1. That he acted without fault;
2. That he was in a place where he had a right to be; and
3. That he had a reasonable fear or apprehension of death or serious bodily injury.

Once the defense of self-defense has been raised by the defendant, in order to negate that claim[,] the State has the burden of disproving one of the three elements beyond a reasonable doubt.

FINAL INSTRUCTION NUMBER TEN

The amount of force used to protect oneself must be proportionate to the urgency of the situation. Where a person has used more force than is reasonably necessary to repel an attack, the right of self-defense is extinguished and the ultimate result is that the intended victim becomes the perpetrator.

FINAL INSTRUCTION NUMBER ELEVEN

One who is assaulted in a manner which does not appear to threaten great bodily harm may not purposely attempt to kill in self-defense.

(Wilson's App. 175-178).

Wilson argues that the trial court's giving of final instruction number nine constituted an abuse of discretion because the instruction improperly required him to prove that he had an apprehension of death or serious bodily injury when he struck Henderson. Wilson argues that under Indiana law, he was merely required to prove that he had an apprehension of "any bodily injury," and not necessarily serious bodily injury. (Tr. 384). We cannot agree.

Despite Wilson's attempt to characterize the trial court's final instruction number nine as fundamentally flawed, it is a correct statement of the law as it is set out in Indiana Code section 35-41-3-2. Simply stated, where a defendant has used deadly force against another, he may prevail in a claim of self-defense only if he proves that he reasonably believed that that force was necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony. I.C. § 35-41-3-2.

Wilson used deadly force against Henderson. Deadly force is "force that creates a substantial risk of serious bodily injury." I.C. § 35-41-1-7. At trial, Smith testified that Wilson struck Henderson with the curved metal edge of the shovel. Wilson did not deny that he struck Henderson with the shovel; he did, however, deny using the metal end of the shovel to do so. In any event, common sense dictates that striking a person's head with a shovel swung like a baseball bat poses considerable risk to the person's life and certainly constitutes "deadly force." Furthermore, the jury saw exhibits which depicted the nature of Henderson's head injuries as well as the scarring left by the shovel. Such evidence could reasonably support the State's theory that the victim was struck with the metal blade of the shovel.

Thus, pursuant to Indiana Code section 35-41-3-2, in order to justify his use of deadly force as an act of self-defense, Wilson was required to demonstrate that he struck Henderson out of a reasonable fear or apprehension of death or serious bodily injury. Accordingly, we conclude that the trial court's final instruction number nine did not contain a misstatement of Indiana law.

Not only has Wilson failed to demonstrate that the trial court's final instruction number nine misstated Indiana law regarding self-defense, but his testimony at trial supports the finding that he was not entitled to invoke the defense at all.

During his testimony, Wilson admitted that he struck Henderson with the shovel because Henderson was "running up behind [him]," and Wilson feared that Henderson, the larger of the two men, was going to strike him. (Tr. 344). In his version of the events, Wilson attempts to contradict the testimony of Smith and Henderson – who testified that Henderson never swung at or struck Wilson, and that it was Wilson who lashed out with the shovel unprovoked; however, Wilson's own testimony supports the finding that he responded to the perceived threat with disproportionate deadly force. *See McKinney v. State*, 873 N.E.2d 630, 643 (Ind. Ct. App. 2007) ("The amount of force used to defend oneself must be proportionate to the requirements of the situation"). *See also Pinkston v. State*, 821 N.E.2d 830, 841 (Ind. Ct. App. 2004) ("When a person uses more force than is reasonably necessary under the circumstances, the right of self-defense is extinguished"). He is merely asking this Court to reweigh the evidence in his favor, which we cannot do. Wilson's actions were not appropriate in response to the alleged aggression from Henderson.

Lastly, had we found that the trial court erred in giving its final instruction number nine, any error would be harmless because Wilson's conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. *Williams*, 891 N.E.2d at 630. The jury heard significant evidence of Wilson's guilt at trial, including, most notably, his admission on the witness stand that he struck Henderson's head with the shovel. Based upon the foregoing, we conclude that the trial court did not abuse its discretion when it instructed the jurors on self-defense.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.