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.

ATTORNEY FOR APPELLANT:

MICHAEL P. QUIRK
Public Defendant
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARK TODD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0606-CR-330
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0507-FD-43

December 27, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Mark Todd (Todd), appeals his conviction of Non-Support of a Child, a Class D felony, Ind. Code § 35-46-1-5.

We affirm.

ISSUE

Todd raises one issue on appeal, which we restate as: Whether the trial court erred by issuing its own Final Instruction #14 to the jury.

FACTS AND PROCEDURAL HISTORY

On December 19, 1994, Todd and Denise Espinosa-Bergdoll divorced. Under the dissolution decree, Todd was obligated to pay $25.00 a week in child support. Subsequently, Todd's child support order was modified twice, increasing to $40.00 a week in October of 1996, and to $59.00 a week in February of 1997. Todd met many of his payment obligations, but also failed to make many payments. On July 1, 2005, it was determined that Todd owed $13,392.61 in child support arrearage.

On July 29, 2005, the State filed an Information charging Todd with Non-Support of a Child, a class D felony, I.C. § 35-46-1-5. On April 17, 2006, a jury trial was held. Following the close of the evidence and prior to deliberation, the trial court instructed the jury that although it had determined that Todd qualified for a public defender in the present case, it could not consider this fact to mean that Todd was indigent during the period of non-support. The jury found Todd guilty of the offense. On June 12, 2006, the trial court sentenced Todd to three years in the Department of Correction, all of which

was suspended providing Todd behave, pay his probation fees, and pay restitution in the amount of $15,668.61.

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

DISCUSSION AND DECISION

Todd contends that the trial court improperly instructed the jury as to the implications of his being appointed a public defender to represent him in the present case. Specifically, Todd argues that the instruction invaded the province of the jury.

It is well-established by this court that instructing the jury is within the sole discretion of the trial court. *White v. State*, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006), *trans. denied*. Jury instructions are to be considered as a whole and in reference to each other. *Id*. An 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*. at 1032-33. Before a defendant is entitled to a reversal, he must affirmatively show that the instructional error prejudiced his substantial rights. *Hancock v. State*, 737 N.E.2d 791, 794 (Ind. Ct. App. 2000).

Here, the trial court, on its own accord, gave Final Instruction #14, which reads:

> You are instructed that the [c]ourt held a hearing on November 7, 2005, and found [Todd] qualified on that date for a public defender. The fact that the [c]ourt appointed a public defender on November 7, 2005, is not to be considered by you as a judicial finding that [Todd] was indigent from December 19, 1994, to July 1, 2005.

(Appellant's App. p. 68). Todd now asserts that this instruction eliminated the possibility of the jury finding that his indigence was a defense to his non-payment of child support. We disagree.

Indiana Constitution Article I, Section 19, provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." In keeping with this duty, the jury is free to accept or reject any evidence. *Gantt v. State*, 825 N.E.2d 874, 878 (Ind. Ct. App. 2005). In fact, we have held that "[i]t is the unique province of the jury to weigh trial testimony and to assess witness credibility." *Id.* (quoting *Morrison v. State*, 609 N.E.2d 1155, 1159 (Ind. Ct. App. 1993)). Our supreme court has also explained that the trial court has no right to invade the province of the jury, as the jury is the sole judge of the credibility of a witness. *Gantt*, 825 N.E.2d at 878.

Our review of the trial court's instruction does not lead us to believe that it invaded the province of the jury. Rather, in our view, the instruction clarifies to the jury that the trial court's determination that Todd was indigent for the purposes of the trial did not mean that the jury's right to determine that fact for the entire period of his non-payment of support had been taken away. Without the instruction, the jury may have assumed that because the trial court found Todd to be indigent, he was incapable of paying child support. Thus, we conclude that the instruction actually reinforced to the jury that they were the final say as to whether any defense existed to Todd's failure to pay child support intermittently over the last eleven years. Accordingly, we hold that the trial court did not err in giving Final Instruction #14.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly instructed the jury.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.