MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Charles E. Traylor
Kolb Roellgen & Traylor LLP
Vincennes, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Eric M. Seibel,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 14, 2022

Court of Appeals Case No. 22A-CR-269

Appeal from the Knox Superior Court

The Honorable Gara U. Lee, Judge

Trial Court Case No. 42D01-2007-F6-180

Shepard, Senior Judge.

[1] Eric M. Seibel appeals from his convictions of one count of Level 6 felony domestic battery[1] and one count of Level 5 felony battery against a public safety official while engaged in the execution of official duties, resulting in bodily injury.[2] In addition to his arguments challenging the sufficiency of the evidence, Seibel challenges the trial court's refusal to give his tendered lesser-included offense instruction as to his Level 5 felony charge. Concluding that the court committed reversible error by refusing to so instruct, we reverse Seibel's Level 5 felony conviction and remand to the trial court with instructions to: (1) vacate Seibel's Level 5 felony conviction (2) enter judgment of conviction on the Level 6 felony lesser-included offense, and (3) resentence accordingly. We further conclude that there is sufficient evidence to support his convictions as corrected. In sum, we affirm in part and reverse and remand in part with instructions.

Facts and Procedural History

[2] Seibel and Whitney Cox were living together in a mobile home in Decker, Indiana in July 2020. Cox's children, one of whom Seibel fathered, lived there as well. On July 27, 2020, Cox and Seibel argued about which of the two should leave. As Cox attempted to enter her home Seibel attempted to shut the door to keep Cox out. The door to the home had an opening for a window, but

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[1] Ind. Code § 35-42-2-1.3(b) (2020).

[2] Ind. Code § 35-42-2-1(e)(2) (2020).

there was no windowpane, just a sheet covering the hole. During the struggle involving the door, Cox's hand was cut. As she grabbed for it, her hand became stuck where the door latched as Seibel pushed on the door to shut it.

[3] Cox disengaged from the struggle and called the police for assistance. Knox County Sheriff's Deputies Fred McCormick and Johanna Carney responded to the dispatch report of potential domestic violence with children present. When they arrived, the officers first spoke with Cox, who was standing outside the home with her children. Deputy McCormick noticed markings on both of Cox's shoulders "from where [Seibel] had allegedly pushed her and shoved her,"[3] and he observed "a cut on her left hand." Tr. Vol. 2, p. 112. Cox then filled out a voluntary statement form while the officers approached the home.

[4] Seibel stepped out of the home and onto the deck to speak with the officers. Seibel, who was "very agitated" and "very high strung" was "very adamant [that] he didn't do it." *Id.* at 113. He repeatedly denied doing anything wrong and, at one point, told the officers that he had the entire encounter "on video" "on his phone." *Id.* However, Seibel was unable to produce the video for officers, claiming various failures with his phone.

[5] Next, Deputy McCormick told Seibel that he had observed marks on Cox. Seibel responded, saying "No she does not. If she does, she put them on

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[3] At trial, Cox explained that the marks on her arms were from her "nudging up against the door" and that "[m]ore of the hitting and beating was me on the door, you know, trying to get in." *Id.* at 130.

herself." Ex. 1. When Deputy McCormick noticed that Seibel appeared to be readying to re-enter the home, he said "Hold up. Don't go anywhere." *Id.* Instead of obeying the command, Seibel "started to go back in towards the house," and the "struggle started" between Seibel and the officers. Tr. Vol. 2, p. 113.

[6] Deputy McCormick, who had grabbed for Seibel's arm and missed, followed Seibel into the mobile home. Once inside, Seibel wrapped his arm around the door through the hole where the windowpane should have been "and bear hugged it like he wasn't going to let go." *Id.* at 114. Deputy Carney was trying to grab Seibel through the hole in the door from outside. After Deputy McCormick warned Seibel that he had a taser and would use it to "drive stun"[4] him if necessary, Seibel let go of the door. *Id.* He then went "crashing through the door" and "fell on Deputy Carney." *Id.* at pp. 93, 114.

[7] Outside on the deck, Deputy McCormick holstered his taser and attempted to get Seibel off of Deputy Carney. Deputy Carney was on her back on the deck with Seibel on top of her. Deputy McCormick attempted to pull Seibel off of Deputy Carney, but Seibel "kept grabbing" her and "grabbing [her] hair and pulling really hard." *Id.* at 94. Seibel "kept screaming that [the officers] were going to have to kill him in front of his daughter, that he wasn't going to go to jail." *Id.* Deputy Carney could be heard on body camera footage commanding

[4] To "drive stun" the officer takes the "cartilage[sic] out" so that the prongs are not ejected, but applied directly to the suspect's body. *Id.*

Seibel to let go of her hair. Eventually, the officers were able to subdue Seibel and handcuff him.

[8] Initially, the State charged Seibel with one count of Level 6 domestic battery and one count of Level 6 felony battery against a public safety official. However, between Deputy Carney's first and second deposition, the State sent an email to her and asked, "Did it hurt when your hair got pulled?" *Id.* at 107. She had not been asked that question during the first deposition. She replied to the email, "Yes, it did." *Id.* at 102. After that email exchange, the State amended the second charge to Level 5 felony battery against a public safety official while engaged in the execution of official duties, resulting in bodily injury. During Deputy Carney's second deposition, she was asked if it hurt when Seibel pulled her hair. She testified then and at trial that it did hurt. During trial, Seibel tendered and requested an instruction on the Level 6 felony lesser-included offense battery against a public safety official. The trial court denied the request saying, "Well I am going to determine that there is no serious evidentiary dispute." *Id.* at 137. At the conclusion of Seibel's jury trial, he was convicted as charged, he admitted to his habitual offender status, and the court imposed an aggregate sentence of eleven years.

Discussion and Decision

I. Instructional Error[5]

[9] Seibel argues that the court committed reversible error by denying his tendered instruction on the lesser-included offense of Level 6 felony battery on a public official. The State concedes that Level 6 felony battery on a public official is a lesser-included offense of Level 5 felony battery against a public safety official while engaged in the execution of official duties, resulting in bodily injury. *See* Appellee's Br. p. 11. However, the State contends that the court did not err in refusing the instruction because there was no serious evidentiary dispute concerning whether Deputy Carney was injured. *See id.* We disagree.

[10] If "a trial court has determined that an alleged lesser included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties." *Wright v. State*, 658 N.E.2d 563, 567 (Ind. 1995). "If there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to

[5] To the extent that Seibel presents claims based on constitutional grounds, those arguments are not preserved for our review. *See GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002) ("an argument or issue not presented to the trial court is generally waived for appellate review."). As he did argue for a lesser-included instruction that aspect of the claim survives.

give an instruction, when requested, on the inherently or factually included lesser offense." *Id.* "If the evidence does not so support the giving of a requested instruction on an inherently or factually included lesser offense, then a trial court should not give the requested instruction." *Id.* Further, it "is reversible error for a trial court not to give a requested instruction on inherently or factually included lesser offenses if there is such an evidentiary dispute." *Schneider v. State*, 155 N.E.3d 1268, 1283 (Ind. Ct. App. 2020), *trans. denied.*

[11] Here, the parties dispute the evidence of Deputy Carney's bodily injury. Indiana Code section 35-31.5-2-29 (2012) defines bodily injury as "any impairment of physical condition, including physical pain." The trial court found that there was no serious evidentiary dispute. *See* Tr. Vol. 2, p. 137. "Where such a finding is made we review the trial court's rejection of a tendered instruction for an abuse of discretion." *Brown v. State*, 703 N.E.2d 1010, 1019 (1998). "[I]f a defendant points out on the record the nature of the serious evidentiary dispute and the evidence supporting it a reviewing court will be better equipped to evaluate the trial court's ruling." *Id.* Our standard of review is for an abuse of discretion. *Id.*

[12] Seibel presented evidence to the court that Deputy Carney did not make any sounds on the body camera footage to suggest she was in pain, and that she testified she did not exhibit sounds that she was in pain. Tr. Vol. 2, p. 99. Deputy Carney also admitted that she did not mention feeling pain when she testified in her first deposition. *Id.* at 99-102. Further, Deputy Carney testified that she did not mention pain in her first deposition because she had not been

asked the specific question. She also admitted that Deputy McCormick was trying to pull Seibel off of her during the skirmish. Deputy McCormick testified that Seibel did not strike, hit, spit or slap either him or Deputy Carney. *Id.* at 118-19. Instead, he testified that he believed that Seibel was trying to resist arrest. *Id.* at 119-20.

[13] The State argued that Deputy Carney simply answered the questions that were posed to her in her first deposition and that she was not asked about being in pain. The State also attempted to establish that the emailed question did not coerce her into later adding that she was in pain. On the other hand, Seibel argued in closing that even if he did unintentionally batter Deputy Carney, he did not cause her pain and that the officer bodycam footage supported his claim. *Id.* at 143. We conclude that the court abused its discretion and committed reversible error as there was a serious evidentiary dispute about Deputy Carney's pain. Therefore, we remand the matter to the trial court to vacate Seibel's Level 5 felony conviction.

II. Sufficiency of the Evidence

[14] Seibel also challenges the sufficiency of the evidence supporting his convictions. Our standard of review of a challenge to the sufficiency of the evidence is well-established: we will not reweigh the evidence or reassess the credibility of the witnesses and will consider only the probative evidence and the reasonable inferences to be drawn therefrom that support the verdict. *See McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

[15] Though we have reversed Seibel's Level 5 felony conviction on grounds of instructional error, this is not the end of our review. Where a conviction is reversed because of insufficient evidence, we may remand for the trial court to enter a judgment of conviction upon a lesser-included offense if the evidence is sufficient to support the lesser offense. *Ball v. State*, 945 N.E.2d 252, 258 (Ind. Ct. App. 2011), *trans. denied.* We conclude that by vacating Seibel's conviction on the instructional error grounds argued here, we have necessarily determined the evidence to be insufficient to support his Level 5 felony conviction. We now examine whether the evidence is sufficient to support a conviction of the Level 6 felony lesser-included offense.

[16] To convict Seibel of Level 6 felony battery against a public official, the State was required to prove beyond a reasonable doubt that Seibel knowingly or intentionally touched Deputy Carney, a law enforcement officer, in a rude, insolent, or angry manner, while Deputy Carney was engaged in her official duty. *See* Ind. Code §35-42-2-1(e)(2) (2020). The facts recited above clearly establish that Seibel knocked Deputy Carney over as she attempted to subdue him during her official investigation, and pulled at her hair and otherwise refused to get off of her, while screaming and struggling. Because the evidence is sufficient to support a conviction for this lesser-included offense, we remand this matter to the trial court to enter judgment of conviction for Level 6 felony battery on a public official and to sentence Seibel accordingly.

[17] Next, we examine Seibel's conviction for Level 6 felony domestic battery. To establish that Seibel committed the offense, the State was required to prove

beyond a reasonable doubt that Seibel knowingly or intentionally touched Cox, a family or household member, in a rude, insolent, or angry manner, resulting in moderate bodily injury. *See* Ind. Code §35-42-2-1.3(b)(3). Seibel contends that he did not touch Cox in any way.

[18] "Any touching, however slight, may constitute battery." *Impson v. State*, 721 N.E.2d 1275, 1285 (Ind. Ct. App. 2000). Further, [w]hile battery requires [a] defendant to have intended to touch another person, [he] need not personally touch another person since battery may be committed by the unlawful touching by [the] defendant or by any other substance put in motion by [the] defendant." *Henson v. State*, 86 N.E.3d 432, 439-40 (quoting *Matthews v. State*, 476 N.E.2d 847, 850 (Ind. 1985)).

[19] The evidence reflects that Cox lived in the mobile home with Seibel and her children, one of whom Seibel had fathered. Seibel pushed the front door against her to push her out of the mobile home. This evidence is sufficient to establish that Seibel touched Cox. Seibel's actions caused an injury to Cox's hand when he shut the door as her hand was between the door and the latch during their argument.

[20] As for Seibel's argument that he did not knowingly or intentionally batter Cox, the jury was well within its right to conclude that Seibel, realizing that Cox was standing there during their argument and was attempting to get in through the door, knew she would be injured as he used the door to keep her from entering. A person engages in conduct knowingly if, when he engages in the conduct, he

is aware of a high probability that he is doing so. *See* Ind. Code §35-41-2-2(b) (1977).

[21] Next, Seibel says that even if he did batter Cox, the offense should not have been enhanced because it did not result in moderate injury to her. "Moderate bodily injury" is defined by statute as "any impairment of physical condition that includes substantial pain." *See* Ind. Code §35-31.5-2-204.5 (2014). "The degree of injury is a question of fact for the jury." *Gebhart v. State*, 525 N.E.2d 603, 604 (Ind. 1988). The record here establishes that Seibel pushed the door shut on Cox's hand such that it was "stuck in there" and "caught on like a piece of metal in the door," which cut her hand. Tr. Vol. 2, p. 126. Both officers observed the injury to Cox's hand. Because jurors are in the best position to make this kind of fact-sensitive determination and are free to use their "experiences in life" and "common sense," we find that there is sufficient evidence to support this element. *See McAlpin v. State*, 80 N.E.3d 157, 163 (Ind. 2017).

[22] In sum, we conclude that there was sufficient evidence to support Seibel's conviction on this count.

Conclusion

[23] We conclude that the trial court committed reversible error by refusing Seibel's tendered lesser-included offense instruction. We reverse his conviction of Level 5 felony battery against a public safety official while engaged in the execution of official duties, resulting in bodily injury. However, because the evidence is

sufficient to support a conviction of the lesser-included offense, we remand the matter to the trial court to vacate Seibel's Level 5 felony conviction, enter a judgment of conviction on Level 6 felony battery on a public official, and resentence him accordingly. The evidence is sufficient to support Seibel's Level 6 felony conviction for domestic battery.

[24] We affirm in part, and reverse and remand in part with instructions.

Mathias, J., and Brown, J., concur.