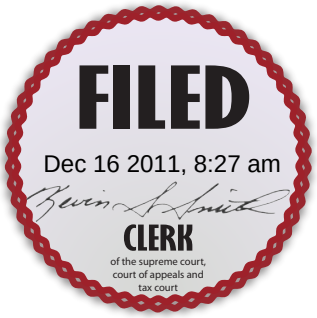

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IN THE
COURT OF APPEALS OF INDIANA

MARIO J. GASTON,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 84A01-1105-CR-198
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0910-FB-3319

December 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a jury trial, Mario Gaston appeals his conviction of aggravated battery, a Class B felony. He raises two issues for our review, which we restate as whether sufficient evidence was presented to sustain his conviction of aggravated battery, and whether the trial court erred in declining to instruct the jury regarding battery as a lesser-included offense. We conclude that sufficient evidence was presented and that Gaston waived his appellate challenge regarding jury instructions, but even aside from waiver, the trial court did not commit reversible error on this issue. Accordingly, we affirm.

Facts and Procedural History

In September 2009 a dispute arose between Dustin Carroll and Joseph Ladd over a stereo Ladd sold to Carroll. Two days later, Ladd and Gaston approached Carroll from behind as he exited a convenience store and both punched and kicked Carroll several times in the face and body.[1] Ladd and Gaston then ran away. Carroll suffered a broken tooth and cut on his elbow, and store displays and merchandise were also damaged. As Carroll reported the incident to police, he held in his hand a piece of broken tooth and showed an officer the gap in his mouth. Carroll testified at trial that his tooth was acutely sensitive to cold temperatures for ten or eleven months, and was still sensitive at trial, seventeen months after the attack. Carroll had to drink from a straw, and he avoids eating foods that might break the remaining portion. At least up to and through trial, Carroll did not seek medical or dental treatment.

The State charged Gaston with aggravated battery, a Class B felony; battery resulting in serious bodily injury, a Class C felony; and criminal mischief, a Class A

[1] Ladd was not prosecuted together with Gaston and is not a party to this appeal.

misdemeanor; and alleged him to be an habitual offender. Following phase one of the trial, the jury found Gaston guilty of aggravated battery, battery resulting in serious bodily injury, and criminal mischief. Following presentation of evidence regarding the habitual offender allegation in phase two of the trial, the jury was unable to reach a verdict. Prior to sentencing, Gaston entered a plea agreement to the substantive crimes, which the trial court accepted. Accordingly, the trial court sentenced Gaston to twenty years for aggravated battery to run concurrent with one year for criminal mischief, and vacated his conviction for battery resulting in serious bodily injury. Gaston now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

Our standard of reviewing a sufficiency claim is well-settled: we do not assess witness credibility or reweigh the evidence, and "we consider only the evidence that is favorable to the judgment along with the reasonable inferences to be drawn therefrom to determine whether there was sufficient evidence of probative value to support a conviction." Staten v. State, 844 N.E.2d 186, 187 (Ind. Ct. App. 2006), trans. denied. "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.

B. Aggravated Battery

To convict Gaston of aggravated battery, the State was required to prove beyond a reasonable doubt that Gaston knowingly or intentionally inflicted injury upon Carroll that created a substantial risk of death or caused serious permanent disfigurement, protracted

loss or impairment of the function of a bodily member or organ, or loss of a fetus.[2] Ind. Code § 35-42-2-1.5. The information filed by the State specifically charged Gaston with knowingly inflicting Carroll with protracted loss or impairment of the function of "a damaged and/or broken tooth." Appendix of Appellant at 2.

We have recognized that "a tooth is a bodily member or organ for purposes of our aggravated battery statute." Smith v. State, 881 N.E.2d 1040, 1045 (Ind. Ct. App. 2008) (citations omitted). Indeed, Gaston refers us to several cases in which an attack resulting in loss or damage to one or more teeth was sufficient to sustain a conviction for aggravated battery. See, e.g., James v. State, 755 N.E.2d 226 (Ind. Ct. App. 2001), trans. denied. Gaston argues that the damage to Carroll's tooth and the injury Carroll suffers is too minor to sustain his conviction, which requires protracted loss or impairment of a function of Carroll's tooth.

"Protracted" means "to draw out or lengthen in time";[3] "impairment" means the "fact or state of being damaged, weakened, or diminished." Mann v. State, 895 N.E.2d 119, 122 (Ind. Ct. App. 2008) (quotations and citations omitted).

Through testimony of Carroll and others, and photographic exhibits, the jury was presented with evidence from which it could and did assess whether Carroll's tooth was damaged, weakened, or diminished for a drawn out period of time. Carroll avoids certain foods because his tooth is weakened in its broken state. Carroll drinks from a straw and his teeth had been sensitive to cold temperatures for seventeen months by the time of

[2] To the extent Gaston compares aggravated battery to any of the categories of battery under Indiana Code section 35-42-2-1, we deem this comparison irrelevant to our determination of whether sufficient evidence was presented to sustain his conviction of aggravated battery.

[3] During deliberations, the jury requested the Court define "protracted loss." App. of Appellant at 119. After consultation with counsel, the Court responded that it means "to draw out or lengthen in them [sic]; prolong." Id.

trial. Any competing inferences as to the extent of an injury based upon the evidence presented at trial are fair game for a defendant's challenge at trial and even defense counsel's closing argument, but on appeal this constitutes a question as to the weight of the evidence which is an improper basis for our review of the sufficiency of the evidence. Riffe v. State, 464 N.E.2d 333, 336 (Ind. 1984); see Louisville, N.A. & C. Ry. Co. v. Miller, 141 Ind. 533, 37 N.E. 343, 353 (1894) (stating, in the context of a personal injury action, that determination of the extent of one's injuries, for purposes of determining monetary damages for compensation, is a matter "peculiarly within the province of the jury"). Although Carroll's injuries may not match the extent of those in published cases that Gaston has referred us to, sufficient evidence was presented such that the jury could have and reasonably did find Gaston guilty of knowingly inflicting Carroll with protracted impairment of the function of his tooth.

II. Jury Instruction of a Lesser-Included Offense

Gaston next argues that the trial court erred in declining to instruct the jury regarding the lesser-included offense of battery as a Class A misdemeanor. But his request was only verbal and was not made in writing. An instruction request must be reduced to writing. Ind. Crim. Rule 8(D); Ketcham v. State, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003), trans. denied. Gaston's failure to make his request in writing is a failure to preserve this issue for appellate review. Ketcham, 780 N.E.2d at 1177; see Helton v. State, 273 Ind. 211, 213, 402 N.E.2d 1263, 1266 (1980) (stating that a request for included offenses instructions must be preserved for review in accordance with trial and appellate rules).

Waiver notwithstanding, Gaston's claim also fails on the merits. Our supreme court has described the correct analysis for trial courts when a party requests an instruction on a lesser-included offense of the crime charged.

> When a defendant requests a lesser-included offense instruction, a trial court applies a three-part analysis: (1) determine whether the lesser-included offense is inherently included in the crime charged; if not, (2) determine whether the lesser-included offense is factually included in the crime charged; and, if either, (3) determine whether a serious evidentiary dispute exists whereby the jury could conclude that the lesser offense was committed but not the greater.

Miller v. State, 720 N.E.2d 696, 702 (Ind. 1999) (citation omitted).

The State implicitly concedes that battery as a Class A misdemeanor is inherently included in aggravated battery as a Class B felony. Class A misdemeanor battery, the lesser offense, involves "bodily injury." Ind. Code § 35-42-2-1(A)(1)(a). "'Bodily injury' means any impairment of physical condition, including physical pain." Ind. Code § 35-41-1-4. Aggravated battery, as noted above, involves protracted loss or impairment of a function of a bodily member or organ. The issue, then, is the third part of the analysis under Miller: whether the trial court correctly determined that no serious evidentiary dispute exists whereby the jury could conclude the lesser offense was committed but not the greater.

As noted above, the law is clear that a tooth constitutes a bodily member or organ, and evidence was presented that Carroll's tooth was broken and impaired for an extended period of time. For this reason, we conclude that the trial court did not err in refusing to instruct the jury of the lesser-included offense of battery as a Class A misdemeanor.

Conclusion

In the form of witnesses' testimony and photographs, sufficient evidence was presented to sustain Gaston's conviction for aggravated battery. Gaston waived his appellate challenge to the trial court's refusal to instruct the jury regarding the lesser-included offense of battery as a Class A misdemeanor. Waiver notwithstanding, the trial court did not err in refusing to provide an additional jury instruction. Therefore, we affirm Gaston's conviction for aggravated battery.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.