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IN THE
COURT OF APPEALS OF INDIANA

SAMUEL R. VIA, III	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 32A01-0904-CR-198
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Karen M. Love, Judge
Cause No. 32D03-0901-FC-1

February 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Samuel Via III was convicted, following a jury trial, of criminal confinement, a Class C felony, criminal mischief, a Class D felony, and two counts of criminal recklessness, Class A misdemeanors. Via appeals, raising three issues for our review, which we restate as: 1) whether the trial court abused its discretion in instructing the jury regarding reasonable doubt; 2) whether sufficient evidence supports Via's convictions; and 3) whether the trial court abused its discretion in denying Via's motion to correct error. Concluding the trial court did not abuse its discretion in instructing the jury or in denying Via's motion to correct error, and sufficient evidence supports his convictions, we affirm.

Facts and Procedural History[1]

The facts supporting the judgment are that on April 3, 2008, Via's teenage son, Sam Via IV ("Sam"), was playing in the back yard of Mark Henderson's residence. Christopher Mink and Conner Hueston, also teenage boys, stopped at the residence driving a red Chevy Blazer. Mink yelled Sam's name, and Sam started walking away from Mink and Hueston into an alley. Mink and Hueston followed Sam in the Blazer, and as Mink turned the Blazer into the alley, he was driving "too fast for that corner." Transcript at 320. Slamming on the brakes, which locked up, Mink lost control of the Blazer, which skidded twenty-one feet across the alley while traveling in the direction of Sam. Sam fled to the Henderson residence where he telephoned his mother. Sam's

[1] In his appellant's brief, Via has related the relevant facts in his Statement of the Case rather than including them in a separate Statement of Facts in accordance with Indiana Appellate Rule 46(A). In addition, Via's brief presents the facts as a witness by witness summary of testimony rather than in narrative form as required by Appellate Rule 46(A)(6)(c). We remind Via's counsel to comply with the Appellate Rules in future filings with this court.

mother telephoned Via and told him that "Mink had just tried to run over Sam." Id. at 565. Meanwhile, Mink and Hueston drove to Mink's house, where they called Sam to apologize. Sam's phone was answered by Via, who, according to Mink, told him he could come over to the Via residence to apologize and that the police would be there. Mink and Hueston switched vehicles and drove an S-10 pickup truck belonging to Mink's father a quarter mile to the Via residence.

Mink and Hueston parked the S-10 truck in the driveway of the Via house. Mink knocked on the front door but no one answered, although two of Via's children, a daughter and Sam's younger brother, were inside. As Mink was turning around to return to the S-10 truck, Via and Sam pulled up in a red 2000 Ford pickup truck, parking in the driveway behind the S-10. Sam ran up to Mink, and a physical and verbal altercation ensued between them. As Mink went to the S-10 truck intending to leave, Via confronted him and the two "exchanged words." Id. at 326. Mink initiated another physical altercation with Sam. Eventually Mink got into the driver's seat of the S-10 while Hueston was in the passenger seat. Mink, starting the S-10 and intending to exit Via's property, was unable to back out because Via's truck was behind him. Instead, Mink pulled forward into Via's yard. As he was doing that, Via, driving his truck, "cut [Mink] off." Id. at 327. Then Mink put the S-10 in reverse and Via "cut [Mink] off again." Id. Mink started to move the S-10 forward again. At that time, Via drove his truck into the driver's side of the S-10, pushing it "ten to fifteen . . . feet" through the yard and up next to the house. Id. at 329. The S-10 came to rest "within just an inch or so" of the house.

Id. at 272. As Mink tried to get out of the S-10, Via kicked its door "into [Mink's] head and said, get the __ back in your car." Id. at 331.

Minutes thereafter, several police officers arrived on the scene. Lieutenant Parsons observed damage to the driver's side of the S-10 and prepared a crash report. He testified the scene involving the two trucks appeared as a crash scene and the damage to the S-10 had the "potential" to affect its interior. Id. at 280. An insurance claim admitted as State's Exhibit 2 listed the collision damage to the S-10 as $3,909.35, and the parties stipulated the damage to the S-10 estimated on Lieutenant Parsons's crash report exceeded $2,500.

The State charged Via with Count I, criminal mischief, a Class D felony; Counts II and III, criminal confinement, Class C felonies; Counts IV and V, criminal recklessness, Class A misdemeanors; and Count VI, battery, a Class B misdemeanor. Via's jury trial commenced on January 24, 2009. Over Via's objection, the trial court gave as both a preliminary and final jury instruction its Instruction 8, which stated, in relevant part:

> The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you should find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you should give him the benefit of the doubt and find him not guilty.

Appellant's Appendix at 65-66, 89-90.

The jury found Via guilty of Counts I, II, IV, and V, but not guilty of Counts III and VI. The trial court entered judgment accordingly and sentenced Via to an aggregate term of two years with the Department of Correction with credit for two days served and the remainder suspended to probation, plus seventy-five days of home detention and restitution of $2,195.65. The trial court denied Via's motion to correct error in which he argued the jury's verdicts of guilty on Count II but not guilty on Count III were impermissibly inconsistent. Via now appeals.

Discussion and Decision

I. Jury Instruction

A. Standard of Review

The standard of review applicable to the trial court's jury instructions is well settled.

> The manner of instructing a jury is left to the sound discretion of the trial court, and we review its decision thereon only for an abuse of that discretion. * * * Jury instructions are to be considered as a whole and in reference to each other. 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. Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights.

Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006) (citations omitted).

B. Reasonable Doubt Instruction

Via argues the trial court improperly instructed the jury regarding reasonable doubt and abused its discretion by not giving a tendered alternative instruction based upon the Indiana Pattern Jury Instructions. In Winegeart v. State, 665 N.E.2d 893 (Ind. 1996), our supreme court addressed the proper wording of jury instructions regarding

reasonable doubt. A majority of the court held that, in the exercise of its supervisory responsibility, it would "authorize and recommend" that Indiana trial courts give a reasonable doubt instruction proposed by the Federal Judicial Center. Id. at 902. The Instruction 8 given by the trial court in this case is materially identical to the instruction our supreme court recommended. See id. In addition, our supreme court subsequently considered and rejected a challenge similar to Via's. See Williams v. State, 724 N.E.2d 1093, 1094-96 (Ind. 2000) (holding the last sentence of the Winegeart reasonable doubt instruction did not undermine the defendant's presumption of innocence, because the first sentence of the instruction clearly stated that the State bore the burden of proof beyond a reasonable doubt and other instructions given explained in greater detail the State's burden of proof and the defendant's presumption of innocence). Because the trial court gave the instruction the supreme court recommended, and Via has shown no basis for distinguishing his challenge from the one rejected in Williams, we conclude the trial court did not abuse its discretion in instructing the jury regarding reasonable doubt.

II. Sufficiency of the Evidence

A. Standard of Review

Our standard of review for sufficiency of the evidence claims is well settled:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of

> innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnotes, and citations omitted) (emphasis in original). This same standard of review applies when, as here, the defendant argues insufficient evidence disproves his self-defense claim. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999).

B. Affirmative Defenses

Via claims the State presented insufficient evidence to disprove his affirmative defenses that he 1) acted in defense of persons; 2) acted in defense of property; or 3) used justifiable force to detain Mink and Hueston. As to defense of persons, "[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." Ind. Code § 35-41-3-2(a). As to defense of property, a person is justified in using reasonable force, including deadly force, against another person and does not have a duty to retreat "if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle." Ind. Code § 35-41-3-2(b). However, a person is not justified in using force if he or she enters into combat with another person or is the initial aggressor unless he or she "withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action." Ind. Code § 35-41-3-2(e)(3). As to the use of force to detain another person, a person other than a law enforcement officer "is justified in using reasonable force against another person to effect an arrest or prevent the other person's

escape if: (1) a felony has been committed; and (2) there is probable cause to believe the other person committed that felony." Ind. Code § 35-41-3-3(a).

Assuming for argument that Via "believed that he was protecting his property and daughter and young son" and "detaining persons whom he believed had engaged in serious criminal activity," Brief of Appellant at 30, the issue becomes whether Via's use of force was reasonable under the circumstances. See Ind. Code §§ 35-41-3-2(a); 35-41-3-2(b); 35-41-3-3(a) (all specifying the force used must be "reasonable"). The reasonableness of a defendant's use of force is a question of fact for the jury, Smith v. State, 403 N.E.2d 869, 875-76 (Ind. Ct. App. 1980), and on appeal we do not reweigh the evidence or reassess witnesses' credibility, see Sanders, 704 N.E.2d at 123. The evidence favorable to the judgment is that after Mink got into the S-10 and he and Hueston were attempting to leave Via's property, Via used his truck to block the S-10 and drove into its driver's side, pushing it ten to fifteen feet sideways. Because Mink and Hueston were attempting to leave, Via's use of force was not reasonably necessary to prevent them from imminently attacking Via or his family or to terminate their entry upon his property. Further, despite Via's claim he used force to detain Mink and Hueston until the police could arrive, the jury could reasonably have determined that the amount of force Via used was excessive because he hit the S-10 with sufficient force to move it ten to fifteen feet sideways. Therefore, we conclude the State presented sufficient evidence to disprove Via's affirmative defenses.

III. Motion to Correct Error

A. Standard of Review

We review a trial court's denial of a motion to correct error in a criminal case for an abuse of discretion. Gregor v. State, 646 N.E.2d 52, 53 (Ind. Ct. App. 1994). An abuse of discretion occurs "when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences which may be drawn therefrom" or its "decision . . . is without reason or is based upon impermissible reasons or considerations." Id.

B. Inconsistent Verdicts

Via filed a motion to correct error alleging the jury's verdicts of guilty on Count II but not guilty on Count III are impermissibly inconsistent. Jury verdicts warrant corrective action only when they are "extremely contradictory and irreconcilable." Powell v. State, 769 N.E.2d 1128, 1131 (Ind. 2002) (quotation omitted). Thus, verdicts are impermissibly inconsistent "only where they cannot be explained by weight and credibility assigned to the evidence." Baber v. State, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007), trans. denied. Ordinarily, an acquittal on one count will not result in reversal of a conviction on a similar or related count, because the former will generally have a factual or legal element not required for the latter. Neuhausel v. State, 530 N.E.2d 121, 123 n.2 (Ind. Ct. App. 1988). In such an instance, the jury will be presumed to have doubted the weight or credibility of the evidence supporting this distinguishing element. Id.

Count II alleged Via "did knowingly or intentionally confine Christopher Mink, without consent, and by use of a vehicle." Appellant's App. at 61. Count III alleged Via

"did knowingly or intentionally confine Conner Hueston, without consent, and by use of a vehicle." Id. at 60. Thus, the factual element distinguishing Counts II and III is the identity of the victim: Mink in Count II and Hueston in Count III. In addition, at least one piece of the evidence that Via knowingly and intentionally confined Mink – his kicking Mink's driver's side door and telling him to stay inside the S-10 – did not necessarily apply to Hueston because Hueston was in the other side of the vehicle and Via did not direct any words to him specifically. Thus, the jury reasonably could have credited the evidence supporting Count II while doubting the weight or credibility of the evidence supporting Count III. The jury's verdicts are not inconsistent, and as a result, the trial court did not abuse its discretion in denying Via's motion to correct error.

Conclusion

The trial court did not abuse its discretion in instructing the jury on reasonable doubt or in denying Via's motion to correct error, and the State presented sufficient evidence to disprove Via's affirmative defenses.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.