

Robert Legan appeals his conviction and sentence for Aggravated Battery,¹ a class B felony, Criminal Trespass,² a class A misdemeanor, and Public Intoxication,³ a class B misdemeanor. Legan presents the following restated issues for review:

1. Did the trial court err in instructing the jury?
2. Was the evidence sufficient to support the convictions for aggravated battery and public intoxication?
3. Was Legan's sentence inappropriate?

We affirm.

The facts favorable to the convictions are that Legan had been banned from the Peppy Grill restaurant in Indianapolis. Joseph Wilkins worked as a cook at Peppy Grill and on three occasions had been forced to tell Legan he was not allowed into the restaurant. At approximately 5:15 a.m. on November 2, 2006, Legan entered Peppy Grill and Wilkins again advised him he was not allowed in the restaurant. Legan exited the building and stood outside the door, but twice opened the door and yelled inside and asked why he was not allowed inside. When Legan repeated this behavior a third time, Wilkins called police. Officer Kelly Novak of the Indianapolis Police Department arrived at the restaurant a short time later and saw Legan standing nearby. She observed that Legan was angry and agitated, his speech was slurred, and he smelled of alcohol. Legan was argumentative and Officer Novak eventually arrested him on charges of trespassing and public intoxication.

The second incident occurred at Peppy Grill on December 16, 2006. At approximately 3:30 a.m. that day, Wilkins was working at Peppy Grill with waitress

1 Ind. Code Ann. § 34-42-2-1.5 (West, PREMISE through 2007 1st Regular Sess.).

2 Ind. Code Ann. § 35-43-2-2 (West, PREMISE through 2007 1st Regular Sess.).

Michelle Poynter. They saw Legan standing outside the restaurant pointing inside and talking. When Wilkins went near the window to prepare an order, Legan pounded heavily on the window. Wilkins went outside to ask why Legan was there. As Wilkins neared Legan and started to speak, Legan lunged at Wilkins, stabbing him with a knife in the right arm and hand, and in the abdomen. Wilkins reentered the restaurant and asked the people inside to call an ambulance.

Wilkins was transported to a local hospital, where he was examined and treated. Doctor Henry Bjerke cleaned and bandaged the wounds on Wilkins's right arm and hand. Dr. Bjerke probed the wound to Wilkins's abdomen and determined that Wilkins should be admitted to the hospital. A subsequent CAT scan revealed active bleeding in his abdominal cavity and wall, both caused by the stab wound, which penetrated the epigastric artery. An exploratory laparotomy was performed and Wilkins received several staples to close his wound. He remained hospitalized until December 18.

Legan was charged under two separate cause numbers. Under 49G05-0611-CM-211855, he was charged with trespass as a class A misdemeanor and public intoxication as a class B misdemeanor, based upon the November 2 incident. Under 49G05-0612-FB-242397, he was charged with aggravated battery as a class B felony, based upon the December 16 incident. The two causes were tried separately in consecutive trials. Legan was found guilty as charged in the first case following a bench trial. He was found guilty as charged in the second case after a jury trial. Following a hearing, the trial court sentenced Legan to concurrent seventy-day terms for the misdemeanor offenses, and to sixteen years

3 Ind. Code Ann. § 7.1-5-1-3 (West, PREMISE through 2007 1st Regular Sess.).

for the aggravated battery conviction.

1.

Legan contends the trial court erred in instructing the jury with respect to the instruction defining “serious bodily injury.” The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading it and to enable the jury to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140 (Ind. 2003), *cert. denied*, 540 U.S. 1150 (2004). Instruction of the jury is reviewed for an abuse of discretion. *Id.*

When the parties were discussing jury instructions after the close of evidence, Legan’s counsel objected to Final Instruction 21E, defining serious bodily injury as follows: “The term ‘serious bodily injury’ is defined by law as meaning bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of bodily member or organ.” *Appellant’s Appendix* at 107. We reproduce here the portion of the discussion that includes Legan’s objections to Final Instruction 21E:

[Defense]: The only objection I had, Judge, is I think there was one that, instruction regarding serious bodily injury.

THE COURT: And you are right, that was in there too because of the C felony. Do you care if I ...

[The State]: I do, and it’s necessary because a deadly weapon is defined as an object that can cause serious bodily injury.

[Defense]: Well, deadly weapon too is not part of the charging Information.

[The State]: Yeah, it is.

[Defense]: It's did inflict injury which caused a substantial risk –

[The State]: The charging Information itself, which they received a copy of, alleges the use of a deadly weapon, Judge.

THE COURT: The charging Information –

[Defense]: It's surplusage, then.

THE COURT: It ...

[Defense]: And not necessary, or not an element to [sic] the offense.

THE COURT: You want it in there?

[The State]: Yes, Judge.

THE COURT: Okay, I'm going to leave them in, I'm going to overrule the objections. I don't see that they can hurt anything.

[Defense]: Both of them?

THE COURT: Yes. Any other objections?

[Defense]: Other than that, none.

Transcript at 271-72.

The State initially contends that Legan argues against the instruction on appeal citing different grounds than were offered in the above colloquy at trial. After reviewing the above colloquy, we agree with Legan that he preserved the arguments he presents on appeal.

Turning to the substance of Legan's challenge, he contends the instruction should not have been given because it confused the jury. In support, he notes that he was charged with aggravated battery as a class B felony and that the elements of that offense in this case are that Legan (1) knowingly (2) inflicted injury (3) on Wilkins (4) that created a substantial risk of death. Final Instruction 21A correctly set out those elements. Why was Final

Instruction 21E given? In its preliminary instructions, the court read the charging information to the jury. The charging information read, in relevant part, “Robert Legan ... did knowingly inflict injury ... by means of a deadly weapon[.]” *Appellant’s Appendix* at 55. The court also read Final Instruction 21D to the jury, which defined “deadly weapon” in relevant part as follows: “Any weapon, device, taser, electronic stun weapon, equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, is readily capable of causing serious bodily injury.” *Id.* at 106. Thus, the jury was instructed that the charging information alleged Legan inflicted injury by means of a deadly weapon and, per Final Instruction 21D, that a “deadly weapon” is one capable of causing “serious bodily injury,” which phrase was, in turn, defined in Final Instruction 21E.

Although we share the trial court’s later-expressed view that Final Instruction 21E need not have been read, we conclude the instruction did not constitute error. Even assuming for the sake of argument, however, that the trial court erred in giving the instruction, reversal is not warranted. “An instruction error will result in reversal when the reviewing court ‘cannot say with complete confidence’ that a reasonable jury would have rendered a guilty verdict had the instruction not been given.” *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (quoting *White v. State*, 675 N.E.2d 345, 349 (Ind. Ct. App. 1996), *trans. denied*). Among other things, the evidence of guilt was overwhelming, assuming the jury believed the victim’s claim that Legan’s attack was unprovoked. *See id.* (“[e]rrors 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”). In the final analysis, the jury was faced with the decision whether to believe Legan’s claim that he acted in justifiable

self-defense, or Wilkins's claim that Legan was the aggressor and the attack was unprovoked. The instruction in question was not relevant to that assessment and determination.

2.

Legan contends the evidence was not sufficient to support the convictions for aggravated battery and public intoxication. When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review “respects ‘the [fact-finder]’s exclusive province to weigh conflicting evidence.’” *Id.* at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the verdict, we must affirm “‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Legan challenges the sufficiency of the evidence supporting his aggravated battery conviction with respect to only one element of that offense: that Wilkins faced a substantial risk of death. *See* I.C. § 35-42-2-1.5. The evidence showed that Wilkins received a stab wound to his abdomen that caused active bleeding in his abdominal cavity and wall. The stabbing penetrated Wilkins's epigastric artery. After an exploratory laparotomy was performed, Wilkins received several staples to close his wound. Doctor Bjerke testified that fifty percent of people with wounds like Wilkins suffered would die if not treated. This evidence was sufficient to prove that Wilkins faced a substantial risk of dying as a result of

his wounds.

Legan also challenges the sufficiency of the evidence supporting his public intoxication conviction. He contends that the evidence of intoxication consisted only of testimony that his speech was slightly slurred. Although other evidence showed that Legan's appearance was disheveled and he was argumentative, Legan contends there are alternate explanations for those facts other than intoxication. Although that may be the case, it is not within our province to reweigh the evidence. Moreover, Legan understates the evidence of intoxication.

Officer Novak did indeed testify that Legan's speech was slightly slurred, his clothes were disheveled and soiled, and he was "very argumentative[.]" *Transcript* at 25-26. She also testified, "there was definitely an odor of alcoholic beverage on his breath and person [.]" *Id.* at 26. Taken as a whole, Officer Novak's testimony was sufficient to prove Legan was intoxicated at the time in question.

3.

Legan contends his sixteen-year sentence for aggravated battery is inappropriate, citing two primary bases. First, he contends the sentence is inappropriate in view of his character. Second, he contends it is inappropriate in view of the nature of the offense he committed.

Beginning with the latter argument, we note that Legan's contentions on this point are premised upon his succeeding on Issue 1 above. That is, he contends that the sentence is inappropriate because inflicting "extreme pain" (as opposed to causing "substantial risk of death") does not merit incarceration in excess of the advisory sentence. We rejected the

predicate argument in Issue 1, and therefore reject an argument upon which that meritless contention is premised.

Legan's second argument is that the sentence is inappropriate in view of his character. In support of this contention Legan cites his mental health issues and the fact that his most recent conviction was more than eight years before the instant incidents.

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. The defendant bears the burden of persuading this court that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867 (Ind. Ct. App. 2007).

We note first that the attack upon Wilkins occurred when Legan returned to a place from which he had been banned and provoked a confrontation with the employees of the restaurant. During the previous incident, Legan had threatened to kill Wilkins. Before Legan returned to the restaurant, he armed himself with a sharp object and used it at the first opportunity when confronted outside by Wilkins. Legan walked away after stabbing Wilkins, although he returned a short time later. Legan's presentence investigation report reveals that he has a lengthy criminal history, consisting of at least ten felony and misdemeanor convictions. In view of the unprovoked and arguably premeditated nature of the attack, and in view of Legan's lengthy criminal history, we cannot say the sixteen-year

sentence is inappropriate.

Judgment affirmed.

KIRSCH, J. and BAILEY, J., concur