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IN THE
COURT OF APPEALS OF INDIANA

KENNETH McCLUNG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0912-CR-1275
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0904-FB-041593

JULY 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Kenneth McClung appeals his conviction of aggravated battery, a Class B felony. We affirm.

ISSUE

McClung raises one issue for our review, which we restate as: Whether the State presented sufficient evidence to show that the victim sustained a protracted loss or impairment to his right leg.

DISCUSSION AND DECISION

On March 22, 2009, eighteen-year-old Delmar Kelly was approached by McClung, and an argument soon ensued. McClung drew a handgun and held it within an inch of Kelly's head, then struck him in the face several times with the barrel of the gun. Kelly attempted to push McClung away, but McClung shot him in the left thigh and the right leg.

Kelly was taken to the hospital for treatment of the gunshot wounds. He remained in the hospital for a day and was on two pain medications for approximately two weeks. He could not walk for two weeks and was forced to undergo physical therapy. Kelly had been a talented running back on his high school football team with college scholarship potential. However, the gunshot wound to his right leg forced him to remain inactive for

several months and significantly decreased his level of play. Kelly was forced to change positions on the football team because he "couldn't take the pressure that was coming in on [his] legs." (Tr. at 54-55). Kelly's initial examination medical reports reveal that he incurred a "right foot drop," "paresthesias of the L5-S1 nerve root," and "anticipated nerve injury limiting strength." (State's Ex. 10; pp. 48-49, 70).

McClung was charged with and convicted of aggravated battery as a Class B felony. He received a sixteen-year sentence, with four years suspended.

DISCUSSION AND DECISION

McClung contends that the State failed to present sufficient evidence to support his conviction. Our standard of review for sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or assess the credibility of witnesses. *Davis v. State*, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003), *trans. denied.* We consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences drawn therefrom. *Id*. at 269-70. The conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the trier of fact. *Id*. at 270.

In order to convict a defendant of aggravated battery, the State must show that the defendant knowingly or intentionally inflicted an injury that caused the protracted loss or impairment of the function of a bodily member or organ. Ind. Code § 35-42-2-1.5. Although there is no statutory definition of "protracted," we have defined it to mean "to

draw out or lengthen in time; prolong." *Fleming v. State*, 833 N.E.2d 84, 89 (Ind. Ct. App. 2005). We have defined "impairment" to mean "[t]he fact or state of being damaged, weakened, or diminished." *Id.* Expert testimony is not required to prove "protracted impairment." *Mann v. State*, 895 N.E.2d 119, 122 (Ind. Ct. App. 2008).

McClung centers his argument on *Neville v. State*, 802 N.E.2d 516 (Ind. Ct. App. 2004), *trans. denied*. In *Neville*, the State alleged that the victim was shot in the leg, hospitalized for three days, experienced pain, and was discharged from the hospital on crutches. 802 N.E.2d at 519. The medical records were silent as to the severity of the injury or the possibility of a protracted loss of impairment of the function of the victim's leg. *Id.* The victim did not testify, "so the jury did not hear evidence from the victim as to how long he used his crutches, wore his brace, experienced pain, or otherwise suffered loss or impairment of the function of his leg." *Id.*

Here, however, Kelly testified regarding the extent and effect of his injuries and demonstrated that the gunshot wound to his right leg diminished the overall use and strength of that leg. Kelly also testified that he could not walk for two weeks after the shooting. Kelly further testified that he was forced to attend physical therapy for at least five months and could not participate in athletics for several months. Kelly specifically testified that he could no longer play running back because he "couldn't take the pressure that was coming on [his] legs." (Tr. 55). Kelly's testimony was sufficient to show impairment, and this case is therefore distinguishable from *Neville*.

Affirmed.

NAJAM, J., and BAILEY, J., concur.