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IN THE
COURT OF APPEALS OF INDIANA

TAIWO K. BAKER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1104-CR-164
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-1006-FB-11

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Taiwo K. Baker, Jr., ("Baker") was convicted of Aggravated Battery, as a Class B felony[1], and Public Intoxication, as a Class B misdemeanor.[2] He now appeals his conviction for Aggravated Battery.

We affirm.

Issues

Baker raises several issues for our review, which we restate as:

I. Whether the trial court abused its discretion when it admitted evidence related to pain and impairment of bodily members or organs;

II. Whether the trial court abused its discretion when it refused Baker's tendered instructions defining certain statutory terms; and

III. Whether the trial court abused its discretion when it permitted testimony from a police officer regarding whether Baker was the initial aggressor where Baker had asserted the affirmative defense of self defense.

Facts and Procedural History[3]

In the early morning hours of June 16, 2010, Baker, his mother, Clyddie Baker ("Clyddie"), and Harvey Wheeler ("Wheeler") were at Wheeler's sister's apartment in Elkhart. Baker and Wheeler had each been drinking at a get-together at the home. Around 3:58 a.m., Wheeler heard an argument coming from an area downstairs from his sister's apartment, and went to see what was happening.

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[1] Ind. Code § 35-42-2-1.5.

[2] I.C. § 7.1-5-1-3.

[3] We note that Baker's Appendix lacks a copy of the Chronological Case Summary as required by Appellate Rule 50(B). We remind counsel to include such documents in the future.

When he arrived downstairs, Wheeler found Baker and Clyddie outside, arguing about whether Baker could take the keys for Clyddie's car and leave the gathering. Believing he had seen Baker lunge at Clyddie, Wheeler attempted to interpose himself between the two and in the process shoved Baker hard enough to force him into bushes next to the home.

Clyddie began to walk back up to the apartment. Baker emerged from the bushes and smashed a bottle against the left side of Wheeler's head. Wheeler stumbled up the stairs, where he was given a towel to hold against his head to staunch profuse bleeding from a large cut around his left ear. Clyddie saw the severity of Wheeler's injury and, fearing an ambulance would take too long to arrive, put Wheeler in her car and began to drive him to a hospital.

In the meantime, someone had already called 911 to report the fight and Wheeler's injury. Two Elkhart police officers, Corporal Jason Reed ("Corporal Reed") and Sergeant Karl Miller ("Sergeant Miller"), intercepted Clyddie's car, alerted an ambulance, and arranged for Wheeler to be transported to Elkhart General Hospital for treatment. Wheeler was bleeding profusely, and police observed that his left ear was mostly detached from his head, with a long C-shaped cut around the ear and a smaller cut just above the ear. Upon seeing the severity of his injuries, Wheeler provided officers a description of Baker and indicated that it was Baker who had struck him with a bottle.

After leaving the intersection at which he intercepted Clyddie's car, Sergeant Miller headed toward Wheeler's sister's house to investigate the scene when he saw an individual matching the description of Baker that Wheeler had provided stumbling and crossing the

street. Sergeant Miller stopped the individual, whom he identified as Baker, and placed him under arrest.

Wheeler was treated at the hospital by Dr. Matthew Michalski ("Dr. Michalski"). Dr. Michalski stitched four separate cuts on Wheeler's head, including numerous internal sutures to seal up arterial bleeding in the cut around Wheeler's ear. Wheeler was left with a thirteen centimeter-long scar around his left ear, a scar that removed half of his left eyebrow, and two smaller scars. At least two glass fragments were left in Wheeler's face because of their nearness to arteries and nerves. Despite Dr. Michalski's efforts to preserve Wheeler's underlying facial structures, individuals who have known Wheeler for a long time have noticed that the left side of his face sags. Wheeler's left ear was cut so deeply that Dr. Michalski was required to apply sutures to rejoin part of Wheeler's auditory canal, and Wheeler's hearing in his left ear remained muffled afterward. The cuts were also deep enough to damage Wheeler's left parotid gland[4] and some of the facial nerves, leaving him with numb spots and difficulty eating.

On June 16, 2010, Baker was charged with Aggravated Battery, citing specifically Indiana Code section 35-42-2-1.5(1),[5] and Public Intoxication. On December 17, 2010, after the omnibus date, the State moved to amend the charging information to include a second

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[4] The parotid gland is located in the cheek and is involved in the production of saliva.

[5] Subsection (1) provides for prosecution for Aggravated Battery resulting in "serious permanent disfigurement."

count of Aggravated Battery under section 35-42-2-1.5(2).[6] Baker objected, and the State ultimately withdrew its motion to amend.

On December 21, 2010, Baker filed several motions in limine seeking pre-trial rulings on the admissibility at trial of evidence regarding pain and impairment of Wheeler's hearing and other body parts. Baker's motions were based upon the charging information, which limited the allegation of Aggravated Battery to subsection (1) of the statute, Aggravated Battery resulting in "serious permanent disfigurement." The trial court granted portions of the motion, but largely denied the motions.

Also on December 21, 2010, voir dire was conducted, but only a partial panel was obtained. The trial was thus continued to January 19, 2011, on which jury selection was completed and trial commenced. The jury trial was conducted from January 19 to January 21, 2011. During the trial, Baker objected on numerous occasions to evidence that fell within the scope of the matters contested in his motions in limine. At the trial's conclusion, the jury found Baker guilty of both charges.

On March 17, 2011, a sentencing hearing was conducted, at the conclusion of which the trial court sentenced Baker to twenty years imprisonment for Aggravated Battery, with five years suspended to probation, and 180 days imprisonment for Public Intoxication, to be served concurrent with the term for Aggravated Battery.

This appeal followed.

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[6] Subsection (2) provides for prosecution for Aggravated Battery resulting in "protracted loss or impairment of the function of a bodily member or organ."

Discussion and Decision

Standards of Review

Baker raises issues with respect to the trial court's decisions on the admissibility of evidence and propriety of jury instructions. We review such decisions for an abuse of discretion, which occurs when a trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2007) (articulating the standard of review for the admission of evidence); Randolph v. State, 802 N.E.2d 1008, 1011 (Ind. Ct. App. 2004), trans. denied. Even where a trial court's decision constitutes an abuse of discretion, we nonetheless do not reverse a judgment where that error is harmless, that is, where the error "is sufficiently minor so as not to affect a party's substantial rights." Appleton v. State, 740 N.E.2d 122, 124 (Ind. 2001) (articulating the standard with respect to the admission of evidence); Randolph, 802 N.E.2d at 1011 (applying harmless error analysis to jury instructions).

Evidence with Respect to Pain and Impairment of Bodily Members or Organs

The first issue Baker raises in his appeal is whether the trial court abused its discretion when it admitted into evidence testimony with respect to the extent of the pain and impairment to bodily members Wheeler experienced as a result of Baker's battery upon him. Baker contends that much of this evidence was irrelevant under Evidence Rule 401 and overly prejudicial under Evidence Rule 403.

Only evidence that is relevant is admissible at trial; evidence that is not relevant is not admissible. Ind. Evidence Rule 402. Relevant evidence is that evidence which has "any

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Evid. R. 403. We afford trial courts "wide latitude in weighing the probative value of evidence against the potentially prejudicial effects of its admission." Julian v. State, 811 N.E.2d 392, 399 (Ind. Ct. App. 2004), trans. denied.

Here, Baker argues that the trial court improperly admitted testimony related to the extent of Wheeler's pain and the impairment of Wheeler's bodily members or organs because the offense as charged did not allege either of these, making such evidence irrelevant and substantially more prejudicial than probative. The Indiana Code sets forth the elements of Aggravated Battery:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:
>
> (1) serious permanent disfigurement;
>
> (2) protracted loss or impairment of the function of a bodily member or organ; or
>
> (3) the loss of a fetus;
>
> commits aggravated battery, a Class B felony.

I.C. § 35-42-2-1.5. The State's charging information alleged that Baker "did knowingly inflict injury upon a person, to wit: one Harvey Wheeler, that caused serious permanent

disfigurement; all of which is contrary to the form of I.C. § 35-42-2-1.5(1)." (Appellant's App. 107.)

Thus, the charging information lacked mention of subsection (2) of the statute, providing for Aggravated Battery where the conduct causes "protracted loss or impairment of the function of a bodily member or organ." I.C. § 35-42-2-1.5(2). Baker draws our attention to numerous rulings by the trial court overruling his objections to the State's questions regarding, inter alia, the amount of blood Wheeler lost, how Wheeler would characterize his pain on a one-to-ten scale, and the effect of the injuries Wheeler suffered upon his parotid gland and hearing. At trial, Baker argued that such questions sought to elicit irrelevant evidence that, even if relevant, was substantially more prejudicial than probative because they pertained to provisions of the Aggravated Battery statute which the State did not charge. He repeats that argument now.

As to relevance under Rule 401, the extent of Wheeler's injuries are directly relevant to the statutory offense charged, which may be proved by, among other results, serious permanent disfigurement or protracted loss or impairment of a bodily member or organ. Moreover, Baker does not argue that the charging information suffers from a fatal defect such that the State deprived him of an adequate advisement of the nature of the charges against him. We also cannot agree with Baker that this evidence was unduly prejudicial under Rule 403, because Baker identifies no other form of prejudice absent his claim that the evidence was irrelevant. Moreover, even if this evidence was erroneously admitted, it was harmless, as the State adduced sufficient evidence in the form of photographs and Wheeler's

testimony and presence before the jury such that Baker's substantive rights were not affected.

Thus, we cannot conclude that the absence of a specific statement in the charging information setting forth an allegation that Baker's actions resulted in protracted loss or impairment under subsection 35-42-2-1.5(2) thereby rendered evidence as to Wheeler's pain and impairment irrelevant or substantially more prejudicial than probative.

Baker's Tendered Jury Instructions

Baker's next issue upon appeal contends that the trial court abused its discretion when it refused to issue his proposed final instructions to the jury regarding the definition of the terms "permanent" and "disfigure" as they applied to the phrase "serious permanent disfigurement" in Indiana Code section 35-42-2-1.5. Concluding that the definition would be confusing and misleading to the jury, the trial court refused to issue Baker's proffered instructions. Baker now contends that this was an abuse of discretion.[7]

Where a trial court refuses to give a tendered jury instruction, we consider 1) whether the instruction correctly states the law; 2) whether there is evidence in the record to support giving the instruction; and 3) whether the substance of the tendered instruction is covered by other instructions. Barton v. State, 936 N.E.2d 842, 845 (Ind. Ct. App. 2010), trans. denied.

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[7] The State contends that Baker has waived this issue for our review because he did not incorporate the jury instructions into his brief as required in Appellate Rule 46(A)(8)(e) (requiring that "[w]hen error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto"). Baker tendered the proposed instructions to the court, the State's objection is fully articulated in the trial transcript, and Baker's proposed instructions are reproduced in full in his Appendix. Moreover, in his reply brief, Baker sets forth the proposed instructions and the State's objections at trial. Thus, while failure to comply with Rule 46(A)(8)(e) ordinarily waives the issue for review, Estate of Dyer v. Doyle, 870 N.E.2d 573, 581 (Ind. Ct. App. 2007), trans. denied, under the circumstances we nevertheless proceed with our review.

"The instructions must be a complete, accurate statement of the law which will not confuse or mislead the jury." Schmidt v. State, 816 N.E.2d 925, 930-31 (Ind. Ct. App. 2004), trans. denied. " '[W]here terms are in general use and can be understood by a person of ordinary intelligence, they need not be defined.'" Roche v. State, 690 N.E.2d 1115, 1128 (Ind. 1997) (quoting McNary v. State, 428 N.E.2d 1248, 1252 (Ind. 1981)).

The parties agree that there is no statutory definition for either "permanent" or "disfigure" as those terms are used in the Aggravated Battery statute. Baker proffered instructions that defined "permanent" and "disfigure" using the dictionary definitions this court cited in James v. State, 755 N.E.2d 226 (Ind. Ct. App. 2001), trans. denied. In James, the defendant appealed his conviction of Aggravated Battery based on the sufficiency of the evidence presented at trial. Id. at 229. James argued that the police officer he battered did not suffer "permanent disfigurement" within the scope of the statute when James knocked out one tooth and damaged several others, one of which was later removed and several others of which were filed down. Id. at 230.

Applying our standards for statutory interpretation, we consulted a dictionary and observed:

> The word "permanent" is defined in relevant part as: "continuing or enduring without fundamental or marked change." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1683 (1993). The word "disfigure" is defined in part as: "to make less complete, perfect or beautiful in appearance or character: deface, deform, mar." Id. at 649.

Id. We therefore concluded that "the legislature intended to protect against continuing or enduring injuries that mar or deface the appearance or physical characteristics of a person,"

id., and that the State had adduced sufficient evidence to meet its burden of proof as to James's offense. Id. at 230-31.

We take no issue with the reasoning or holding of the James case. However, the standards we apply for determining legislative intent are not the same as the standards we apply for reviewing a trial court's rejection of a proposed jury instruction. The concern of the trial court—and this court on review—is to ensure that a jury is properly instructed on the law without imposing undue confusion upon jurors. "Permanent" and "disfigure" are terms in wide and common use and go without definition in our statutes or, as the State notes, in the pattern jury instructions. Moreover, while the trial court did not instruct the jury on the definitions cited in James, the State recited these definitions to the jury during its closing argument. **(Tr. 904-905.)** And while closing argument is not a replacement for jury instruction, we nevertheless observe that the jury was ultimately provided with the definitions for "permanent" and "disfigure."

Because the terms of Indiana Code section 35-42-2-1.5(1) are not so far removed from the common understanding as to require specific instructions to the jury on their meaning, we cannot conclude that the trial court abused its discretion in rejecting Baker's instruction.

Testimony Regarding Baker as Initial Aggressor

Finally, Baker contends that the trial court abused its discretion when it allowed the State to adduce testimony from Corporal Reed regarding the results of his investigation, which led him to conclude that Baker was the initial aggressor in the altercation with Wheeler. The State argues that Corporal Reed's testimony in this instance was proper

impeachment of Clyddie's earlier testimony, and even if admitted erroneously, that error was in any event harmless.

Baker contends that Corporal Reed's testimony was an evidentiary harpoon. "An 'evidentiary harpoon' occurs when the prosecution injects inadmissible evidence before the jury for the deliberate purpose of prejudicing the jury against the defendant and his defense." Roberts v. State, 712 N.E.2d 23, 35 (Ind. Ct. App. 1999), trans. denied. To obtain a reversal for an evidentiary harpoon, the defendant must show that the prosecution 1) acted deliberately to prejudice the jury, and 2) the evidence used for that purpose was inadmissible. Jewell v. State, 672 N.E.2d 417, 424 (Ind. Ct. App. 1996), trans. denied. The defendant need not establish that he would not have been found guilty but for the evidentiary harpoon—only that "he was placed in a position of grave peril to which he should not have been subjected." Id.

During her testimony, Clyddie testified that Wheeler's pushing of Baker was "out of the blue" (Tr. 720) and that she did not recall any argument between herself and Baker, let alone that Wheeler may have intervened to break up any argument. Corporal Reed testified that he had interviewed Clyddie at Elkhart General Hospital. The State asked Corporal Reed whether Clyddie had told him that Wheeler began the altercation, and whether his investigation allowed him to conclude whether it was Baker or Wheeler who was the "primary aggressor." (Tr. 797)

Baker objected, first contending that the State sought to improperly introduce hearsay testimony regarding Clyddie's statements to Corporal Reed, and further arguing that Corporal

Reed "can't make a determination of fact on something that he wasn't even there to see." (Tr. 798.) The State responded that it sought to impeach Clyddie's testimony based upon her statements to Corporal Reed at the hospital, and argued that because Baker had asked questions directed toward establishing self-defense as an affirmative defense, Corporal Reed's conclusion on that point was relevant.

Over Baker's objection, the trial court ruled as admissible for purposes of impeachment Corporal Reed's testimony that Clyddie did not tell him that Wheeler was the initial aggressor. Immediately before allowing Corporal Reed to answer, the trial court admonished the jury that the purpose of the State's question and Corporal Reed's answer was to impeach Clyddie's credibility, and not to provide probative evidence on the fight between Baker and Wheeler. The trial court also ruled as admissible Corporal Reed's statement that, "[g]iven the information I received, it sounded as if Mr. Baker was the aggressor." (Tr. 800.)

We cannot conclude that this testimony constitutes an evidentiary harpoon, because, even assuming Corporal Reed's testimony was inadmissible, we cannot conclude that the testimony was so prejudicial as to put Baker in grave peril. At trial, Baker invoked self defense as an affirmative defense to the Aggravated Battery charge; the jury was instructed on self defense, and the State and Baker each adduced evidence with respect to that defense. Our statutes provide for self defense as an affirmative defense, stating that "[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," but must be "justified in using deadly force" and need not retreat if the person "reasonably

believes that force is necessary to prevent serious bodily injury." I.C. § 35-41-3-2(a). Use of force is not justified where "the person … is the initial aggressor" unless he withdraws and communicates his intent to do so, and the other person "continues or threatens to continue unlawful action." I.C. § 35-41-3-2(e)(3). The force used "must be proportionate to the urgency of the situation," and the right to self defense is extinguished where greater force than is proportionate is used. Hollowell v. State, 707 N.E.2d 1015, 1021 (Ind. Ct. App. 1999) (holding that "being struck in the mouth" was not so life threatening as to justify "self-defense with a knife").

Here, there is an evidentiary dispute with respect to whether Baker was the initial aggressor: Clyddie testified that the push came from "out of the blue" (Tr. 720), while Corporal Reed testified that Clyddie did not tell him that and that his investigation led him to conclude that Baker was the initial aggressor. Assuming for the sake of argument that Baker was not the initial aggressor, however, we observe that Baker fell into the bushes when Wheeler pushed him and that there is no evidence that Wheeler threatened or took any further action toward Baker. Baker, however, responded to Wheeler by striking him on the side of the head with a glass bottle, alternately described as either a forty-ounce beer bottle or a fifth of vodka.

Thus, whoever the initial aggressor may have been, there was ample evidence from which the jury could conclude that Baker did not act in self defense because of Baker's escalation of force beyond that which was proportionate to the situation. We therefore cannot conclude that Corporal Reed's answers to the State's question, whether admissible or

not and whether introduced for the purpose of prejudicing Baker's defense, placed Baker in grave peril amounting to reversible error.

Conclusion

The trial court did not abuse its discretion when it admitted evidence of Wheeler's pain and impairment to bodily members or organs. The trial court did not improperly refuse Baker's proffered instructions that offered definitions of statutory terms. Finally, the State did not introduce an evidentiary harpoon in the form of Corporal Reed's testimony on whether Baker was the initial aggressor.

Affirmed.

BAKER, J., and DARDEN, J., concur.