MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Aaron James Kearney,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

April 26, 2021

Court of Appeals Case No. 20A-CR-2117

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause No. 45G01-1810-F6-1216

Robb, Judge.

Case Summary and Issues

[1] Following a jury trial, Aaron James Kearney was convicted of pointing a firearm, a Level 6 felony, and intimidation, a Class A misdemeanor. The trial court sentenced Kearney to serve an aggregate of two years in community corrections. Kearney appeals and raises two issues for our review: (1) whether there is sufficient evidence to support his intimidation conviction; and (2) whether the trial court abused its discretion by failing to instruct the jury on the defense of property. Concluding there is sufficient evidence to support his conviction, and the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

[2] On October 8, 2018, Kearney was visiting his mother, Lugrash Taylor, at her apartment in Merrillville, Indiana. Kearney's sister, Tailhesia Crayton, was also visiting. At some point that day, Donald White, a tow truck driver, was dispatched to relocate a silver four door Acura, later determined to be Kearney's vehicle, at the apartment complex. Dispatch provided White with the vehicle description and license plate number. White drove his tow truck to the apartment complex, located the vehicle, and began loading the vehicle onto the bed of the tow truck. Taylor and Crayton saw the tow truck, approached White, and asked if he was towing the vehicle. White confirmed he was towing the vehicle. The women asked if they could gather some belongings from the vehicle, which White allowed. White then loaded the vehicle onto his truck.

As he began to secure the vehicle, Taylor had a "panic [sic] look on her face and [told White to] 'Go. Just go.'" Transcript, Volume 2 at 181.

[3] White then saw Kearney running toward him and shouting, "Put the car down." *Id.* at 181-82. White then got into his truck because Kearney "seemed rather angry and [White] didn't . . . want to be outside the truck." *Id.* at 182. Before White could lock the doors, Kearney opened up the passenger door of the truck. Kearney had a revolver that he was "twisting . . . back and forth" and pointing in the "general direction [of White's] face." *Id.* at 183-84. Kearney demanded that White set his car down and stated, "I'll kill you, motherf*****[.]" *Id.* at 183. White believed it "could have been the last 25 seconds of [his] life." *Id.* at 185.

[4] At some point, Taylor and Crayton told Kearney that "he can't be doing this." *Id.* at 186. Around the same time, White got out of the truck, unchained the vehicle, got his dog, locked the door, and ran around the corner of the apartment complex seeking safety. He called dispatch, which then contacted 911. Crayton also called 911 because she "felt that a professional needed to come to . . . aid the situation." *Id.* at 216.

[5] Mario Ruff, who lived in a townhome across the street from the complex, witnessed the incident. He observed the tow truck driver load the vehicle on the truck when he "heard a guy [later identified as Kearney] come out yelling, telling the tow truck driver to get the f***** car off of his truck." Tr., Vol. 3 at 14. Ruff then observed Kearney with a gun. He watched the tow truck driver

get into the truck, and Kearney open the door and wave his gun at the driver. He also heard Kearney state that he was going to kill everybody. Ruff called 911.

[6] Corporal Jason Besse of the Merrillville Police Department was dispatched to the scene. When he arrived, he handcuffed Kearney. Taylor and Crayton advised Corporal Besse that Kearney was no longer armed. They stated that the gun was in their vehicle. Officer Besse located the gun in the vehicle, secured it, and gave it to another officer to be placed into evidence.

[7] On October 9, the State charged Kearney with pointing a firearm, a Level 6 felony, and intimidation, a Class A misdemeanor. After the presentation of evidence at his jury trial, Kearney tendered a proposed jury instruction on the use of force to protect property, which stated:

> It is an issue whether the Accused acted in defense of his/her property.
>
> A person may use reasonable force, but not deadly force, against another person if he reasonably believes that the force is necessary to immediately prevent or terminate the other person's criminal interference with property lawfully in Accused's possession.

Appendix of the Appellant, Volume Two at 90. The trial court declined to give the instruction. Specifically, the trial court explained, in part,

> [W]e don't know what the defendant was thinking [so] we don't know what [his] mental state is [when he threatened White.] So

> without the defendant saying what he's thinking, I don't know how this instruction can be given, based on the information that's been presented. There's very little information on what the defendant . . . was thinking. [W]hat we have before the jury are just a lot of acts on behalf of the defendant and a few words about threats, but we don't really know what he was thinking. [S]o where we are right now is a point where this instruction would be not be proper.

Tr., Vol. 3 at 126-27. In response, Kearney argued that his statement demanding that White take his vehicle down was sufficient evidence to show his state of mind, i.e., that he believed he needed to defend his property. *See id*. at 129. The trial court disagreed and denied the proposed instruction.

[8] Ultimately, the jury found Kearney guilty as charged and the trial court sentenced him to an aggregate of two years in community corrections. Kearney now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

[9] Kearney challenges the sufficiency of the evidence supporting his intimidation conviction. Specifically, Kearney contends that White, the tow truck driver, was not engaged in a prior lawful act for which retaliation was directed. *See* Appellant's Brief at 12-13. We disagree.

A. Standard of Review

[10] When reviewing the sufficiency of the evidence required to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Instead, we consider only the evidence supporting the verdict and any reasonable inferences that can be drawn therefrom. *Morris v. State*, 114 N.E.3d 531, 535 (Ind. Ct. App. 2018), *trans. denied*. We consider conflicting evidence most favorably to the verdict. *Silvers v. State*, 114 N.E.3d 931, 936 (Ind. Ct. App. 2018). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). The evidence need not overcome every reasonable hypothesis of innocence; it is sufficient if an inference may reasonably be drawn from the evidence to support the verdict. *Silvers*, 114 N.E.3d at 936.

B. Intimidation

[11] The State bears the burden of proving all elements of the charged crime beyond a reasonable doubt. *Taylor v. State*, 587 N.E.2d 1293, 1301 (Ind. 1992); Ind. Code § 35-41-4-1(a) ("A person may be convicted of an offense only if his guilt is proved beyond a reasonable doubt."). "A person who communicates a threat with the intent . . . that another person be placed in fear of retaliation for a prior lawful act . . . commits intimidation, a Class A misdemeanor." Ind. Code § 35-45-2-1(a)(2). Therefore, to convict Kearney of intimidation, the State had to

prove that Kearney (1) communicated a threat; (2) with the intent that White be placed in fear of retaliation; (3) for White's prior lawful act.

[12] Kearney does not dispute that he communicated a threat with the intent to place White in fear of retaliation. Instead, he claims that the State failed to prove White was engaged in a prior lawful act: that White was not performing a lawful act, i.e., White's conduct was illegal, and White had not engaged in a prior act, i.e., it was a contemporaneous act as White had not completed the towing of Kearney's vehicle. *See* Appellant's Br. at 11-15.

[13] When determining the proper interpretation of a statute, we utilize the well-established rules of statutory construction. *Casey v. State*, 676 N.E.2d 1069, 1072 (Ind. Ct. App. 1997). Our foremost duty is to determine and give effect to the true intent of the legislature. *Ind. Dep't of Human Servs. v. Firth*, 590 N.E.2d 154, 157 (Ind. Ct. App. 1992), *trans. denied*. We presume that all of the words appearing in the statute were intended to have meaning and absent a clearly manifested purpose to the contrary, we give the statutory language its plain and ordinary definition. *Casey*, 676 N.E.2d at 1072. As a panel of this court previously explained,

> Black's Law Dictionary . . . defines "lawful" as: "Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law; not illegal." "Retaliation" is defined as "to repay in kind; to return for like; to get revenge." Webster's Collegiate Dictionary 999 (10th ed. 1993). Construing these words together, it is apparent that the legislature intended to require the State to prove that the victim had engaged in a prior act, which was not contrary to the

> law, and that the defendant intended to repay the victim for the prior lawful act. . . . Therefore, mere proof that the victim is engaged in an act which is not illegal at the time the threat is made is not sufficient. Rather, the State must establish that the legal act occurred prior to the threat and that the defendant intended to place the victim in fear of retaliation for that act.

Id.

[14] Kearney claims White was engaged in an unlawful act because the State failed to prove that the towing company and property owner complied with Indiana Code section 9-22-1-15, which outlines the requisite procedures to tow an abandoned vehicle. Indiana Code section 9-22-1-15(a) provides that a person who locates a vehicle believed to be abandoned on private property the person owns or controls may arrange for the removal of the vehicle by complying with subsection (b). Subsection (b) requires that the person attach in a prominent place on the vehicle a notice tag with certain information, such as the date and time; that the vehicle will be removed after twenty-four hours; and the name, address, and telephone number of the person who owns or controls the private property. Ind. Code § 9-22-1-15(b). Kearney argues that there is no evidence of compliance with subsection (b) of the towing statute and therefore, Kearney's threat to White could not be retaliation for a "lawful" act – negating an element of the crime. However, we agree with the State's interpretation of the statute, namely that it was "intended only to provide a procedure by which property owners could be shielded from civil liability to a vehicle's owner for any damages caused by removing a vehicle from private or public property." Brief of Appellee at 13. Indiana Code section 9-22-1-32 provides that certain

individuals or entities are not liable for loss or damage to a vehicle occurring during removal under the chapter, including a person who owns property from which an abandoned vehicle is removed as well as a towing service. Furthermore, the statute does not render a property owner's failure to comply with the statutory provisions a crime such that White's removal of the vehicle was illegal. *See generally* Ind. Code ch. 9-22-1. And Kearney does not claim White was stealing his vehicle. There is no evidence White was engaged in unlawful conduct. Kearney's argument to this point fails.

[15] Next, Kearney claims the evidence is insufficient to support his conviction because White had not engaged in a *prior* lawful act at the time he threatened White. Specifically, his position is that because White had not completed towing the vehicle when Kearney threatened him, it was a contemporaneous act as opposed to a *prior* act. We are unpersuaded by this argument.

[16] "[A] conviction under the intimidation statute should not depend upon a precise parsing of the threatening language used by a defendant or a detailed timeline of when a threat was issued in relation to a prior lawful act." *Chastain v. State*, 58 N.E.3d 235, 241 (Ind. Ct. App. 2016), *trans. denied*. Instead, the defendant must engage in a prior lawful act and there must be a clear nexus between that act and the defendant's threat. *Id.*; *see also Casey*, 676 N.E.2d at 1073 (reversing the defendant's intimidation conviction because the evidence failed to "demonstrate his reasons for threatening [the victim] or indicate that he was doing so because of any specific prior act"). In this case, the evidence shows that White had attached chains to Kearney's vehicle and loaded it onto

the bed of his truck before Kearney threatened him. Although White may not have driven away with the vehicle when Kearney threatened him, this does not affect the outcome as there is a clear nexus between the threats and prior lawful act. The evidence clearly establishes that Kearney threatened White because White was towing his vehicle. In sum, there is sufficient evidence supporting Kearney's conviction for intimidation.

II. Jury Instructions

[17] Kearney also argues the trial court erred by failing to instruct the jury on the defense of property. We disagree.

A. Standard of Review

[18] The trial court has broad discretion in instructing the jury, and as a result, we review the trial court's decision to give or refuse a party's tendered instruction for an abuse of discretion. *New v. State*, 135 N.E.3d 619, 622 (Ind. Ct. App. 2019). In reviewing a challenge to jury instructions, this court considers three factors: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions. *Schmid v. State*, 804 N.E.2d 174, 182 (Ind. Ct. App. 2004), *trans. denied*. We consider jury instructions as a whole, not individually. *Id.* And we will reverse a conviction only if the appellant demonstrates that the instruction error prejudices his substantial rights. *Treadway v. State*, 924 N.E.2d 621, 636 (Ind. Ct. App. 2010).

B. Defense of Property

[19] A criminal defendant is entitled to have a jury instruction on "any theory or defense which has some foundation in the evidence." *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). This rule is applicable even if the evidence "is weak and inconsistent so long as the evidence presented at trial has some probative value to support it." *Id.* However, an error in failing to give an instruction to the jury does not necessarily warrant reversal. *Smith v. State*, 777 N.E.2d 32, 37 (Ind. Ct. App. 2002), *trans. denied*. In determining whether the refusal warrants reversal, we must assess whether the defendant was prejudiced by the court's failure to give the instruction. *Id.*

[20] Indiana Code section 35-41-3-2(e) provides:

> With respect to property other than a dwelling, curtilage, or an occupied motor vehicle, a person is justified in using reasonable force against any other person if the person reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect.

However, a person may only use deadly force "if the person reasonably believes that that force is necessary *to prevent serious bodily injury to the person*[.]" Ind. Code § 35-41-3-2(c), (e) (2013) (emphasis added). "Deadly force" is defined as "force that creates a substantial risk of serious bodily injury." Ind. Code § 35-31.5-2-85.

[21] Kearney argues that his proposed defense of property instruction should have been given because although deadly force is not justified to defend property, he did not use deadly force but only threatened it. This court has held that pointing a loaded firearm constitutes use of "deadly force" as referred to in the defense of property statute. *Nantz v. State*, 740 N.E.2d 1276, 1280-81 (Ind. Ct. App. 2001) (rejecting the defendant's argument that he threatened deadly force rather than used deadly force when he pointed a loaded firearm at a victim's head), *trans. denied.* Here, the evidence clearly establishes Kearney did in fact use "deadly force" when he pointed a gun at White. And, as outlined above, the defense of property does not justify use of deadly force. Therefore, there is no evidence in the record to support the giving of Kearney's proposed instruction.

[22] In addition, the trial court declined to give this instruction because there was no evidence to show Kearney's mental state, namely that he "believe[d] that the force [was] necessary to immediately prevent or terminate [White's] trespass on or criminal interference with property lawfully in [his] possession[.]" Ind. Code § 35-41-3-2(e). The record shows Kearney demanded that White take his vehicle down and threatened to kill him; however, there is no evidence revealing that Kearney felt it was necessary to use force to protect his property at the time. *See id.* And we agree with the trial court that the statements are insufficient evidence to show his state of mind. Therefore, the evidence in the record cannot support the giving of Kearney's proposed instruction of the

defense of property, *Schmid*, 804 N.E.2d at 182, and the trial court did not err in refusing to give the instruction.

Conclusion

[23] For the reasons set forth above, we conclude there is sufficient evidence to support Kearney's conviction for intimidation, and the trial court did not abuse its discretion by failing to instruct the jury on the defense of property. Accordingly, we affirm.

[24] Affirmed.

Bailey, J., and May, J., concur.