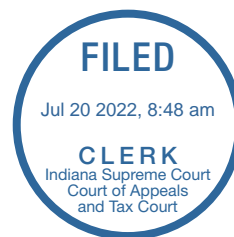


## MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Jessie Cherry,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

July 20, 2022

Court of Appeals Case No.  
22A-CR-172

Appeal from the Marion Superior  
Court

The Honorable Jennifer P.  
Harrison, Judge

Trial Court Cause No.  
49D20-2102-F3-3378

### **Mathias, Judge.**

- [1] Jessie Cherry was convicted in Marion Superior Court of Level 3 felony aggravated battery. He appeals his conviction and argues that the State failed to

rebut his claim of self-defense and that the evidence is insufficient to support his conviction.

## **Facts and Procedural History**

[2] On January 25, 2021, James Ward was fixing the back door of his mother's house on 10<sup>th</sup> Street in Indianapolis. The back door opened to an alley adjacent to a park. While Ward was working on the door, his friends drove their vehicle down the alley and stopped to speak with him. During their conversation, Ward observed a green truck in the alley traveling toward him at a high rate of speed. Suddenly, the vehicle veered into the adjacent park, spun around, and headed back toward Ward.

[3] Cherry, the vehicle's passenger, was sitting on the passenger side windowsill leaning over the hood of the vehicle. He began shooting at Ward. Cherry's sister, Tia, the driver, also began shooting at Ward. As Ward's friends began to flee the scene, Ward attempted to shield himself by running along the side of their truck. Ward fell after he was shot in the back of his leg.

[4] Tia stopped the truck near Ward and she and Cherry approached Ward on foot. They stood over him as he lay by a telephone pole. Tia stated to Cherry, "I ought to give [Ward] a colostomy bag" and then shot Ward in the abdomen.<sup>1</sup>

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<sup>1</sup> Ward initially told the police that Cherry shot him while he was on the ground, at trial he insisted that Tia shot him while he was on the ground. Tr. Vol. 2 pp. 166, 168. Ward's friend, who witnessed the shooting from the park, testified that Cherry shot Ward while he was on the ground. *Id.* at 176. But Cherry was only charged with aggravated battery due to the injuries he inflicted on Ward's leg. Appellant's App. p. 25.

Tr. Vol. 2 p. 168. Cherry did not shoot Ward as he lay on the ground but hit Ward in the head with his gun. Tia and Cherry shot Ward in retaliation for an incident that occurred when Ward dated their mother.

- [5] Cherry and Tia did not leave the scene of the shooting and called 911. Cherry told the 911 operator that Ward had thrown a brick at their truck. Tia and Cherry were arrested when police officers arrived on the scene. The officers found two handguns: one on the hood of the truck and one in between the console and the seat. Eighteen shell casings were found at the scene and established that shots were fired from both handguns.
- [6] Ward was hospitalized for several days to treat the gunshot wounds to his leg and abdomen. The gunshot wounds also fractured his leg bone. Ward had to use a wheelchair when he was released from the hospital and continues to use a cane.
- [7] The State charged Cherry with Level 3 felony aggravated battery. Cherry's jury trial commenced on November 30, 2021. Cherry relied on his 911 call to support his claim of self-defense. Ward testified that both Cherry and Tia shot him, and he denied throwing a brick at their vehicle. Tr. Vol. 2 p. 160. The jury found Cherry guilty as charged. The trial court sentenced Cherry to nine years, with five years executed in the Department of Correction and four years to be served in community corrections.
- [8] Cherry appeals his conviction.

## Discussion and Decision

- [9] On appeal, Cherry claims both that the State failed to rebut his claim of self-defense and that the State failed to prove that bullets from his gun struck Ward.

For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. On sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

*Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). We address each of Cherry's arguments in turn.

### *Self-Defense*

- [10] First, we address Cherry's argument that the State failed to rebut his claim of self-defense.

A defendant can raise self-defense as a justification for an otherwise criminal act. I.C. § 35-41-3-2; *Miller v. State*, 720 N.E.2d [696,] 699 [(Ind. 1999)]. When self-defense is asserted, the defendant must prove he was in a place where he had a right to be, "acted without fault," and reasonably feared or apprehended death or great bodily harm. *Miller*, 720 N.E.2d at 699-700. The State must then negate at least one element beyond a reasonable doubt "by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief." *Lilly v. State*, 506 N.E.2d 23, 24 (Ind. 1987). We will reverse a conviction only if no reasonable person could say the State overcame the self-defense claim beyond a reasonable doubt. *Id.*

*Larkin v. State*, 173 N.E.3d 662, 670 (Ind. 2021).

[11] At trial, Cherry argued that he and Tia shot Ward in self-defense after Ward threw a brick at their vehicle. The only evidence presented that supported Cherry's claim was his 911 call and a photograph depicting a brick laying on the ground near his vehicle. There was no evidence that a brick struck his vehicle causing any damage. The jury was free to discredit Cherry's claim that Ward threw a brick at his vehicle.

[12] But even if the jury believed Cherry's claim, his use of deadly force was unreasonable because it was disproportionate to the situation. The amount of force a person uses to protect himself "must be proportionate to the urgency of the situation." *Hall v. State*, 166 N.E.3d 406, 414 (Ind. Ct. App. 2021); *Harmon v. State*, 849 N.E.2d 726, 730-31 (Ind. Ct. App. 2006). A claim of self-defense fails when the person uses more force than is reasonably necessary under the circumstances. *Hall*, 166 N.E.3d at 414; *Weedman v. State*, 21 N.E.3d 873, 892 (Ind. Ct. App. 2014), *trans. denied*. "Where a person has used more force than necessary to repel an attack the right to self-defense is extinguished, and the ultimate result is that the victim then becomes the perpetrator." *Weedman*, 21 N.E.3d at 892 (quotation omitted).

[13] After Ward allegedly threw the brick at the truck, Cherry willingly participated in the violence by chasing Ward down and shooting Ward from behind as Ward attempted to run away. Ward was unarmed. After Ward fell because he suffered gunshot wounds to his leg, Cherry and Tia exited their vehicle and

approached Ward on foot. Tia shot Ward in the abdomen and Cherry struck Ward in the head with his handgun.

- [14] Under these facts and circumstances, it was more than reasonable for the jury to conclude that Cherry used an unreasonable amount of force in response to having a brick thrown at his truck. It was also within the province of the jury to discredit Cherry's claim entirely. For all of these reasons, we conclude that the State presented sufficient evidence to rebut Cherry's self-defense claim.

### *Sufficient Evidence of Aggravated Battery*

- [15] Cherry also argues that the evidence is insufficient to support his conviction because "no evidence was admitted to show that any of the bullets found in Ward were fired by either of the guns seized, and no evidence was admitted to show which of the two guns seized was used by Cherry." Appellant's Bt. at 10. But Ward testified that Cherry fired shots at him, and he was struck in the back of the leg. Tr. Vol. 2 p. 160.

- [16] Moreover, the jury was given an accomplice liability instruction. *See* Tr. Vol. 3 p. 8. "Indiana makes no distinction between the responsibility of a principal and an accomplice." [Hall v. State](#) 177 N.E.3d 1183, 1191 (Ind. 2021) (citing [Wise v. State](#), 719 N.E.2d 1192, 1198 (Ind. 1999)). An accomplice commits the actual offense when a person knowingly or intentionally aids, induces, or causes another person to commit an offense. [Ind. Code § 35-41-2-4](#).

- [17] Cherry actively and willingly participated in shooting Ward. Cherry does not dispute that both he and Tia fired shots at Ward. Even if Ward was only struck

by bullets from Tia's handgun, the jury could have reasonably found Cherry guilty of aggravated battery as an accomplice.

[18] For these reasons, we conclude that sufficient evidence supports Cherry's conviction for Level 3 felony aggravated battery.

### **Conclusion**

[19] The State presented sufficient evidence to rebut Cherry's self-defense claim and to support his conviction for Level 3 felony aggravated battery.

[20] Affirmed.

Brown, J., and Molter, J., concur.