MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tyrone Harper,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 23, 2024

Court of Appeals Case No. 23A-CR-2044

Appeal from the Henry Circuit Court

The Honorable Kit C. Dean Crane, Judge

Trial Court Cause No. 33C02-1610-F5-71

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] Tyrone Harper was convicted in Henry Circuit Court of Level 5 felony battery resulting in injury to a public safety officer. Harper appeals his conviction and argues that the trial court abused its discretion when it refused to tender his self-defense instructions to the jury.

[2] Because we conclude that there was no evidence presented at trial to support Harper's claim that he acted in self-defense, we affirm.

Facts and Procedural History

[3] On August 28, 2016, Harper was incarcerated in the New Castle Correctional Facility. On that day, Harper transferred from the B housing unit to the F housing unit of the prison. In the early afternoon hours on August 28, Harper began his move to the F unit. Harper was given a "bed move slip," or his written authorization for the move, which he dropped while walking to the F unit. Tr. pp. 45-46. Harper realized he had dropped the paper when Officer Jerry Rader attempted to collect it from him. Officer Rader could not let Harper into the unit without the written authorization, and Harper began to argue with the officer. Officer Rader sent another officer to look for the lost written authorization.

[4] The officer found the "bed move slip," and Harper was admitted to his new unit. Harper aggressively pushed the cart containing his belongings through the entrance of the unit and almost hit Officer Rader with his cart.

[5] Ninety minutes to two hours later, at approximately 3:30 p.m., Officer Rader returned to the F unit to count the number of inmates to confirm that the

inmates that were assigned to the unit were present. The unit had two levels. Officer Rader counted the bottom level twice, as required, and then proceeded up the stairs to the top level of the unit. As the officer started his count on that level of the unit, Harper threw hot liquid in the officer's face causing him pain.[1] The officer fled down the stairs, and Harper pursued him. Harper kicked and punched Officer Rader in the back. Officer Rader yelled for assistance, and Harper stopped attacking him. Officer Rader exited the unit and was transported to the emergency room where he received medical treatment.

[6] On October 17, the State charged Harper with Level 5 felony battery resulting in bodily injury to a public safety officer. Specifically, the State alleged that Harper committed the offense by "throwing a bowl of boiling water on [Officer] Jerry Rader's face and chest and punching and kicking" the officer while he was "engaged in the execution of his official duties . . . ." Appellant's App. p. 35. Harper's trial date was rescheduled numerous times due to changes in counsel, attempts to resolve the matter by plea agreement, motions to continue and the COVID-19 pandemic. His jury trial finally commenced on July 10, 2023.

[7] During trial, Harper testified concerning the events that occurred on August 28, 2016. He described the confrontation he had had with Officer Rader during his move from the B to the F housing unit. Harper testified that the officer "snapped" at him multiple times. Tr. pp. 78-79. Harper claimed that he tried to

[1] An investigator reviewed the security video and observed Harper continually heating water in the microwave for about 30 minutes before Officer Rader returned to perform the inmate count of the pod.

defuse the situation, and Officer Rader said, "I'm good." *Id*. at 80. When Harper asked what he meant by that, the officer replied, "you're going to find out." *Id*. Harper stated he was "terrified" by Officer Rader's response and believed that the officers were "going to do something to" him. *Id*. at 81-83.

[8] Harper unpacked his things in his new unit. He then told the other inmates that he was "in trouble." *Id*. at 84. And another inmate replied, "[y]ou gotta do what you gotta do." *Id*. at 85. Harper told the jury that he felt he needed to do something to defend himself, and he used a microwave to heat water in his cup. He testified that he threw hot water on Officer Rader, "chased him down the stairs," and "kicked him and punched him a couple times." *Id.*

[9] Harper requested two instructions on self-defense. The trial court refused to tender his instructions to the jury because the evidence presented at trial established that Harper was the initial aggressor in the confrontation. The jury found Harper guilty as charged. The trial court held Harper's sentencing hearing on August 4, 2023. The court ordered Harper to serve six years in the Department of Correction. Harper now appeals.

Discussion and Decision

[10] Harper presents only one issue on appeal: whether the trial court abused its discretion when it refused to tender his proposed self-defense instructions to the jury.

> The trial court has broad discretion as to how to instruct the jury, and we generally review that discretion only for abuse. To

> determine whether a jury instruction was properly refused, we consider: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given. In doing so, we consider the instructions as a whole and in reference to each other and do not reverse the trial court for an abuse of discretion unless the instructions as a whole mislead the jury as to the law in the case.

Paul v. State, 189 N.E.3d 1146, 1159 (Ind. Ct. App. 2022) (citations and internal quotations omitted), *trans. denied*.

[11] We are only asked to consider whether the evidence presented at trial supported giving the self-defense instructions.[2] It is well-settled that a criminal defendant is entitled to have a jury instruction on "any theory or defense which has some foundation in the evidence." *Toops v. State*, 643 N.E.2d 387, 389 (Ind. Ct. App. 1994). "We apply this rule even if the evidence is weak and inconsistent so long as the evidence presented at trial has some probative value to support it." *Howard v. State*, 755 N.E.2d 242, 247 (Ind. Ct. App. 2001). If there is a "scintilla" of evidence to support a criminal defendant's proposed defense instruction, it is within the province of the jury to determine whether the evidence is credible. *See Hernandez v. State*, 45 N.E.3d 373, 378 (Ind. 2015).

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[2] Harper's proposed instructions are correct statements of the law and were not covered by other instructions given to the jury. *See* Appellant's App. pp. 223-24; Tr. Vol 2, pp. 125-135.

[12] Harper requested two self-defense instructions, the pattern jury instruction and an instruction to inform the jury when a person may lawfully act against a public servant in self-defense. The State objected to the proposed instructions. The trial court refused to tender the instructions to the jury because the court concluded that Harper's own testimony established that Harper was the initial aggressor. Tr. p. 111.

[13] "A person is justified in using reasonable force against any other person to protect the person . . . from what the person reasonably believes to be the imminent use of unlawful force." Ind. Code § 35-41-3-2(c). The level of force that an individual may use to protect themselves must be proportionate to the situation, and when one uses more force than needed in a circumstance, the right to self-defense is extinguished. *Hall v. State*, 166 N.E.3d 406, 414 (Ind. Ct. App. 2021). Importantly, "a person is not justified in using force if . . . the person has entered into combat with another person or is the initial aggressor . . . ." Ind. Code § 35-41-3-2(g)(3). Moreover, while a person may be justified in using reasonable force against a public servant in certain circumstances enumerated in Indiana Code section 35-41-3-2(i), a person is not justified in using force if the person reasonably believes that the public servant is "engaged in the lawful execution of the public servant's official duties." I.C. 35-41-3-2(j)(4)(B).

[14] Considering the evidence presented at trial, and even if we credit Harper's testimony, Harper failed to present a scintilla of evidence that he acted in self-defense. Harper testified that Officer Rader snapped at him when he attempted

to move into F unit and that the officer made a vague threatening statement. Approximately two hours later, Harper knew an officer would be returning to the unit for the inmate count. For several minutes before the expected inmate count, Harper continually heated water in a cup using the unit's microwave. Harper testified that, after Officer Rader came up to the top level of the unit to complete the count, the officer "snapped" at another inmate to "stand up" but the officer was looking at Harper. Tr. p. 86. But there was no evidence that Officer Rader threatened Harper either verbally or physically while the officer was walking through the unit to perform the inmate count. Harper admitted that he threw hot water in the officer's face, chased him, and kicked and punched the officer as he ran down the stairs. Harper's own testimony shows that Harper was the initial and sole aggressor in the altercation. In addition, Officer Rader was engaged in the lawful execution of his official duties, i.e. conducting the required standing inmate count, when Harper threw hot water in his face, chased him, and attacked him as the officer ran down the stairs and out of F unit.

[15] Because Harper was the initial aggressor and engaged in combat with a public servant engaged in the lawful execution of his official duties, we conclude that the trial court did not abuse its discretion when it refused to tender Harper's proposed self-defense instructions to the jury. We therefore affirm Harper's Level 5 felony battery conviction.

[16] Affirmed.

Riley, J., and Crone, J., concur.