

MEMORANDUM DECISION

ON REHEARING

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

Charles E. Traylor
Kolb Roellgen & Traylor LLP
Vincennes, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
George P. Sherman
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Eric M. Seibel,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 8, 2023

Court of Appeals Case No.
22A-CR-269

Appeal from the
Knox Superior Court

The Honorable
Gara U. Lee, Judge

Trial Court Cause No.
42D01-2007-F6-180

Memorandum Decision by Senior Judge Shepard

Judges Mathias and Brown concur.

Shepard, Senior Judge.

- [1] The State requests rehearing of our memorandum decision issued on November 14, 2022, which determined in effect that Seibel could not be retried for Level 5 felony battery on a public safety official and directed entry of a judgment of conviction for Level 6 felony battery on a public safety official. *See Seibel v. State*, No. 22A-CR-69, 2022 WL 16911255 (Ind. Ct. App. Nov. 14, 2022). Today we grant the State's petition for rehearing to adjust our decision in that respect and reaffirm it in all others. Thus, on rehearing, we reaffirm our decision as modified today.
- [2] In our original decision we concluded that the trial court erred by refusing to instruct the jury on the lesser-included offense of Level 6 felony battery on a public safety official. *Id.* at *3. We reached that conclusion because we found there was a serious evidentiary dispute as to Deputy Carney's pain, and remanded with instructions to vacate Seibel's Level 5 felony conviction. *Id.*
- [3] Next, we considered whether the evidence was sufficient to support both convictions. The evidence supporting Seibel's conviction for Level 6 felony domestic battery was sufficient, that conviction was affirmed, and our decision is not challenged here on rehearing. The State argues on rehearing that this Court erred by holding that Seibel could not be retried for Level 5 felony battery on a public official. *See* Pet. for Reh'g, pp. 4-7. We agree.

- [4] Deputy Carney testified at trial that she experienced pain when her hair was pulled during the altercation and was cross-examined about her failure to mention the same during her deposition. She was further questioned about whether she was prompted to report the pain after receiving the State’s emailed question inquiring if she had experienced pain. There was no dispute that Deputy Carney was a public safety official as defined by statute or that she was engaged in her official duty at the pertinent time.
- [5] Bodily injury is statutorily defined as “any impairment of physical condition, including physical pain.” Ind. Code § 35-31.5-2-29 (2012). And our Supreme Court has said that “any degree of physical pain may constitute a bodily injury and thus enhance punishment” *Bailey v. State*, 979 N.E.2d 133, 142 (Ind. 2012). In cases where the credibility of the witness claiming bodily injury is at issue, that credibility may be challenged through cross-examination for such things as witness coaching or revenge such as occurs in the area of emotionally charged trials where domestic violence is present. *See id.*
- [6] Here, Seibel’s Level 5 felony battery conviction was reversed due to instructional error, and should not have been reversed for the additional reason of insufficient evidence. We write to correct this error.
- [7] What seemed evident was that the record would support a conviction for Level 6 felony battery, had the jury been allowed to consider it, finding that Seibel knowingly or intentionally touched Deputy Carney, a public safety official engaged in her official duties, in a rude, insolent or angry manner. *See Ind.*

Code §35-42-2-1(e)(2) (2020). However, the jury was not allowed to consider that option when sanctioning Seibel for his criminal conduct. The jury was asked only if Seibel touched Deputy Carney, a public safety official engaged in her official duties, in a rude, insolent, or angry manner, resulting in bodily injury. *See* Ind. Code §35-42-2-1(g)(5)(A) (2020). Because any physical pain is sufficient to establish bodily injury, the evidence was sufficient to support the Level 5 felony conviction; but reversal was required where the jury was not allowed to consider a conviction on the lesser-included offense based on the facts before it. Thus, the option of retrial on that count remains available to the State.

- [8] Consequently, we reaffirm our decision that the evidence was sufficient to support Seibel's Level 6 felony conviction of domestic battery, and our decision that reversible instructional error occurred, such that Seibel's Level 5 felony conviction of battery on a public safety officer must be vacated. We amend our opinion to conclude that because sufficient evidence existed to support Seibel's Level 5 felony conviction, the State may proceed to re-prosecute him on that charge should it so choose. However, our prior instructions to the trial court for entry of judgment of conviction on Level 6 felony battery against a public safety officer is obviated by our decision here and rescinded.

Mathias, J., and Brown, J., concur.