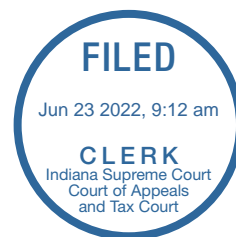


## MEMORANDUM DECISION

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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Marcel Edward Malone,  
*Appellant-Defendant*

v.

State of Indiana,  
*Appellee-Plaintiff.*

June 23, 2022

Court of Appeals Case No.  
22A-CR-72

Appeal from the St. Joseph  
Superior Court

The Honorable John M.  
Marnocha, Judge

Trial Court Cause No.  
71D02-2010-F1-15

**Pyle, Judge.**

## Statement of the Case

[1] Marcel Edward Malone (“Malone”) appeals, following a jury trial, his conviction for Level 5 felony attempted battery with a deadly weapon.<sup>1</sup> Malone contends that there was insufficient evidence to support his conviction. Concluding that the evidence was sufficient to support Malone’s conviction, we affirm the trial court’s judgment.

[2] We affirm.

## Issue

Whether there is sufficient evidence to support Malone’s conviction.

## Facts

[3] In October 2020, Malone agreed to do some work on Markey Kinds’ (“Kinds”) home. While Malone was still working on Kinds’ home, a dispute arose between the two parties about payment for the work. Malone called Kinds, demanding payment for his work. Kinds responded that he could not pay Malone until the bank opened the following day. Malone was aggressive and upset during his phone conversation with Kinds.

[4] Later that day, Kinds, accompanied by his two six-year-old children and his five-month-old baby, drove to a restaurant to pick up food. After picking up his

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<sup>1</sup> IND. CODE § 35-42-2-1; I.C. § 35-41-5-1.

food, Kinds began to drive his SUV out of the restaurant parking lot. At this time, Kinds saw Malone, who was driving in his own vehicle, drive into the restaurant parking lot. Before Kinds could drive out of the restaurant parking lot, Malone used his car to block Kinds' SUV from exiting the parking lot. Malone then drew a handgun, leaned out of his driver's side window, and began firing shots at the front of Kinds' SUV. Bullets struck Kinds' SUV multiple times along its front, resulting in damage to the hood, radiator, headlights, windshield, and the SUV's Chevy medallion. Kinds instructed his children to get down as the bullets struck his SUV. Malone then fled the scene.

[5] Soon after, South Bend Police Department Officer Joseph Mitchell ("Officer Mitchell") responded to the dispatch and arrived on the scene. When Officer Mitchell arrived, he saw an SUV with multiple bullet holes along its front. Kinds, along with his children, exited their SUV and rushed into the restaurant. Kinds, after entering the restaurant, shouted "I know who shot[.]" (Tr. Vol. 2 at 153). As additional police officers arrived, Officer Mitchell spoke with Kinds. After Kinds had given officers Malone's information, he then went to the police department for additional questioning.

[6] A few days later, Kinds offered South Bend Police Department Detective Matt Ryan ("Detective Ryan") his cell phone that contained text messages between Kinds and Malone from after the shooting. These included messages from Malone that said "police ass n\*\*\*\*[.]" "you can run but you can't hide[.]" and "you a bitch." (State's Ex. 83).

- [7] Nearly a week after the incident, Detective Ryan interviewed Malone. After obtaining a search warrant, Detective Ryan searched Malone’s home. Detective Ryan did not find a handgun but did find a box of ammunition hidden above a ceiling fan. Additionally, Detective Ryan saw no bullet holes or damage to Malone’s vehicle.
- [8] The State charged Malone with Level 5 felony attempted battery with a deadly weapon.<sup>2</sup> The trial court held a jury trial in November 2021. The jury heard the facts as set forth above. At trial, Malone’s strategy was to claim self-defense. Specifically, Malone suggested that Kinds had had a gun when he was in his SUV with his children and that Kinds had pulled out his gun and shot at Malone.
- [9] South Bend Police Department Crime Scene Technician Ronald Kaszas (“CST Kaszas”) testified that he found six cartridge casings at the scene. CST Kaszas also testified that there was no evidence of shots being fired from Kinds’ SUV. CST Kaszas testified that he believed all six cartridge casings had been fired from a single weapon. South Bend Police Department Firearm and Tool Mark Examiner Christopher Voros (“Firearm Examiner Voros”) testified that the cartridge casings recovered from the scene were fired by the same firearm.

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<sup>2</sup> The State also charged Malone with Level 1 felony attempted murder for the shots fired at Kinds and Level 1 felony attempted murder for firing shots that hit another individual. The jury acquitted Malone of these charges. The State also charged Malone with Level 5 felony attempted battery with a deadly weapon for firing at the other individual, but the jury was unable to reach a verdict on this charge. The State ultimately dismissed this charge at sentencing.

Additionally, Firearm Examiner Voros testified that the cartridge casings were 9mm Luger cartridge casings.

[10] Kinds testified that he did not have a gun when he went to pick up food from the restaurant. He also testified that he did not fire any shots at Malone. Kinds emphasized that he never carries a firearm when he is around his children. Additionally, Detective Ryan testified that during Malone’s interview, Malone made no mention of Kinds having a gun, Kinds pointing a gun at him, or Kinds firing a gun at him.

[11] Malone testified on his own behalf. Malone testified that he had seen Kinds with a revolver in his hand when he had driven up to the restaurant parking lot. Malone testified that Kinds had fired a shot at his vehicle and that Malone had responded by firing multiple rounds at Kinds’ SUV. Malone further testified that he had returned fire “[f]or the concern of [his] safety.” (Tr. Vol. 2 at 172). Malone also testified that he had only been trying to “shoot [Kinds’] motor so [Kinds] c[ould]n’t come after [him].” (Tr. Vol. 2 at 172). On cross-examination, the State asked Malone if the cartridge casings recovered from the scene around Kinds’ SUV had been fired from Malone’s gun, and Malone said, “[y]es[.]” (Tr. Vol. 2 at 182).

[12] At the conclusion of the jury trial, the jury found Malone guilty of Level 5 felony attempted battery with a deadly weapon. At sentencing, the trial court sentenced Malone to five (5) years to be served at the Indiana Department of Correction.

[13] Malone now appeals.

## Decision

[14] Malone argues that there was insufficient evidence to support his Level 5 felony attempted battery with a deadly weapon conviction. Our standard of review for sufficiency of the evidence claims is well settled. We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not reweigh the evidence or judge witness credibility. *Id.* We will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 146-47. The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147.

[15] INDIANA CODE § 35-42-2-1 provides that “a person who knowingly or intentionally . . . touches another person in a rude, insolent, or angry manner . . . commits battery[.]” Additionally, the statute provides that the battery is a Level 5 felony if “the offense is committed with a deadly weapon[.]” I.C. § 35-42-2-1(g)(2). INDIANA CODE § 35-41-5-1 provides that a person attempts to commit a crime “when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime.” Malone argues that there was insufficient evidence “that Malone knowingly or intentionally tried to injure [Kinds][.]” (Malone’s Br. 12). We disagree.

[16] Our review of the record reveals that Malone and Kinds had fought the morning of the shooting over payment for work Malone had done on Kinds' home. Later that day, Malone blocked Kinds' SUV from exiting a restaurant parking lot and fired six rounds into the front of Kinds' SUV at close range. At trial, Malone admitted to firing these shots at Kinds' SUV. Moreover, by asserting a defense of self-defense, Malone admitted that he had intentionally shot at Kinds' SUV. In addition, Kinds testified that he clearly saw Malone fire a gun at his SUV. Also, CST Kaszas and Firearm Examiner Voros both testified that the six cartridge casings found on the scene were fired from a single gun, and Malone admitted that those same casings came from his weapon. Malone's argument amounts to a request to reweigh the evidence, which we will not do. *See Drane*, 867 N.E.2d at 146.

[17] Based on our review of the evidence presented at trial, we conclude that there was sufficient evidence from which a reasonable jury could have found Malone guilty of attempted battery with a deadly weapon. Accordingly, we affirm Malone's conviction.

[18] Affirmed.

Robb, J., and Weissmann, J., concur.