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IN THE
COURT OF APPEALS OF INDIANA

NOEL E. SHUCK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0706-CR-519
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0507-FC-241

December 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Noel E. Shuck challenges the sufficiency of the evidence supporting his convictions for class C felony battery by means of a deadly weapon and class A misdemeanor battery resulting in bodily injury. We affirm the former and vacate the latter.

Shuck and Richard Torongeau were cellmates at the Hamilton County Jail. On June 5, 2006, Torongeau quarreled with Shuck about his sleeping habits and told him that he might want to find a new cell. Later that day, another inmate came to talk to Torongeau outside the cell while Shuck slept. When Torongeau re-entered the cell, Shuck said, "[Y]ou don't give a fuck who you bring to the door[.]" Tr. at 138. Torongeau replied, "[D]amn Shuck man you're going to end up making us fight over this." *Id.* Torongeau attended to other matters in the cell. Shuck left the cell and broke a wooden broom handle over his knee. Shuck returned to the cell and yelled at Torongeau. When Torongeau turned, Shuck struck him on the right side of his forehead with the broom handle.

The State charged Shuck with Count 1, class C felony battery by means of a deadly weapon, and Count 2, class A misdemeanor battery resulting in bodily injury. Count 1 alleged that Shuck "did knowingly touch Richard Torongeau in a rude, insolent, or angry manner, to wit: struck him in the head; said touching being committed with a deadly weapon, to wit: mop handle[.]" Appellant's App. at 6. The evidence presented at trial established that Shuck struck Torongeau with a broom handle. Count 2 alleged that Shuck "did knowingly touch Richard Torongeau in a rude, insolent, or angry manner, to wit: punched him with his fist resulting in bodily injury, to wit: pain." *Id.* At trial, the State presented no evidence that Shuck punched Torongeau with his fist.

On September 6, 2006, a jury found him guilty as charged. The trial court withheld entry of judgment until sentencing. At the sentencing hearing on December 15, 2006, the trial court entered judgment of conviction on both counts and merged Count 2 with Count 1 "because the alleged conduct under Count 2 is the same conduct as was used to prove Count 1." Tr. at 211. The trial court sentenced Shuck to eight years on Count 1, with six years suspended.

On appeal, Shuck first contends that the State failed to prove that the broom handle with which he battered Torongeau was a deadly weapon as alleged in Count 1. Our standard of review is well settled:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.… Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations, quotation marks, footnote, and alterations omitted) (emphasis in *Drane*).

Indiana Code Section 35-41-1-8(a) defines "deadly weapon" in pertinent part as "[a] destructive device, weapon, device, … equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury." Indiana Code Section 35-41-1-25 defines "serious bodily injury" in pertinent part as "bodily injury that creates a substantial risk of death or that

causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; [or] (4) permanent or protracted loss or impairment of the function of a bodily member or organ[.]"

"Whether an object is a deadly weapon is a question of fact for the jury to determine based on the manner of its use and circumstances of the specific case." *Timm v. State*, 644 N.E.2d 1235, 1238 (Ind. 1994). "[I]t is the manner in which the instrument was used, not its originally intended use that determines whether something is a deadly weapon. We look to the capacity of the object to inflict serious bodily injury under the factual circumstances of the case." *Id*. (citation omitted). "[W]hether bodily injury is 'serious' is a question of degree and therefore more appropriately reserved for the finder of fact." *Sutton v. State*, 714 N.E.2d 694, 697 (Ind. Ct. App. 1999), *trans. denied*.

After Shuck hit Torongeau in the right side of his forehead with the broom handle, Torongeau's wound bled profusely and required seven stitches. At the time of trial, Torongeau was taking prescription pain medication daily for headaches and had started wearing glasses because his right eye was twitching. Given these facts, a jury reasonably could conclude that Torongeau suffered serious bodily injury and that therefore the broom handle was a deadly weapon pursuant to Indiana Code Section 35-41-1-8(a). Shuck's arguments to the contrary are merely requests to reweigh the evidence in his favor, which we may not do. We affirm Shuck's conviction for class C felony battery by means of a deadly weapon.

Next, Shuck contends that the State presented no evidence that he punched Torongeau with his fist, resulting in pain, as alleged in Count 2. The State does not dispute this, but instead asserts that we need not address Shuck's argument because the trial court merged

Count 2 with Count 1. *See*, *e.g.*, *Fry v. State*, 748 N.E.2d 369, 373 n.2 (Ind. 2001) ("Because the trial court merged the robbery conviction into the conspiracy to commit robbery conviction, here we do not separately address the sufficiency of the evidence with regard to the robbery conviction."). We note, however, that the trial court entered judgment of conviction on both counts before merging them, apparently on double jeopardy grounds. Assuming, without deciding, that the trial court's double jeopardy concerns were warranted, this procedure was improper. *See Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006)("[A] defendant's constitutional rights are violated when a court enters judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count."). Given that we would have to overturn Shuck's class A misdemeanor battery conviction for insufficient evidence in any event, we hereby vacate that conviction.

Affirmed in part and vacated in part.

BAILEY, J., and NAJAM, J., concur.