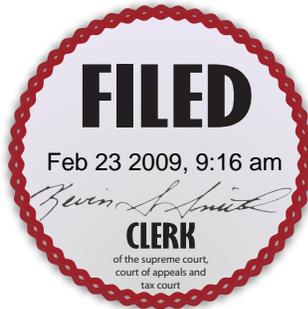


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL GREEN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0806-CR-539

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Carol Orbison, Judge  
Cause No. 49G17-0606-FD-108781

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February 23, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issues

Following a bench trial, Michael Green appeals his convictions of criminal recklessness, a Class D felony; domestic battery, a Class A misdemeanor; and battery, a Class A misdemeanor. On appeal, Green raises one issue, which we restate as whether sufficient evidence supports his convictions. We also address sua sponte whether Green's convictions violate double jeopardy. Concluding that sufficient evidence supports Green's convictions, but that his convictions violate double jeopardy, we affirm in part, reverse in part, and remand.

### Facts and Procedural History

On May 4, 2006, Tonya Billips, Green's girlfriend of nine years, was at her friend's Indianapolis apartment when she saw Green talking with a woman in a nearby yard. The woman was the mother of two of Green's children; she and Billips did not get along. According to Billips, she approached Green and the woman to "ask[] him what was going on" and saw Green pick up a stick. Transcript at 8. In response, Billips got a knife from the apartment, approached Green and the woman, and spoke with them briefly without incident. Approximately thirty minutes later, after riding with her friend to the store, Billips again approached Green and the woman. As Billips approached, the woman "jumped up in [Billips's] face" and asked Billips if she wanted to fight. *Id.* at 9. Before Billips could respond, Green struck her three times – twice in the face and once in the arm – with a folded-up baby stroller. The attack resulted in Billips sustaining a broken nose and requiring sutures.

On June 16, 2006, the State charged Green with criminal recklessness, a Class D felony; domestic battery, a Class A misdemeanor; and battery, a Class A misdemeanor. On July 27, 2006, the trial court presided over a bench trial, hearing testimony from Billips, Green, and the investigating officer. Based on this evidence, the trial court found Green guilty of all three charges. On May 15, 2008, the trial court conducted a sentencing hearing, ordering that Green serve 545 days on the criminal recklessness conviction, with 180 days executed and 365 days suspended, and that concurrent to the criminal recklessness sentence, Green serve 365 days for each of the remaining convictions. Green now appeals.

### Discussion and Decision

#### I. Sufficiency of Evidence

Green makes two arguments challenging the sufficiency of the evidence, one relating to all three convictions and one relating to the criminal recklessness conviction only. We will address each argument in turn, but note initially that in addressing challenges to the sufficiency of the evidence, we neither reweigh evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Instead, we “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” Id. (quoting Alkhalidi v. State, 753 N.E.2d 625, 627 (Ind. 2001)).

Green’s first argument invokes an exception to the foregoing standard of review, namely, that insufficient evidence supports his convictions because Billips’s testimony was incredibly dubious. Under the “incredible dubiousity rule,” an appellate court may

reverse a defendant's convictions by impinging on the trier of fact's responsibility to judge witness credibility. Tillman v. State, 642 N.E.2d 221, 223 (Ind. 1994). Application of the rule, however, is limited to cases "where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt." White v. State, 706 N.E.2d 1078, 1079 (Ind. 1999).

Green urges us to apply the incredible dubiousity rule to Billips's testimony because it was contradictory "as to how she was struck and by what." Appellant's Brief at 9. Our review of the record, however, indicates Billips was certain how she was struck – that is, by Green striking her in the face twice and the arm once – and was at best confused regarding whether Green struck her with a baby stroller or another object:

Q. When we spoke before court you said it was, was a chair but then you earlier said it was a stroller . . .

A. I said it was a baby stroller. It was one of them [sic] little fold up things. I thought it was [a] baby stroller[.] I never really looked at it but I knew it was a, a baby something. I thought it was a baby stroller.

Q. So it could have been a chair right?

A. Uh, to me I thought it was a baby stroller. . . .

Tr. at 37. There is nothing inherently contradictory about Billips being confused over whether Green struck with a baby stroller or a similar object. As such, we decline Green's invitation to apply the incredible dubiousity rule to Billips's testimony.

Green also argues insufficient evidence supports his criminal recklessness conviction because a baby stroller is not a deadly weapon within the meaning of Indiana Code section 35-41-1-8(a). To convict Green of criminal recklessness as a Class D felony, the State had to prove beyond a reasonable doubt that Green, while armed with a

deadly weapon, recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to Billips. See Ind. Code § 35-42-2-2(b)(1) and (c)(2)(A). “Deadly weapon” is statutorily defined to include any device that “is readily capable of causing serious bodily injury,” Ind. Code § 35-41-1-8(a)(2), and “serious bodily injury” is statutorily defined to include bodily injury that creates a substantial risk of death or extreme pain, see Ind. Code § 35-41-1-25. Thus, the question becomes whether the trial court could have found that the baby stroller was readily capable of causing bodily injury that creates a substantial risk of death or extreme pain.

Case law from our supreme court, coupled with the evidence presented in this case, compel a conclusion that the baby stroller was a deadly weapon within the meaning of Indiana Code section 35-41-1-8(a). “Whether an object is a deadly weapon is a question of fact for the jury to determine . . . .” Timm v. State, 644 N.E.2d 1235, 1238 (Ind. 1994). In making this determination, the trier of fact may “look to the capacity of the object to inflict serious bodily injury under the factual circumstances of the case.” Id. The State presented evidence that Green struck Billips twice in the face and once in the arm with the baby stroller and that Billips sustained a broken nose and required sutures as a result. This evidence was sufficient to permit the trial court to find that the baby stroller was readily capable of causing serious bodily injury, which means the baby stroller was a deadly weapon within the meaning of Indiana Code section 35-41-1-8(a). Cf. id. (concluding there was sufficient evidence to support a finding that a flashlight was a deadly weapon where the defendant struck the victim in the face with the flashlight,

causing lacerations and requiring sutures).<sup>1</sup> Because the baby stroller meets the statutory definition of a deadly weapon, it follows that sufficient evidence supports Green’s criminal recklessness conviction.

## II. Double Jeopardy

Although sufficient evidence supports Green’s convictions, we note *sua sponte* that his convictions violate double jeopardy. Article I, Section 14, of the Indiana Constitution states, “No person shall be put in jeopardy twice for the same offense.” “[T]wo or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original). To prevail under the “actual evidence” test, “the defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Id. at 53.

Here, the State used the same evidentiary fact – Green’s act of striking Billips twice in the face and once in the arm – to support all three charges, which is a

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<sup>1</sup> The dissent would reverse Green’s criminal recklessness conviction in part because Billips’s injuries do not constitute serious bodily injury, see dissent, slip op. at 10, and in part because a baby stroller is not readily capable of causing serious bodily injury, see id. The dissent’s first point, citing Davis v. State, 813 N.E.2d 1176 (Ind. 2004), as support, is misplaced because the State was not required, as was the case in Davis, see 813 N.E.2d at 1178, to prove that Green inflicted serious bodily injury; instead, it merely had to prove the baby stroller was readily capable of inflicting serious bodily injury. This distinction brings us to the dissent’s second point, and although we share the dissent’s apparent frustration that the baby stroller or a photograph of it should have been admitted into evidence, we are simply not prepared to conclude, as a matter of law, that a baby stroller is not readily capable of inflicting serious bodily injury.

straightforward violation of double jeopardy. See Rutherford v. State, 866 N.E.2d 867, 871-73 (Ind. Ct. App. 2007) (concluding defendant’s convictions of battery and criminal recklessness violated double jeopardy where the same evidentiary fact – firing a weapon into a vehicle – was used to support both charges); Stewart v. State, 866 N.E.2d 858, 863-65 (Ind. Ct. App. 2007) (same); cf. Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002) (recognizing a “long adher[ance] to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson,” one of which is a prohibition on conviction and punishment for a crime consisting of the very same act as another crime for which the defendant has been convicted and punished (citing Richardson, 717 N.E.2d at 55 (Sullivan, J., concurring))). We therefore remand to the trial court with instructions to vacate Green’s domestic battery and battery convictions. See Spears v. State, 735 N.E.2d 1161, 1166 (Ind. 2000) (stating that the remedy for a double jeopardy violation is to reduce or vacate the convictions that violate double jeopardy).

### Conclusion

Sufficient evidence supports Green’s convictions of criminal recklessness, domestic battery, and battery. However, these three convictions violate double jeopardy, and we therefore remand with instructions to the trial court to vacate Green’s convictions of domestic battery and battery.

Affirmed in part, reversed in part, and remanded.

CRONE, J., concurs.

BROWN, J., concurs in part, dissents in part with opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL GREEN,	)	
	)	
Appellant-Defendant,	)	
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vs.	)	No. 49A02-0806-CR-539
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**Brown, J., concurring in part and dissenting in part.**

I concur in the majority’s discussion of the incredible dubiousity rule and in the majority’s determination that double jeopardy bars conviction on all three charged counts. However, I respectfully dissent as to the majority’s conclusion that the evidence was sufficient to support Green’s criminal recklessness conviction as a class D felony.

Ind. Code § 35-42-2-2(b) and (c)(2)(A), in effect at the time of the commission of the offense, provided in relevant part as follows: “A person who recklessly, knowingly, or intentionally performs: (1) an act that creates a substantial risk of bodily injury to another person; . . . commits criminal recklessness . . . a Class D felony if it is committed while armed with a deadly weapon.” Ind. Code § 35-41-1-8(a), in effect at the time of the commission of the offense, defined deadly weapon and, in pertinent part, provided that deadly weapon means:

- (1) A loaded or unloaded firearm.
- (2) A destructive device, weapon, device, taser . . . or electronic stun weapon . . . , 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.

\* \* \* \* \*

The information charging Green with criminal recklessness as a class D felony alleged in part that he “was armed with a deadly weapon, to-wit: baby doll stroller.” The majority refers to the weapon as a “folded-up baby stroller” and correctly recites some of the testimony from Billips that it was a baby stroller. Other testimony at trial was that the item was a doll stroller or doll chair. No photo of the item was admitted and no size or weight or other dimensions were given. Billips’s hospital report showed a nose laceration and a “Probable nondisplaced nasal fracture.” State’s Exhibit 1 at 14. Billips also testified that her teeth felt loose.

The majority relies on Timm v. State, 644 N.E.2d 1235 (Ind. 1994), and correctly quotes, “We look to the capacity of the object to inflict serious bodily injury under the factual circumstance of the case.” Id. at 1238. In Timm, the defendant’s convictions for battery and other charges were upheld where defendant, impersonating a police officer, stopped the victim’s vehicle and, carrying a flashlight, approached the victim’s car and struck her in the face with the flashlight, smashing her glasses and breaking the head of the flashlight. Timm argued that the State failed to establish that the attack was committed with a deadly weapon or resulted in serious bodily injury. The Supreme Court held that “Whether or not the jury found that Mark’s injuries were serious in this case, the jury could reasonably have concluded on these facts that the flashlight was capable of causing serious bodily injury” and cited Ind. Code § 35-41-1-25, which defined “Serious bodily injury” as “bodily injury that creates a substantial risk of death or that causes

serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ.” Id. Because the Court found the evidence sufficient to support a finding that the flashlight was a deadly weapon due to its capability to cause serious bodily injury, it did not determine whether the jury could have concluded that Mark in fact suffered “serious bodily injury.” Id. at 1239 n.1.

Ten years later, in Davis v State, 813 N.E. 2d 1176, 1178 (Ind. 2004), the Indiana Supreme Court reversed Davis’s conviction for criminal recklessness involving serious bodily injury. Although the case did not involve a weapon but rather the defendant’s act of pushing the victim down on the street and punching her and thereafter attempting to run her over with his vehicle as she tried to flee, the Court held that evidence of a slightly lacerated lip, abrasion to the knee, and a broken pinky finger were insufficient to support a finding of “serious bodily injury.” The Court reversed the defendant’s conviction for criminal recklessness as a class D felony and remanded for entry of judgment for criminal recklessness as a class B misdemeanor.

Given the injuries in the present case, a possible fractured nose with a laceration, and possible loose teeth for which there is no evidence that Billips received any follow up treatment, along with the fact that she waited at least an hour and during that time finished doing her friend’s hair before going to the hospital, based on Davis, I do not see that her injury constituted “serious bodily injury.” Viewing these facts with the fact that the characteristics of the baby doll stroller were not shown, the item is unlike a flashlight or other handled tool that one can readily envision being used to inflict bodily injury, and

the fact that Green was not “armed” with the item beforehand, I would reverse his conviction for criminal recklessness as a class D felony, affirm the conviction for domestic battery as a class A misdemeanor, and due to double jeopardy, vacate the battery conviction as a class A misdemeanor.<sup>2</sup>

For the foregoing reasons, I respectfully concur in part and dissent in part.

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<sup>2</sup> Green’s conviction for criminal recklessness as a class D felony could be reversed and entry of judgment for criminal recklessness as a class B misdemeanor could be entered. See Davis, 813 N.E.2d at 1178-1179. However, due to double jeopardy, the conviction would then be vacated along with the battery conviction, leaving the domestic battery conviction as a class A misdemeanor.