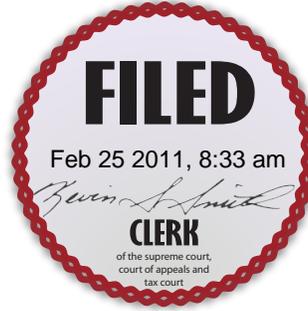


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JEFFERY M. OGLE, )  
 )  
Appellant/Defendant, )  
 )  
vs. ) No. 09A02-1007-CR-779  
 )  
STATE OF INDIANA, )  
 )  
Appellee/Plaintiff. )

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APPEAL FROM THE CASS SUPERIOR COURT  
The Honorable Thomas C. Perrone, Judge  
Cause No. 09D01-0912-FD-329

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February 25, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Defendant Jeffery M. Ogle appeals following his convictions for Class D felony domestic battery<sup>1</sup> and Class B misdemeanor disorderly conduct.<sup>2</sup> Ogle contends that the evidence presented by the State at trial was insufficient to support his convictions and that the sentence imposed by the trial court was inappropriate in light of the nature of his offenses and his character. We affirm in part, reverse in part, and remand for a corrected sentencing order.

### **FACTS AND PROCEDURAL HISTORY**

On December 18, 2009, Ogle and his wife, H.O., who were the parents of three young children, ages six, four, and two, were entertaining Ogle's friend Kenny Howell at their home in Logansport. After putting their children to bed in a bedroom that adjoined their own bedroom, Ogle, H.O., and Howell played cards. Ogle and Howell were drinking during the card game.

Around 1:00 a.m., Ogle and H.O. went upstairs to bed. Ogle and H.O. had to walk through the bedroom where their children were sleeping in order to get to their bedroom. Once inside their bedroom, Ogle began questioning H.O. about whether she was cheating or wished to cheat on him. H.O. sat down on the bed and denied that she was cheating or wished to cheat on Ogle. Ogle continued to ask H.O. about her fidelity, and "kept getting closer" to H.O. to the point where she "had [her] arms up in front of [her] ... to keep him

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<sup>1</sup> Ind. Code § 35-42-2-1.3(a) and (b)(2) (2009).

<sup>2</sup> Ind. Code § 35-45-1-3(a)(1) (2009).

from getting any closer than he was.” Tr. Vol. 3, p. 129. As he questioned her, Ogle’s voice became louder and his accusations became more direct.

At one point, Ogle knocked H.O. to the floor after he struck her with his forearm. As a result of being knocked to the floor, H.O. began suffering from discomfort and had difficulty breathing. H.O. picked up her cellular phone, which was on the floor next to the bed, flipped it open, and dialed 911. About that time, Ogle grabbed H.O. by the ankles and pulled her onto the bed. Ogle flipped H.O. over into a face-down position, straddled her, and told her that if she “wasn’t seeing anybody else then he shouldn’t have any problems gettin [sic] his.” Tr. Vol. 3, p. 133. H.O. struggled to get free and repeatedly asked Ogle to “get off” her. Tr. Vol. 3, p. 134. Ogle refused, and continued to straddle H.O. and confine her to the bed. H.O. heard the 911 operator’s voice and yelled out their home address. After realizing that H.O. had called 911, Ogle immediately released H.O. and H.O. closed the cellular phone and ended the 911 call. About thirty seconds later, the police, including Officer John Spear, arrived. H.O. told Officer Spear that throughout the ordeal, she suffered from discomfort and chest pains and had difficulty breathing. Officer Spear observed that H.O. was suffering from labored breathing and had a horizontal red mark on her chest.

On December 22, 2009, the State charged Ogle with Class D felony domestic battery, Class A misdemeanor battery resulting in bodily injury, and Class B misdemeanor disorderly conduct. Following trial, a jury found Ogle guilty as charged. At sentencing, the trial court found Ogle’s Class A misdemeanor battery conviction to be a lesser-included offense of Ogle’s Class D felony domestic battery conviction. As a result, the trial court merged the

Class A misdemeanor battery conviction into the Class D felony domestic battery conviction. The trial court imposed a two-year sentence for the Class D felony domestic battery conviction and a 180-day sentence for the Class B misdemeanor disorderly conduct conviction. The trial court ordered that the 180-day sentence for disorderly conduct be served consecutive to the two-year sentence for domestic battery, for an aggregate two-and-one-half-year sentence. This appeal follows.

## **DISCUSSION AND DECISION**

### **I. Sufficiency of the Evidence**

Ogle contends that the evidence presented at trial was insufficient to support his Class D felony domestic battery and Class B misdemeanor disorderly conduct convictions.

The standard for reviewing sufficiency of the evidence claims is well settled. We do not reweigh the evidence or assess the credibility of the witnesses. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

*Stewart v. State*, 768 N.E.2d 433, 435 (Ind. 2002). “[I]t is for the trier of fact to reject a defendant’s version of what happened, to determine all inferences arising from the evidence, and to decide which witnesses to believe.” *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006).

### **Domestic Battery**

The offense of domestic battery as a Class D felony is governed by Indiana Code section 35-42-2-1.3 which provides that “[a] person who knowingly or intentionally touches

an individual ... who is the spouse of the other person ... in a rude, insolent, or angry manner that results in bodily injury to the [spouse] ... commits domestic battery as a Class A misdemeanor.” “However, the offense is a Class D felony if the person who committed the offense “committed the offense in the presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense.” Ind. Code § 35-42-2-1.3. Thus, to convict Ogle of Class D felony domestic battery, the State was required to prove that: (1) Ogle intentionally touched H.O. in a rude, insolent, or angry manner that resulted in bodily injury to H.O.; (2) the touching occurred in the physical presence of the couple’s children; and (3) Ogle knew that the children were present and might have been able to see or hear the offense.

Ogle challenges the sufficiency of the evidence to support the finding that H.O. suffered a bodily injury as a result of his touching her in a rude, insolent, or angry manner. Specifically, Ogle claims that H.O. did not suffer a bodily injury. “‘Bodily injury’ means ‘any impairment of physical condition, including physical pain.’” *Williams v. State*, 924 N.E.2d 121, 129 (Ind. Ct. App. 2009) (quoting Ind. Code § 35-41-1-4), *trans. denied*. In establishing bodily injury, it is enough that the evidence shows that a person experienced physical pain, even if no permanent or lingering injuries were sustained. *See Mathis v. State*, 859 N.E.2d 1275, 1281 (Ind. Ct. App. 2007) (providing that evidence was sufficient to support determination that battery resulted in bodily injury when the defendant’s actions caused the victim to “hurt” and “kinda see stars for a second”).

Here, the evidence establishes that during the altercation, H.O. repeatedly said “ouch”

in response to discomfort or pain while connected to the 911 operator. H.O. testified that she suffered discomfort and chest pain as a result of experiencing difficulty breathing. Officer John Spear testified that when he arrived, H.O. showed him a horizontal red mark on her chest and displayed labored breathing. He further testified that H.O. indicated that her chest and back hurt. In light of these facts, we conclude that the jury could reasonably infer that H.O. suffered bodily injury as a result of Ogle's touching her in a rude, insolent, or angry manner.

Ogle also challenges the sufficiency of the evidence to support the finding that the touching occurred in the physical presence of his children. Specifically, Ogle claims that the children did not see the touching because the door to his and H.O.'s bedroom was shut and the children were asleep in another bedroom at the time of the touching. In *Boyd v. State*, 889 N.E.2d 321, 325 (Ind. Ct. App. 2008), *trans. denied*, this court concluded that Indiana Code section 35-42-2-1.3(b) does not require that the children see or hear the offense, but rather that the touching occur in the physical presence of the child and that the perpetrator know that the child might be able to see or hear the offense.

The evidence is sufficient to support the finding that Ogle knew that his children were present and that they might be able to see or hear his altercation with H.O. The record establishes that earlier in the evening, Ogle and H.O. put their three young children to bed in the bedroom that was adjacent to their bedroom, and upon coming upstairs for the evening, Ogle and H.O. had to walk through the children's bedroom to enter their own adjoining bedroom. H.O. testified that Ogle shut the bedroom door behind him before initiating the

altercation, but that she did not believe that the door was locked. Further, Officer John Spear testified that at least one of the couple's children was awake when he entered the bedroom upon arriving at the residence. Based off of these facts, we conclude that the jury could reasonably infer that Ogle knew that his children were present and that they might have been able to see or hear his altercation with H.O. *See id.* at 325-26 (providing that sufficient evidence existed from which the trial court could have found that the child might have been able to see or hear the domestic battery). Ogle's challenge to the sufficiency of the evidence supporting his domestic battery conviction effectively amounts to an invitation to reweigh the evidence, which we will not do. *See Stewart*, 768 N.E.2d at 435.

## **II. Disorderly Conduct and Double Jeopardy**

Although Ogle does not raise this claim, we conclude that his convictions for class D felony domestic battery and class B misdemeanor disorderly conduct violate the double jeopardy clause of the Indiana Constitution. We raise this issue sua sponte because a double jeopardy violation, if shown, implicates fundamental rights. *Smith v. State*, 881 N.E.2d 1040, 1047 (Ind. Ct. App. 2008); *Scott v. State*, 855 N.E.2d 1068, 1074 (Ind.Ct.App.2006).

Article I, section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” In *Richardson v. State*, our Supreme Court held that “two 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.” 717 N.E.2d 32, 49 (Ind.1999) (emphases in original).

*Smith*, 881 N.E.2d at 1047-48.

Under the actual evidence test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Richardson*, 717 N.E.2d at 53. To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a 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.*

Here, Ogle was convicted of both Class D felony domestic battery and Class B misdemeanor disorderly conduct. The evidence at trial demonstrated that Ogle, in the presence of his young children, initiated an altercation with H.O. during which he accused H.O. of cheating on him, used his forearm to knock H.O. off the bed, pulled her back on the bed by her ankles, flipped her over to a face-down position, and confined her to the bed. The evidence at trial further demonstrated that throughout the altercation Ogle was aggressive and accusatory and became more direct as the altercation wore on. While these facts may satisfy the statutory requirements for each of the charged offenses, we observe that in charging Ogle, the State did not specify which facts it relied upon to support each conviction, but rather alleged that Ogle’s actions satisfied the statutory requirements for each charge. As a result, upon review, we conclude that there is a reasonable possibility that the fact-finder relied upon the same evidentiary facts to support each conviction. Thus, we conclude that Ogle’s convictions for both Class D felony domestic battery and Class B misdemeanor disorderly conduct violate the prohibitions against double jeopardy. *See Davis v. State*, 770 N.E.2d 319,

323 (Ind. 2002).

Having concluded that Ogle's convictions for both Class D felony domestic battery and Class B misdemeanor disorderly conduct violate the prohibitions against double jeopardy, we next determine what must be done to correct the double jeopardy violation.

When two convictions are found to contravene Indiana double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. *Richardson*, 717 N.E.2d at 54. If it will not, one of the convictions must be vacated. *Id.* In the interest of efficient judicial administration, the trial court need not undertake a full sentencing reevaluation, but rather the reviewing court will make this determination itself, being mindful of the penal consequences that the trial court found appropriate. *Id.*

*Owens v. State*, 742 N.E.2d 538, 544-45 (Ind. Ct. App. 2001), *trans. denied*.

In the instant case, reducing one of the convictions to a less serious form of the same offense will not eliminate the double jeopardy violation because we have determined that the two convictions arose out of the same set of facts. Consequently, one of the convictions must be vacated. As previously stated, when we determine that two convictions contravene double jeopardy principles, we may eliminate the violation by vacating either conviction and we consider the penal consequences that the trial court found appropriate. *Id.* We, therefore, vacate the disorderly conduct conviction because it has less severe penal consequences, and we leave standing the Class D felony domestic battery conviction. *See id.*

### **III. Appropriateness of Sentence**

Initially, we note that in vacating Ogle's Class B misdemeanor disorderly conduct conviction, we also vacate his 180-day sentence that was imposed in connection with the now

vacated conviction. Thus, we will consider Ogle's challenge to his sentence only as it relates to his two-year sentence for Class D felony domestic battery.

Ogle also contends that his two-year sentence is inappropriate in light of the nature of his offense and his character. Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the nature of Ogle's offenses, the record indicates that Ogle engaged in an altercation with his wife and the mother of his young children, during which he accused H.O. of cheating on him, knocked her to the floor, pulled her back onto the bed by her ankles, flipped her over to a face-down position, and confined her to the bed. Ogle also ignored H.O.'s many requests that he stop. As a result of the altercation, H.O., who was frightened by the altercation, suffered from pain and discomfort and had difficulty breathing. Ogle only stopped after he realized that H.O. had called 911 and had given the 911 operator their home address. Furthermore, Ogle was aware that his young children were sleeping in an adjoining room throughout the entire altercation.

With respect to Ogle's character, the record indicates that although Ogle's first criminal conviction did not occur until he was twenty-three years old, Ogle, who was twenty-seven years old at the time the instant altercation occurred, has amassed a criminal history that includes multiple operating while intoxicated convictions and a conviction for check

deception. Ogle has previously been placed on probation but has failed to modify or reform his behavior to conform to the laws of this state. Notably, Ogle was on probation at the time he committed the instant offenses. In addition, since the time of his arrest for the instant offenses, Ogle has been further charged with committing invasion of privacy, a Class A misdemeanor. While we commend Ogle for his desire to provide for his young children, based on our review of the evidence, we see nothing in Ogle's character or in the nature of his offenses that would suggest that his two-year sentence is inappropriate.

The judgment of the trial court is affirmed in part, reversed in part, and remanded for a corrected sentencing order.

KIRSCH, J., and CRONE, J., concur.