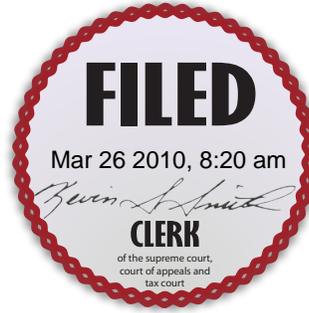


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAISY POPE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 71A04-0910-CR-586

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R. W. Chamblee, Jr., Judge
Cause No. 71D08-0704-FC-121

March 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Daisy Pope (“Pope”) appeals her conviction for Battery Resulting in Serious Bodily Injury, a Class C felony.¹ We affirm.

Issues

Pope presents two issues for review:

- I. Whether there is sufficient evidence of serious bodily injury so as to elevate the offense of Battery from a Class A misdemeanor to a Class C felony; and
- II. Whether she was entitled to an instruction upon the lesser-included offense of Battery Resulting in Bodily Injury.

Facts and Procedural History

During the evening of November 26, 2006, Lora Chisonga (“Chisonga”) heard a knock at her door and went to answer it. Before Chisonga could get the door open, it was “kicked in.” (Tr. 36.) Chisonga was knocked to the floor. Pope, who is Chisonga’s former sister-in-law, jumped on Chisonga and began kicking and hitting her. Willie Pope, Chisonga’s former husband and Pope’s brother, attacked Chisonga’s current husband.

Chisonga crawled into the kitchen in an effort to reach a telephone. Pope continued to strike Chisonga and, at some point, Chisonga became aware that someone had attempted to stab her with a knife. The knife did not strike Chisonga but instead struck the refrigerator. Pope stood over Chisonga, who was still on the floor, and poured a full pot of hot coffee on her. Pope then laughed and left the apartment with her brother.

¹ Ind. Code § 35-42-2-1(a)(3). She does not challenge her conviction for Residential Entry, a Class D felony. See Ind. Code § 35-43-2-1.5.

Pope was subsequently charged with Residential Entry and Battery Causing Serious Bodily Injury. At the conclusion of a jury trial, she was convicted as charged. Pope was sentenced for battery to four years imprisonment with three years suspended to probation. She received an eighteen-month concurrent sentence for Residential Entry. She now appeals.

Discussion and Decision

I. Evidence of Serious Injury

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and the reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). In so doing, we do not assess witness credibility or reweigh the evidence. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

To convict Pope of Battery, as charged, the State was required to prove that she knowingly or intentionally touched Chisonga in a rude, insolent, or angry manner, causing serious bodily injury. Ind. Code § 35-42-2-1(a)(3). “Serious bodily injury” is bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, permanent or protracted loss or impairment of the function of a bodily member or organ, or loss of a fetus. Ind. Code § 35-41-1-25. The State specifically alleged that Chisonga suffered “extreme pain,” (App. 106.), and Pope contests only the sufficiency of the evidence offered to establish such.

Chisonga testified that Pope poured a full, freshly made pot of coffee on her. She described her immediate feelings as “horrible” and “painful.” (Tr. 40.) Chisonga had called her friend Kristin Draper (“Draper”) to come over and put burn ointment on the injury; during her wait, Chisonga experienced pain to which she assigned “a ten” on a scale of one to ten. (Tr. 56.) Draper testified that Chisonga was crying hysterically, and that she had observed “huge blisters all over [Chisonga’s] back.” (Tr. 116.) Draper felt the burn ointment was ineffective and advised Chisonga’s husband to take her to the emergency room. At the hospital, Chisonga was treated with sulfadiazine cream.

For the next few weeks, Chisonga’s pain level remained “like a ten.” (Tr. 63.) She testified that “it got worse before it got better because the skin got tight and that made it really uncomfortable.” (Tr. 63.) Chisonga missed six weeks of work as a food server because she was unable to carry the trays. She was permanently scarred. A photograph of Chisonga’s injuries depicts large blisters covering an extensive area of her neck and back. From this evidence, the jury could conclude that Pope knowingly or intentionally touched Chisonga in a rude, insolent, or angry manner, causing serious bodily injury, specifically, extreme pain, to Chisonga.

II. Lesser-included Offense Instruction

Pope next argues that the jury should have been instructed that it could convict her of Battery Resulting in Bodily Injury, a Class A misdemeanor, as opposed to Battery Resulting in Serious Bodily Injury, a Class C felony.

Indiana Code Section 35-42-2-1 provides in pertinent part:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) A Class A misdemeanor if:

(A) It results in bodily injury to any other person; . . .

(3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon[.]

In Wright v. State, the Indiana Supreme Court clarified the circumstances under which a trial court should instruct a jury on a lesser included offense of the crime charged and set forth a three-part test. 658 N.E.2d 563, 566-67 (Ind. 1995). First, the trial court should determine whether the lesser offense is inherently included in the charged offense. 658 N.E.2d at 566. If the offense is not inherently included, then the trial court should determine if it is factually included in the charged offense. Id. at 567. Finally, if the offense is either inherently or factually included in the charged offense, the court should examine the evidence and determine whether there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense. Id.

Battery Resulting in Bodily Injury is an included element of Battery Resulting in Serious Bodily Injury, as the elements differ only as to the severity of the injury. See Ind. Code § 35-42-2-1. Where, as here, a trial court makes a finding as to the absence of a substantial evidentiary dispute, we review the trial court's rejection of a tendered instruction for an abuse of discretion. Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998).

Pope's defense strategy was to suggest that someone else who was present in the apartment poured coffee on Chisonga. She did not produce evidence giving rise to a serious evidentiary dispute as to whether Chisonga was merely injured but not seriously injured. The

trial court did not abuse its discretion by rejecting Pope's tendered instruction.

Conclusion

There is sufficient evidence to support Pope's conviction of Battery Resulting in Serious Bodily Injury. She has demonstrated no abuse of discretion in the trial court's instruction of the jury.

Affirmed.

MAY, J., and BARNES, J., concur.