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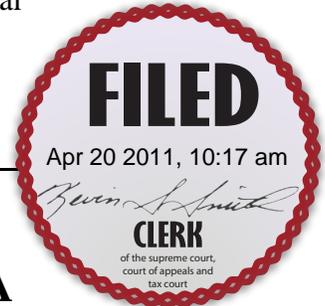
ATTORNEY FOR APPELLANT:

MATTHEW J. McGOVERN
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

GARY R. ROM
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

LOREN SALLEE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 31A01-1008-CR-399

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-0812-FD-957

April 20, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Loren Sallee (Sallee), appeals his conviction for Count I, domestic battery, as a Class A misdemeanor, Ind. Code § 35-42-2-1.3, Count II, domestic battery, as a Class D felony, I.C. § 35-42-2-1.3, and Count IV, interference with reporting of a crime, a Class A misdemeanor, I.C. § 35-45-2-5.

We affirm.

ISSUE

Sallee raises one issue for our review, which we restate as the following: Whether the evidence was sufficient to support his conviction.

FACTS AND PROCEDURAL HISTORY

In November 2008, Patricia Wright (Wright) and Sallee were married and living together in their home with their three children: Megan, eighteen-years old, M.S., seventeen-years old, and S.S., thirteen-years old. At the time, Sallee's brother, Terry Sallee (Terry), was living in their house. Early that month, Wright underwent gallbladder surgery and was involved in a serious auto accident. Because of her surgery and accident, Wright was taking prescription pain medication, digestive aids, antibiotics, and muscle relaxers.

On November 17, 2008, Wright was at home recuperating. Both M.S. and S.S. were also at home. At some point during the evening, Wright and Sallee got into an argument because Sallee wanted to have sex with Wright. The argument lasted "off and on throughout the whole evening." (Transcript p. 79). At around 2 a.m. in the morning, Megan returned home with two young men and the three of them went straight to her bedroom. Sallee, who

had been asleep on a recliner in the living room, woke up and woke Wright to tell her she needed to “get those two boys out of his house.” (Tr. p. 80). Wright responded that she was sick, tired, and needed to sleep, and that she would deal with the situation in the morning. Sallee began to yell and insisted that she tell the young men to leave. Sallee and Wright started to argue again for about an hour.

At some point, Wright came out of her bedroom and attempted to go outside to her van because Sallee told her that “he was going to fix it to where [she] could not leave [] the home.” (Tr. p. 81). As soon as Wright came back into the house, Sallee took the van keys from her. Wright had her cell phone in her hand and attempted to call 9-1-1, but Sallee grabbed the phone. A fight ensued and Sallee started “pushing [Wright] around, grabbing [her], holding [her] real tight, trying to get the [cell] phone, [and] squeezing [her] arm.” (Tr. p. 83).

Meanwhile, Megan heard Sallee and Wright argue. At one point, Megan heard a loud crash come from M.S.’s bedroom. Isaac Jones (Jones), one of the two young men that came home with Megan, also heard Wright yelling for help and then what sounded like “something heavy [] being thrown up against the wall....” (Tr. p. 130). At that point, Megan went into M.S.’s room, and when she entered, she saw Sallee holding Wright’s wrists and “toss[ing] [Wright] around like a rag doll.” (Tr. p. 153). Additionally, she saw Wright’s broken cell phone on the floor, which she took to the kitchen to try and fix.

After the argument ended early that morning, Wright and Sallee agreed to talk about the argument when Sallee returned from work. Later that day, Wright went to the police

station and gave a statement regarding the argument she and Sallee had because she felt “very scared.” (Tr. p. 85). Soon thereafter, on November 20, 2008, Sallee filed for divorce and also filed a protective order against Wright to prevent the children, who were living with Sallee at the time, from seeing her. At the hearing for the protective order, Wright recanted her statements against Sallee because she was “desperate to see her children.” (Tr. p. 87). Ultimately, the protective order was not granted.

On December 3, 2008, the State filed an Information charging Sallee with Count I, domestic battery, as a Class A misdemeanor, I.C. § 35-42-2-1.3; Count II, domestic battery, as a Class D felony, I.C. § 35-42-2-1.3; Count III, criminal confinement, a Class D felony, I.C. § 35-42-3-3; and Count IV, interference with reporting of a crime, a Class A misdemeanor, I.C. § 35-45-2-5.

During the course of the investigation into the charges, Wright gave a deposition. Prior to the deposition, Wright spoke with Sallee, who told her to say that she had made everything up and that it was a lie. He told her that if she did not do this, he would not allow her to see her children. Sallee also told her that the pain medication she had been taking was the “key” to ensuring that they both would be out of trouble. (Tr. p. 115). At the deposition, Wright answered most of the questions asked by the attorneys with “I don’t remember.” (Tr. pp. 89-90). Wright answered like that “because of the threats of not being able to see [her] children again.” (Tr. p. 90).

On May 18-20, 2010, a jury trial was held. During the trial, Wright testified that she had given inconsistent statements at the protective order hearing and at her deposition in

order to help Sallee get out of trouble and because she believed that if she did not comply, Sallee would act on his threats. Terry also testified at the trial, and recounted a different version of the argument. He testified that “[n]obody was hit” and that the physical contact between Sallee and Wright “was just a grabbing thing for the [van] keys.” (Tr. p. 215). At the close of the evidence, the jury found Sallee guilty of Count I and II, domestic battery, and Count IV, interference with reporting of a crime. On July 12, 2010 Sallee was sentenced to one year for Count II and four months for Count IV, with sentences to run concurrently for an aggregate sentence of one year. The trial court did not enter judgment for Count I because of double jeopardy concerns.

Sallee now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Sallee argues that the evidence is insufficient to sustain his conviction because Wright and Megan’s testimony was incredibly dubious. Specifically, he contends that Wright’s testimony contradicts the testimony of Terry, who was an eyewitness to the event, and also that she “recanted the accusations that she and Megan made on two occasions prior to trial and told several witnesses that she fabricated the accusations.” (Appellant’s Br. p. 8).

In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the

judgment. *Id.* at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

Under the incredible dubiousity rule, a reviewing court will impinge on the factfinder's responsibility to judge the credibility of the witness only when it has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of "incredible dubiousity." *Copeland v. State*, 802 N.E.2d 969, 971 (Ind. Ct. App. 2004). When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. *Id.* Application of this rule is rare. *Id.* The standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.* Additionally, the rule applies to conflicts in trial testimony rather than conflicts that exist between trial testimony and statements made to the police before trial. *Buckner v. State*, 857 N.E.2d 1011, 1018 (Ind. Ct. App. 2006).

The offense of domestic battery is governed by I.C. § 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 "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." Additionally, the offense of interference with the reporting of a crime is governed by I.C. § 35-45-2-5, which provides that "[a] person who, with the intent to commit, conceal,

or aid in the commission of a crime, knowingly or intentionally interferes with or prevents an individual from: (1) using a 911 emergency telephone system.”

Sallee directs us to *Sisson v. State*, 710 N.E.2d 203, 206 (Ind. Ct. App. 1999), where we reversed Sisson’s conviction for burglary. In that case, the key witness testified on direct examination that Sisson was involved in three burglaries, then recanted during cross-examination and stated that Sisson was only present during the first. *Id.* at 205, 208. The witness also admitted during cross-examination that he had lied to police and to the jury. *Id.* at 206. The jury acquitted Sisson of two burglaries, but convicted him of burglarizing one house about which the witness was particularly unclear. *Id.* at 207. We held that such blatantly contradictory testimony could not support the jury’s verdict. *Id.* at 207-08.

We find that this case is inapposite because Wright’s testimony during the trial was not incredibly dubious, as we have stated that “discrepancies between a witness’s trial testimony and earlier statements made to police and in depositions do not render such testimony ‘incredibly dubious.’” *Holeton v. State*, 853 N.E.2d 539, 542 (Ind. Ct. App. 2006). Wright testified that prior to the deposition, she recanted her story and stated that she did not remember the events of that evening because she was afraid of the threats she had received from Sallee that she would not see her children again. However, during the trial, Wright did not waver about the events that occurred on November 17, 2008, when she testified that Sallee threw her against the wall, squeezed her arm and held her tightly, all of which resulted in pain. Whatever inconsistencies that appeared in Wright’s statements to the police when compared to her trial testimony, such discrepancies go only to the weight of that testimony

and Wright's credibility. *Holeton*, 853 N.E.2d at 542. As such, Wright's testimony was not incredibly dubious.

In addition, Wright's testimony was consistent with Megan and Jones' version of the event. Megan testified that she heard a loud crash and then went into her brother's room and saw Sallee holding Wright's wrists and "toss[ing] [Wright] around like a rag doll." (Tr. p. 153). Jones also testified that he heard Wright yelling for help and then what sounded like "something heavy [] being thrown up against the wall..." (Tr. p. 130). Furthermore, Wright testified that Sallee broke her phone when she intended to call 9-1-1, which Megan corroborated when she took the phone to the kitchen to fix.

Sallee also argue that Terry's testimony contradicted Wright's testimony. Specifically, he argues that Wright pushed Sallee against the wall, and Jones' account of the incident is consistent with Terry's. The incredibly dubiousity rule is inapplicable here because he is directing us to inconsistencies between two witnesses; not contradictions within the testimony of one witness. Essentially, Sallee is essentially asking us to reweigh the evidence, which we cannot do. *Perez*, 872 N.E.2d at 212-13. The State presented sufficient evidence to sustain Sallee's convictions, as Wright testified that Sallee pushed her against the wall,

squeezed her, and held her tightly, all of which caused her pain, and Sallee performed these acts when in the presence of their thirteen-year-old son.

CONCLUSION

Based on the foregoing, we conclude that Wright's testimony was not incredibly dubious and the State presented sufficient evidence to convict Sallee.

Affirmed.

DARDEN, J., and BARNES, J., concur.