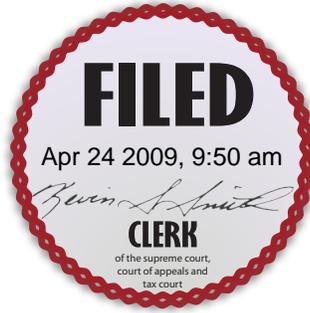


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JOHN C. BOHDAN
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RICK L. ROBINSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 02A05-0811-CR-658
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No.02D04-0802-FB-31

April 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Rick Robinson appeals his convictions following a jury trial for Criminal Confinement, a Class C felony,¹ Intimidation, a Class D felony,² two counts of Possession of a Controlled Substance, a Class D Felony,³ and Possession of a Firearm by a Serious Violent Felon, a Class B Felony.⁴ On appeal, Robinson raises several issues which we restate as whether the evidence was insufficient to support Robinson's convictions, and whether the trial court abused its discretion in admitting and excluding certain evidence at trial. Concluding that the evidence was sufficient to support Robinson's convictions and that the trial court did not abuse its discretion in admitting or excluding certain evidence at trial, we affirm.

FACTS AND PROCEDURAL HISTORY

Robinson and Amy Pate, who first met in 2001, began dating in January of 2008. On February 7, 2008, Pate spent the night at Robinson's home on Third Street in Fort Wayne. The next morning, Robinson and Pate awoke around 6:00 a.m. and had sexual intercourse before Pate left to take her children to school. Pate returned to Robinson's home at approximately 9:30 a.m. That morning, Robinson and Pate ran some errands around town before returning to Robinson's home together around noon. Robinson and Pate then "went upstairs," "smoked a blunt," "had intercourse," and "took showers together." Tr. p. 166. As Pate and Robinson walked downstairs to leave, Pate realized that she could not find her keys.

¹ Ind. Code § 35-42-3-3 (2007).

² Ind. Code § 35-45-2-1 (2007).

³ Ind. Code § 35-48-4-7 (2007).

⁴ Ind. Code § 35-47-4-5 (2007).

Pate described what happened next as follows:

[Pate] said, 'Baby, I can't find my keys,' and [Robinson] turned around and looked at me and said, 'what do you mean?' And I said, 'I can't find my keys.' I put my hands in my coat pocket and they weren't there and he turned and said, 'Bitch, I'm going to show you what happens to bitches like you that want to f*** with me.' He slapped me across my face and told me to sit on his weight bench. He went outside to his van. When he came back inside, he dead bolted his door with a key. He picked up a brown weight belt that he had in his living room and he told me we were going to go through the whole house and look for my keys and everywhere we didn't find my keys he was going to hit me with that belt. We started in his living room and walked through the whole downstairs. I knew when I went through the kitchen and I looked at his clock and it said 1:40 p.m. We got up the stairs, he told me to open up his bedroom door. I did. We got in the room, he continued to hit me with the belt. I had my back to it. He wrapped the belt around my neck. He bent back over his bed. He was spitting at me, yelling things at me. I can't exactly remember what he was saying because all I could think was pray to God that I would see my kids again. When I told him I couldn't breathe, he picked me up off of my feet, put the belt around my neck. I remember things started to turn white and fade away and I felt like I was going to pass out. [Robinson] stopped. He started touching my face realizing that he had caused injury to the left side of my face. He started freaking out, asking me what I was going to say happened to me. I told him anything I could to make him feel safe so he would let me go. I told him I would tell people I fell, that I got into a fight. I convinced him I would not turn him into anyone so that he would let me out of his house.

Tr. pp. 167-68. Robinson told Pate that she would be on the front page of the newspaper if she told the police what happened to her. Robinson and Pate then walked downstairs together where they talked in his kitchen for a little bit. While in the kitchen, Pate noticed that her keys were in a plastic Kroger bag on Robinson's table. Robinson told Pate that he "knew they were there the whole time." Tr. p. 182. At approximately 3:40 p.m., Robinson allowed Pate to leave his home.

Pate waited until approximately 1:00 a.m. on February 9, 2008, a time when she knew

Robinson would be asleep, to seek treatment. Pate was treated for bruises on her back, shoulder, and head, for pain in her left ear, and for facial contusions and abrasions. Dr. Andrew McCanna, Pate's treating physician, described Pate's demeanor as "pretty tearful, crying, upset and anxious." Tr. p. 263. Pate told Dr. McCanna that her boyfriend had assaulted her and that she was afraid of him. Dr. McCanna determined that Pate's injuries were consistent with blunt force injury.

On Sunday, February 10, 2008, Pate visited her sister and her father at her sister's apartment. Upon observing Pate's injuries, Pate's father called the police. Fort Wayne Police Officer Doug Hart responded to Pate's father's call, recorded Pate's statement that Robinson had beat her, and photographed Pate's injuries. Later that evening, Robinson began calling Pate, describing the people who were visiting Pate's home and what they were wearing. Pate, fearing for her safety as well as that of her children and her visitors, agreed to meet Robinson at his home.

At some point after Pate arrived at Robinson's home, Robinson became afraid that the police were going to raid his home because he thought they knew Pate was there. Robinson "grabbed his gun and waved it around pacing from his window to his bed and told [Pate] to write a note" stating that she suffered injuries after falling down the stairs. Tr. p. 189. Robinson told Pate what to write word-for-word and directed her to sign and date the note. Pate complied.

Several days later, Fort Wayne Police Detective Scott Morales interviewed Pate and took additional photographs of her injuries. Detective Morales obtained a search warrant for

Robinson's home based on the information provided by Pate. Upon executing the search warrant, Detective Morales recovered a large, brown weight lifting belt from Robinson's living room, a loaded silver, Smith and Wesson .357 magnum revolver, two boxes of .357 magnum ammunition, a holster, and the note allegedly written by Pate stating that she fell down Robinson's stairs from Robinson's bedroom. Detective Morales also recovered an unlabeled pill bottle containing nine pills. Robinson described the pills as "methadone" and "Tylenol 3s" and admitted to Detective Morales that he knew the pills were in his bedroom. Chemical tests confirmed that the pills were methadone and Tylenol 3, both of which are scheduled drugs requiring a prescription for possession. No evidence was presented suggesting that Robinson had a prescription for either drug.

On February 22, 2008, the State charged Robinson with Class C felony battery, Class C felony criminal confinement, Class D felony intimidation, Class D felony strangulation, two counts of Class D felony possession of a controlled substance, and Class B felony possession of a firearm by a serious violent felon. Prior to trial, Robinson moved to suppress the evidence recovered from his home, claiming that the search warrant lacked probable cause. The trial court granted Robinson's motion as it related to certain bodily fluids and his cell phone, but denied the motion as it related to the other evidence recovered from Robinson's home. Robinson also moved to prevent the State from presenting the testimony of Pate's sister, Shannon Whelchel, that Robinson had made an unsolicited offer to sell her methadone, stating that he had a "doctor in his pocket." Tr. p. 278-79. The trial court denied this motion. Following trial, the jury found Robinson guilty of all charges, except for the

Class C felony battery charge and the Class D felony strangulation charge. The trial court entered judgment against Robinson and sentenced him to an aggregate term of twenty-eight years. This appeal follows.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Robinson challenges the sufficiency of the evidence supporting his convictions for criminal confinement, intimidation, possession of a controlled substance, and possession of a firearm by a serious violent felon by arguing that his convictions are based on the incredibly dubious testimony of the victim, Amy Pate. Robinson also challenges the sufficiency of the evidence to support his convictions for possession of a controlled substance on the additional ground that the evidence was insufficient to show that he knowingly or intentionally possessed the controlled substances Tylenol 3 and methadone.

Our standard for reviewing sufficiency of the evidence claims is well-settled. *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). Upon review, we consider only the evidence that supports the verdict and all reasonable inferences drawn therefrom. *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). We do not reweigh the evidence or judge the credibility of the witnesses, and it lies within the jury's exclusive province to weigh conflicting evidence. *Alkhalidi*, 753 N.E.2d at 627. We will affirm a conviction if there is probative evidence and reasonable inferences from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Hyppolite v. State*, 774 N.E.2d 584, 598 (Ind. Ct. App. 2002), *trans. denied*.

A. Incredibly Dubious Testimony

“Under the incredible dubiousity rule, a court will impinge upon the jury’s responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” *Murray*, 761 N.E.2d at 408. Application of this rule is limited to cases where a single 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. *Id.* Additionally, it is well established that a conviction may be based on the sole uncorroborated testimony of the victim. *Smith v. State*, 432 N.E.2d 1363, 1372 (Ind. 1982).

Robinson contends that Pate’s testimony was so incredibly dubious or inherently improbable that no reasonable person could say that his guilt had been proven beyond a reasonable doubt. Robinson claims that Pate’s testimony contained a mass of contradictions and inherent improbability that defy rational reconciliation. We disagree. The events described by Pate are not inherently improbable, nor do they run counter to human experience. In addition, the State presented additional testimony and evidence corroborating Pate’s testimony. The testimony of Detective Morales and Dr. McCanna corroborated Pate’s testimony as did the physical evidence presented by the State, including the brown leather weight lifting belt, the gun, the ammunition, the holster, and the letter allegedly written by Pate to Robinson.

Moreover, to the extent that Pate’s lengthy testimony may have contained a few minor inconsistencies, such inconsistencies were for the jury to resolve and did not rise to the level

of making Pate's testimony incredibly dubious. *See Murray*, 761 N.E.2d at 409 (stating that it is for the trier of fact to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve); *Heeter v. State*, 661 N.E.2d 612, 615-16 (Ind. Ct. App. 1996). As such, we will not disturb the jury's determination with respect to Robinson's guilt.

B. Knowing or Intentional Possession

To convict Robinson of possession of a controlled substance, the State was required to prove, pursuant to Indiana Code section 35-48-4-7, that Robinson, without a prescription, knowingly or intentionally possessed "a controlled substance (pure or adulterated) classified in schedule I, II, III, or IV." Robinson claims that the evidence was insufficient to prove that he knowingly or intentionally possessed the controlled substances Tylenol 3 and methadone. "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Indiana Code § 35-41-2-2(a) (2006). Likewise, "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Indiana Code § 35-41-2-2(b). "Intent and knowledge may be proved by circumstantial evidence and inferred from the circumstances and facts of each case." *Heavrin v. State*, 675 N.E.2d 1075, 1079 (Ind. 1996).

Here, the evidence establishes that nine pills subsequently determined to be Tylenol 3, which contains codeine, and methadone were found in a pill bottle in Robinson's bedroom. When questioned by Detective Morales, Robinson described the pills as "methadone" and "Tylenol 3s" and admitted that he knew the pills were in his bedroom. Chemical tests confirmed that the pills were methadone and Tylenol 3. Evidence was presented establishing

that Tylenol 3 is a Schedule III controlled substance and methadone is a Schedule II controlled substance. No evidence was presented suggesting that Robinson had a prescription for either drug.

We conclude that this evidence was sufficient to support the jury's determination that Robinson knowingly or intentionally possessed the controlled substances Tylenol 3 and methadone. We therefore affirm Robinson's convictions for Class D felony possession of a controlled substance. Robinson's claim that the evidence presented at trial was insufficient to prove that he knowingly or intentionally possessed the Tylenol 3 and methadone amounts to an invitation to reweigh the evidence, which we decline.

II. Admission of Evidence

Robinson next contends that the trial court abused its discretion in admitting certain evidence at trial. Specifically, Robinson claims that the trial court erred in denying his motion to suppress and committed reversible error in admitting bad character evidence concerning his alleged drug dealing activities. Robinson also claims that the trial court abused its discretion in denying his right to present a defense by excluding certain evidence from trial.

The admission [and exclusion] of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. In determining the admissibility of evidence, the reviewing court will only consider the evidence in favor of the trial court's ruling and unrefuted evidence in the defendant's favor.

Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002), *trans. denied*; *see also Wilson v. State*, 765 N.E.2d 1265, 1272 (Ind. 2002) (providing that the exclusion of evidence is within the sound discretion of the trial court). The reviewing court will not reverse the trial court’s decision to admit evidence if that decision is sustainable on any ground. *Crawford v. State*, 770 N.E.2d 775, 780 (Ind. 2002).

A. Adequacy of Affidavit⁵

Robinson claims that evidence recovered from his home should not have been admitted at trial because the warrant authorizing the search of his home was not supported by probable cause. Specifically, Robinson claims that Detective Morales’s affidavit of probable cause was insufficient to justify a warrant permitting the search of his home because the affidavit was based solely upon the report made by Robinson’s victim, Amy Pate. It is undisputed that to be valid, “[A] warrant and its underlying affidavit must comply with the Fourth Amendment prohibition on unreasonable searches and seizures, as well as Indiana constitutional and statutory law.” *Gray v. State*, 758 N.E.2d 519, 521 (Ind. 2001). “In order to comply with these restrictions, the magistrate’s task is ‘simply to make a practical, commonsense decision whether, given all the circumstances set forth before him . . . there is a

⁵ Initially, we note that Robinson frames his argument as whether the trial court abused its discretion by denying his motion to suppress the evidence recovered from his home. However, Robinson did not seek an interlocutory appeal after the denial of his motion to suppress. Rather, he proceeded with his trial and objected to the admission of the evidence at trial. “In such cases, the trial court’s denial of a motion to suppress is insufficient to preserve error for appeal.” *Washington v. State*, 784 N.E.2d 584, 586 (Ind. Ct. App. 2003). “Rather, the defendant must make [a] contemporaneous objection to the admission of the evidence at trial.” *Id.* “Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial.” *Id.*

fair probability that contraband or evidence of a crime will be found in a particular place.”

Id. (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

“As the reviewing court, our duty under the Fourth Amendment is to determine whether the magistrate issuing the warrant had a ‘substantial basis’ for concluding that probable cause existed.” *Id.* (citing *Gates*, 462 U.S. at 238-39). “While significant deference is due to the magistrate’s determination, our search for substantial basis must focus on whether ‘reasonable inferences drawn from the totality of the evidence support the determination.’” *Id.* (quoting *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997)).

Indiana Code section 35-33-5-2(a) (2007) provides in pertinent part that no warrant for a search of a person’s residence shall be issued until an affidavit is filed with the judge:

- (1) particularly describing:
 - (A) the house or place to be searched and the things to be searched for
...
- (2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:
 - (A) the things as are to be searched for are there concealed ... and
- (3) setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause.

Indiana Code section 35-33-5-2(b) further provides that when based on hearsay, “[T]he affidavit must either (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.” However, the Indiana Supreme Court has held that “where the report to the police officer is made by a victim of the crime, the affidavit of the

police officer setting forth the report of the victim is sufficient to justify the issuance of a warrant.” *Mickens v. State*, 479 N.E.2d 520, 523 (Ind. 1985). Therefore, in light of the Indiana Supreme Court’s holding in *Mickens*, we conclude that Detective Morales’s affidavit of probable cause setting forth Pate’s report was sufficient to justify the issuance of a search warrant. Accordingly, the trial court did not abuse its discretion in admitting the evidence recovered as a result of the search of Robinson’s home.

B. Character Evidence

Robinson also claims that the trial court abused its discretion in admitting certain statements by Shannon Welchel that Robinson offered to obtain methadone for her and told her that he had “a doctor in his pocket” because such statements were inadmissible pursuant to Indiana Rule of Evidence 404(b). Tr. p. 279. Conversely, the State argued that Welchel’s testimony regarding Robinson’s offer to obtain methadone for her and his comment that he had “a doctor in his pocket” was properly admitted because it was relevant to show that Robinson knew that methadone was only available with a prescription by a doctor. Tr. p. 279.

Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

To decide whether character evidence is admissible under Indiana Evidence Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. *Matthews v. State*, 866 N.E.2d 821, 825 (Ind. Ct. App. 2007), *trans. denied*.

Here, the trial court determined that Whelchel's testimony regarding Robinson's offer to obtain methadone for her and his statement that he had "a doctor in his pocket" were relevant to prove Robinson's knowledge that methadone was a controlled substance, requiring a prescription by a doctor. Tr. p. 279. In addition, Robinson does not assert that the State failed to give him reasonable notice in advance of trial of Whelchel's testimony. Moreover, Robinson has not shown that the probative value of these statements is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See Ind. Evidence Rule 3. In fact, Robinson has failed to show that he suffered any prejudice as a result of Whelchel's testimony. Whelchel's testimony was therefore admissible under Rule 404(b).

C. Right to Present a Defense

Robinson also claims that the trial court abused its discretion in allegedly denying his right to present a defense by excluding evidence that Pate had been in a disagreement with another individual during the relevant time period.

Every defendant has the fundamental right to present witnesses in their own defense. This right is in plain terms the right to present a defense, the right to

present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. At the same time, while the right to present witnesses is of the utmost importance, it is not absolute. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998) (citations and quotations omitted), *modified on reh'g on other grounds*, 711 N.E.2d 1237 (Ind. 1999).

One of the evidentiary rules with which a defendant must comply is Indiana Evidence Rule 401, which governs relevant evidence. Ind. Evidence Rule 401. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401. "The two components of relevant evidence are materiality and probative value." *Kubsch v. State*, 784 N.E.2d 905, 924 (Ind. 2003). "If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." *Id.* (quoting 1 *McCormick on Evidence* § 185, at 637 (John W. Strong ed., 5th ed. 1999)). Whether or not the proffered testimony is relevant, and thus, whether the evidence should be admitted, is a decision within the discretion of the trial court. *Roach*, 695 N.E.2d at 939. Again, on appeal, this court only reviews such decisions for an abuse of discretion. *Id.*

At trial, Robinson sought to admit, through the testimony of Pate, evidence that Pate had been engaged in a disagreement with another individual during the relevant time period. The State objected to the relevance of this line of questioning. Robinson asserted that this evidence was relevant to show that Pate had been engaged in a dispute with another

individual, but admitted that he did not intend to subpoena this alleged other individual. Furthermore, Robinson presented no argument suggesting that Pate's alleged disagreement with another individual during the first half of February 2008 had resulted in a physical confrontation. The trial court determined that this line of questioning was irrelevant as to whether Robinson had hit Pate on February 8, 2008.

Robinson failed to show how the admission of the proffered testimony concerning an alleged disagreement between Pate and another individual was relevant to prove or disprove the material assertion that he had been involved in a physical altercation with Pate on February 8, 2008. As such, the trial court was within its discretion to determine that Pate's testimony on the alleged disagreement was irrelevant. Moreover, to the extent that the trial court's exclusion of evidence that Pate had been involved in a disagreement with another individual during the relevant time period may have amounted to an abuse of the trial court's discretion, we observe that such was harmless because the jury acquitted Robinson of the Class C felony battery charge and the Class D felony strangulation charge.

CONCLUSION

In sum, having concluded that Pate's testimony was not incredibly dubious, that evidence was sufficient to support the jury's determination that Robinson knowingly or intentionally possessed the controlled substances Tylenol 3 and methadone, that Officer Morales's affidavit of probable cause was sufficient to justify a warrant providing for the search of Robinson's home, that the trial court did not abuse its discretion in admitting Whelchel's testimony at trial, and that the trial court did not deny Robinson the right to assert

any defense, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.