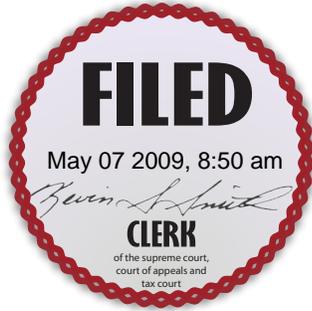


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

STEVEN P. TEVERBAUGH
Greensburg, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

TIFFANY N. ROMINE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

KELLY S. SHEPHERD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 40A01-0808-CR-397

APPEAL FROM THE JENNINGS SUPERIOR COURT
The Honorable James Funke, Jr., Judge
Cause No. 40D01-0709-CM-646

May 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kelly S. Shepherd appeals her conviction for class B misdemeanor disorderly conduct.

We reverse.

Issue

Kelly presents a single issue, which we restate as:

Whether the evidence is sufficient to support her conviction.

Facts and Procedural History

The evidence most favorable to the verdict shows that on March 28, 2007, Kelly gave permission to her ex-husband, Scott Shepherd, to come to her home to remove a couch and other belongings pursuant to a final divorce decree. The couch was on the second floor, and Kelly removed the couch's legs to facilitate its removal before Scott arrived. Scott came to the house with his son, who described Kelly as "uncooperative[,] "constantly yelling[,] "and "telling [Scott] what he could do, what he couldn't do, that he needed to just leave." Tr. at 100. Scott and his son carried the couch down the stairs, put it down, and started to reattach the legs. Kelly threw one of the couch legs and told Scott to "get out." *Id.* at 117. Kelly said she was going to kick the couch leg if Scott did not leave. *Id.* at 148, 162. Scott testified that he "may have told her to go ahead and kick." *Id.* at 148. Kelly then kicked the leg that Scott was attaching and struck his hand in the process, resulting in red marks and swelling.¹ The kick also bent the screw so that the couch leg was unusable.

¹ The incident was videotaped, and the tape was given to the police and submitted as evidence in Kelly's trial.

On September 7, 2007, the State charged Kelly with class A misdemeanor domestic battery,² class A misdemeanor battery resulting in bodily injury,³ and class B misdemeanor disorderly conduct. On May 28, 2008, a jury found Kelly guilty of class B misdemeanor disorderly conduct and not guilty of the remaining charges. Kelly appeals.

Discussion and Decision

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 drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment.” *Id.* at 213.

To convict Kelly of disorderly conduct, the State was required to prove beyond a reasonable doubt that she (1) recklessly, knowingly, or intentionally (2) engaged in fighting and/or (3) tumultuous conduct. Ind. Code § 35-45-1-3(a)(1); Appellant’s App. at 23. We first address whether the evidence demonstrates beyond a reasonable doubt that Kelly engaged in “fighting.” “Fighting” is not statutorily defined, but we have interpreted it as a “hostile encounter; either physical or verbal in nature.” *J.S. v. State*, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006) (quoting BLACK’S LAW DICTIONARY 565 (5th ed. 1979)) (brackets omitted), *trans. denied*. The State asserts that the evidence shows that Kelly was verbally

² Ind. Code § 35-42-2-1.3.

³ Ind. Code § 35-42-2-1.

hostile toward Scott and was physically hostile when she kicked the couch leg. Although Kelly was uncooperative and yelling, we think that adopting the State’s position would result in an overly broad interpretation of fighting under the statute. Expressing hostility is not per se synonymous with fighting. Kelly told Scott she was going to kick the couch leg, and she did. Such conduct does not constitute a fight.

We next turn to the tumultuous conduct prong. Conduct is tumultuous when it “results in, or is likely to result in, serious bodily injury to a person or substantial damage to property.” Ind. Code § 35-45-1-1. “The term ‘likely,’ as used to define tumultuous conduct, includes a temporal requirement of immediacy.” *B.R. v. State*, 823 N.E.2d 301, 307 (Ind. Ct. App. 2005). Serious bodily injury is defined as “bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) *extreme pain*; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus.” Ind. Code § 35-41-1-25 (emphasis added).⁴

The State contends that Scott experienced extreme pain. In *Sutton v. State*, 714 N.E.2d 694 (Ind. Ct. App. 1999), *trans. denied*, another panel of this Court held that the victim suffered extreme pain where she suffered a large contusion to her left temple, a black eye that remained bruised for two to four weeks, suffered a constant migraine-like headache for one to two weeks, and her face, jaw, and teeth hurt so much that it was difficult to eat. *Id.* at 696-97. Here, Scott testified that he felt pain when Kelly’s foot struck his hand as she

⁴ Indiana Code Section 35-41-1-3 provides that the definitions in that chapter apply throughout Title 35.

kicked the couch leg. His hand had red marks and was swollen the next day. There is no evidence that Scott saw a doctor or was in any lingering pain. The evidence demonstrates that Scott suffered some pain, but certainly not extreme pain. Thus, the evidence is insufficient to demonstrate beyond a reasonable doubt that Kelly's conduct resulted in, or was likely to cause, extreme pain.⁵

Alternatively, the State argues that Kelly's conduct caused substantial property damage. When Kelly kicked the couch leg, she bent the screw. The State argues that the leg was an essential part of the couch and was rendered unusable. We cannot agree that a bent screw constitutes substantial property damage. Accordingly, based on the foregoing, we conclude that there was insufficient evidence to support Kelly's conviction for class B misdemeanor disorderly conduct and therefore reverse her conviction. *See N.J. ex rel. Jackson v. Metro. Sch. Dist. of Washington Twp.*, 879 N.E.2d 1192, 1196 (Ind. Ct. App. 2008) (concluding that defendant's conduct in yelling at another student on the bus, being rude to police officers, and refusing to provide information to police officers about events leading to her arrest were not tumultuous conduct).

Reversed.

BRADFORD, J., and BROWN, J., concur.

⁵ The State also asserts that the fact that the screw was bent shows that Kelly kicked with force sufficient to cause extreme pain. While the bent screw may show that Kelly's kick could cause pain, to say it demonstrates that her kick could cause extreme pain is overstating the case.