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IN THE
COURT OF APPEALS OF INDIANA

JEROME A. OSBORN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0812-CR-721
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0703-FC-84

May 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jerome A. Osborn appeals his conviction, after a jury trial, of one count of attempted battery, as a class C felony.

We affirm.

ISSUE

Whether sufficient evidence supports his conviction.

FACTS

At approximately 8:00 p.m. on March 25, 2007, Officers Kelly Waite and Charles Rothy were investigating vacant properties for possible squatters in an area of South Bend. After the officers had checked the vacant house at 4319 South Main, they walked in an eastward direction toward the driveway that paralleled a five-foot retaining wall topped by a wire fence. The ground was elevated higher on the other side of the wall, where they observed Osborn walking in their direction.

Waite pointed his flashlight at Osborn, and Rothy said "hello." Osborn responded, "get that f***ing light out of my eyes." (Tr. 88-89). Waite responded, "don't tell me to take the light out of your eyes." (Tr. 56). Osborn then said, "here is why," and "pulled out a handgun and pointed it at [Waite]." (Tr. 201, 56). When Rothy saw Osborn point the handgun "at [Waite]," he "yelled gun and . . . started to draw [his] weapon." (Tr. 91, 92). As he was "drawing [his] weapon, Rothy "s[aw] a flash * * *, from Mr. Osborn's gun." (Tr. 92). Both Waite and Rothy fired their weapons in the direction of Osborn – who fled westward and into his residence.

Multiple officers responded to the scene, and Osborn was taken into custody. Waite suffered a gunshot wound to his forehead; and Osborn suffered a graze to the left side of his torso.

On March 27, 2007, the State charged Osborn with two counts of battery, as class C felonies. On March 28, 2007, the State amended the charging information to allege that Osborn committed two counts of attempted battery, as class C felonies.[1] Specifically, Osborn "was charged with attempting to batter Officers Waite and Rothy by shooting his firearm at them, 'which conduct constituted a substantial step toward the commission of the crime of battery, that is intentionally touching another person in a rude, insolent, or angry manner.'" State's Br. at 3.[2]

Osborn was tried before a jury on May 27-28, 2008. Evidence of the foregoing was presented.

Osborn testified on his behalf as follows: when he walked outside that evening, he had his gun in his pocket; he saw a flashlight and heard people next-door; "one of 'em hollered something at [him]"; and then there was a flashlight shined in his face. (Tr. 200). Osborn testified that when they ignored his demand that the light not be shined in his eyes, he "pulled the gun up" and "pointed" it. (Tr. 201, 208). He did so "to frighten the people away," and "to get them to take that light out of [his] eyes." (Tr. 208, 233).

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[1] Osborn provided this information regarding the State's charges in his brief, citing to an Appendix. However, our docket does not reflect the filing of an Appendix, and we have not received one. Inasmuch as we have the transcript of his trial; his appeal is a challenge to the sufficiency of the evidence to support his conviction; and the transcript includes the jury's verdict of "guilty on the attempted battery on Officer Waite," we do not find the lack of an Appendix to be critical. (Tr. 284).

[2] Osborn did not disagree that this was the specific allegation of the charging information.

Osborn testified that he faced "two heavy duty threats" – the "lights in [his] eyes, and . . . them not identifying themselves." (Tr. 232). Osborn testified that the light in his eyes made it impossible for him to determine the identity of the people, and that he did not know that they were police officers. Both Waite and Rothy testified that they believed their identity was apparent because they were wearing full uniforms; it was not yet fully dark; and they were fairly close to Osborn.[3] Further, the circumstances did not provide time for them to identify themselves as police officers before Osborn pointed and fired his weapon.

The jury returned a verdict finding Osborn guilty of one count of attempted battery, as a class C felony. Specifically, the jury found that Osborn committed the attempted battery of Waite.

DECISION

> When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

[3] Waite testified that he was approximately twelve feet away from Osborn when they spoke. Rothy described his distance from Osborn as approximately "from [the prosecutor questioning him] to [Rothy on the witness stand]." (Tr. 90).

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted, emphasis in original).

Osborn argues that "there is insufficient evidence to support the conclusion, by the trier of fact, that the State proved beyond a reasonable doubt that Osborn intended to batter Kelley Waite when he pointed and discharged his firearm at him." Osborn's Br. at 5. We disagree.

The State's evidentiary burden was to prove beyond a reasonable doubt that Osborn, "acting with the culpability required for" battery, as a class C felony, "engage[d] in conduct that constitute[d] a substantial step toward commission of" battery, which is to "knowingly or intentionally touch[] another person in a rude, insolent, or angry manner . . . by means of a deadly weapon." Ind. Code §§ 35-41-5-1, 35-42-2-1. Citing to these two statutes, our Supreme Court held in *Richeson v. State*, 704 N.E.2d 1008 (Ind. 1998), that to establish that the defendant committed an attempted battery, the State is not required to prove "that the defendant intended to batter"; but rather, it must "prove that the defendant took a substantial step to accomplish a knowing or intentional battery." *Id.* at 1010. *See also Corbin v. State*, 840 N.E.2d 424, 430 (Ind. Ct. App. 2006) (to convict of attempted aggravated battery, State required to prove defendant "engaged in conduct that constituted a substantial step toward knowingly or intentionally inflicting injury . . . .").

The facts supporting the jury's verdict revealed that, at the time of the incident, both officers were in full uniform, nightfall was not complete, and, that Osborn stood fairly close to the officers on elevated ground several feet above them. Osborn did not ask who they were, or what they were doing. Rather, Osborn profanely demanded that a

flashlight not be shined in his face, and when it was not, he immediately pulled out his weapon and shot in Waite's direction. Osborn presented no evidence at the time he fired his weapon that he was in imminent danger, and the jury declined to accept his self defense theory. We find the evidence is sufficient to establish that when Osborn fired his weapon, he took a substantial step toward the rude, angry or insolent touching of Waite by means of a deadly weapon. *See McEwen v. State*, 695 N.E.2d 79, 88 (Ind. 1998) ("Firing a gun at another but fortuitously missing the target is an attempted battery." (citing *Henderson v. State*, 534 N.E.2d 1105 (Ind. 1989)).

Affirmed.

BAILEY, J., and ROBB, J., concur.