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IN THE
COURT OF APPEALS OF INDIANA

JAMES ANDREW FOXWORTHY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A05-1009-CR-583
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-1006-CM-118

May 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

James Andrew Foxworthy appeals his Class A misdemeanor domestic battery conviction. At the bench trial in this case, the deputy testified about the victim's statements to him at the scene over the defendant's hearsay objection. The State did not offer any hearsay exception. The trial court therefore abused its discretion in admitting the deputy's testimony concerning the victim's statements. Moreover, the error was not harmless because there was no independent evidence of the victim's statements. In addition, when the deputy's testimony concerning the victim's statements is disregarded, the evidence is insufficient to support the defendant's conviction. We therefore reverse the defendant's conviction.

Facts and Procedural History

In 2010, James and Holly Foxworthy, husband and wife, lived together in their Camby, Indiana, apartment. In the early morning hours of May 27, 2010, Holly came home after drinking with friends. As soon as Holly arrived home, she "got in an argument" with James about her "being out." Tr. p. 3. The argument soon turned physical. Eventually, James called the police, and the Hendricks County Sheriff's Department responded to their apartment. When Deputy Craig Hughes arrived, Holly was crying, distraught, and had a bruised arm, bruised and swollen cheek, and bruised leg. She was transported to the hospital by ambulance. The State charged James with Class A misdemeanor domestic battery.

A bench trial was held in August 2010. At the time, James and Holly were separated. Deputy Hughes testified about what Holly had told him about the incident

when he arrived at the apartment. *Id.* at 21. James objected on hearsay grounds. The State offered no exception to the hearsay rule. The trial court overruled James's objection. The following exchange then occurred:

> Q Okay and what exactly was the detail about what had happened?
> A She had told me that the argument had started in the bedroom and from the bedroom it went into the bathroom and that's when she told me that bathroom [sic] got slammed on her arm.
> Q All right and did she describe any injuries that she sustained as a result of that?
> A Yes, which the pictures, I took pictures of.
> Q Now, the pictures were not taken there at the scene, is that correct?
> A No, it was. That's in the back of an ambulance.
> Q Okay, all right, so that was still at the property, at the apartment property?
> A Yes.
> Q That was not in the hospital?
> A That is correct.
> Q All right, so did you observe injuries that were consistent with what she had told you had happened?
> A Yes.
> Q What exactly where those injuries?
> A She had swelling on her arm, she had a little bit of swelling on her eye and then she had a red mark on her arm as well as on her knee.
> Q As far as the bathroom door being slammed on her arm, you observed a red mark on her arm?
> A It was more swelling than a red mark, I would say, from what I recall.
> Q I'll show you State's Exhibit #3 and ask you, can you identify that, is that a picture of her arm that you're referring to?
> A Yes.
> Q Okay and it's somewhat of a blurry picture . . . .
> A Right.
> Q But you're indicating that there was swelling there as well as that red mark?
> A Yes.
> Q Okay, now uh . . . did she go on to tell you about anything else that happened as far as a physical incident between the two of them?
> A She did.
> Q Do you recall what that was? Do you need to review your probable cause?
> A I would like to look at my probable cause if I could. Okay . . . .

Q Does that help refresh your memory?
A It does a little bit.
Q Okay, did she indicate any additional incidents between her and the defendant where she was injured?
A Yes, she had told me she was hit in the face, which was the swelling under the eye.
Q Okay and did you observe injuries on her person that were consistent with that?
A She did have swelling underneath her eye, yes.

Id. at 21-23. Deputy Hughes testified that he observed no injuries on James.

Holly painted quite a different picture than Deputy Hughes. Holly testified that she did not "remember a whole lot about [the incident]" and that she did not remember what she told Deputy Hughes because she had been drinking that night. *Id.* at 3, 8. According to Holly, they "*both* got aggressive." *Id.* at 4 (emphasis added). That is, they "were struggling, wrestling around" and at some point the front door (not bathroom door) was slammed on her arm because James was trying to leave. *Id.*; *see also id.* at 16 ("Our door to our apartment, it shuts, like it shuts itself, it's like a hotel door. It swings shut, so I don't know if he slammed it or if it just shut on my arm."). Holly said she was trying to stop James from leaving because he had been drinking and she felt he had no business driving in his intoxicated state. *Id.* at 11. As for Holly's bruised and swollen cheek and bruised leg, she explained that it was the result of fighting by "both of [them]." *Id.* at 6, 7; *see also id.* at 13 (Holly testifying she did not specifically remember how her cheek or leg got bruised).

James, in turn, painted Holly as the aggressor. He testified that after Holly came home, she went back out with her friends, at which point he texted her that their marriage was over. James said that he then went to bed and locked both doors to the bedroom.

When Holly came home around 5 or 6 a.m., she broke his cell phone and one of the doors off the hinges and "came in and started arguing and then she got on top of me and started, you know, slapping me, head butting me, kicking me . . . ." *Id.* at 33. According to James, he grabbed his work clothes and tried to leave the apartment because Holly was "violent," "screaming," "yelling," "drunk," "stumbling around," and "falling over stuff." *Id.* at 34. James described Holly as "aggressively coming at [him], like almost [a] linebacker trying to push [him] around . . . pulling on [his] work clothes . . . ." *Id.* at 35. James said at one point when Holly was pulling on his work clothes, he let go of them and she fell backward. James denied pushing Holly and knowing how her knee, arm, or cheek became injured. James said that Holly even tried cutting his shorts off him. A photograph of the cut shorts was admitted into evidence at trial. When Holly started making suicide threats, James went to the Meijer gas station across the street and called 911.

The trial court found James guilty as charged and sentenced him to 365 days with 363 days suspended to probation. James now appeals.

Discussion and Decision

James raises two issues on appeal. First, he contends that the trial court erred in admitting Deputy Hughes's testimony concerning what Holly told him at the apartment because it constitutes inadmissible hearsay. Second, he contends that without that hearsay, the evidence is insufficient to sustain his conviction.

I. Hearsay

James first contends that the trial court erred in admitting Deputy Hughes's testimony concerning Holly's statements to him at the apartment because it constitutes inadmissible hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible except as provided by law or by the evidence rules. Ind. Evidence Rule 802. In deciding whether to admit an out-of-court statement, a trial court must determine if the statement is hearsay, and, if so, whether a hearsay exception makes the statement admissible. *Camm v. State*, 908 N.E.2d 215, 226 (Ind. 2009), *reh'g denied*.

Here, the State essentially concedes that Deputy Hughes's testimony concerning Holly's statements to him at the apartment is hearsay. Indeed, it was admitted to prove the truth of the matter asserted, that is, to prove that James battered Holly. Moreover, the State does not allege that a hearsay exception applies, such as the excited utterance exception. Instead, the State argues that Deputy Hughes's testimony constitutes harmless error. If a trial court abuses its discretion by admitting evidence, we will only reverse if the error is inconsistent with substantial justice or if a substantial right of the party is affected. Ind. Evidence Rule 103(a); *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006), *trans. denied*. In viewing the effect on a defendant's substantial rights, we look to the probable impact on the factfinder. *Pitts v. State*, 904 N.E.2d 313, 318 (Ind. Ct. App. 2009), *trans. denied*. The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt such that there is no

substantial likelihood that the questioned evidence contributed to the conviction. *Hape v. State*, 903 N.E.2d 977, 991 (Ind. Ct. App. 2009), *trans. denied*.

Although Officer Hughes's testimony that Holly told him the argument started in the bedroom and then continued to the bathroom where James slammed the door on her arm is inadmissible hearsay, the State argues that there is independent evidence to support this assertion in the record. As support, the State points to Holly's testimony that she remembers a door being shut on her arm. Appellant's Br. p. 4-5. However, if Holly's testimony is considered in its entirety, she actually testified that she did not remember if James shut the front door on her arm when he was trying to leave *or* if the front door shut by itself because of the nature of the door. There is no independent evidence that James slammed the door on Holly's arm. As for Officer Hughes's hearsay testimony that Holly reported that James hit her in the face causing injuries, notably the State does not even attempt to allege that there is independent evidence of this allegation in the record. Because there is no substantial independent evidence of guilt that satisfies us that there is no substantial likelihood that the challenged evidence contributed to James's conviction, the error is not harmless.

II. Sufficiency of the Evidence

James next contends that when Deputy Hughes's hearsay testimony is excluded, the remaining evidence is insufficient to sustain his domestic battery conviction. *See Littler v. State*, 871 N.E.2d 276, 279-80 (Ind. 2007) ("When a new trial is required because of trial error, and a defendant presents a claim of insufficient evidence, an

acquittal instead of a new trial will be required if the proof of the defendant's guilt is insufficient in light of the evidence that was actually presented at trial.").

In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or assess the credibility of the witnesses. *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010). Rather, we look to the evidence and reasonable inferences drawn therefrom that support the judgment, and we will affirm the conviction if there is probative evidence from which a reasonable factfinder could have found the defendant guilty beyond a reasonable doubt. *Id.*

In order to convict James of Class A misdemeanor domestic battery, the State had to prove that he knowingly or intentionally touched Holly, his spouse, in a rude, insolent, or angry manner resulting in bodily injury. Ind. Code § 35-42-2-1.3(a). When you strip away Holly's statements to Deputy Hughes at the apartment and take the evidence most favorable to the State, we are left with a distraught Holly with bruises to her face, arm, and leg. In addition, Holly described a situation where "both" she and James were aggressive, struggling, fighting, and wrestling around. In fact, Holly testified that she is the one who tried to prevent James from leaving the apartment, at which point her arm became injured—either when James shut the door or when the door shut by itself. Holly admitted to "probably" slapping James and claimed she did not know or did not remember how her leg or face became injured. Moreover, she did not know "who touched who first in this fight," but she had no reason to go after him first. Tr. p. 14. At the end of the day, the admissible evidence in this case shows that James and Holly were both wrestling around on the ground, which is where the bruises to Holly's face and leg

could have come from. And as for the bruise to Holly's arm, Holly herself said that the door could have shut by itself on her arm. The evidence is insufficient to prove that James knowingly or intentionally touched Holly in a rude, insolent, or angry manner resulting in bodily injury. We therefore reverse his conviction.

Reversed.

KIRSCH, J., and MATHIAS, J., concur.