

Case Summary

Randolph Bishop appeals his convictions for battery as a Class C felony and domestic battery as a Class A misdemeanor. We affirm.

Issue

Bishop raises one issue, which we restate as whether the evidence is sufficient to sustain his convictions for battery as a Class C felony and domestic battery as a Class A misdemeanor.

Facts

In May 2002, Bishop and E.B. had been married for approximately ten years. On the morning of May 10, 2002, they got into an argument at their residence in Indianapolis. E.B. went to take a shower, but Bishop followed her, calling her names. She then put her clothes on, went into the kitchen, and tried to cook some breakfast. Bishop retrieved a gun and told E.B. that he was going to kill her. Bishop started “prodding” E.B. with the gun and then started to hit her with it. Tr. p. 21. Bishop was “slapping” E.B. with the side of the gun and also hit her on her head with the butt of the gun. Id. at 22.

E.B. said that she was going to take a shower and dress properly. Bishop followed her with the gun and a knife and continued hitting her. Bishop “hit [E.B.] up side [sic] the head with the gun, he was kicking [her] in the side, he was kicking [her] in the stomach, [and] beating [her] on the head.” Id. at 24. He also put the barrel of the gun in

her mouth and told her that he was going to kill her. Bishop shot the gun into a wall near E.B.

Bishop then took a belt from a robe, tried to tie E.B.'s hands behind her back, and placed a leather belt around her neck. Bishop told E.B. that he was going to take her three states away and "put [her] out." Id. at 41. He then took E.B. to the garage and put her in the back of their van. When he went back into the house to retrieve a bag and keys, E.B. got into the driver's seat and drove the van through the closed garage door. E.B. obtained help from two nearby police officers. E.B. had abrasions and contusions to her lip, forehead, cheek, neck, wrist, and arm.

The State charged Bishop with: Count I, criminal confinement as a Class B felony; Count II, battery as a Class C felony; Count III, criminal recklessness as a Class D felony; Count IV, criminal recklessness as a Class C felony; Count V, pointing a firearm as a Class D felony; Count VI, domestic battery as a Class A misdemeanor; and Count VII, battery as a Class A misdemeanor. In Count II, the State alleged that Bishop "by means of a deadly weapon, that is: a handgun, did knowingly touch [E.B.] in a rude, insolent, or angry manner, that is: struck [E.B.] repeatedly in the face and head." App. p. 23. In Count VI, the State alleged that Bishop "did knowingly or intentionally touch [E.B.], a person who is or was a spouse of Randolph Bishop . . . in a rude, insolent, or angry manner, that is: kicked [E.B.] in the chest, resulting in bodily injury to [E.B.], that is: pain." Id. at 23-34.

At a bench trial on October 7, 2009, the trial court found Bishop guilty as charged. At the sentencing hearing, due to double jeopardy concerns, the trial court sentenced

Bishop only on Counts I, II, III, IV, and VI. Bishop received an aggregate sentence of fourteen and one-half years in the Department of Correction with six years suspended. Bishop now appeals his convictions for Count II, battery as a Class C felony, and Count VI, battery as a Class A misdemeanor. Bishop does not appeal his remaining convictions.

Analysis

The issue is whether the evidence is sufficient to support Bishop's convictions for Count II, battery as a Class C felony, and Count VI, battery as a Class A misdemeanor. When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." Id. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. Id.

I. Count II – Class C Felony Battery

Indiana Code Section 35-42-2-1(a)(3) governs the offense of battery as a Class C felony and provides: "A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is . . . a Class C felony if it . . . is committed by means of a deadly weapon." Bishop argues that the State charged him in Count II with striking E.B. "repeatedly in the face and head" but that the evidence demonstrated he struck E.B. only on the head. App. p. 23.

Bishop misconstrues the evidence presented during the bench trial. E.B. testified that Bishop was “slapping” her with the side of the gun and also hit her on her head with the butt of the gun. Tr. p. 22. Later, Bishop “hit [E.B.] up side [sic] the head with the gun” *Id.* at 24. On her face, E.B. had injuries to her lip, forehead, and cheek. The trial court could have inferred from E.B.’s use of the term “slapping” and from her injuries to her face that Bishop also struck her on the face. We conclude that the evidence is sufficient to show that Bishop hit her on both the face and head.

II. Count VI – Domestic Battery as a Class A Misdemeanor

Similarly, as for Count VI, Bishop argues that the State charged him with kicking E.B. “in the chest,” but that the evidence demonstrated he kicked her only on the side and stomach. App. p. 24. Bishop, in effect, argues that there was a variance between the information and the evidence presented at trial. The failure to make a specific objection at trial waives any material variance issue. *Childers v. State*, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004). Bishop did not object to the alleged variance at trial and has thus waived the issue.

Waiver notwithstanding, a charging information must allege the elements of the crime such that the accused is sufficiently apprised of the nature of the charges against him so that he may anticipate the proof and prepare a defense in advance of trial. *Winn v. State*, 748 N.E.2d 352, 356 (Ind. 2001). The State is not required to include detailed factual allegations in the charging instrument, though it may choose to do so. *Id.* Specific facts are surplusage if the facts could have been “entirely omitted without affecting the sufficiency of the charge against the defendant.” *Id.* (quoting *Mitchem v.*

State, 685 N.E.2d 671, 676 (Ind. 1997)). “When the factual allegations in the charge are not necessary to the sufficiency of the charge, a greater variance between the allegations and the proof is tolerated before finding the variance material or fatal.” Id.

To award relief on the basis of a variance between allegations in the charge and the evidence at trial, the variance must be such as to either have misled the defendant in the preparation and maintenance of his defense with resulting harm or prejudice or leave the defendant vulnerable to double jeopardy in a future criminal proceeding covering the same event, facts, and evidence.

Id.

We conclude the facts at issue here, which were included in the charging information for Count VI, were mere surplusage. Further, Bishop does not demonstrate how he was misled in his defense or suffered prejudice as a result of the variance or how the variance left him vulnerable to double jeopardy in a future criminal proceeding covering the same event, facts, and evidence. As a result, we conclude that any alleged variance was not fatal. See id. at 357.

Having concluded that the alleged variance was not fatal, we must still determine whether the evidence is sufficient to sustain Bishop’s convictions for Count VI, domestic battery as a Class A misdemeanor. Indiana Code Section 35-42-2-1.3 governs the offense of domestic battery as a Class A misdemeanor and provides: “A person who knowingly or intentionally touches an individual who: (1) is or was a spouse of the other person . . . in a rude, insolent, or angry manner that results in bodily injury to the person . . . commits domestic battery, a Class A misdemeanor.” The State presented evidence that Bishop argued with his wife, E.B., and kicked her on the side and stomach. We conclude

that the evidence was sufficient to sustain Bishop's conviction for domestic battery as a Class A misdemeanor.

Conclusion

The evidence is sufficient to sustain Bishop's convictions for battery as a Class C felony and domestic battery as a Class A misdemeanor. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.