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IN THE
COURT OF APPEALS OF INDIANA

SHELDON C. MCAULEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-1011-CR-646
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-1004-FC-78

JULY 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Sheldon McAuley appeals his convictions of battery, a Class C felony, Indiana Code section 35-42-2-1 (2009); residential entry, a Class D felony, Indiana Code section 35-43-2-1.5 (1991); and interference with the reporting of a crime, a Class A misdemeanor, Indiana Code section 35-45-2-5 (2002). We affirm.

ISSUE

McAuley presents one issue for our review, which we restate as: whether there was sufficient evidence to support McAuley's convictions.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the verdict follow. In the early morning hours of January 1, 2010, the victim in this case, Shalissa Hicks, returned to her apartment after being out. In the parking lot of her apartment building, she encountered McAuley, her ex-boyfriend against whom she had a protective order. McAuley and Hicks struggled, and McAuley took Hicks' keys and unlocked her apartment door. McAuley attempted to pull Hicks into her apartment, but Hicks resisted. As Hicks was struggling with McAuley, McAuley fell on top of Hicks and broke her leg. Hicks asked McAuley to call the police, but he refused. McAuley took Hicks' cell phone and left. Hicks yelled for help but was unable to get anyone's attention. After crawling to the parking lot and obtaining another cell phone from her purse, she was able to call for help.

Based upon this incident, McAuley was charged with battery, residential entry, and interference with the reporting of a crime. At trial, McAuley testified in his defense

and denied seeing Hicks on December 31, 2009 and/or January 1, 2010. A jury found him guilty on all charges, and he was sentenced to an aggregate term of eight years. It is from these convictions that he now appeals.

DISCUSSION AND DECISION

McAuley seeks reversal of his convictions on the basis of insufficient evidence with regard to him being identified as the perpetrator of these crimes. McAuley argues that the State's failure at trial to obtain Hicks' confirmation of the statements contained in the 9-1-1 call and the incredible dubiosity of Hicks' testimony result in insufficient evidence to convict him.

When reviewing claims of insufficiency of the evidence, we neither weigh the evidence nor judge the credibility of the witnesses. *Caruthers v. State*, 926 N.E.2d 1016, 1022 (Ind. 2010). If there is substantial evidence of probative value from which a reasonable trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*. However, appellate courts may apply the incredible dubiosity rule to impinge upon a jury's function to judge the credibility of a witness when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Whatley v. State*, 908 N.E.2d 276, 282 (Ind. Ct. App. 2009), *trans. denied*. Application of this rule is rare and 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 guilt. *Id.* In using this rule, the standard to be applied is whether the testimony is so incredibly dubious or

inherently improbable that no reasonable person could believe it. *Fancher v. State*, 918 N.E.2d 16, 22 (Ind. Ct. App. 2009).

As part of the State's case-in-chief, the recording of Hicks' 9-1-1 call was admitted as an exhibit at trial and played for the jury. During the 9-1-1 call, Hicks was hysterical and crying and saying she was in a great amount of pain. She identified McAuley at least two times as the person who broke her leg. On the recording, Hicks also gave her name and address and stated that McAuley tried to pull her into her apartment and that he took her phone.

The State also called Hicks as a witness. Hicks' trial testimony consisted entirely of numerous statements that she did not remember what happened on the night in question and that she did not remember whether someone was with her when she fell and broke her leg. In addition, Officer Hughes, the first officer on the scene, testified at trial. Officer Hughes testified that in the entryway of the apartment she found a torn woman's coat. She then came upon Hicks who was screaming and crying with a "grossly misshapen and broken" leg. Tr. p. 47. Officer Hughes further testified that it appeared as though a struggle had taken place inside the apartment because a plant was turned over and items were scattered through the living room area. Officer Hughes testified Hicks told her that McAuley approached her in the parking lot where the two struggled. McAuley took her keys and attempted to pull her into the apartment. She resisted and, in the struggle, McAuley pulled her into the entryway and fell on top of her, breaking her leg. Officer Hughes also testified Hicks stated that she asked McAuley to call the police

several times, but he refused. He then took her cell phone and left. After the State rested, McAuley testified that he did not see Hicks on December 31, 2009 and/or January 1, 2010. He testified that he went to a friend's home early on the evening of December 31, 2009, and stayed there until the following morning.

The 9-1-1 recording was admitted at trial without any objection by McAuley. Therefore, he has waived on appeal his argument concerning the lack of confirmation at trial by Hicks of the statements contained in the 9-1-1 call. A defendant must make a timely objection to the allegedly erroneous admission of evidence to preserve the error for appeal. *O'Neal v. State*, 716 N.E.2d 82, 86 (Ind. Ct. App. 1999), *trans. denied*.

Further, in his brief, McAuley characterizes Hicks' testimony at trial as equivocal. While our review of the transcript reveals that Hicks implicated McAuley in the 9-1-1 call and in a pre-trial interview with police, she never accused McAuley at trial. Rather, she refused to confirm her out-of-court allegations against McAuley. The rule of incredible dubiosity applies only when a witness contradicts herself in a single statement or while testifying, not to conflicts between multiple statements. *Glenn v. State*, 884 N.E.2d 347, 356 (Ind. Ct. App. 2008), *trans. denied*. Although Hicks implicated McAuley in her pre-trial statements, she never wavered in her trial testimony from her initial insistence that she could not remember the events of that evening/early morning. Thus, her trial testimony was unequivocal, and the incredible dubiosity rule does not apply in this case. Even without the benefit of Hicks' in-court identification of McAuley

as her attacker, the evidence here is sufficient to show that McAuley was the person who entered Hicks' apartment, broke her leg and then interfered with her ability to call 9-1-1.

To the extent that the last sentence of the argument section of McAuley's brief is an attempt to raise a third issue on appeal, we briefly address what we are able to discern to be his concern. McAuley claims that it was error for the trial court to admit the testimony of Officer Hughes and Detective Espinoza, who also testified on behalf of the State. Officer Hughes' testimony was properly admitted pursuant to Indiana Evidence Rule 803(2) as an excited utterance exception to the hearsay rule. Later in the trial, Detective Espinoza's testimony was admitted to impeach Hicks' testimony that she could not remember what had happened on the evening in question, and the trial court admonished the jury as to the nature of this evidence. There was no error.

CONCLUSION

Based upon the foregoing analysis and authorities, we conclude that there was sufficient evidence to sustain McAuley's convictions.

Affirmed.

ROBB, C.J., and KIRSCH, J., concur.