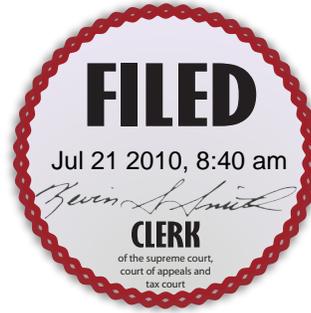


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

BENJAMIN W. MURPHY
Murphy Yoder Law Firm, P.C.
Merrillville, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JOHN R. CANTRELL
Hammond, Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ERIC PILIPOW,)

Appellant-Defendant,)

vs.)

No. 71A03-1001-CR-19

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable J. Jerome Frese, Judge
Cause No. 71D03-0804-FC-120

July 21, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Eric Pilipow appeals his conviction for Battery,¹ a class C felony, challenging the sufficiency of the evidence. Specifically, Pilipow claims that the State failed to demonstrate that the victim suffered a “serious bodily injury.” Appellant’s Br. p. 7. Thus, Pilipow argues that his battery conviction must be reduced to a class A misdemeanor. Finding the evidence sufficient to show that the victim sustained serious bodily injuries as the result of Pilipow’s conduct, we affirm the judgment of the trial court.

FACTS

On April 26, 2008, Sean McCarthy was visiting a friend, David Lee, in South Bend. At some point, Lee and McCarthy went to a hog roast. While there, McCarthy drank two beers. Several hours later, at approximately 12:30 a.m., McCarthy and Lee attended a college party at a residence in St. Joseph County. At some point, Pilipow arrived and began to “harass” McCarthy and some of the others. Tr. p. 52. McCarthy told Pilipow to leave because he thought that Pilipow was intoxicated. Pilipow refused, stepped on to the porch, and began to yell at McCarthy. Pilipow then threw a punch at McCarthy. Although McCarthy tried to duck, the punch landed on his head. When Pilipow tried to throw another punch, McCarthy grabbed Pilipow’s arm. At that point, another individual arrived on the scene and escorted Pilipow to another residence in the neighborhood.

¹ Ind. Code § 35-42-2-1(a)(3).

Sometime thereafter, McCarthy left the party. As McCarthy walked to his car, four individuals—including Pilipow—approached him. McCarthy pushed one of the men in order to escape, and someone in the group responded, “oh, you’re in for it now.” Id. at 58-59. At that point, Pilipow punched McCarthy in the face and knocked him to the ground. Pilipow and some of the others then repeatedly kicked McCarthy.

Several other individuals came outside and dispersed the crowd. Police officers and an ambulance arrived at the scene and transported McCarthy to a local hospital. South Bend Police Officer Timothy Wiley observed that McCarthy’s injuries looked “pretty severe.” Id. at 266-69. Officer Wiley noticed that McCarthy had a “very large” laceration on his face, and his nose “looked kind of like a hamburger.” Id. During an examination at the hospital, it was determined that McCarthy suffered a broken nose, cuts on his face, and a brain contusion. McCarthy was in “very much pain” from the injuries, and underwent an X-ray or CAT scan at the hospital. Id. at 64.

Within a month of the incident, McCarthy’s nose was reset and surgery was performed to correct a deviated septum. Over the next several months, McCarthy experienced migraine headaches, had difficulty concentrating, and suffered from an “inability to control [his] emotions.” Id. at 69.

Pilipow was charged with battery, a class C felony, and following a jury trial on October 15, 2009, Pilipow was found guilty as charged. Thereafter, the trial court sentenced Pilipow to a suspended term of four years of incarceration that was to be served on probation. Pilipow was also ordered to perform 200 hours of community service work and pay restitution in the amount of \$2,170.05. Pilipow now appeals.

DISCUSSION AND DECISION

In addressing Pilipow's claim that the evidence failed to demonstrate that McCarthy suffered "serious bodily injury" as a result of the incident, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict. Id. We will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Pursuant to Indiana Code section 35-42-2-1(a)(3), a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class C felony, "if it results in serious bodily injury to any other person. . . ." 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. Whether an injury is "serious" is a matter of degree and thus reserved for the fact-finder. Whitlow v. State, 901 N.E.2d 659, 661 (Ind. Ct. App. 2009). In other words, considerable deference is given to whether bodily injury is "serious." Davis v. State, 813 N.E.2d 1176, 1178 (Ind. 2004).

In this case, Pilipow directs us to Davis for the proposition that his conviction must be reversed because the evidence demonstrated that McCarthy suffered only a "slim level of injury." Appellant's Br. p. 9. Indeed, our Supreme Court in Davis concluded

that a slightly lacerated lip, an abrasion to the knee, and a “broken pinky” do not satisfy the definition of a “serious bodily injury.” Davis, 813 N.E.2d at 1178.

However, unlike the circumstances in Davis, the evidence established that Pilipow punched McCarthy in the head and knocked him to the ground. Tr. p. 59. Pilipow and at least one other individual then kicked McCarthy nearly seven times while McCarthy was on the ground. Id. at 59, 123.

The evidence also showed that McCarthy sustained a laceration that required fifteen stitches, a broken nose, and a brain contusion. Id. at 61-62. As discussed above, Officer Wiley testified that McCarthy’s injuries looked “severe,” and McCarthy testified that the injuries caused him “very much” pain. Id. at 64, 266-69. Photographs that were admitted into evidence showed blood on McCarthy’s face, and lacerations and abrasions on his elbows and shoulder. State’s Ex. 1-7. Moreover, McCarthy’s nose had to be reset and surgery was performed to repair a deviated septum. Id. at 68-69, 106. McCarthy also suffered from migraine headaches and other symptoms that were related to his head injury. Id. at 69.

In light of this evidence, we conclude that the State presented substantial evidence of probative value that McCarthy sustained serious bodily injury as a result of Pilipow’s actions. In essence, Pilipow’s arguments amount to an invitation to reweigh the evidence, which we may not do. Howell v. State, 921 N.E.2d 503, 506 (Ind. Ct. App. 2009), trans. denied. Thus, we decline to set aside Pilipow’s conviction.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.

