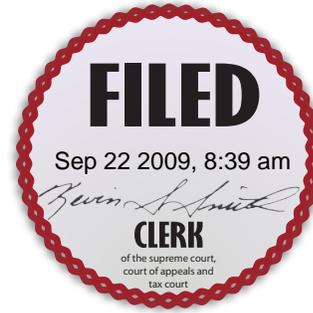


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES TALLEY,)

Appellant-Defendant,)

vs.)

No. 49A05-0901-CR-53

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Certo, Judge
Cause No. 49G21-0809-CM-203226

September 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

James Talley appeals his conviction for invasion of privacy as a Class A misdemeanor. We affirm.

Issues

Talley raises two issues, which we restate as:

- I. whether the trial court abused its discretion and shifted the burden of proof by allowing the State to question him regarding corroboration of his location at the time of the offense; and
- II. whether the evidence is sufficient to sustain Talley's conviction.

Facts

On July 23, 2008, Frankie Talley obtained a protective order against her husband, Talley. On July 31, 2007, Frankie saw Talley on her property cutting her telephone wires. The State charged Talley with invasion of privacy as a Class A misdemeanor and criminal mischief as a Class A misdemeanor.

At the bench trial, the trial court dismissed the criminal mischief charge. Talley testified and denied going to Frankie's house on July 31, 2007.¹ During the State's cross examination of Talley, the deputy prosecutor questioned whether anyone could confirm Talley's location on July 31, 2007. Talley claimed that his cousin Casey could confirm his location but that his cousin was not in court that day. Talley's counsel objected, arguing that the State was "shifting the burden of proof onto [Talley]." Tr. p. 47. The

¹ Talley did not file a notice of alibi under Indiana Code Section 35-36-4-1.

trial court overruled Talley's objection. The trial court found Talley guilty of invasion of privacy as a Class A misdemeanor.

Analysis

I. Burden Shifting

Talley contends that the trial court abused its discretion and shifted the burden of proof to him by allowing the State to question him regarding corroboration of his location at the time of the offense. A trial court's ruling on the admission of evidence is subject to appellate review for abuse of discretion. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005).

During the State's cross examination of Talley, the deputy prosecutor questioned whether anyone could confirm Talley's location on July 31, 2007. Talley claimed that his cousin Casey could confirm his location but that his cousin was not in court that day. Talley's counsel objected, arguing that the State was "shifting the burden of proof onto [Talley]." Tr. p. 47. The trial court overruled Talley's objection. Defendants have a constitutional right to make the State prove every element of its case beyond a reasonable doubt. Hirsch v. State, 697 N.E.2d 37, 43 (Ind. 1998). However, even if we assume that the trial court abused its discretion by allowing the State's questioning, Talley's argument fails because any error was harmless.

"[W]hen a trial is before a bench and not a jury, we generally presume that the trial judge considers only relative and probative evidence in reaching its decision." Birdsong v. State, 685 N.E.2d 42, 47 (Ind. 1997) (citing Coleman v. State, 558 N.E.2d 1059, 1062 (Ind. 1990); Misenheimer v. State, 268 Ind. 274, 280, 374 N.E.2d 523, 528

(1978)). “We presume that evidence, which might be inadmissible and prejudicial when placed before a jury, is disregarded by the court when making its decision.” *Id.* (citing *Misenheimer*, 268 Ind. at 280, 374 N.E.2d at 528; *Kleinrichert v. State*, 260 Ind. 537, 542, 297 N.E.2d 822, 826 (1973)). “Unless the defendant presents evidence to the contrary, we presume no prejudice.” *Id.*

Talley has failed to demonstrate that he was prejudiced by the State’s limited questioning. Given the other evidence presented by the State, we are confident that the trial court was able to disregard the evidence in question and consider only the relative and probative evidence in reaching its decision. *See, e.g., Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (“[B]ecause there was no jury, we are confident that the trial court was able to overlook any prejudicial aspects of this evidence and concentrate solely on the probative portions of the testimony.”), *trans. denied, cert. denied*, 547 U.S. 1026, 126 S. Ct. 1580 (2006). Any error in the admission of the testimony was harmless.

II. Sufficiency of the Evidence

Talley next argues that the evidence is insufficient to sustain his conviction for invasion of privacy as a Class A misdemeanor. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. *Id.* We consider conflicting evidence most favorably to the trial court’s ruling. *Id.* We affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Id.* (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind.

2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. Id.

The offense of invasion of privacy is governed by Indiana Code Section 35-46-1-15.1 which provides: “A person who knowingly or intentionally violates: (1) a protective order to prevent domestic or family violence issued under IC 34-26-5 . . . commits invasion of privacy, a Class A misdemeanor.” Thus, to convict Talley of invasion of privacy as a Class A misdemeanor, the State was required to prove that Talley knowingly or intentionally violated a protective order by appearing at Frankie’s residence.

Frankie testified that she saw Talley cut the telephone wires on her property on July 31, 2007, after the protective order had been issued. Although Talley claims that Frankie’s testimony was confused and unreliable, Talley’s argument is merely a request that we reweigh the evidence and judge Frankie’s credibility, which we cannot do. We conclude that the evidence is sufficient to sustain Talley’s conviction for invasion of privacy. See, e.g., Dixon v. State, 869 N.E.2d 516, 520-21 (Ind. Ct. App. 2007) (holding the evidence was sufficient to sustain the defendant’s conviction for invasion of privacy).

Conclusion

Any error in the State’s cross examination of Talley was harmless, and the evidence is sufficient to sustain his conviction for invasion of privacy. We affirm.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.