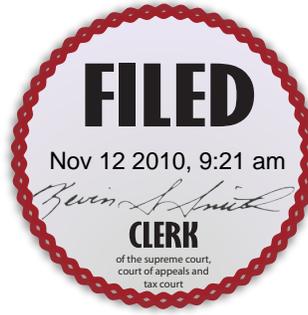


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JAMES A. EDGAR
J. Edgar Law Offices, Prof. Corp.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MELLISICA K. FLIPPEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER UPTON,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-1003-CR-135
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Certo, Judge
Cause No. 49G21-0910-FD-88056

November 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Christopher Upton was convicted of invasion of privacy as a Class D felony¹ after he violated a protective order. He argues there was insufficient evidence to support his conviction. We affirm the determination Upton committed invasion of privacy, but reverse the enhancement to a Class D felony and remand for entry of and sentencing for the conviction as a Class A misdemeanor.

FACTS AND PROCEDURAL HISTORY

On September 14, 2009, H.I. obtained a protective order that prohibited Upton from “harassing, annoying, telephoning, contacting or directly or indirectly communicating with the Petitioner, except [Upton] may also take [one of his children] with him for the overnight parenting time he now exercises with [another child].”² (State’s Ex. 1 at 5.) The order provided Upton’s mother would “facilitate this parenting time.” (*Id.* at 6.)

On September 26, Upton called H.I. to ask her to pick up the children. When she arrived, “he hopped in the car.” (Tr. at 14.) On October 10, 2009, Upton went to H.I.’s home. Her roommate answered the door and asked him to leave, and Upton and the roommate began arguing. H.I. came to the door and told Upton there was a warrant for his arrest, and he left. H.I. then called the police and reported Upton had come to her residence and threatened to kill her.

The State charged Upton with intimidation³ and invasion of privacy. In an effort to

¹ Ind. Code § 35-46-1-15.1.

² Apparently H.I. and Upton had at least two children together.

³ Ind. Code § 35-45-2-1.

prove Upton had a prior conviction of invasion of privacy, which was necessary to enhance the crime from a Class A misdemeanor to a Class D felony,⁴ the State offered only H.I.'s testimony that she saw Upton plead guilty in May 2008 to a prior charge. The trial court entered a conviction of invasion of privacy as a Class D felony. Upton was acquitted of intimidation.

DISCUSSION AND DECISION

When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, and not ours, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when we are confronted with conflicting evidence, we consider it most favorably to the trial court's ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence, *id.* at 147; rather, the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

There was ample evidence that Upton violated the protective order and committed invasion of privacy. A person who knowingly or intentionally violates a protective order issued under Ind. Code art. 34-26-5 commits Class A misdemeanor invasion of privacy. Ind.

⁴ Invasion of privacy is a Class D felony if the person has a prior unrelated conviction for an offense under the same section. Ind. Code § 35-46-1-15.1.

Code § 35-46-1-15.1.

Upton notes the protective order he was accused of violating generally prohibits him from “contacting or directly or indirectly communicating with” H.I., but at the same time provides he may “have the Saturday overnight with [one of his children], returning the child, along with [another one of the children] in [sic] Sunday morning. [Upton’s] mother will facilitate this parenting time.” (State’s Ex. 1 at 6.) This, Upton asserts, means the order “does not restrict contact related to this visitation,” (Appellant’s Br. at 11), or that the order is at least ambiguous and should be construed in his favor.

We have addressed the need for definiteness in provisions for visitation:

The provisions of a divorce decree concerning custody or visitation rights should be definite and certain. If the decree is indefinite it invites a controversy as to the rights and duties of the parents; and it may be too indefinite to be enforced. An order or judgment which merely declares the rights of the parties in regard to custody and visitation, without any express command or prohibition cannot be the basis of contempt proceedings. After the court states the rights of the parties in an order or judgment it should state its orders or prohibitions. The portions of the decree relating to visitation rights should spell out the times, places, and circumstances of visitation, and a decree that defendant shall have the right to visit his children “at reasonable times and places” is too indefinite to be enforced.

Cook v. State, 547 N.E.2d 1118, 1121 (Ind. Ct. App. 1989) (quoting 24 Am.Jur.2d Divorce and Separation § 796 (1966)), *trans. denied*. We agree the protective order before us is sufficiently indefinite to “invite a controversy” as to the rights and duties of the parents. *See id.* But it was not, as Upton asserts, so indefinite that it could be interpreted to permit Upton “to have contact with [H.I.] for purposes of visitation,” (Appellant’s Br. at 11); nor do we find credible his assertion that he was not “reasonably . . . on notice that such contact was

prohibited.” (*Id.*)

The protective order explicitly prohibits Upton from contacting H.I. The order includes a provision addressing visitation between Upton and the two children, but that visitation provision does not state any exception to the general prohibition against Upton contacting H.I. Rather, the order provides Upton’s mother is to “facilitate” the visitation. (State’s Ex. 1 at 6.) We therefore must decline Upton’s invitation to read the order as permitting him to have contact with H.I. for child visitation purposes.

Neither has Upton directed us to anything in the record suggesting his presence at H.I.’s home on October 10, 2009, when Upton argued with H.I.’s roommate, was related to child visitation. The evidence most favorable to the judgment is that Upton contacted H.I. even though the protective order prohibited such contact, and that evidence is sufficient to support a conviction of Class A misdemeanor invasion of privacy.

The court entered Upton’s conviction as a Class D felony based on Upton’s alleged prior unrelated conviction of invasion of privacy. Ind. Code § 35-46-1-15.1. The only evidence of a prior unrelated conviction was H.I.’s testimony that she had seen Upton plead guilty to a prior charge. The State acknowledges that is not sufficient evidence to support the enhancement to a Class D felony. *See Pierce v. State*, 737 N.E.2d 1211, 1213 n.2 (Ind. Ct. App. 2000) (acknowledging the general rule that parol evidence alone is not sufficient to show prior convictions, and court records must be produced unless the State can prove they are unavailable), *trans. denied*.

We accordingly remand so the trial court may enter Upton’s conviction as a Class A

misdemeanor and resentence Upton accordingly.

Affirmed in part, reversed in part, and remanded.

ROBB, J., and VAIDIK, J., concur.