

Appellant-defendant David Pollack appeals his conviction for Battery,¹ a class B misdemeanor, challenging the sufficiency of the evidence. Specifically, Pollack argues that the conviction must be set aside because the State failed to rebut his claim of self-defense. Concluding that the trial court properly rejected his claim of self-defense, and finding the evidence sufficient to support the battery conviction, we affirm the judgment of the trial court.

FACTS

Pollack and his wife, Martina, lived with Martina's thirteen-year-old son, C.G. Sometime during the early morning hours of December 23, 2009, Martina was sleeping on the couch and Pollack entered the residence in an intoxicated state. Pollack immediately began turning on the lights and boosting the volume on the television. Because Martina had to be at work at 3:30 a.m., she asked Pollack to be quiet. In response, Pollack yelled obscenities at her. When Martina attempted to turn out the lights and reduce the volume on the television, Pollack turned the lights back on and raised the volume. Pollack then followed Martina downstairs, continued to yell obscenities at her, and called her a "stupid Mexican b***h." Tr. p. 11.

C.G., who had been asleep in his room, woke up and told Pollack to be quiet or to "take it somewhere else." Id. at 7, 11, 40-41. Pollack then yelled, "shut up you fat Mexican b***h," at C.G. Id. at 11, 41. Pollack then repeated those words, grabbed C.G. by his wrists, and attempted to "head-butt" him. Id. at 12-13, 28, 44. Martina then

¹ Ind. Code § 35-42-2-1.

stepped into the middle of them in an effort to stop Pollack from attacking C.G. As a result, Pollack hit Martina in the face with an open hand. Pollack then shoved Martina, which caused her to fall on a couch. Martina hit her head on the armrest, resulting in pain and inflammation.

Martina reached for the telephone, but Pollack wrestled it away from her. C.G. then ran behind Pollack, grabbed the telephone, and handed it to Martina, who called the police. Pollack ran upstairs to the bathroom and dialed 911, explaining that he had locked himself in the bathroom because “his stepson and wife were attacking him.” *Id.* at 15-16, 45. When the police officer arrived at the residence, Pollack refused to cooperate and declined to give a statement.

As a result of the incident, Pollack was charged with class A misdemeanor domestic battery, class B misdemeanor battery against C.G., and class A misdemeanor battery against Martina. Prior to trial, Pollack filed a Notice of Affirmative Defense, alleging that he acted in self-defense.

At a bench trial that concluded on March 22, 2010, Pollack was found guilty of domestic battery and class B misdemeanor battery. Pollack was sentenced to 365 days for domestic battery with 305 days suspended, and to sixty days on the battery count. The sentences were ordered to run concurrently and Pollack was placed on probation for 200 days. Pollack now appeals the class B misdemeanor battery conviction.²

DISCUSSION AND DECISION

² Pollack is not appealing his conviction for domestic battery.

As noted above, Pollack asserts that his battery conviction cannot stand because the evidence demonstrated that he acted in self-defense. A valid claim of defense of oneself or another person is legal justification for an otherwise criminal act. In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. Wilson v. State, 770 N.E.2d at 799, 800 (Ind. 2002). When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. If a defendant is convicted despite his claim of self-defense, this Court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. Id. at 800-01. In any event, a mutual combatant, whether or not the initial aggressor, must declare an armistice before he or she may claim self-defense. Id. at 801 (citing Indiana Code section 35-41-3-2(e)(3) (“[A] person is not justified in using force if: . . . the person has entered into combat with another person or is the initial aggressor, unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action”)).

Finally, we note that the standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. Id. We neither reweigh the evidence nor judge the credibility of witnesses. If there is sufficient evidence of probative value to support the conclusion of

the trier of fact, the verdict will not be disturbed. Id. at 800. When a defendant's claim of self-defense is not supported by the evidence, it must fail. Kimbrough v. State, 911 N.E.2d 621, 636 (Ind. Ct. App. 2009).

To convict Pollack of battery, the State was required to show that he touched C.G. in a rude, insolent, or angry manner. I.C. § 35-42-2-1. In this case, the undisputed evidence established that Pollack was intoxicated, and he grabbed C.G. by both wrists. Although Pollack attempted to "head-butt" C.G., Martina intervened and Pollack smacked her. He then shoved her onto the couch. Id. 12-13, 28, 44. The testimony of both Martina and C.G. supported the battery conviction. See Holeton v. State, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006) (holding that a conviction may rest solely on the victim's testimony).

As the trial court observed, Pollack's claim of self-defense is nonexistent. Indeed, the record demonstrates Pollack's provocation, instigation, and willing participation when he came home intoxicated, turned on the lights, raised the volume on the television, and directed racial slurs at both C.G. and Martina. Tr. p. 8-11, 41, 53, 65. In other words, Pollack's abusive language and rude behavior could be deemed as instigating or provoking the violence that ultimately occurred. Moreover, Pollack was the first person to initiate a physical altercation when he grabbed C.G. Id. at 12-13, 28, 44, 68.

Pollack was a forty-nine-year-old marine, who directed his aggression toward C.G., a thirteen-year-old boy. Id. at 74. Pollack failed to demonstrate that he had a reasonable fear of death or great bodily harm in these circumstances. Although the trial

court heard Pollack's testimony regarding a prior incident that involved C.G.'s possession of a Chinese sword, it was not required to believe that evidence in support of the self-defense claim. See Alkhalidi v. State, 753 N.E.2d 625, 627 (Ind. 2001) (holding that it is for the factfinder to decide how to assess credibility, what witnesses to believe, and what inferences to draw from the evidence). In other words, the fact that Pollack's testimony placed him in a less aggressive light is inconsequential because the trier of fact is entitled to disbelieve that evidence. McIver v. State, 654 N.E.2d 308, 311 (Ind. Ct. App. 1995).

In sum, the trial court acted well within its province in rejecting Pollack's self-defense claim. As a result, we conclude that the State presented sufficient evidence to support Pollack's class B misdemeanor battery conviction.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.