

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:

SEAN P. HILGENDORF
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

BARBARA A. NARDI
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

T.M.,)
)
Appellant-Defendant,)
)
vs.) No. 71A03-0612-CR-570
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D01-0504-FD-337

July 27, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

T.M. appeals his conviction in St. Joseph Superior Court for Class D felony domestic battery. On appeal, he contends there is insufficient evidence to support his conviction. We affirm.

Facts and Procedural History

The facts most favorable to the conviction demonstrate that T.M.'s wife, Brenda ("Brenda") and T.M. quarreled at their home on April 6, 2005. Brenda was walking towards the bathroom to put some towels away. T.M. confronted her, with a look of rage on his face. He gritted his teeth and repeatedly called her "Judas." The previous morning he had left her sticky notes on the bathroom mirror, calling her "Judas," a "back-stabber," and a "traitor." Tr. p. 136. Brenda did not understand these notes, so she took them down and gave them to the police after the altercation on the 6th.

When T.M. confronted Brenda, he had been lifting weights and was carrying a ten-pound weight in each hand. He swung the weights at Brenda, knocking the towels out of her hands. T.M. pushed his wife into the bedroom and against the bed. He swung another weight past her and told her that he could "kill [her] that fast." Id. at 130. He hit the ten pound weight against the dresser, putting a hole in it, and repeated that he "could have killed [her] that fast." Id. Then T.M. pushed Brenda back onto the bed and got on top of her. He put one hand around her throat and the other over her mouth, while yelling at her that tonight was the night she was going to die. Id. at 131. He told her that she was going to die like Lisa Bianco and Beth Kubsch, and that he would not get caught because he was going to kill himself. Id. He commanded her, "Beg for your life, beg for your life," and continued calling her names. Id. at 133.

Brenda thrashed around on the bed, kicking and hitting at him. She told him that she couldn't breathe and that she needed her inhaler. T.M. put all his weight on her and pushed down with his hand on her nose and mouth. Brenda was in pain and feared that she would not see her children again. Id. at 140. Brenda continued struggling and succeeded in knocking T.M. off her. She ran into the living room to find her inhaler and immediately took a couple of puffs from it. T.M. followed her into the living room and repeated that he was going to kill himself and make her watch. He said he was going to retrieve his knife, which he regularly carried on his person, and then he went into the music room. Brenda saw her opportunity to flee from the house, and she escaped to the home of a neighbor, who called 911.

When the medics arrived, they gave Brenda oxygen as she was still hyperventilating. The police had problems talking with Brenda because of her labored breathing, which prevented her from being able to fully articulate sentences. The police surrounded the house while T.M. was inside. They attempted knocking on the door and even communicating with T.M. via a bullhorn. Eventually, the SWAT team was dispatched to the house. After a four-hour standoff, the police coaxed T.M. out of the residence and arrested him.

Officer Steven Egendoerfer ("Officer Egendoerfer") later accompanied Brenda to her home where he photographed the damage T.M. had caused with his weights. He photographed a few creases on the front door, a baseball-sized hole in the bedroom door, and a couple of creases on the bedroom dresser. Id. at 198. The police also located T.M.'s knife on top of the refrigerator.

On April 8, 2005, the State charged T.M. with Class A misdemeanor battery, Class A misdemeanor domestic battery, Class A misdemeanor resisting law enforcement, Class D felony intimidation, and Class D felony domestic battery. A jury trial was conducted on August 15 and 16, 2006, and found T.M. guilty of Class A misdemeanor battery and Class A misdemeanor domestic battery. On August 16th, T.M. pleaded guilty to having a prior domestic battery conviction involving the same person, Brenda. This prior conviction, pursuant to the Indiana Code, elevated the Class A misdemeanor domestic battery to a Class D felony.

The trial court merged all of the convictions into one Class D felony domestic battery conviction and sentenced T.M. to eighteen months with twelve months suspended. T.M. now appeals. Additional facts will be provided as necessary.

Discussion and Decision

T.M. contends that Brenda's testimony was incredibly dubious, and therefore, there was not sufficient evidence to support his conviction. Specifically, he contends that her testimony was incredibly dubious because she cannot explain how she was able to push T.M. off of her when he is much larger than her and because there were no physical marks on her face or neck.

Initially, we observe that when reviewing a sufficiency of the evidence claim, we consider only the evidence most favorable to the verdict and all reasonable inferences to be drawn from that evidence. We neither reweigh the evidence nor judge the credibility of the witnesses. Green v. State, 756 N.E.2d 496, 497 (Ind. 2001) (citations omitted).

We will affirm a conviction upon finding substantial evidence of probative value from which the jury could find the defendant guilty beyond a reasonable doubt. Id.

The testimony of a single eyewitness to a crime is sufficient to sustain a conviction. Emerson v. State, 724 N.E.2d 605, 609-10 (Ind. 2000). Inconsistencies in testimony are factual issues for the jury to resolve. Miller v. State, 770 N.E.2d 763, 774 (Ind. 2002). “The ‘incredible dubiousity’ doctrine applies where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant’s guilt.” Thompson v. State, 765 N.E.2d 1273, 1274 (Ind. 2002). Reversal under this rule is rare, and the testimony at issue must be “so incredibly dubious or inherently improbable that no reasonable person could believe it.” Love v. State, 761 N.E.2d 806, 810 (Ind. 2002).

The incredible dubiousity rule does not apply here because corroborating testimony and evidence was presented. Officer Egendoerfer testified that more than fifteen minutes after the 911 call, Brenda still had to keep an oxygen mask on her face and could not breath well enough to speak in full sentences. Officer Egendoerfer also testified about and presented photos of the damage that T.M. had done to the doors and furniture in the home with his weights. Officer Egendoerfer testified about the sticky notes that T.M. had left his wife, calling her a “traitor” and a “Judas.” These sticky notes were also submitted into evidence.

Officer Egendoerfer’s testimony and the exhibits corroborate Brenda’s story that T.M. confronted her by calling her a “Judas,” then swung weights at her, crashing them into the doors and furniture of her home, and then attempted to choke her, causing her to

hyperventilate. The trier of fact is entitled to determine which version of the incident to credit. Reyburn v. State, 737 N.E.2d 1169, 1171 (Ind. Ct. App. 2000) (citation omitted).

T.M.'s claim amounts to a request to reweigh the evidence and credibility of the witnesses, which we will not do. Brenda's testimony about the incident combined with Officer Egendoerfer's corroborating testimony and the submitted exhibits sufficiently support T.M.'s conviction for domestic battery.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.