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IN THE
COURT OF APPEALS OF INDIANA

LARRY HACKETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0701-CR-8
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0608-FD-452434

August 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Larry Hackett ("Hackett") appeals his conviction for Class D felony criminal recklessness. On appeal, he raises the issue of whether there is sufficient evidence to support his conviction. Concluding the State presented insufficient evidence that Hackett's recklessness resulted in "serious bodily injury," we reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

By mid-2006, Hackett had been involved in a relationship with Angelina Bowman ("Bowman") for approximately two years. On the evening of August 16, 2006, Bowman came to Hackett's residence after taking her brother to work. She had brought her two dogs with her. Hackett and Bowman began to argue because she wanted to leave, and he wanted her to stay. Their raised voices caused her two dogs to run away. Bowman drove around the block looking for her dogs. When she returned to Hackett's home, the dogs were inside, and she tried to collect them from the house to leave. Hackett came outside and stood between Bowman and the driver's side door, preventing her from leaving.

Bowman later testified that she does not remember the event that caused her injury. She said that the next thing she remembered was being in her yard with her brother, who was calling the police. Officer Michael Kermon ("Officer Kermon") arrived at Bowman's house shortly thereafter. He observed that Bowman's upper lip was swollen, and she was holding a white towel to it, which was full of blood. He said she appeared to be in a lot of pain. Tr. p. 31. Bowman's front tooth was also chipped. Once an ambulance arrived at Bowman's home, Officer Kermon went to Hackett's house.

Hackett told the officers he knew they were there about the incident with Bowman. Officer Kermon saw blood on Hackett's hand, and he requested a medic to attend to Hackett's injury. Officer Kermon said that from his experience, the hand injury appeared to be an "avulsion caused by blunt force trauma by the hand to a solid object." Id. at 28.

The State charged Hackett with Class D felony criminal recklessness and Class A misdemeanor battery. Hackett waived his right to a jury trial, and the trial court conducted a bench trial on December 7, 2006. Both Officer Kermon and Bowman testified at the trial; however, Bowman seemed reluctant to talk about the altercation or her injuries. The trial court nonetheless found Hackett guilty of Class D felony criminal recklessness. Immediately after the bench trial, the trial court held a sentencing hearing, where it concluded that Hackett's criminal history involving drug abuse and violence was an aggravating circumstance. Hackett was sentenced to 910 days with credit for 114 days served prior to sentencing. Hackett now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Hackett contends that the State failed to produce sufficient evidence to sustain his conviction for criminal recklessness. In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor assess the credibility of the witnesses. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). We must respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). On review, we look to the evidence most favorable to the verdict and reasonable inferences

drawn therefrom. Id. The trier of fact is entitled to determine which version of the incident to credit. Duren v. State, 720 N.E.2d 1198, 1201 (Ind. Ct. App. 1999), trans. denied. We will affirm a conviction when there is substantial evidence of probative value from which the trier of fact could find guilt beyond a reasonable doubt. Trotter v. State, 838 N.E.2d 553, 556-57 (Ind. Ct. App. 2005) (citations omitted).

Indiana law provides that a person may be convicted for Class D felony criminal recklessness if the person recklessly, knowingly, or intentionally inflicts serious bodily injury on another person. Ind. Code § 35-42-2-2 (2004 & Supp. 2006). Hackett first contends that the State failed to produce sufficient evidence of his intent to cause Bowman harm. Instead, Hackett claims that the evidence only demonstrates his concern for Bowman in that he was attempting to convince her to remain at his house until her dogs returned.

Because Hackett was charged with criminal recklessness, it was not necessary for the State to prove that he acted intentionally. Miller v. State, 449 N.E.2d 1119, 1121 (Ind. Ct. App. 1983). The State only had to prove that Hackett acted recklessly, or in other words that he realized or should have realized there was a strong probability that bodily injury might occur as a result of his actions. Id. Certainly, circumstantial evidence presented by Officer Kermon and Bowman support the inference that Hackett struck Bowman in the mouth with his hand, causing her injuries. A reasonable person should realize that such actions are likely to inflict bodily injury, and therefore there was sufficient evidence that Hackett had the requisite mens rea when he struck Bowman.

Hackett next contends that the State failed to produce sufficient evidence to support the finding of Bowman's "serious bodily injury," which elevated the crime to a Class D felony. The Indiana Code defines "serious bodily injury" as 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 (2004).

Hackett directs our attention to our supreme court's opinion in Davis v. State, 813 N.E.2d 1176 (Ind. 2004), where the court unanimously agreed that evidence of a slightly lacerated lip, an abrasion to the knee, and a broken pinky finger was insufficient to support the finding of "serious bodily injury." In Davis, our supreme court endeavored to differentiate those injuries that constitute "serious bodily injury" from those that merely constitute "bodily injury." Id. at 1178. The supreme court noted:

> Our commitment to the role of fact-finders tends to produce considerable deference on a matter as judgmental as whether a bodily injury was "serious." The appellate courts have sometimes been willing to sanction convictions resting on rather slim levels of injury. See, e.g., Williams v. State, 520 N.E.2d 1261 (Ind. 1988) (injury held "serious" when victim was struck in face and back of head, causing lacerations requiring several sutures to close); Sutton v. State, 714 N.E.2d 694 (Ind. Ct. App. 1999) (evidence of black eye, soft tissue swelling, and migraine-like headaches causing victim to use aspirin on several occasions over two weeks held sufficient to establish "extreme pain").
>
> Still, most of the cases cited by the present parties rightly focus on injuries that plainly reflect the sort of serious infliction of damage suggested by the statutory definition of "serious bodily injury." See, e.g., Hollins v. State, 790 N.E.2d 100 (Ind. Ct. App. 2003) (victim's arm, injured by gunshot, was "useless" and likely to be amputated); Judy v. State, 470 N.E.2d 380 (Ind. Ct. App. 1984) (beat with pool cue, victim's leg broken in four places,

> hospitalized for four days, in a cast for three months, still limped at time of trial).
>
> To be sure, injuries less substantial than those in cases like Hollins and Judy can qualify as "serious bodily injury." But measured against that standard and against the statutory definition, a slightly lacerated lip and a broken pinky do not make the grade.

Id.

The State contends that it presented circumstantial evidence of Bowman's "extreme pain," supporting the finding of "serious bodily injury." The State points to Officer Kermon's testimony that he believed Bowman was in pain and that the towel she was holding to her lip was full of blood. Unfortunately, as is oftentimes the case with domestic violence, Bowman was reluctant to testify about the altercation, her injuries, and her pain. She testified:

> Bowman: I was just really concerned with the dogs. I wasn't – I mean when I seen – seen that – I have a high tolerance to pain, but when I seen it, didn't really hurt. It was just bleeding, and I was just scared to eat cause of the tooth.
>
> The Court: So you did not experience pain?
>
> Bowman: I didn't really notice it.

Tr. pp. 17-18.

Although we agree with the State that "extreme pain" can be proven by circumstantial evidence, we are not convinced that the evidence presented demonstrates that Bowman's injuries were such as to cause her "extreme pain." In Davis, even though the victim had a broken finger requiring a splint, the supreme court focused on the lack of testimony regarding her pain and the fact that pain medication was not prescribed when the victim left the hospital. Davis, 813 N.E.2d 1178-79. In light of these facts and

circumstances, the supreme court entered a lesser conviction for Davis, holding that insufficient evidence was presented regarding the victim's alleged serious bodily injury.

Likewise, in the case at hand, the victim stated that she was not in pain. There was no evidence presented that she took any pain medicine or that she was required to seek out medical treatment for her injuries. It is the State's burden to produce evidence that Bowman's injuries caused her extreme pain to rise to the level of "serious bodily injury." Although we are sure that the incident caused Bowman distress and physical discomfort, we are compelled by the precedent set forth in Davis to hold that the State failed to present sufficient evidence of Bowman's "extreme pain" constituting "serious bodily injury." See Hand v. State, 863 N.E.2d 386, 392 (Ind. Ct. App. 2007).

The State further contends that Bowman's chipped tooth was a "serious permanent disfigurement" because it caused her difficulty in eating. The State relies on James v. State, 755 N.E.2d 226 (Ind. Ct. App. 2001), where our court concluded that the victim suffered permanent disfigurement as a result of damage to several of his teeth. In that case, the victim had one tooth knocked out, one tooth loosened, and one tooth broken. An oral surgeon had to remove the victim's loosened tooth, file down his other teeth, and insert fake teeth and a bridge in his mouth. The victim also had a hole in the top of his gum where the loosened tooth had been surgically removed, and he would have to undergo reconstructive gum surgery to repair the damage.

In the case at hand, the State did not present evidence of an injury of similar severity. Bowman testified that she was afraid of her tooth chipping more, so she tried to

eat on the side of her mouth. Tr. p. 15. There was no evidence presented that she needed to seek medical attention or that she was experiencing any pain with the tooth.

Accordingly, the evidence was insufficient to demonstrate that Bowman sustained a "serious bodily injury," and therefore Hackett's conviction for Class D felony criminal recklessness must be vacated. Because we conclude that there was sufficient evidence to prove that Hackett recklessly struck Bowman, creating a substantial risk of bodily injury, we reverse and remand for entry of judgment for the lesser-included offense of Class B misdemeanor criminal recklessness.[1]

Reversed and remanded for proceedings consistent with this opinion.

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

[1] "A person who recklessly, knowingly, or intentionally performs: (1) an act that creates a substantial risk of bodily injury to another person . . . commits criminal recklessness. Except as provided in subsection (c), criminal recklessness is a Class B misdemeanor." Ind. Code § 35-42-2-2(b) (2004 & Supp. 2006).