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**IN THE
COURT OF APPEALS OF INDIANA**

EDWARD ZIEMER,)

Appellant-Defendant,)

vs.)

No. 82A01-0707-CR-345

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Mary Margaret Lloyd, Judge
Cause No. 82D02-0511-FD-961

November 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a bench trial, the trial court found Edward Ziemer guilty of battery resulting in bodily injury, a Class D felony; battery by body waste, a Class D felony; and resisting law enforcement, a Class A misdemeanor. On appeal, Ziemer raises the sole issue of whether there was sufficient evidence to support his conviction for battery resulting in bodily injury. Concluding there was sufficient evidence for the trial court to conclude beyond a reasonable doubt that Ziemer was guilty of battery resulting in bodily injury, we affirm.

Facts and Procedural History

On November 5, 2005, Evansville Police Department Officer Kyle Kassel was on patrol when he saw a man, later identified as Ziemer, who matched the description of a prowler. When Officer Kassel stopped his vehicle to get a better look, Ziemer ran away. After a brief search, Officer Kassel found Ziemer hiding behind a bush. As Officer Kassel approached, Ziemer emerged, threw a bottle of tequila into the bush, and started to walk away. Officer Kassel identified himself as a police officer and requested that Ziemer stop and talk with him. Ziemer eventually stopped, and Officer Kassel conducted a pat-down search. While searching Ziemer, Officer Kassel smelled alcohol on Ziemer's breath and observed that his speech was slurred and his eyes were bloodshot. Based on these observations, Officer Kassel told Ziemer he was under arrest for public intoxication and told him to put his hands behind his back. As Officer Kassel was handcuffing Ziemer, he tried to pull away. Officer Kassel pushed Ziemer onto the hood of his vehicle, told him not to resist, and finished handcuffing him. Officer Kassel then contacted dispatch to see if Ziemer had

any outstanding warrants. There were none, but Ziemer was identified as “an officer safety alert,” which means he had been arrested previously for battery of a police officer. Transcript at 16.

As Officer Kassel was escorting Ziemer to the backseat of his vehicle, Officer Bryan Hirshman arrived to assist. When Ziemer was at the driver’s side rear door, he pushed his foot against the vehicle’s running board in an attempt to free himself from Officer Kassel’s grasp. Officer Kassel grabbed Ziemer and tried to push him into the backseat, but Ziemer resisted and kicked Officer Kassel in the thigh. After several attempts to get Ziemer to stop kicking, including Officer Kassel laying on top of Ziemer and striking Ziemer’s back and legs with his flashlight, Officer Hirshman used his taser gun. Ziemer initially relented, but continued struggling by grabbing Officer Kassel’s hand when Officer Kassel tried to pull himself off of Ziemer. Concluding they could not safely transport Ziemer in Officer Kassel’s vehicle, the officers arranged for a van to take Ziemer to the police station.

At the police station, Officer Kassel kept Ziemer handcuffed and sat him in a chair so he could complete Ziemer’s booking information. While in the chair, Ziemer cursed at another officer, called Officer Kassel “a bitch” several times, and spat on Officer Kassel. Id. at 29. Officer Kassel asked Officer Marcus Craig to assist him in putting a “spit hood” over Ziemer’s face. Id. at 32. When Officer Kassel approached, Ziemer raised his legs in an attempt to kick Officer Kassel. Officer Kassel pushed Ziemer to the floor while Officer Craig put the spit hood over Ziemer’s face. Several minutes later, Officer Kassel noticed Ziemer’s chin was bleeding, and Ziemer was escorted to the hospital for treatment. Officer

Kassel received a one-day suspension based on a finding that he had cursed at Ziemer during the incident at the police station.

The State charged Ziemer with battery resulting in bodily injury, a Class D felony; battery by body waste, a Class D felony; and resisting law enforcement, a Class A misdemeanor. Following a bench trial, the trial court found Ziemer guilty on all counts. Based on these findings, the trial court sentenced Ziemer to concurrent sentences of eighteen months for battery resulting in bodily injury, eighteen months for battery by body waste, and one year for resisting law enforcement. Ziemer now appeals.

Discussion and Decision

I. Standard of Review

Ziemer argues there was insufficient evidence to support his conviction for battery resulting in bodily injury. In reviewing whether there is sufficient evidence to support a conviction, “appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict.” McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). It is the trier of fact’s duty to weigh the evidence to determine whether the State has proved each element of the offense beyond a reasonable doubt. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). Accordingly, we “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” McHenry, 820 N.E.2d at 126 (quoting Tobar v. State, 740 N.E.2d 109, 111-12 (Ind. 2000)).

II. Sufficiency of the Evidence

Indiana Code section 35-42-2-1(a) states in pertinent part:

(a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(2) a Class D felony if it results in bodily injury to:

(A) a law enforcement officer . . . while the officer is engaged in the execution of the officer's official duty

Thus, to convict Ziemer of battery resulting in bodily injury as a Class D felony, the State had to prove beyond a reasonable doubt that while Officer Kassel was executing his official duty, Ziemer knowingly or intentionally touched him in a rude, insolent, or angry manner, resulting in bodily injury. Ziemer does not challenge the sufficiency of the evidence regarding the touching or whether Officer Kassel was executing his official duty. Instead, Ziemer argues there was insufficient evidence to support a finding that the touching resulted in bodily injury.

We note initially that Officer Kassel's testimony that he experienced pain when Ziemer kicked him is sufficient evidence that the touching resulted in bodily injury. See Ind. Code § 35-41-1-4 ("Bodily injury' means any impairment of physical condition, including physical pain."). However, Ziemer urges us to disregard Officer Kassel's testimony because it is "incredibly dubious." Appellant's Brief at 15.

Under the "incredible dubiosity rule," an appellate court may reverse a conviction by impinging on the trier of fact's responsibility to judge witness credibility. Tillman v. State, 642 N.E.2d 221, 223 (Ind. 1994). Application of the rule, however, is limited to cases "where a sole witness presents inherently contradictory testimony which is equivocal or the

result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt." White v. State, 706 N.E.2d 1078, 1079 (Ind. 1999). Ziemer argues the first time Officer Kassel stated he experienced pain was at trial. Thus, because Officer Kassel had "substantial motive to lie" based on the one-day suspension he received, Ziemer argues Officer Kassel's testimony is incredibly dubious. Appellant's Br. at 15.

Even if we agreed Officer Kassel had substantial motive to lie, such a finding does not permit application of the incredible dubiousity rule. Instead, Ziemer had to show Officer Kassel's testimony was inherently contradictory, and there is nothing inherently contradictory about Officer Kassel stating for the first time at trial that he experienced pain. Nor is there a complete lack of circumstantial evidence regarding Ziemer's guilt. Officer Hirshman testified as follows:

A Once [Officer Kassel] kind of shoved him in the car, Mr. Ziemer reared back and kicked him in the leg.

A Well, once [Ziemer] partially gotten [sic] back into the car, he leaned all the way back, like I said, he kicked Kyle in the leg and then he just basically went berserk. Started thrashing about, kicking[,] screaming, yelling.

Q And, so [Ziemer] kicked Officer Kassel, while he's laying on the backseat of the car and Kassel is standing outside of the car?

A Yes.

Q Okay. And, you saw this?

A Yes.

Tr. at 70, 71-72. Although not dispositive, this testimony is circumstantial evidence from which it can be inferred that Officer Kassel experienced pain when Ziemer kicked him. Cf. White, 706 N.E.2d at 1080 (refusing to apply the incredible dubiousity rule based on circumstantial evidence that the defendant's clothing was found at the scene of the crime).

Thus, because we conclude Officer Kassel's testimony is not inherently contradictory and circumstantial evidence indicates the touching resulted in bodily injury, we decline Ziemer's invitation to apply the incredible dubiousity rule to Officer Kassel's testimony.

Conclusion

There was sufficient evidence to support Ziemer's conviction for battery resulting in bodily injury.

Affirmed.

KIRSCH, J., and BARNES, J., concur.