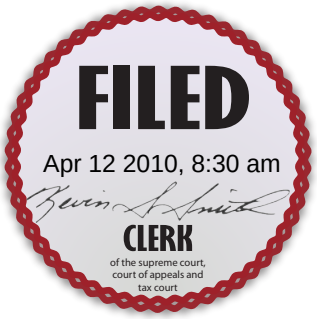

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL EMERICK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 30A01-0908-CR-420
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry K. Snow, Judge
Cause No. 30D01-0807-FB-129

April 12, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Michael Emerick ("Emerick") was convicted in Hancock Superior Court of two counts of Class B felony dealing in a schedule I, II, or III controlled substance and one count of Class D felony neglect of a dependent. The trial court sentenced Emerick to an aggregate sentence of ten years with two years suspended to probation. Emerick appeals and argues that the evidence presented at trial was insufficient to support his convictions and that Emerick's trial counsel provided ineffective assistance of counsel.

We affirm.

Facts and Procedural History

On July 22, 2008, Matt Thiery ("Thiery") contacted Hancock County Sheriff's Department Detective Tim Cicenas ("Detective Cicenas") and informed him that Thiery had an opportunity to purchase oxycodone from Emerick. Detective Cicenas arranged for a controlled buy with Thiery. After searching Thiery and his vehicle, Thiery was given a digital recorder and $120 in bills whose serial numbers had been recorded. Thiery was followed to Emerick's house by Detective Cicenas and Detective Matt Holland ("Detective Holland") where they watched Thiery enter Emerick's house.

Once inside, Thiery went upstairs to the rooms shared by Emerick, his girlfriend, Katie Colwell ("Colwell"), and their two-year-old daughter. Emerick handed Colwell two oxycodone tablets which she then handed to Thiery. Thiery handed her the recorded $120 which Colwell handed to Emerick. Thiery left the house and met the detectives at a prearranged location and handed over the oxycodone tablets. The detectives retrieved the recorder and searched Thiery and his vehicle.

On July 23, 2008, Thiery contacted Detective Cicenas again and another purchase from Emerick was arranged. Thiery again received $120 in recorded currency. Thiery went to Emerick's residence but only one oxycodone tablet was available, which he purchased for $60, using the recorded currency. Emerick's two-year-old daughter was present during the purchase. Thiery returned to the detectives with one tablet and the remaining $60. He and his vehicle were searched again.

Based on the two controlled drug buys, Detective Cicenas obtained a search warrant on July 23, 2008. The warrant was executed that evening. During the search, Emerick sat on the floor. When he stood up a cellophane wrapper with seven pills inside was found on the floor. The wrapper had not been there earlier. Further search of the residence revealed two empty Fentanyl packages, a marijuana grinder, eight oxycodone tablets, rolling papers, a roach clip, an ashtray containing two partially burnt marijuana cigarettes, a plastic case containing a digital scale and a partially burnt marijuana cigarette, mail addressed to Emerick, and a hookah.

Colwell was charged and eventually pleaded guilty to dealing in a controlled substance, neglect of a dependent, and possession of a controlled substance. On July 25, 2008, Emerick was charged with two counts of Class B felony dealing in a controlled substance, two counts of Class D felony possession of a controlled substance, and one count of Class D felony neglect of a dependent. On February 23, 2009, Emerick pleaded guilty to all counts except the Class D felony neglect of a dependent charge, without the benefit of a plea agreement. The Class D felony neglect of a dependent charge was then dismissed by the State. On March 25, 2009, Emerick appeared for sentencing and moved

to withdraw his guilty plea. Without objection by the State, the trial court granted the motion.

Emerick waived his right to a jury trial and a bench trial was held on May 4, 2009. Emerick was found guilty of two counts of Class B felony dealing in a controlled substance and one count of Class D felony neglect of a dependent. He was acquitted of the two counts of Class D felony possession of a controlled substance.

On June 2, 2009, the trial court sentenced Emerick to concurrent sentences of ten years with two years suspended to probation on each of the two Class B felony dealing in controlled substances and to four years on the Class D felony neglect of a dependent. Emerick now appeals.

Discussion and Decision

Emerick argues that the evidence was insufficient to support his convictions for Class B felony dealing in a controlled substance and Class D felony neglect of a dependent. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. If inferences may be reasonably drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt, then circumstantial evidence will be sufficient. Id.

Emerick attempts to argue that the testimony of Colway and Thiery is incredibly dubious. Appellate courts may apply the "incredible dubiosity" rule to judge the credibility of a witness. This rule is expressed as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Fajardo v. State, 859 N.E.2d 1201,1208 (Ind. 2007) (quoting Love v. State, 761 N.E.2d 806, 810 (Ind. 2002)).

Emerick's reliance on this rule in this case is misplaced: "Application of this rule 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." Tillman v. State, 642 N.E.2d 221, 223 (Ind. 1994). Emerick's convictions were based on the testimony of two witnesses. Emerick believes that the witnesses' testimony presented was contradictory; however, this would require that we judge the credibility of the witnesses which we will not do.

Emerick also raises the issue of ineffective assistance of counsel.[1] However, he chooses not to argue this issue and counsel further acknowledges that the trial strategy of trial counsel was legitimate and "did not render her trial counsel ineffective."

[1] Normally, a post-conviction hearing is the preferred forum to adjudicate a claim of ineffective assistance of counsel. McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999); Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998). Presenting such a claim often requires the development of new facts not present in the trial record. McIntire, 717 N.E.2d at 101. While a defendant may choose to raise a claim of ineffectiveness of counsel on direct appeal, if he does so the issue will be foreclosed from collateral review. Id. at 102; Woods, 701 N.E.2d at 1220.

Appellant's Br. p. 5. Emerick has waived this issue for failing to put forth a cogent argument on appeal. See Ind. Appellate Rule 46(A)(8).

Conclusion

The evidence is sufficient to support Emerick's convictions for two counts of Class B felony dealing in a controlled substance and one count of Class D felony neglect of a dependent. Emerick has waived the issue of ineffective assistance of trial counsel.

We affirm.

RILEY, J., and BRADFORD, J., concur.