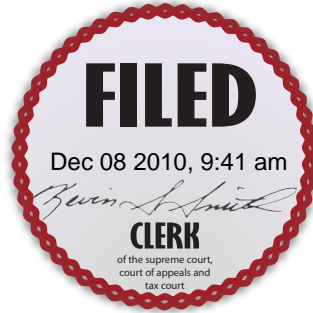


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

PAUL FOX,
 Appellant-Defendant,

 vs.

STATE OF INDIANA,

 Appellee-Plaintiff.

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) No. 49A05-1003-CR-193
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APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Clark H. Rogers, Judge
Cause No. 49G17-1001-CM-488

December 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Paul Fox appeals his conviction, after a bench trial, of domestic battery, a class A misdemeanor.

We affirm.

ISSUE

Whether sufficient evidence sustains Fox's conviction.

FACTS

Fox and Candy Whitesides were formerly married, and Joel Fox ("Joel") is their adult son. In January of 2010, Joel was living with Fox in Fox's second floor apartment. On January 4, 2010, while Joel was away from the apartment buying groceries, a short in Fox's dryer caused a fire. After the Fire Department extinguished the fire, Fox's living room was a mess – with debris from wet drywall and charred carpeting. The fire upset Fox. When Joel came home, he put the groceries away, went to his bedroom, and used his computer. According to Joel, Fox "start[ed] yelling at [Joel] and cursing at [him]." *Id.* 14. "[R]ather than have it end up into a fist fight or a physical confrontation," Joel called Whitesides to come pick him up. *Id.* at 24. Fox proceeded with "vacuuming up the charred pieces of carpet." *Id.* at 21.

When Whitesides arrived at the residence with her husband, Fox "was outside ranting, screaming and hollering" and "throwing carpet away." *Id.* at 22, 23. Fox came to the car window, "telling [them] not to bring the little m***** f***** to the house again." *Id.* at 23. Whiteside "told [Fox] to just let [Joel] get his stuff" and they would leave. *Id.* Fox then went inside and upstairs.

Whitesides heard “screaming” coming from inside, and she ran upstairs to the apartment. *Id.* at 24. Whitesides “asked what was going on and [Fox] was screaming and hollering, ranting and raving, . . . stomping around.” *Id.* She “said, calm down,” and Fox “said get the f*** out of my house.” *Id.* She said “no problem,” and “started backing” away. *Id.* “[S]till screaming get the f*** out, get the f*** out,” Fox “swung” the vacuum cleaner at Whitesides, and the vacuum cleaner hose “hit [her] on [her] leg” -- inflicting a “pretty deep” cut on her shin. *Id.* at 24, 25, 26.

Whitesides called 9-1-1, as Fox kept “screaming get out.” *Id.* at 27. Police responded, and an officer photographed Whitesides’ injury.

On January 5, 2010, the State charged Fox with domestic battery, as a class A misdemeanor, and battery, also as a class A misdemeanor. On March 2, 2010, the trial court held a bench trial and heard testimony of the above from Joel and Whiteside. In addition, Tommy Grubb, Fox’s friend and first-floor tenant, testified that he was in Fox’s kitchen that afternoon and heard Fox “yelling” at Whitesides; she “said can we talk? And [Fox] said get the F out of my house”; and then Grubb heard a crash. *Id.* at 45. Joel testified that he was in the bedroom when “the altercation between” Whitesides and Fox took place, *id.* at 17, but that Grubb was not present. Whitesides also testified that Grubb was not present in Fox’s apartment at the time. Fox admitted that he “was hysterical,” “angry,” and “upset about the fire”; argued with Joel about cleaning up the damage and became “more upset”; and then ordered him to leave. *Id.* at 35, 36. Fox further admitted that Whitesides “was . . . telling [him] not to argue with [Joel],” and he told her to “get the f*** out,” but he testified that he did not “throw a vacuum cleaner at her.” *Id.* at 39,

40. According to Fox, Whitesides injured herself when she “stumble[d]” and “fell backwards and tripped over” the vacuum cleaner. *Id.* at 41, 40.

The trial court found Fox guilty of domestic battery. “[B]ased on double jeopardy,” however, it found him “[n]ot guilty” on the battery charge. *Id.* at 52.

DECISION

To convict Fox of the offense of domestic battery, as a class A misdemeanor, the State was required to prove that Fox did knowingly or intentionally touch another person to whom he was formerly married, or with whom he “ha[d] a child in common . . . , in a rude, insolent, or angry manner,” and that “bodily injury to” that other person resulted. Ind. Code § 35-42-2-1.3(a).

When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

Fox argues that his conviction must be reversed because “there was no evidence to support a finding that he” committed domestic battery “other than Mrs. Whitesides’ biased testimony.” Fox’s Br. at 6. We disagree.

Fox emphasizes the testimony by Grubb “that he had a clear view of Mr. Fox as she was leaving the home and that Mr. Fox did not throw anything at Mrs. Whitesides or touch her in any way.” *Id.* at 8. We first note that testimony was conflicting as to whether Grubb was present in Fox’s apartment at the time of the incident. Moreover, Grubb testified that he and Fox “d[id] things together socially,” and Fox testified that Grubb was his “friend” and that they talked “all the time.” (Tr. 45, 33). Such testimony allows inferences to be drawn as to Grubb’s credibility by the trier of fact. *See Kilpatrick v. State*, 746 N.E.2d 52, 61 (“It is for the trier of fact to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve.”). In addition, Grubb testified that at the time of the incident, he was “in the kitchen,” which was “right next to the living room,” yet he also testified that Fox “[wa]s standing in front of [him] in the living room.” (Tr. 45). Grubb’s testimony that he was able to see Fox “standing right exactly in front of [him] in the living room” from the room “next to the living room” also provides for the drawing of an inference as to Grubb’s credibility. *Id.* Further, Fox testified that the vacuum “sweeper” was in the living room. *Id.* at 40. Thus, Whitesides’ injury must have occurred in that room.

Fox testified that he believed Whitesides had tripped, falling backward, and injured herself. Yet her injury, as reflected in the photograph, was to the front of her leg.

As to Fox’s repeated argument that Mrs. Whitesides provided “biased testimony,” Fox’s Br. at 6, 10, we note that she testified that she was “just there to calm” Fox and “to get [her] son out of the situation.” (Tr. 27). Fox testified that his relationship with Whitesides since their divorce was “[n]ot great, but pretty much we got along because of

Joel.” *Id.* at 39. There was no testimony from either Joel or Grubb to support the inference of animus by Whitesides against Fox. Thus, a motive for Whitesides to lie about what happened was not clearly established. Further, Fox’s own testimony established his extremely emotional state when Whitesides came into his living room; and he admitted – as testified to by Whitesides and Grubb – that she tried to calm him down. *Id.* In response, Fox “was upset with her thinking that she was going to try to tell [him] how to run the house” and “telling [him] not to argue with [Joel].” *Id.*

It is undisputed that Whitesides and Fox had formerly been married and had a child in common; that Fox was angry and screamed at her to leave; and that Whitesides suffered a deep cut to the front of her leg. Her testimony was that she suffered the cut when Fox angrily swung a vaccum cleaner at her and its hose struck her leg. Based upon the evidence presented, a reasonable trier of fact could have found Fox guilty beyond a reasonable doubt of domestic battery, as a class A misdemeanor. *See Drane*, 867 N.E.2d at 146.

Affirmed.

BRADFORD, J., and BROWN, J., concur.