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IN THE
COURT OF APPEALS OF INDIANA

CURTIS D. MAGEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0910-CR-964
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 17
The Honorable Clark H. Rogers, Judge
The Honorable Melissa Kramer, Master Commissioner
Cause No. 49G17-0906-FD-56998

May 19, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Curtis D. Magee (Magee), appeals his conviction for domestic battery, as a Class D felony, Ind. Code § 35-42-2-1.3.

We affirm.

ISSUE

Magee presents one issue for our review, which we restate as: Whether the State presented sufficient evidence to prove beyond a reasonable doubt that he committed domestic battery, as a Class D felony.

FACTS AND PROCEDURAL HISTORY

In the summer of 2009, Magee lived in Indianapolis, Indiana, with his wife, A.M., his step-daughter and their one-year-old son. On June 6, 2009, A.M. was upstairs napping with their one-year-old son. Magee came into the room yelling at her, telling her he had proof that she had been engaged in an extra-marital affair in the form of a text message that was on her cell phone. A.M. did not have an opportunity to respond because Magee was "ranting and raving." (Transcript p. 15). Magee sat down on the edge of the bed and hit A.M. on her shoulder causing her pain. A.M. said she was going to call the police and Magee went downstairs, took the cordless phone receiver off the base, and hid it. Magee then left the apartment, and A.M. locked him out. Magee repeatedly came back to the door of the apartment, banging on it while yelling at A.M. to let him in. A.M. found the phone receiver and called the police.

Indianapolis Metropolitan Police Officer, Marlon Minor (Officer Minor), responded to A.M.'s call. When Officer Minor arrived, Magee was in his car in the parking lot outside the apartment. Officer Minor talked with Magee and A.M. separately about the incident and placed Magee under arrest.

On June 17, 2009, the State filed an Information charging Magee with domestic battery, as a Class D felony, I.C. § 35-42-2-1.3; domestic battery, as a Class A misdemeanor, I.C. § 35-42-2-1.3; and battery, as a Class A misdemeanor, I.C. § 35-42-2-1. On July 23, 2009, the trial court conducted a bench trial. At the close of evidence and arguments, the trial court stated that it found A.M.'s testimony to be credible. On September 10, 2009, the trial court conducted a sentencing hearing. At the close of the hearing, the trial court announced that it was entering a conviction for domestic battery, as a Class D felony, and sentenced Magee to probation with credit for time served.

Magee now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Magee contends that the State did not present sufficient evidence to prove that he committed domestic battery.

> Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. [] Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material evidence of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*.

Indiana Code section 35-42-2-1.3 provides, in pertinent part, that a person commits domestic battery, as a Class D felony, when he knowingly or intentionally touches an individual who is his spouse in a rude, insolent, or angry manner that results in bodily injury in the presence of a child under sixteen years of age, knowing that the child was present and might be able to see or hear the offense. A.M. testified that she was lying in her bed with their one-year-old son when Magee yelled at her and then punched her in the shoulder causing her pain. This evidence, which is the evidence most favorable to the trial court's decision, is sufficient to sustain Magee's conviction.

However, Magee contends that we should apply the "incredible dubiosity rule" to conclude that A.M.'s testimony was incredible. Under the "incredible dubiosity rule" we will impinge upon the trier of fact's determination of credibility when a witness has presented testimony that is inherently improbable, coerced, or equivocal while also wholly uncorroborated. *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994). "When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed." *Newson v. State*, 721 N.E.2d 237, 240 (Ind. 1999).

Specifically, Magee argues that, although much of A.M.'s testimony is corroborated by his testimony and Officer Minor's testimony, A.M.'s testimony that Magee hit her in the shoulder is uncorroborated. Further, he contends that her testimony is improbable because she testified that at the time that Magee hit her, she was lying on her side propped up on her

elbow; however, she did not testify that she lost her balance when Magee hit her hard enough to cause pain.

We first note that there was not a complete lack of circumstantial evidence supporting A.M.'s testimony. Magee testified about confronting A.M. regarding a text message that he read on her cell phone. The trial court noted the circumstantial effect of the situation by stating: "I don't buy that [Magee] is going to find something on a text message . . . and that [he goes] to confront [his] wife about it and that the entire exchange is [Magee] being calm . . . ." (Tr. p. 39). Furthermore, Magee's contention that A.M.'s testimony was highly improbable is flawed. Although A.M. did not testify that she lost her balance when being struck by Magee, she was never asked whether she lost her balance. The absence of testimony is not proof that an event did not occur. Moreover, we cannot determine from the record that A.M. was positioned in a way, or struck in a way, that would necessarily result in A.M. losing her balance from a blow from Magee. Therefore, we conclude that A.M.'s testimony was supported by circumstantial evidence, and was not highly improbable; thus, we conclude that the "incredible dubiosity rule" does not apply.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence that Magee committed domestic battery, as a Class D felony, and that the "incredible dubiosity rule" does not apply to A.M.'s testimony.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.