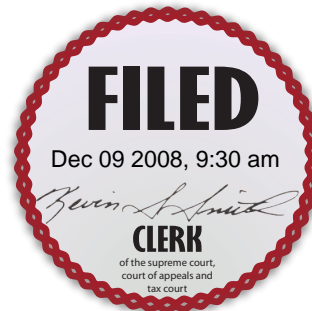


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

EMILIANO PEREZ,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0804-CR-393
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Annie Christ-Garcia, Judge
Cause No. 49G17-0801-CM-901

December 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Emiliano Perez appeals his conviction for Class A misdemeanor domestic battery. Specifically, he contends that the evidence is insufficient to support his conviction because he acted in self-defense. Finding his argument an impermissible invitation to reweigh the evidence, we affirm his conviction for domestic battery. However, because we find *sua sponte* that the abstract of judgment and CCS are inconsistent with the trial court's oral sentencing pronouncement, we remand.

Facts and Procedural History

On December 24, 2007, Emiliano and his wife, Kathryn Perez, were together in their Indianapolis home. Kathryn, who knew that her husband had recently received a paycheck, asked Emiliano for money so she could buy her blood pressure medicine. Emiliano refused, responding that she should ask someone else in the family for money. Kathryn became upset and started crying. Kathryn approached Emiliano, who was sitting in a reclining chair watching television, and leaned in toward him, asking again for help to buy her medicine. When Emiliano refused again, Kathryn put up her hand, saying, "Fine, don't help me." Tr. p. 7. Emiliano then struck Kathryn's upper arm with his fist, causing bruising and pain. Kathryn, afraid that Emiliano might hurt her again, waited until Emiliano left the house to call the police and report the battery.

The State charged Emiliano with Class A misdemeanor domestic battery¹ and Class A misdemeanor battery.² After a bench trial, the trial court stated at sentencing that

¹ Ind. Code § 35-42-2-1.3(a).

² Ind. Code § 35-42-2-1(a).

it found Emiliano guilty of domestic battery.³ The trial court sentenced him to 180 days for the domestic battery with eight days executed and 172 days suspended to probation. The trial court also ordered Emiliano to undergo twenty-six weeks of domestic violence counseling. Emiliano now appeals.

Discussion and Decision

On appeal, Emiliano contends that his domestic battery conviction should be reversed because the evidence supports a finding that he acted in self-defense. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the factfinder'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. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at 147 (quotation omitted). The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

³ At trial, the trial court stated that "[t]he Court agrees and finds the defendant guilty of domestic battery, a Class A misdemeanor." Tr. p. 47. The trial court did not mention the battery count at that time. However, the CCS and Abstract of Judgment both reflect that the trial court found Emiliano guilty of both domestic battery and battery. Appellant's App. p. 6, 10.

The standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. *Wilson v. State*, 770 N.E.2d 799, 801 (Ind. 2002). If a defendant is convicted despite his claim of self-defense, this Court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. *Id.* at 800-01.

In order to convict Emiliano of Class A misdemeanor domestic battery, the State had to prove that Emiliano knowingly touched Kathryn, his spouse, in a rude, insolent, or angry manner, resulting in bodily injury. Ind. Code § 35-42-2-1.3(a). A valid claim of self-defense is a legal justification for an otherwise criminal act. *Henson v. State*, 786 N.E.2d 274, 277 (Ind. 2003). A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. Ind. Code § 35-41-3-2. In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear or apprehension of bodily harm. *Henson*, 786 N.E.2d at 277; *Wilson*, 770 N.E.2d at 800. When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. *Id.*

The evidence shows that Emiliano instigated the violence after Kathryn asked him for money so she could buy her blood pressure medication. During their argument about the money, he struck his wife on her upper arm, causing bruising, swelling, and pain.

Emiliano testified that he was afraid that when Kathryn put her hand in his face she would cause him serious bodily injury, but Kathryn testified that she leaned in close to Emiliano, put up her hand, and said, “Fine, don’t help me.” Tr. p. 7. She testified that she did not touch him or threaten him. The trial court was entitled to believe either that Emiliano did not genuinely fear imminent bodily harm or that Emiliano’s fear, even if genuine, was not reasonable. Thus, Emiliano’s argument is merely an invitation for us to reweigh the evidence, which we will not do. In sum, we conclude that there is sufficient evidence to support Emiliano’s domestic battery conviction.

In this case, the trial court stated in open court that it found Emiliano guilty of domestic battery only. Tr. p. 47. However, both the abstract of judgment and the CCS show Emiliano as being convicted of both domestic battery and battery. Appellant’s App. p. 6, 10. We determine, *sua sponte*, that if Emiliano were simultaneously convicted for battery as the abstract and CCS reflect then he would be subjected to double jeopardy. *See Adams v. State*, 754 N.E.2d 1033, 1034 (Ind. Ct. App. 2001). We raise the issue *sua sponte* because a double jeopardy violation, if shown, ensnares fundamental rights. *Scott v. State*, 855 N.E.2d 1068, 1074 (Ind. 2006). We remand to the trial court to correct the abstract of judgment and CCS to indicate that Emiliano was convicted only of domestic battery. *See Jarrett v. State*, 829 N.E.2d 930, 932 (Ind. 2005).

Affirmed in part and remanded.

KIRSCH, J., and CRONE, J., concur.