

James Bennett appeals his convictions for domestic battery as a class A misdemeanor,¹ battery as class A misdemeanor,² and criminal mischief as a class B misdemeanor.³ Bennett raises several issues, which we revise and restate as whether the evidence is sufficient to sustain his convictions for battery, domestic battery, and criminal mischief.⁴ We affirm in part, reverse in part, and remand.

The facts most favorable to Bennett's convictions follow. On September 10, 2008, Bennett, Bennett's then fiancée Melissa Gilbert, Donna Mealer, Paul Wheatcraft, Wheatcraft's sister Cheryl, and David Para met at Mealer's house. The group stayed at Mealer's house for about forty-five minutes and had several beers before traveling to a concert at Verizon Music Center. The group drank whiskey and consumed beer at the concert.

Following the concert, the group entered a station wagon to return to Mealer's house. Cheryl was the driver, Para sat in the front passenger seat, Mealer and Paul sat in the backseat, and Bennett and Gilbert sat in the "rumble seat," which faced the back window of the vehicle. Transcript at 25-26. At some point during the return trip to Mealer's house while traveling on Interstate 465, Bennett observed Paul lean over the backseat of the vehicle and kiss Gilbert on the cheek. Bennett became upset and grabbed

¹ Ind. Code § 35-42-2-1.3 (Supp. 2006).

² Ind. Code § 35-42-2-1 (Supp. 2008) (subsequently amended by Pub. L. No. 131-2009 § 73 (eff. July 1, 2009)).

³ Ind. Code § 35-43-1-2 (Supp. 2007).

⁴ In his statement of the issue presented for review, Bennett indicates that he is appealing his conviction for "Count V, Public Intoxication, as a Class B Misdemeanor." Appellant's Br. at 1. However, as Bennett later states in his brief, he was found not guilty on that count.

Paul by the throat and pinned him up against the window. Bennett and Paul were separated, and Bennett told Gilbert that “he was pissed that [Paul] had kissed [her] cheek.” Id. at 27. Gilbert told Bennett that the kiss was “totally innocence [sic]” and that he was “blowing it out of proportion.” Id.

Bennett then “proceeded to start kicking at the back of the door.” Id. Gilbert told him to stop because he was going “to tear the car up,” but Bennett kept kicking and “eventually . . . got to the glass of the window, and busted it.” Id. After kicking out the glass in the back door of the vehicle, Bennett “went out the back glass” and “took [Gilbert] with him.” Id. Bennett said, “If I’m going, you are going to [sic].” Id. Bennett grabbed Gilbert by the waist and began to exit the vehicle through the broken window. The vehicle was traveling at “[a]bout 50, 60 mph.” Id. at 15. Gilbert was “in fear that [Bennett] was going to pull [her] out of the car, and [she would] end up dead on the road.” Id. at 30. Mealer and Para grabbed hold of Gilbert’s pants and “jerked her back in” the car. Id. at 17. Bennett “reached his hand in [Gilbert’s] mouth.” Id. at 18. Gilbert started crying and screaming, and she stated that “[Bennett] ripped [her] tooth out of [her] mouth.” Id. Once Gilbert “broke free from [Bennett], he proceeded to get on top of the car as [it went] down the highway.” Id. at 29.

Once Bennett was on top of the vehicle, Mealer, Para, and Gilbert started to yell to Cheryl to stop the vehicle. Because there was road construction in the area and there was no shoulder, Cheryl stopped the vehicle in the middle of the road. Bennett “jumped off” the roof of the vehicle, and “was making his way towards Paul who was in the passenger

seat in the car.” Id. at 30. Cheryl “took off” and “left [Bennett] on the side of 465.” Id. at 18.

Cheryl then drove to Clarian West Medical Center because Gilbert was bleeding. Gilbert had bruises on her arm and across her chest where Bennett had pulled her out of the car. She also had scratches and a missing tooth. Gilbert hurt physically and emotionally. Gilbert was given Vicodin for the pain and was told to see a dentist immediately.

On September 11, 2008, the State charged Bennett with: (1) Count I, domestic battery as a class A misdemeanor; (2) Count II, battery against Melissa Gilbert as a class A misdemeanor; (3) Count III, battery against Paul Wheatcraft as a class A misdemeanor; (4) Count IV, criminal mischief as a class B misdemeanor; and (5) Count V, public intoxication as a class B misdemeanor. On October 1, 2008, Bennett filed a notice of self defense pursuant to Ind. Code § 35-41-3-2. On October 14, 2008, the trial court granted the State’s motion to amend the charging information related to the count of criminal mischief.⁵

At the bench trial, Gilbert testified that she was the owner of the vehicle damaged by Bennett because she purchased the vehicle from Bennett in August 2008. In addition, the State admitted records from the Bureau of Motor Vehicles (the “BMV”) showing that the vehicle was titled to and registered in the name of Gilbert at the time of the incident.

⁵ The original information for criminal mischief charged Bennett with damaging the vehicle of Donna Mealer without the consent of Fred McClullogh. The amended information charged Bennett with damaging the vehicle of Melissa Gilbert without her consent.

The trial court found Bennett guilty of Counts I through IV and not guilty of Count V. The trial court merged Count II, battery against Gilbert as a class A misdemeanor, into Count I, domestic battery as a class A misdemeanor. The trial court sentenced Bennett to: (1) 365 days, with 289 days suspended to probation, for domestic battery as a class A misdemeanor; (2) 365 days, with 289 days suspended for battery as a class A misdemeanor; and (3) 180 days with 104 days suspended for criminal mischief as a class B misdemeanor. The trial court ordered the three sentences to be served concurrently with each other.

The sole issue is whether the evidence is sufficient to sustain Bennett's convictions for domestic battery, battery, and criminal mischief. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

A. Domestic Battery

Bennett argues that the evidence is insufficient to support his conviction for domestic battery as a class A misdemeanor. The offense of domestic battery is governed by Ind. Code § 35-42-2-1.3(a), which provides as follows:

A person who knowingly or intentionally touches an individual who:

- (1) is or was a spouse of the other person;
- (2) is or was living as if a spouse of the other person as provided in subsection (c); or
- (3) has a child in common with the other person;

in a rude, insolent, or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A misdemeanor.

Subsection (c) of Ind. Code § 35-42-2-1.3 sets forth the factors which a trial court shall review to determine whether a person is or was living as a spouse of another individual. See Ind. Code § 35-42-2-1.3(c) (listing factors as the duration of the relationship, the frequency of contact, the financial interdependence, whether the two individuals are raising children together, whether the two individuals have engaged in tasks directed toward maintaining a common household, and other factors the court considers relevant).

The State's charging information for domestic battery as a class A misdemeanor provides in relevant part:

JAMES BENNETT, did knowingly in a rude, insolent or angry manner touch MELISSA GILBERT, another person, who is or was the spouse of the Defendant, is or was living as if a spouse of the Defendant, or has a child in common with the Defendant, and further that said touching resulted in bodily injury to the other person, specifically any of the following: COMPLAINT OF PAIN.

Appellant's Appendix at 20. Thus, to convict Bennett of domestic battery as a class A misdemeanor, the State needed to prove that Bennett knowingly touched Gilbert, who was a person living as if a spouse of Bennett, in a rude, insolent, or angry manner that resulted in bodily injury to Gilbert in the form of pain.

Bennett argues that "he was struck in the eye by Melissa [Gilbert] and that she struck him first." Appellant's Brief at 9-10. Bennett also argues that "[a]lthough [he] did not assert a self-defense claim as to [Gilbert], his testimony appears to be that any injury to or striking of Melissa was by accident. It happened only as he sought to remove himself from the vehicle and the continuous attacks." Id. at 10. Bennett concedes that the testimony supporting his argument conflicts with the testimony of Gilbert and Mealer, but nevertheless argues that his testimony is "perfectly consistent with his efforts to get away from being hit" and that therefore the evidence does not show that he knowingly or intentionally touched Gilbert. Id. Bennett's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Drane, 867 N.E.2d at 146.

To the extent that Bennett argues that he was acting in self-defense, we observe that Bennett filed a notice of self-defense on October 1, 2008, and argued to the trial court that he did not commit domestic battery because Gilbert and Mealer attacked him and that he was trying to get out of the vehicle and away from Gilbert and Mealer. Self-defense is governed by Ind. Code § 35-41-3-2. A valid claim of self-defense is legal justification for an otherwise criminal act. Wilson v. State, 770 N.E.2d 799, 800 (Ind. 2002). In order to prevail on a self-defense claim, a defendant must demonstrate he was

in a place he had a right to be; did not provoke, instigate, or participate willingly in the violence; and had a reasonable fear of death or great bodily harm. Id. If a defendant is convicted despite his claim of self-defense, we will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. Id. at 800-801. As we review the sufficiency of evidence disproving self-defense, we may neither reweigh the evidence nor assess the credibility of the witnesses. Id. at 801. If evidence of probative value supports the judgment, then we must affirm. Id.

Given the facts previously mentioned, we conclude that the State presented evidence of a probative nature from which a reasonable trier of fact could have found that Bennett did not validly act in self-defense and that he was guilty of domestic battery as a class A misdemeanor. See Bryant v. State, 498 N.E.2d 397, 398 (Ind. 1986) (holding that, where the defendant did not specifically raise the issue of self-defense but argued on appeal that his testimony supported that defense, the defendant's "position amounts to no more than an invitation for us to reweigh the evidence" and noting that the State's evidence was sufficient to negate self-defense); West v. State, 907 N.E.2d 176, 178 (Ind. Ct. App. 2009) (holding that the evidence was sufficient to convict the defendant of domestic battery as a class A misdemeanor); Boyer v. State, 883 N.E.2d 158, 164 (Ind. Ct. App. 2008) (holding that the evidence was sufficient to convict the defendant of domestic battery as a class A misdemeanor and to negate the defendant's claim of self-defense).

B. Battery

Bennett argues that the evidence is insufficient to sustain his conviction for battery against Paul as a class A misdemeanor. The offense of battery is governed by Ind. Code § 35-42-2-1, which provides that “[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: . . . a Class A misdemeanor if . . . it results in bodily injury to any other person.” “Bodily injury” is defined as “any impairment of physical condition, including physical pain.” Ind. Code § 35-41-1-4 (2004). The State’s charging information for battery against Paul Wheatcraft stated in relevant part: “JAMES BENNETT, did knowingly in a rude, insolent or angry manner touch PAUL WHEATCRAFT, another person, and further that said touching resulted in bodily injury to the other person, specifically any of the following: COMPLAINT OF PAIN.” Appellant’s Appendix at 22. Thus, in order to convict Bennett of battery against Paul as a Class A misdemeanor, the State was required to prove that Bennett knowingly or intentionally touched Paul in a rude, insolent, or angry manner, and that the touching resulted in bodily injury to him in the form of pain. See Ind. Code § 35-42-2-1(a)(1)(A); Appellant’s Appendix at 22.

Bennett specifically appears to argue that his battery conviction should not have been elevated to a class A misdemeanor under Ind. Code § 35-42-2-1 because “[i]t is clear from this record that there is a failure of proof on the allegation that bodily injury took place involving the touching of Paul Wheatcraft.” Appellant’s Brief at 8. Bennett argues that Wheatcraft’s “brief testimony does not provide sufficient facts to establish ‘bodily injury’ or pain, as alleged.” Id. In its brief, the State observes that “Wheatcraft

specifically testified that he did not feel any pain” and states that “although the State showed that [Bennett] touched Wheatcraft in a rude, insolent, or angry manner, it did not show that the touching resulted in bodily injury to [Paul].” Appellee’s Brief at 6.

As the State acknowledges in its brief, the record reveals that the State failed to elicit evidence that Paul suffered pain as a result of being grabbed by Bennett and pinned against the vehicle’s window. The following exchange occurred during the State’s examination of Paul:

Q. Okays [sic]. When [Bennett] had your hand . . . your throat in his hand, did that hurt at all?

A. No.

Q. No, it didn’t hurt?

A. No, it scared me more than anything.

Q. Yeah, it’s kind of scary to have someone grab your throat in a car, huh? And, did this happen in Marion County, Indiana?

A. Yes ma’am.

Transcript at 55. After Paul’s testimony, the State failed to put on any evidence of pain experienced by Paul. Being grabbed by the throat and pinned against the vehicle’s window may amount to pain or may not amount to pain. Here, Paul testified that he did not experience pain. The trier of fact could only speculate that Paul experienced pain, and, especially in light of Paul’s testimony above, such speculation is not a reasonable inference drawn from the evidence presented and does not constitute proof beyond a reasonable doubt that the touching by Bennett resulted in bodily injury to Paul in the

form of pain. Therefore, the evidence does not support Bennett's battery conviction as a class A misdemeanor under Ind. Code § 35-42-2-1, and we reverse that conviction.

When a conviction is reversed because of insufficient evidence, we may remand for the trial court to enter a judgment of conviction upon a lesser-included offense if the evidence is sufficient to support the lesser offense. Chatham v. State, 845 N.E.2d 203, 208 (Ind. Ct. App. 2006) (citing Neville v. State, 802 N.E.2d 516, 519 (Ind. Ct. App. 2004), trans. denied). Bennett concedes that “[t]he record is clear in this case that Mr. Bennett touched Paul in a rude, insolent or angry manner” and “requests that the Court find under Count III that there is a failure of proof and enter judgment as Battery, as a Class B Misdemeanor.” Appellant's Brief at 7-8. Accordingly, we reverse Bennett's conviction for battery as a class A misdemeanor and remand to the trial court with instructions to enter judgment for battery as a class B misdemeanor and to resentence Bennett accordingly. See Chatham, 845 N.E.2d at 208 (reversing the defendant's conviction for sexual battery and remanding with instructions to enter judgment for the lesser-included offense of battery as a class B misdemeanor pursuant to Ind. Code § 35-42-2-1(a) and to resentence accordingly); Neville, 802 N.E.2d at 520 (reversing the defendant's conviction for aggravated battery and remanding with instructions to enter judgment for battery as a class C felony and to resentence accordingly).

C. Criminal Mischief

Bennett argues that the evidence is insufficient to sustain his conviction for criminal mischief as a class B misdemeanor. The offense of criminal mischief is governed by Ind. Code § 35-43-1-2, which provides in pertinent part:

- (a) A person who:
- (1) recklessly, knowingly, or intentionally damages or defaces property of another person without the other person's consent;
or
 - (2) knowingly or intentionally causes another to suffer pecuniary loss by deception or by an expression of intention to injure another person or to damage the property or to impair the rights of another person;

commits criminal mischief, a Class B misdemeanor.

The State's charging information for criminal mischief, as amended, provided in relevant part: "JAMES BENNETT, without the consent of MELISSA GILBERT, did recklessly or knowingly damage that person's property, to wit of any of the following items: REAR WINDOW and/or TRIM OF A THE VEHICLE OF MELISSA GILBERT by KICKING and/or STRIKING AGAINST IT." See Appellant's Appendix at 37. Thus, in order to convict Bennett of criminal mischief as a class B misdemeanor, the State needed to prove that Bennett recklessly or knowingly damaged the rear window and/or trim of Gilbert's vehicle.

Also, we note that this court has observed that "[p]ossession of a title certificate is not in itself conclusive proof of ownership or legal title of a vehicle," but that "[r]ather, the three primary indicia of ownership of personal property . . . are title, possession, and control." Womack v. State, 738 N.E.2d 320, 324 (Ind. Ct. App. 2000) (citations omitted), trans. denied.

Bennett states that it is his "position that there is a complete and total failure of proof under Count IV, Criminal Mischief." Appellant's Brief at 8. Bennett appears to

argue that the State failed to present sufficient evidence that the vehicle belonged to Gilbert. Specifically, Bennett argues that “the true ownership of this vehicle was his, notwithstanding the submission of Exhibits Two and Three by . . . Gilbert.” Id. at 9. Bennett argues that he purchased the car through his employment, made payments through payroll deductions, paid insurance and repairs, and did not sign the vehicle over to Gilbert until after the September 10, 2008 incident. Bennett argues that “he signed an ‘open title’ on August 28, 2008, but did not sign it over to . . . Gilbert.” Id. Bennett further argues that “Exhibit Two appears to support his position, as the transfer date is September 18, 2008 - after the incident.” Id. Bennett’s argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Drane, 867 N.E.2d at 146. To the extent that Bennett’s testimony conflicted with Gilbert’s testimony or the BMV records admitted at trial, we note that we will not reweigh the evidence or judge the credibility of the witnesses. See id.

Here, the record includes the BMV records admitted at trial, which included records regarding the vehicle’s title and registration, indicating that Bennett had purchased the vehicle in September 2006 and sold the vehicle to Gilbert on August 29, 2008. The record shows that Bennett caused the damage to the vehicle on September 10, 2008. The record also shows that Gilbert testified that she was the owner of the vehicle damaged by Bennett because she purchased the vehicle from Bennett in August 2008. Gilbert testified that, at the time of the damage to the vehicle, she and Bennett had been engaged for eight years and had been living together for four years. The record shows that Gilbert testified that she had an agreement with Bennett that she would “pay the

insurance” on the vehicle “to pay off the loan in which [Bennett] paid for the car.” Transcript at 45. Gilbert further testified that “[o]nce [she] had paid it off, [Bennett] signed the title over to [her].” Id. Also, Bennett testified that, after he broke the back window of the Mercury Sable, “[Gilbert] kept saying, ‘You broke my car! You broke my car!’” See Transcript at 70.

Based upon the record, we conclude that evidence of probative value exists from which the trial court could have found that Bennett did not own the vehicle at the time he caused damage to it, and therefore we conclude that the evidence presented at trial supports Bennett’s conviction of criminal mischief as a class B misdemeanor. See Womack, 738 N.E.2d at 324-325 (holding that sufficient evidence existed to support the defendant’s conviction for criminal mischief based upon damage the defendant caused to a trailer owned by the defendant’s ex-girlfriend); McGuire v. State, 625 N.E.2d 1281, 1282 (Ind. Ct. App. 1993) (holding that the evidence was sufficient to support a conviction for criminal mischief as a class B misdemeanor).

For the foregoing reasons, we affirm Bennett’s convictions for domestic battery as a class A misdemeanor and criminal mischief as a class B misdemeanor, reverse Bennett’s conviction for battery as a class A misdemeanor, and remand to the trial court with instructions to enter judgment for battery as a class B misdemeanor and to resentence Bennett accordingly.

Affirmed in part, reversed in part, and remanded with instructions.

MATHIAS, J., and BARNES, J., concur.