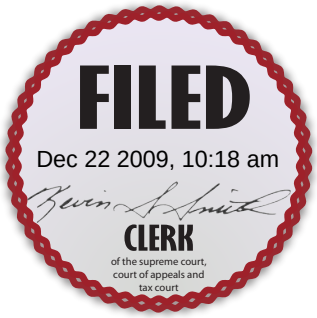

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IN THE
COURT OF APPEALS OF INDIANA

BILLIE D. BACK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 75A03-0907-CR-376
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0811-FC-37

December 22, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Billie D. Back (Back), appeals his convictions for intimidation, as a Class C felony, Ind. Code § 35-45-2-1(b)(2), and domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3(a)(2).

We affirm.

ISSUES

Back presents two issues for our review, which we restate as:

(1) Whether the trial court erred when it denied Back's motion for a mistrial during *voir dire* of the jury; and

(2) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that he committed intimidation, as a Class C felony.

FACTS AND PROCEDURAL HISTORY

On October 25, 2008, Back and his girlfriend, K.F., attended the Moose Family Center's Halloween party in Starke County, Indiana. After leaving the party, they went to K.F.'s home and K.F. went to the bathroom to remove her make-up. Back went into the bathroom and asked K.F. if she wanted to have sex, and K.F. told him to wait until she finished taking off her make-up. Back struck K.F. under her left eye, knocking her into the wall and breaking the window blind. Back then slapped K.F. causing her to fall into the bathtub while pulling the shower curtain and rod down upon her. As K.F. attempted to get out of the bathtub, Back struck her again. "The last time" K.F. tried to get up out of the bathtub, Back pushed her down, grabbed his knife, put it to her neck, and said "You bitch.

You Bitch." (Transcript p. 246). Back then grabbed K.F. by her neck, pulled her out of the bathtub, and dragged her to her bed. Back told her: "Don't you f---ing move, you bitch. You stay there or I will f---ing kill you. You don't get off that bed." (Tr. p. 249). Back walked out of the bedroom and then outside of the home. K.F. ran to the door and locked it. Back tried to force his way into the home, but K.F. held the lock and braced the door while calling 9-1-1. Back broke a window pane and K.F. yelled that she had called 9-1-1, causing Back to leave.

Officer David Combs (Officer Combs) of the Knox City Police Department responded to K.F.'s call and saw Back walking near K.F.'s home. Officer Combs approached Back and talked to him. Back stated that he and K.F. had attended a Halloween party and gotten into an argument after. Another officer searched for K.F.'s home and approached a residence, but it was the wrong one. Officer Combs let Back leave when the second officer could not locate K.F. A few days later, a worker for the Department of Child Services (DCS) received a report of domestic violence at K.F.'s home and went there to investigate. The DCS worker spoke with K.F. and noticed that she had two black eyes, an injury to her bottom lip, and a bruise upon her nose. K.F. reluctantly told the DCS worker about Back's attack. Police officers arrested Back.

On November 4, 2008, the State filed an Information charging Back with Count I, battery by means of a deadly weapon, a Class C felony, I.C. § 35-42-2-1; Count II, intimidation, as a Class C felony, I.C. § 35-45-2-1; and Count III, domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3. On February 18, 2009, a jury trial was held. During the

voir dire of the jury, a prospective jury member realized that he recognized Back and stated, "Yes, sir, I didn't recognize him at first but I pulled him up on on the website on the - - like, where you check for - -." (Tr. p. 61). The trial court cut the prospective juror off at that point, saying: "Hold on. Hold on. Hold on," and asking the prospective juror: "Are you talking about the defendant?" (Tr. pp. 61-62). The prospective juror responded in the affirmative and the trial court asked him to hold his comment for the time being. The trial court later questioned the prospective juror outside of the presence of the other jurors. The prospective juror explained that weeks prior he had seen Back on a website when researching area offenders for his neighborhood watch group. The trial court dismissed the prospective juror. Back moved for a mistrial, and the trial court denied that motion. The trial proceeded and the jury returned a verdict of not guilty of Count I, but guilty of Count II, intimidation, as a Class C felony, and Count III, domestic battery, as a Class A misdemeanor.

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

DISCUSSION AND DECISION

I. *Motion for Mistrial*

Back contends that the trial court erred by denying his motion for a mistrial. The trial court has broad discretionary powers to regulate the *voir dire's* form and substance. *Stroud v. State*, 450 N.E.2d 992, 993 (Ind. Ct. App. 1983). The decision to grant or deny a mistrial rests largely within the trial court's sound discretion and we will reverse that decision only when it is shown that the defendant was placed in a position of grave peril to which he should not have been subjected. *Id*.

During *voir dire*, the trial court inquired, "based on what you've heard so far, does anything come to mind that you might as well tell us right up front here? Either you know the defendant or you've heard about this case outside the courthouse? Anything like that?" (Tr. p. 61). A prospective juror responded: "Yes, sir. I didn't recognize him at first but I pulled him up on the website on the – like, where you check for--." (Tr. p. 61). The trial court cut off the juror by saying: "Hold on. Hold on. Hold on." (Tr. p. 61). The trial court then asked: "Are you talking about the defendant?" and the prospective juror responded in the affirmative. (Tr. p. 62).

After the trial court's questioning of the prospective juror outside of the presence of the other jury members, Back requested a mistrial because the prospective juror "indicated that he had seen Mr. Back on the [Department of Correction (D.O.C.)] website . . . ." (Tr. p. 80). However, the trial court stated "you heard something I didn't hear. I never heard him say D.O.C. website. And that's a pretty important distinction." (Tr. p. 81). The trial court then had the court reporter replay the recording of what the prospective juror stated and determined, "nobody hears [the prospective juror] say D.O.C. website; just that he looked him up on 'the' website, and doesn't elaborate." (Tr. p. 83). The trial court denied the motion for mistrial, and stated:

> I can't imagine that there's anyone on the jury that would have concluded by his statements that the defendant is in the Department of Corrections, or that he has a criminal record. And there's no reason for this court to believe that the rest of the jurors are tainted in any way. The comment could have been made about practically an unlimited number of alternatives.

(Tr. p. 84).

Back contends that "the prospective juror's statement created a substantial risk of prejudice such that the trial court should have inquired into the jurors already accepted. Since there was no such inquiry, it cannot be held that Back received a trial by a fair impartial jury." (Appellant's Br. p. 14). We disagree. The prospective juror made no comment before the other jurors as to what website he was checking or what content he was looking for when he found information about Back. Outside of the presence of the other jury members the prospective juror explained to the trial court that he had come across information about Back when searching for information for his neighborhood watch program a couple of weeks prior. Nevertheless, the other potential jury members, including those that were eventually placed on the jury panel, did not hear this statement. There are many innocuous reasons that information about Back may have been on the internet and the trial court's question to the jury solicited a response if the jurors knew Back for any reason. Therefore, we conclude that the prospective juror's statement did not place Back in a position of grave peril which required the trial court to grant a mistrial.

II. *Sufficiency of the Evidence*

Back contends that the State did not present evidence sufficient to prove beyond a reasonable doubt that he committed intimidation, as a Class C felony.

> In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will 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. A conviction may be based upon circumstantial evidence alone. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

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

Indiana Code section 35-45-2-1 provides, in pertinent part, that: "A person who communicates a threat to another person, with the intent: (1) that the other person engage in conduct against the other person's will," commits intimidation and that the crime is a "Class C felony if, while committing it, the person draws or uses a deadly weapon."

Back states the crux of his argument as follows:

> There is very little evidence concerning a knife being drawn or used during Back and [K.F.'s] altercation. The only evidence concerning a knife being used during the altercation is from [K.F.'s] testimony. [K.F.] testified that Back pulled a knife and placed it to her neck cutting her while she was in the bathtub. []. She testified that he held the knife to her neck while he pulled her out of the bathtub with his other hand and dragged her into the bedroom. [] She then testified that Back shoved her onto the bed, and said "don't' you f---ing move, you bitch. You stay there or I'll f—in' kill you." [] However, [K.F.] even testified that she did not know whether or not Back had a knife at this point. [] There was no knife found by the police when they searched Back for weapons within minutes of the incident.

(Appellant's Br. p. 11).[1]

Back's contentions make a two part argument, the first of which being that K.F.'s testimony is not supported by other evidence. However, the uncorroborated testimony of a victim may be sufficient to support a conviction. *See Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003). Therefore, the fact that police officers did not find a knife in Back's possession

[1] Back also contends that because the jury acquitted Back of battery by means of a deadly weapon that it necessarily found that there was reasonable doubt as to whether Back had the knife at all. However, it is just as likely that the jury concluded that Back used the knife to intimidate K.F., but not to batter her.

when they searched him later does not render K.F.'s testimony insufficient. Moreover, by the time that Officer Combs approached Back, Back knew that K.F. had called 9-1-1 and had been outside for more than ample time to hide the knife.

The second part of Back's contention is that, even relying on K.F.'s testimony, she did not see the knife in Back's hand at the exact moment when he uttered the threat "You stay there or I will f---ing kill you." (Tr. p. 249). However, the reason that K.F. did not see the knife is because she did not look due to overwhelming fear. Specifically, when asked whether she saw the knife when lying on the bed and being threatened with death she testified: "I didn't look. I didn't want to see him. I didn't want to know." (Tr. p. 249). The reason justifying K.F.'s fear was the fact that Back had just beaten her and placed a knife to her throat. Altogether, we conclude that this is sufficient evidence to prove that Back used a deadly weapon when communicating a threat to K.F. with the intent that she remain on the bed against her will.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err by denying Back's motion for a mistrial and the State presented evidence sufficient to prove beyond a reasonable doubt that Back committed intimidation, as a Class C felony.

Affirmed.

VAIDIK, J., and CRONE, J., concur.