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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0512-CR-1172
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION 3
Honorable Sheila A. Carlisle, Judge
The Honorable William T. Robinette, Master Commissioner
Cause No. 49G03-0507-FB-127440

November 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a bench trial, Appellant, Michael Lewis, was convicted of Criminal Confinement as a Class B felony,[1] Battery as a Class C felony,[2] and Intimidation as a Class C felony.[3] Upon appeal, Lewis presents two issues for our review: (1) whether the trial court properly denied his motion to vacate the conviction for criminal confinement, and (2) whether the evidence is sufficient to sustain his convictions.

We affirm.

The facts most favorable to the convictions reveal that on July 25, 2005, between 11:30 a.m. and 12:00 p.m., Lewis went to the residence of Lisa Williams, with whom he had an eighteen-year relationship and three children. Williams let Lewis in, and the two talked for a couple of hours about their relationship. After Williams told Lewis that she did not want to be with him any longer, Lewis became aggressive and violent. Lewis said something to the effect of, "I have something for you," and then he spit in Williams's face. Transcript at 21. Lewis then grabbed Williams by the neck and threw her to the ground. Using one hand, Lewis grabbed Williams's hair and repeatedly banged her head against the kitchen floor causing Williams to black out momentarily. As a result, Williams's left eye became partially bloodshot, and she suffered welts on her arm, a bruise on her shin, and scratches on her face and neck which later turned into bruises on her neck and along her chin line.

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[1] Ind. Code § 35-42-3-3 (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-42-2-1 (Burns Code Ed. Supp. 2006).

[3] Ind. Code § 35-45-2-1 (Burns Code Ed. Repl. 2004).

Upon regaining consciousness, Williams saw Lewis going through the kitchen drawers, and then he asked her where she kept the kitchen knives. Lewis finally found a small steak knife and, as he was motioning toward Williams with the knife, he told her that he could kill her.

Eventually, the altercation with the knife came to an end, and Lewis and Williams went upstairs into Williams's room where they continued "talking and screaming and yelling" for another hour or two. Transcript at 25. The conversation moved into their daughter's room so that Williams could use a telephone. Williams had agreed to call the apartment complex and cancel her lease agreement at Lewis's request. Williams called the apartment complex, but the line was busy. When she called a second time, she pretended like no one had answered the phone even when someone had. In between her attempts to call the apartment complex, Williams called 911, but then hung up without saying anything.

In the meantime, Williams and Lewis continued to talk about their relationship, and at some point, Lewis went to retrieve a hammer from his car. Lewis held the hammer and at least twice told Williams that "if . . . [she] tried anything" he would "hurt [her] with the hammer." Transcript at 28-29. After deciding that it was hot upstairs, Williams and Lewis went downstairs. As Williams went down the stairs she saw a police officer approaching. Williams then ran out the front door.

Officer Kevin Kern of the Indianapolis Police Department had been dispatched to Williams's residence to investigate an incomplete 911 call. When Officer Kern arrived, Williams walked past him and stood next to a car approximately twenty feet away.

Officer Kern asked Williams if she had called 911, but Williams did not answer. Officer Kern then knocked on the door to the residence, and Lewis answered. Officer Kern asked Lewis if he had called 911, and Lewis replied he had not.

Officer Kern then began talking to Williams, at which time he observed that her eye was partially bloodshot and that she had abrasions and redness on her neck and arm. While talking to Williams, Officer Kern noticed out of the corner of his eye that Lewis was motioning to Williams and trying to get closer. Lewis would stop motioning when Officer Kern would turn to look at him. After other officers responded to the scene, they were asked to keep Lewis away from Williams because Officer Kern could not "interview [Williams] as long as [Lewis] was around because he kept trying to come in and . . . he was making gestures the whole time and [Williams] wouldn't talk to [Officer Kern] as long as [Lewis] was present." Transcript at 10. It took Officer Kern about fifteen minutes to get a basic account of what had happened from Williams.

On July 27, 2005, the State charged Lewis with Count I, criminal confinement as a Class B felony; Count II, battery as a Class C felony; Count III, intimidation as a Class C felony; Count IV, intimidation as a Class C felony; Count V, criminal recklessness as a Class D felony; Count VI, battery as a Class A misdemeanor; and Count VII, domestic battery as a Class A misdemeanor. Following a bench trial, the trial court found Lewis guilty of Counts I, II, and III.[4] The trial court subsequently sentenced Lewis to six years on Count I, four years on Count II, and four years on Count III, and ordered the sentences

[4] The trial court did not enter a judgment of conviction upon the remaining Counts, concluding that Count IV merged with Count I, Count V merged with Count III, Count VI merged with Count VII, and, in turn, Count VII merged with Count II.

to be served concurrently. On October 14, 2005, Lewis filed a motion to vacate his conviction on Count I, criminal confinement, based upon newly discovered evidence. After a hearing held on November 4, 2005, the trial court denied Lewis's motion to vacate.

Lewis first argues that the trial court erred in denying his motion to vacate his criminal confinement conviction which he based upon newly discovered evidence. We begin by noting that although Lewis titled his motion as a motion to vacate, the motion is more appropriately considered as a motion to correct error pursuant to Indiana Trial Rule 59.[5] When reviewing a trial court's denial of a motion to correct error which was based upon newly discovered evidence, our review is deferential, and we will reverse only upon a showing of an abuse of discretion. Stephenson v. State, 742 N.E.2d 463, 476 (Ind. 2001), cert. denied, 534 U.S. 1105 (2002). To obtain a new trial upon newly discovered evidence, the moving party must establish the following requirements:

> "(1) the evidence was not available at trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result." Martin v. State, 784 N.E.2d 997, 1009 (Ind. Ct. App. 2003).

The moving party bears the burden of proving that the newly discovered evidence meets all nine requirements. Id.

[5] Trial Rule 59(A) provides in pertinent part: "A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address . . . [n]ewly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial . . . ."

Here, Lewis submitted as "newly discovered evidence" a letter addressed to his attorney and written by Williams in which Williams indicated that she wished to change her testimony with regard to use of the hammer during the July 25 incident. Specifically, Williams stated in the letter, among other things, that "[she] can't say [she] was confined especially since there is no evidence of a hammer." Defendant's Exhibit A. During the hearing on the motion to vacate, Williams reiterated this same sentiment on direct examination when she testified, "I don't think he confined me with the hammer." Transcript at 101. Lewis asserts that Williams's statements in the letter and her testimony during the hearing demonstrate that Williams was recanting her trial testimony, thereby rendering her trial testimony "incredibly dubious." Lewis thus argues that Williams's trial testimony cannot support a finding of guilt beyond a reasonable doubt as to the criminal confinement conviction. We disagree.

Williams's statements following her testimony in the bench trial, in whatever form, were not necessarily inconsistent with her trial testimony. Indeed, on cross-examination during the hearing on Lewis's motion, Williams confirmed what she had said during her trial testimony—that Lewis had a hammer and that she did not feel free to leave her daughter's bedroom. With her letter to Lewis's attorney and her post-trial testimony, Williams sought to clarify her trial testimony to the extent that because she felt she was not free to leave before Lewis retrieved the hammer, it was not his possession of the hammer which made her feel confined. Given the fact that the evidence demonstrates that Lewis confined Williams, irrespective of the presence of the hammer, we do not agree with Lewis's claim that Williams recanted her trial testimony. Given the

trivial nature of Lewis's "newly discovered evidence," we cannot say that it was material or relevant or that it would have produced a different result at trial.[6] Lewis has failed to establish that his conviction should be vacated and that he is entitled to a new trial on the basis of newly discovered evidence. We therefore conclude that the trial court did not abuse its discretion in denying Lewis's motion to correct error.

Lewis also argues that the evidence is insufficient to sustain his convictions. Specifically, Lewis argues that his convictions cannot be supported by Williams's testimony because he asserts her testimony was contradictory and equivocal and, in his view, recanted by her statements in her letter and post-trial testimony.[7]

When reviewing a challenge to the sufficiency of the evidence, this court will neither reweigh evidence nor judge witness credibility, but instead, considering only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom, we determine whether there is substantial evidence of probative value from which a reasonable jury could have concluded that the defendant was guilty of the charged crime beyond a reasonable doubt. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied.

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[6] To sustain a conviction for criminal confinement as a Class B felony, the State is only required to prove that the defendant committed the offense "while armed with a deadly weapon." I.C. § 35-42-3-3(b)(2)(A); Mallard v. State, 816 N.E.2d 53, 57 (Ind. Ct. App. 2004), trans. denied. The State does not have to prove that the deadly weapon was used during the commission of the offense. Mallard, 816 N.E.2d at 57. As already noted, in her post-trial comments upon the evidence, Williams confirmed her trial testimony to the effect that Lewis was in possession of a hammer and that she did not feel free to leave. It was not necessary for the State to prove that the reason Williams did not feel free to leave was Lewis's possession of the hammer. It was enough that Lewis had the hammer at the time of the confinement. The evidence is sufficient to sustain Lewis's conviction for B felony criminal confinement.

[7] Lewis advances no other theory for this argument.

Notwithstanding this standard of review, a reviewing court will impinge on the fact-finder's responsibility to judge witness credibility when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Id. A conviction will be overturned only where a victim's testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. Id. The incredible dubiosity rule is limited to cases where a sole witness testifies. Id.

Here, we begin by noting that although much of the evidence was provided by Williams's testimony, Williams was not the sole witness, as Officer Kern also testified. Notwithstanding the inapplicability of the incredible dubiosity rule, we have reviewed the record and conclude that Williams's trial testimony was not incredibly dubious. Williams's trial testimony was neither equivocal nor inherently contradictory. Even the trial court commented at the conclusion of the evidence that it found Williams to be a credible witness in spite of unrelated evidence which indicated that Williams was untrustworthy[8] and that it saw nothing in the evidence which indicated that Williams was misrepresenting what transpired during the July 25 encounter with Lewis. Indeed, at trial Williams provided a version of events occurring on July 25 which was not so inherently improbable that it ran counter to human experience. And, contrary to Lewis's argument, Williams's post-trial comments upon her trial testimony did not change the substance of what Williams testified to at trial.

[8] On cross-examination, Williams admitted that she was receiving food stamps and other governmental services and aid when she may have not otherwise been qualified. Williams also admitted to providing governmental agencies with an incorrect address in order to receive those benefits.

Additionally, Williams's testimony was supported by circumstantial evidence of Lewis's guilt. Williams suffered physical injuries, including a bloodshot eye, abrasions and redness on her neck, welts on her arm, and a bruise on her leg, all of which were consistent with her testimony that Lewis grabbed her by the neck, threw her down, choked and kicked her. Further, Officer Kern corroborated Williams's testimony by testifying about the nature of her injuries. Based upon the forgoing, we conclude that Williams's testimony was not incredibly dubious, and indeed, such testimony was probative and properly relied upon by the court in determining that Lewis was guilty of B felony criminal confinement, C felony battery, and C felony intimidation.

The judgment of the trial court is affirmed.

BARNES, J., and ROBB, J., concur.