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

CHARLES MOORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0602-CR-120
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Danielle Gaughan, Commissioner
Cause No. 49G17-0511-FD-203516

November 22, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Charles Moore appeals a conviction for Battery,[1] a class A misdemeanor, which was merged into his conviction for Domestic Battery,[2] a class A misdemeanor, and thereby vacated. Specifically, Moore contends that his conviction must be reversed because the State failed to establish the elements of the crime beyond a reasonable doubt. Because Moore is appealing a vacated conviction, we are compelled to dismiss his appeal.

FACTS

On November 28, 2005, Moore lived with Tina Collins, their son, and Diana Kaga—Collins's mother—in Indianapolis. During the early morning hours, Collins came home after a night of drinking and asked Moore why he had not come home after work. An argument ensued, and Kaga saw Moore push Collins into a closet, pull her arms behind her, and pull her fingers backward. Collins yelled for her mother to "call the police" and Kaga called 911 for assistance. Tr. p. 25. Deputy Ryan Anders of the Marion County Sheriff's Department arrived at the residence and questioned Moore, Collins, and Kaga. Collins told Deputy Anders that Moore had grabbed her, pulled her fingers back, and thrown her into walls and a closet. Collins told Deputy Anders that Moore's contact caused pain in her hands, back, and chest.

On November 30, 2005, Moore was charged with Count I, class D felony criminal confinement, Count II, class A misdemeanor domestic battery, and Count III, class A misdemeanor battery. A bench trial was held on January 13, 2006. Moore successfully

[1] Ind. Code § 35-42-2-1.

moved to dismiss Count I, but the trial court found Moore guilty on both Counts II and III. The trial court merged Count III, the battery count, into Count II, the domestic battery count, and sentenced Moore to one year with one hundred eighty five days suspended. Moore now attempts to appeal the merged battery conviction.

DISCUSSION AND DECISION

On appeal, Moore argues that "[t]here is an insufficient amount of evidence in this record, directly or indirectly, to support the Court's finding of battery . . . ." Appellant's Br. p. 3 (emphasis added). Moore's brief outlines the elements of Indiana Code section 35-42-2-1—the battery statute—and argues that there was insufficient evidence presented to the trial court to support his battery conviction.

While the trial court did find Moore guilty on both the battery and domestic battery counts, the court merged the battery count into the domestic battery count at sentencing: "As to Count Two, Domestic Battery a Class A misdemeanor, and Count Three merges into Count Two. Three hundred sixty-five days executed, I am going to suspend one hundred eighty-five days." Tr. p. 43 (emphasis added). Additionally, the abstract of judgment lists only the conviction for "Count 002 Domestic Battery." Appellant's App. p. 10. Moore's argument that the evidence presented to the trial court was insufficient to sustain a conviction under Indiana Code section 35-42-2-1—the battery statute—is meaningless because Moore was convicted under Indiana Code section 35-42-2-1.3—the domestic battery statute. Therefore, we must dismiss this appeal because Moore is appealing a nonexistent

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[2] I.C. § 35-42-2-1.3.

conviction.[3]

Appeal dismissed.

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

[3] In its brief, the State simply responds to Moore's battery argument without noting that Moore was not convicted of battery. While in its "Statement of the Case" the State quotes the trial court's instruction that "Count III merges into Count II," appellee's br. p. 2, the State either did not recognize that Moore had not been convicted of battery or strategically chose only to address the argument Moore presented. In the future, we ask the State to alert us of the appellant's mistake instead of merely responding to the appellant's futile argument.