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IN THE COURT OF APPEALS OF INDIANA

DAVID COOPER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0807-CR-604
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda E. Brown, Judge
The Honorable Jeanne Hamilton, Judge Pro Tempore
Cause No. 49F10-0712-CM-266474

April 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

David Cooper appeals his convictions for Class A misdemeanor battery and Class B misdemeanor battery for throwing a tape dispenser and a two-liter bottle at his employee. Invoking the incredible dubiosity rule and asking us to alter it, Cooper contends that the evidence is insufficient to support his convictions. Concluding that the incredible dubiosity rule does not apply, declining Cooper's invitation to modify this well-established standard, and concluding that the evidence is sufficient to support Cooper's convictions, we affirm the trial court.

Facts and Procedural History

The facts most favorable to the verdicts reveal that Cooper owns a convenience store on Southeastern Avenue in Indianapolis known as Puff 'N' Chew. In 2007, Deborah Hines worked for Cooper at his store. On June 15, 2007, Hines was working while Cooper and his friends were at the back of the store drinking beer. Cooper became angry at Hines and threw a tape dispenser at her, which hit her in the back and caused her to fall to her knees from the pain. After Hines got up, she asked Cooper why he threw the tape dispenser at her. Cooper replied, "[B]ecause you don't need to be running your mouth at me." Tr. p. 14. Charles Ward, who was also working at the store that day, saw Cooper throw the tape dispenser at Hines and saw it hit her in the back.

On September 23, 2007, Hines was again working at the store with another employee, Joyce Collier. Cooper, who again had been drinking beer that day, came into the store and asked why "everything" was not done properly the night before and why there were problems with the register receipts. *Id.* at 8. After Collier gave an

explanation, Cooper ordered her to leave and buy him a case of beer. Cooper then told Hines that he was getting ready to fire two girls, presumably Hines and Collier. When Hines turned to walk away from Cooper, she was hit with a two-liter Mountain Dew bottle in her back. Hines and Cooper were the only two people in the store at the time. At the time Hines was hit, Cooper said, "[W]hat's M-F'n wrong with you[?]" *Id.* at 9. When Collier returned from buying the beer, she observed a two-liter bottle on the floor and asked Hines why it was there. Hines replied that Cooper had thrown it at her. Cooper did not dispute this assertion. When Cooper started getting "loud," *id.* at 38, both Hines and Collier walked out of the store, effectively quitting their jobs.

Hines reported both incidents to the police on the following day, September 24, 2007. Thereafter, the State charged Cooper with Class A misdemeanor battery (bodily injury) for the June 2007 incident and Class B misdemeanor battery for the September 2007 incident.[1] Later, a bench trial was held. Cooper testified on his own behalf at trial, denying the allegations and speculating that Hines and Collier were stealing money from his store. Specifically, when Cooper took the stand, his attorney asked him, "Did any of this happen," and Cooper responded, "No, sir." *Id.* at 54. The trial court found Cooper guilty as charged:

> Mr. Cooper I find you guilty on both counts. The reason is, I believe Ms. Hines, and I don't believe you. And I believe they're corroborating witnesses. While there may be some minor discrepancies, I think they're truthful, and that they under oath have done their best to rel[a]y what they know about this incident. Ms. Hines seems very clear about what occurred on both of those occasions; and so I'm going to find you guilty on Count 1, Battery which is an A misdemeanor . . . and count 2, Battery, a Class B misdemeanor . . . .

[1] Ind. Code § 35-42-2-1.

Id. at 59-60. The trial court sentenced Cooper to an aggregate term of one year, all suspended. Cooper now appeals.

Discussion and Decision

Invoking the incredible dubiosity rule and asking us to alter it, Cooper contends that the evidence is insufficient to support his battery convictions. When reviewing the sufficiency of the evidence, appellate courts must only consider the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably 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.* at 146-47 (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at 147 (quotation omitted). "[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Id.* (quotation omitted).

In order to convict Cooper of Class B misdemeanor battery for the September 2007 incident, the State had to prove that he knowingly touched Hines in a rude, insolent, or angry manner. I.C. § 35-42-2-1(a). And, in order to convict Cooper of Class A misdemeanor battery for the June 2007 incident, the State had to additionally prove that the battery resulted in bodily injury to Hines, specifically, pain. I.C. § 35-42-2-1(a)(1)(A).

The "incredible dubiosity rule" provides that a court may "impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. *James v. State*, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), *trans. denied*. "[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no person could believe it." *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

As for Cooper's Class A misdemeanor battery conviction, Hines testified that in June 2007, Cooper threw a tape dispenser at her, that it hit her in the back, and that the pain caused her to drop to her knees. Bodily injury is defined as any impairment of physical condition, including physical pain. Ind. Code § 35-41-1-4.[2] In addition, Ward testified that he saw Cooper throw the tape dispenser at Hines and that it hit her in the back. Because there is more than one witness to this battery, the incredible dubiosity rule does not apply to this conviction.

[2] Contrary to Cooper's argument, Hines' testimony that the pain from the tape dispenser hitting her back caused her to fall to her knees is sufficient to support the enhancement of his battery conviction from a Class B misdemeanor to a Class A misdemeanor due to bodily injury. *See Mathis v. State*, 859 N.E.2d 1275, 1281 (Ind. Ct. App. 2007) (concluding evidence sufficient to support "bodily injury" element of battery where victim testified that the defendant's actions caused her to "hurt" and "kinda see[] stars for a second").

As for Cooper's Class B misdemeanor battery conviction, Hines testified that in September 2007, when she turned to walk away from Cooper, he threw a two-liter Mountain Dew bottle at her and that it hit her in the back. Although Hines did not actually see Cooper throw the bottle at her, Hines testified that she and Cooper were the only people in the store at the time, thereby making reasonable the inference that Cooper was the one who threw the bottle at her. In addition, when Collier returned to the store after buying the beer, she saw a two-liter bottle on the floor and asked Hines why it was there. Hines told Collier that Cooper had thrown it at her. Because there is circumstantial evidence to support this battery, the incredible dubiosity rule is also inapplicable to this conviction.

Realizing that he cannot prevail under the incredible dubiosity rule, Cooper argues that this well-established standard should be changed by eliminating the requirement that there be only a sole witness and no circumstantial evidence and by applying the standard to only the complaining witness's testimony. The incredible dubiosity rule, however, was and still is intended to be a very narrow exception to the general rule that witness credibility is not to be reweighed on appeal. This is based on the sound principle that the trier of fact is in a much better position to assess credibility than we are. Cooper provides no reason why this long-accepted rule should be changed except that he cannot win under the old standard and would be raising a frivolous issue on appeal if he attempted to do so. We thus decline Cooper's invitation to change the incredible dubiosity standard.

As for Cooper's other arguments, such as that Ward is not a believable witness because of his documented mental disability, the discrepancies between Collier's

deposition and trial testimony, and Hines' confusion in her deposition testimony about the two-liter bottle incident and an unrelated incident during which Cooper threw a can at her (which she explained at trial), they are merely requests for us to reweigh the evidence, which we will not do. As the State points out, the trial court could not have made a more clear-cut determination of credibility in this case: "I believe Ms. Hines, and I don't believe you. And I believe they're corroborating witnesses." Tr. p. 59. The evidence is sufficient to support Cooper's battery convictions.

Affirmed.

RILEY, J., and DARDEN, J., concur.