MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Matthew Q. Baker,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 2, 2023

Court of Appeals Case No. 22A-CR-2513

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

Trial Court Cause No. 03C01-2101-F6-35

Memorandum Decision by Judge Weissmann
Judges Bailey and Brown concur.

Weissmann, Judge.

[1] Matthew Baker knew he was entitled to ten peremptory challenges during jury selection in his trial for felony domestic battery. But when the trial court stated before voir dire that Baker would receive only five peremptory challenges, Baker did not object or otherwise bring the error to the trial court's attention. Instead, he waited until voir dire was over and the jury sworn before he complained. The trial court denied Baker's motion for a mistrial, and Baker was convicted and sentenced to four years in prison. On appeal, we conclude the trial court properly found Baker waived any error about the number of peremptory challenges he received during voir dire. We also find sufficient evidence supports Baker's conviction and that his sentence is not inappropriate. We therefore affirm.

Facts

[2] Baker and C.C. dated 25 years ago, broke up, and then dated again for 3 years beginning in 2016. A year after their relationship ended, C.C. gave Baker a ride to his mother's home. Along the way, Baker began arguing with C.C., who eventually parked at a gas station, removed her keys from the ignition, and told Baker that she would stay there until he left her car. Baker refused and continued to argue for another hour.

[3] After C.C. suggested he obtain a ride from acquaintances walking by, Baker slapped her face. When C.C. yelled for help, Baker hit her again and wrestled with her over her keys. Baker also kicked and damaged the car. After a

bystander told Baker that he was calling police, Baker grabbed the car registration from the glove box and fled. C.C. suffered a black eye, a laceration above her eye, and redness on her face and neck.

[4] The State ultimately charged Baker with domestic battery, a Level 5 felony. At his jury trial, the trial court advised Baker during voir dire that he had 5 peremptory challenges. Baker exercised all five peremptory challenges and did not request more. After the jury was sworn but before any evidence was presented, Baker moved for a mistrial based on the trial court's failure to allow him 10 peremptory challenges as authorized by the Indiana Jury Rules. The trial court denied the motion for mistrial, ruling:

> The Court is going to find that the Defense did waive their right to 10 preemptory challenges; they had known prior to starting as he just said he told his client even prior to jury selection that he had 10 preemptory challenges. The Court did allow five mistakenly; there was no objection made and he proceed[ed] on saying nothing. The jury was sworn and now we have the motion. So the Court is going to find that that was waived and we are going to go forward.

Tr. Vol. II, p. 8. The jury found Baker guilty of Level 5 felony domestic battery. The trial court sentenced him to four years imprisonment.

Discussion and Decision

[5] Baker appeals both his conviction and sentence. As to his conviction, Baker contends the trial court abused its discretion in denying his motion for a mistrial and that the evidence supporting his conviction was incredibly dubious. Finally,

Baker challenges his sentence under Indiana Appellate Rule 7(B) as inappropriate in light of the nature of the offense and the character of the offender. We conclude Baker was not entitled to a mistrial, the evidence supported his conviction, and a sentencing revision is unwarranted.

I. Mistrial Denial

[6] We review a ruling on a motion for mistrial for an abuse of discretion. *Ramirez v. State*, 7 N.E.3d 933, 935 (Ind. 2014). An abuse of discretion occurs only if the defendant shows that he was so prejudiced that he was placed in a position of grave peril. *Inman v. State*, 4 N.E.3d 190, 198 (Ind. 2014). "The gravity of the peril turns on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct." *Id.* A mistrial is an "extreme" remedy unavailable except where the "perilous situation" cannot be otherwise remedied. *Warren v. State*, 757 N.E.2d 995, 998-99 (Ind. 2001) (quoting *Bradley v. State*, 649 N.E.2d 100, 107 (Ind. 1995)). Our standard of review is deferential to the trial court because that court is in the best position to evaluate whether a mistrial is warranted, given that it can assess first-hand all relevant facts and their impact. *Ramirez*, 7 N.E.3d at 935.

[7] At issue is Indiana Jury Rule 18, which states:

> (a) In criminal cases the defendant and prosecution each may challenge peremptorily:
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> > (1) twenty (20) jurors in prosecutions where the death penalty or life without parole is sought;

> (2) ten (10) jurors when neither the death penalty nor life without parole is sought in prosecutions for murder, and Class A, B, or C felonies, including enhancements, and Level 1, 2, 3, 4, or 5 felonies, including any enhancement(s); and
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> (3) five (5) jurors in prosecutions for all other crimes . . . .

Because Baker was charged with a Level 5 felony based on his prior conviction for domestic battery, Baker and the State each were entitled to 10 peremptory challenges under Indiana Jury Rule 18(A)(2).

[8] On appeal, Baker argues that he was deprived of his right under the Jury Rules and Indiana Code § 35-37-1-3 to 10 peremptory challenges, which are "an important auxiliary tool" for securing a fair and impartial jury guaranteed by the Sixth Amendment to the United States Constitution. Appellant's Br., p. 11 (quoting *Whiting v. State*, 969 N.E.2d 24, 29 (Ind. 2012)). Indiana Code § 35-37-1-3(a)-(c) is essentially identical to Jury Rule 18(A)(1)-(3). Baker acknowledges that his claim otherwise has no constitutional implications. Appellant's Br., p. 11; *see Pfister v. State*, 650 N.E.2d 1198, 1200 (Ind. Ct. App. 1995) ("In Indiana, there is no constitutional right to exercise peremptory challenges.").

[9] But Baker does not deny that he waived his right to 10 peremptory challenges or contend that waiver is not dispositive. For that reason alone, he is not entitled to relief on appeal; he has failed to establish the trial court's waiver finding—the basis for its denial of Baker's motion for mistrial—was incorrect. *See Archer v. State*, 166 N.E.3d 963, 968 (Ind. Ct. App. 2021) (noting that the appellant bears the burden of showing reversible error because the trial court's

judgment is presumed to be correct). Even if we were to ignore the shortcomings of his appellate arguments, Baker still would not be entitled to relief.

[10] Baker exercised all five peremptory challenges allowed by the trial court and also challenged one or two jurors for cause.[1] But Baker has never claimed that he would have exercised more peremptory challenges if they had been available. In other words, he has never contended that he would have challenged any of the prospective jurors who ultimately were seated on the jury. He also does not specifically allege or show that he was deprived of a fair trial due to the peremptory challenge limitation.

[11] In short, Baker has failed to show he was prejudiced. *See Spangler v. State*, 498 N.E.2d 1206, 1207-08 (Ind. 1986) (finding that appellant, who complained that he was deprived of a fair trial due to a deprivation of peremptory challenges, did not establish the required prejudice for reversal, given that he never argued "that he wished to excuse certain jurors during voir dire proceedings but could

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[1] The transcript does not contain the voir dire proceedings, although Baker requested a transcript of the jury trial proceedings in his notice of appeal. "The appellant bears the burden of presenting a record that is complete with respect to the issues raised on appeal." *Graddick v. Graddick*, 779 N.E.2d 1209, 1210 (Ind. Ct. App. 2002). When the court reporter produced the incomplete transcript, Baker's duty was to ensure that the error was corrected. Baker had a panoply of options. He could have filed a motion to compel the transcript of voir dire or sought a corrected or supplemental transcript. *See* Ind. Appellate Rule 9(G) ("Any party to the appeal may file with the trial court clerk . . ., without leave of court, a request with the court reporter . . . for additional portions of the Transcript."). Depending on the reasons for the omission of voir dire, Baker might have been able to proceed under Indiana Appellate Rules 31 ("Statement of Evidence When No Transcript is Available"), Indiana Appellate Rule 32 ("Correction or Modification of Clerk's Record or Transcript"), or Indiana Appellate Rule 33 ("Record on Agreed Statement"). Baker pursued none of these options, leaving us with a record that does not include part of the proceedings about which he complains.

not for lack of peremptory challenges"). With no showing of prejudice or claim of constitutional error, Baker cannot establish that he was placed in a position of grave peril, as required to overturn the trial court's denial of his motion for mistrial. *See Inman*, 4 N.E.3d at 198; *Warren*, 757 N.E.2d at 998-99.

II. Evidence Sufficiency

[12] When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. *Carmouche v. State*, 188 N.E.3d 482, 485 (Ind. Ct. App. 2022). We do not judge witness credibility or reweigh the evidence. *Id.* We will affirm unless no reasonable factfinder could determine each element of the crime proven beyond a reasonable doubt. *Id.*

[13] To prove Baker committed Level 5 domestic battery under Indiana Code § 35-42-2-1.3(A)(1), the State was required to show beyond a reasonable doubt that:

- Baker knowingly or intentionally touched C.C. in a rude, insolent, or angry manner;
- C.C. was a "household member" of Baker's at the time of the offense—specifically, that she was dating Baker or had dated him or "is or was engaged in a sexual relationship with" Baker under Indiana Code § 35-31.5-2-128; and
- Baker had a previous conviction for a battery offense and C.C. was the victim of that offense. *See* Ind. Code § 35-42-2-1.3(c)(4).

[14] Baker's claim of insufficient evidence rests solely on his claim that C.C.'s testimony was "incredibly dubious" and thus does not support his conviction. Generally, "[a] conviction can be sustained on only the uncorroborated testimony of a single witness, even when that witness is the victim." *Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012). The incredible dubiosity rule is an exception to that rule. It allows an appellate court to find the evidence inadequate when the sole witness's testimony is "so unbelievable, incredible, or improbable that no reasonable person could ever reach a guilty verdict based upon that evidence alone." *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015).

[15] The three requirements of the incredible dubiosity rule are: "(1) a sole testifying witness; (2) testimony that is inherently contradictory, equivocal, or the result of coercion; and (3) a complete absence of circumstantial evidence." *Id.* Baker fails to meet the latter two requirements.

[16] As to those requirements, Baker merely points to the State's failure to produce other eyewitnesses to the battery and C.C.'s refusal to give a recorded statement. But the absence of other eyewitness testimony does not render C.C.'s testimony inherently contradictory, equivocal, or the result of coercion. That standard is only met "where the facts alleged 'could not have happened as described by the victim and be consistent with the laws of nature or human experience,' or where the witness was so equivocal about the act charged that her uncorroborated and coerced testimony 'was riddled with doubt about its trustworthiness.'" *Carter v. State*, 31 N.E.3d 17, 31 (Ind. Ct. App. 2015) (quoting

Watkins v. State, 571 N.E.2d 1262, 1265 (Ind. Ct. App. 1991)). Those circumstances are absent here.

[17] And, in any case, other evidence corroborated C.C.'s testimony that Baker battered her. The investigating officer testified about C.C.'s visible injuries, and photographs depicting her injuries were admitted into evidence. Given that Baker does not prove two of the three requirements of the incredible dubiosity rule and does not challenge the adequacy of the evidence on any other basis, we conclude his conviction was proper.

III. Sentence Appropriateness

[18] Baker's final contention is his sentence is inappropriate under Indiana Appellate Rule 7(B). That rule allows this Court to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

[19] We conduct Rule 7(B) review with "substantial deference" to the trial court because the "principal role of [our] review is to attempt to leaven the outliers, and not to achieve a perceived correct sentence." *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014) (quotations and citations omitted). "To assess the appropriateness of the sentence, we look first to the statutory range established for the classes of the offenses." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011).

[20] The sentencing range for Level 5 felony domestic battery is 1 to 6 years imprisonment, with an advisory sentence of 3 years imprisonment. Ind. Code § 35-50-2-6(b). Baker's 4-year sentence thus is one year beyond the advisory sentence.

[21] As to the nature of the offense, Baker repaid C.C.'s altruism in offering him a ride by prolonging a heated argument and refusing to leave C.C.'s vehicle at her request. When C.C. asked Baker to seek another ride, Baker responded in anger by hitting C.C. twice and wrestling her for her keys. He stopped the attack only after a bystander stated he was calling police. For no apparent reason other than possible harassment, Baker stole C.C.'s car registration before fleeing. C.C. suffered a black eye, a laceration above her eye, and redness on her face and neck. Baker also damaged her car.

[22] As to Baker's character, Baker has a criminal history consisting of 11 misdemeanor and three felony convictions since 1989. He violated the terms of his probation at least six times. *See Phelps v. State*, 969 N.E.2d 1009, 1021 (Ind. Ct. App. 2012) (ruling that the defendant's refusal to seize rehabilitative efforts reflected poorly on his character). Unemployed, Baker has been homeless for several years. The probation department calculated the risk that Baker would reoffend as very high. Baker's stated desire to remain sober and improve his life is commendable but not enough to show that his character supported a lesser sentence.

[23] Baker has not presented "compelling evidence portraying in a positive light" either the nature of the offense or his character. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). We therefore conclude Baker's sentence was not inappropriate under Rule 7(B) in light of the nature of the offense and the character of the offender.

[24] We affirm the trial court's judgment.

Bailey, J., and Brown, J., concur.