MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kyle G. Scott,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 15, 2021

Court of Appeals Case No. 20A-CR-1914

Appeal from the Johnson Superior Court

The Honorable Lance D. Hamner, Judge

Trial Court Cause No. 41D03-2003-CM-320

Mathias, Judge.

[1] Following a bench trial, the Johnson Superior Court convicted Kyle Scott of Class B misdemeanor criminal mischief and sentenced him to the maximum allowable jail time of 180 days. Scott appeals, raising the following three issues:

I. Whether the evidence is insufficient to support his conviction under the incredible-dubiosity rule;

II. Whether his 180-day sentence is inappropriate in light of the nature of the offense and the character of the offender; and

III. Whether he was denied the right of allocution during sentencing.

[2] Concluding that the incredible-dubiosity rule does not apply, Scott's 180-day sentence is not inappropriate, and he was not denied his right of allocution, we affirm.

Facts and Procedural History

[3] In March 2020, Scott and Miranda Stafford had been in an "off and on relationship" for almost one year. Tr. p. 9. As soon as they woke up on the morning of March 20, the two began arguing "about a situation that had occurred a couple of days prior." *Id.* at 6. When it became clear "[t]he argument wasn't getting anywhere positive," Stafford asked Scott to leave. *Id.* Scott, who did not live with Stafford, gathered his belongings in the bedroom while the two continued arguing. Eventually, the quarrel turned "kind of disrespectful" and was loud enough that it woke Stafford's eleven-month-old son. *Id.*

[4] While holding her son in one arm and her cellphone in the opposite hand, Stafford—standing in her bedroom doorway—demanded that Scott move quicker and leave immediately or she would call the police. Scott then approached Stafford and, as he walked past her through the doorway, Scott "slapped [the] phone out of [her] hand." *Id.* The phone fell to the hardwood floor, cracking the screen. Scott slammed the front door on his way out. Minutes later, Stafford heard "air gushing . . . outside" and ran outside to find Scott crouched near the back passenger tire of her vehicle. *Id.* at 17. Believing Scott was letting air out of the tire, Stafford yelled at Scott, who took off running. She then went back inside and called the police.

[5] Officer Greg Lengerich responded, and Stafford explained what happened that morning and showed the officer her broken phone. Officer Lengerich located Scott "four to five" blocks from Stafford's residence. *Id.* at 20. Scott denied breaking Stafford's phone or crouching by her vehicle, and he informed the officer that he was homeless and currently on probation. Officer Lengerich told Scott to stay away from Stafford's house for the remainder of the day but did not arrest him at that time. However, about a week later, a warrant was issued for Scott's arrest.

[6] Scott was charged with Class B misdemeanor criminal mischief and a bench trial was held on October 6. After hearing evidence and argument from both sides, the trial court found Scott guilty as charged and proceeded to sentencing. Prior to pronouncing Scott's sentence, the court asked Scott whether he had "any witnesses to call" or "any arguments to make." *Id.* at 31. In response,

Scott proceeded to discuss, among other things, his occupation and criminal history. He also professed his innocence and stated his desire to avoid incarceration. The court then sentenced him to 180 days incarcerated, the maximum penalty allowed for a Class B misdemeanor. Scott now appeals.

Discussion and Decision

[7] Scott raises three issues on appeal. First, he challenges the sufficiency of the evidence supporting his conviction, arguing that Stafford's testimony was incredibly dubious. Second, he asserts that his sentence is inappropriate in light of the nature of his offense and his character. Finally, he argues that he was denied the right of allocution during sentencing. We disagree with each contention.

I. *The incredible-dubiosity rule does not apply, and sufficient evidence supports Scott's conviction.*

[8] Scott first claims that the evidence was insufficient to support his conviction, asserting that Stafford "was an incredibly dubious witness." Appellant's Br. at 11. This is a particular sufficiency claim that is premised on application of the incredible-dubiosity rule.

[9] The incredible-dubiosity rule is an exception to well-settled law mandating that, on appeal, we will neither reweigh the evidence nor judge the credibility of witnesses. *Toles v. State*, 151 N.E.3d 805, 808 (Ind. Ct. App. 2020), *trans. denied*. This rule applies only when the following three conditions are met: (1) the conviction is based on a sole testifying witness; (2) the witness's testimony is

inherently contradictory, equivocal, or the result of coercion; and (3) there is a complete lack of circumstantial evidence. *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015). If all three conditions are satisfied, reversal is warranted because the evidence is insufficient, as a matter of law, to establish guilt beyond a reasonable doubt. *Id.* at 755 (citing *Gaddis v. State*, 253 Ind. 73, 80–81, 251 N.E.2d 658, 661–62 (1969)). But making this showing is no easy task—while application of the incredible-dubiosity rule is "not impossible," it is "a rare occasion." *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001).

[10] This case is not one of those rare occasions because Scott has failed to show that the rule's second and third conditions are satisfied: Stafford's trial testimony was not internally contradictory; and there was circumstantial evidence of Scott's guilt. We address each in turn.

1. Stafford's testimony is not inherently contradictory.

[11] For the incredible-dubiosity rule to apply, the witness's trial testimony must be so "inherently improbable that no reasonable person could believe it." *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). In making this determination, we consider the witness's testimony in isolation. *See West v. State*, 907 N.E.2d 176, 178 (Ind. Ct. App. 2009). The inquiry is not whether "the testimony of the witness under consideration . . . [is] in contradiction to the testimony of other witnesses." *Id.* (citing *Altes v. State*, 822 N.E.2d 1116, 1123 (Ind. Ct. App. 2005), *trans. denied*). Rather, a witness's testimony is inherently contradictory or equivocal only when that witness makes two or more statements that are incompatible with one another. *Id.*

[12] Here, Scott asks us to find Stafford's trial testimony equivocal because there are two "very reasonable interpretations" of what happened: (1) Stafford's story—Scott slapped the phone out of her hand; or (2) Scott's story—he unintentionally bumped the phone as he was leaving. Appellant's Br. at 14. But, as noted above, this is not the type of inconsistency contemplated under the incredible-dubiosity rule. *See, e.g.*, *West*, 907 N.E.2d at 178. What matters is whether Stafford's own testimony is equivocal. And it was not. *See* Tr. pp. 5–17. When opposing witnesses contradict one another, as is the case here, it is the fact-finder's duty—not ours—to determine each witness's credibility and rectify any inconsistencies. *See, e.g.*, *Winborn v. State*, 100 N.E.3d. 710, 714–15 (Ind. Ct. App. 2018).

[13] In short, the fact that Scott and Stafford offered two "reasonable interpretations" has no bearing on whether Stafford's trial testimony was so "inherently improbable that no reasonable person could believe it," *Love*, 761 N.E.2d at 810. Scott has failed to make this showing, and thus the incredible-dubiosity rule does not apply for this reason alone. But it is also inapplicable for a second reason.

2. Circumstantial evidence supports Scott's conviction.

[14] When there is circumstantial evidence of a defendant's guilt, "reliance on the incredible-dubiosity rule is misplaced." *Majors v. State*, 748 N.E.2d 365, 367 (Ind. 2001). And here, there is circumstantial evidence of Scott's guilt.

[15] Stafford's version of the events leading to Scott's arrest was corroborated by testimony from the responding police officer and physical evidence. At trial, Officer Lengerich testified that he saw Stafford's broken cell phone, and a photograph of the phone was admitted into evidence. Tr. pp. 7–8, 19; Ex. Vol. at 3. Because this evidence supports a reasonable inference that Scott broke Stafford's cellphone by slapping it out of her hands, this is not a case with "a complete absence of circumstantial evidence" of Scott's guilt. *Moore*, 27 N.E.3d at 756.

[16] Further, Scott's own testimony provides circumstantial evidence of his guilt. Scott confirmed that he and Stafford were in an argument and that Stafford told him she would "call the cops if [Scott did not] hurry up." Tr. pp. 24–25. Scott knew he was on probation at the time and feared "going to jail . . . for no reason at all." *Id.* at 21, 26. From this testimony, the trial court could reasonably infer that Scott recklessly damaged Stafford's cell phone while fleeing her house to avoid encountering police. Ind. Code § 35-43-1-2(a); *see Hightower v. State*, 866 N.E.2d. 356, 368 (Ind. Ct. App. 2007), *trans. denied*.

[17] In sum, for two independent reasons, the incredible-dubiosity rule does not apply, and Scott's conviction is supported by sufficient evidence.

II. *Scott's sentence is not inappropriate.*

[18] Scott next claims that his 180-day sentence is inappropriate under Indiana Appellate Rule 7(B).[1] Rule 7(B) permits us to revise a sentence if, "after due consideration of the trial court's decision . . . [we] find that the sentence is inappropriate in light of the nature of the offense and the character of the offender." App. R. 7(B). The purpose of 7(B) review is to "attempt to leaven the outliers and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The proper inquiry "is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate." *Hunt v. State*, 43 N.E.3d 588, 590 (Ind. Ct. App. 2015), *trans. denied*. And the defendant has the burden of making this showing is on appeal. *Brock v. State*, 983 N.E.2d. 636, 642 (Ind. Ct. App. 2013).

[19] Here, Scott was convicted of Class B misdemeanor criminal mischief, and the court imposed a maximum sentence of 180 days in prison. *See* I.C. § 35-50-3-3. Scott asserts that his maximum sentence "was inappropriate given the nature of the offense and the character of the offender." Appellant Br. at 19. We disagree.

[20] As to the nature of the offense, Scott argues that "the severity of the crime and damage to others is minor." *Id.* While we acknowledge that Scott's crime

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[1] Scott supports his Rule 7(B) argument by referring to the fact that he was "also given the maximum prison sentence possible under the probation violation that was based on" the conviction at issue here. Appellant's Br. at 19. That separate sentence, however, has no bearing on our review of whether Scott's 180-day sentence in this matter is inappropriate. *See Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008).

resulted in minor monetary damage, his argument downplays other relevant considerations. Before Scott broke Stafford's phone, the two were involved in a "disrespectful" argument that was so hostile it woke Stafford's young son. Tr. pp. 6, 11, 25. Further, Stafford was "holding [her] son" when Scott smacked the phone out of her hand. *Id.* at 12. Given these facts, Scott has not established that his sentence is inappropriate based on the nature of his offense. And our consideration of his character does not alter this conclusion.

[21] We initially observe that although Scott argues his sentence is inappropriate in light of "the character of the offender," he does not direct us to any character evidence in support of this claim. Appellant's Br. at 11, 19. Thus, Scott has not met his burden of demonstrating that his character warrants sentence revision. Nevertheless, our review of the record establishes that Scott has a significant criminal history, which reflects poorly on his character. *See, e.g., Prince v. State*, 148 N.E.3d 1171, 1174–75 (Ind. Ct. App. 2020). At the time of this conviction, Scott was on probation for operating a vehicle after being adjudged a habitual traffic offender. Tr. pp. 35–36. He also has a prior conviction for Class C felony sexual misconduct with a minor. *Id.* at 36. And that conviction is the basis of Scott's pending charge for failure to register as a sex offender. *Id.*

[22] In short, Scott has not met his burden of persuading us that his 180-day maximum sentence is inappropriate.

III. *Scott was not denied the right of allocution during sentencing.*

[23] Finally, Scott claims that he was denied the right of allocution. Appellant's Br. at 20. This right is preserved by Indiana Code section 35-38-1-5, which requires trial courts, before pronouncing a sentence, to "ask the defendant whether the defendant wishes to make . . . a statement." I.C. § 35-38-1-5. The purpose of this right of allocution is satisfied "[w]hen the defendant is given the opportunity to explain his view of the facts and circumstances." *Vicory v. State*, 802 N.E.2d 426, 430 (Ind. 2004) (citation omitted). A defendant "carries a strong burden" in establishing this right was denied. *Id.* at 429. Scott has not carried that burden here.

[24] After the trial court found Scott guilty, but prior to announcing a sentence, the court asked whether Scott had "any witnesses to call[] or any arguments to make." Tr. p. 31. Scott proceeded to discuss, among other things, his employment as a freelance artist, criminal history, disagreement with the court's verdict, child-support arrearage, and fervent desire to avoid incarceration. *Id.* at 32–36. Following this testimony, Scott's counsel asked whether there was "anything else [Scott] want[ed] to say to the court." *Id.* at 35. The trial court interjected by stating, "he's already declined." *Id.* The State then asked Scott several additional questions. *Id.* at 35–36.

[25] Scott challenges the court's interjection, arguing that he "was never again given an opportunity to make a statement on his own behalf." Appellant's Br. at 20. But Scott cites no precedent, and we find none, to support a claim that a defendant's right to allocution includes multiple opportunities to speak before

the court pronounces a sentence. The fact that the trial court gave Scott the opportunity to testify prior to announcing a sentence, and Scott seized that opportunity, demonstrates that the purpose of allocution was accomplished. *See Vicory*, 802 N.E.2d. at 430. We thus conclude that Scott has failed to carry his heavy burden of establishing that the trial court denied him the right of allocution.

Conclusion

[26] For the reasons stated above, the incredible-dubiosity rule does not apply and Scott's conviction is supported by sufficient evidence. Further, Scott has failed to establish either that his sentence is inappropriate or that he was denied the right of allocution.

[27] Affirmed.

Altice, J., and Weissman, J., concur.