MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Everett W. Fox,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 8, 2022

Court of Appeals Case No. 22A-CR-1394

Appeal from the Scott Circuit Court

The Honorable Jason M. Mount, Judge

Trial Court Cause No. 72C01-2202-F5-4

Brown, Judge.

[1] Everett W. Fox appeals his convictions and sentence for domestic battery as a level 5 felony and interference with the reporting of a crime and theft as class A misdemeanors. He asserts the evidence is insufficient to sustain his convictions and his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] D.E. has known Fox since she was fourteen years old. "In the beginning," the relationship was "good" and later became "just a sexual relationship." Transcript Volume II at 39. On February 3, 2022, Fox and J.N. went to D.E.'s apartment, and Fox left at some point. On February 4, 2022, D.E. heard a knock at her door and opened it. Fox entered her home and walked into the kitchen. He stood on one side of the kitchen table while she stood on the other side. D.E. "felt a weird feeling" all over her and ran for the front door. *Id.* at 40. Fox grabbed her, "slung" her by her hair back into the apartment and into a wall, and "proceeded to keep hitting and punching" her. *Id.* He then grabbed her, put her into a recliner and continued to hit her. Fox then "grabbed [her] and he slung [her] back to the floor," pulled her toward the bathroom, and started a bath for her because she was covered with blood. *Id.* at 41.

[3] D.E. washed herself in the bath. Fox "proceeded [sic] [her] to go [into the bedroom] and lay in the bed with no clothes on, with just a blanket on" her. *Id.* Fox told D.E. "things [she] was going to say and things [she] was going to do." *Id.* D.E. continued to lie on the bed because she "couldn't take no more." *Id.* She "wasn't allowed to make a peep, a sound, nothing." *Id.* at 42.

[4] Scott County Reserve Sheriff's Deputy Donald Royce and Deputy Hammond responded to the scene based upon a request for a welfare check on J.N. from her family. Deputy Royce spoke with Fox outside the residence and asked him if "the owner, his girlfriend" D.E. was home, and Fox indicated that she was home. *Id.* at 92. Deputy Royce told Deputy Hammond that he was going to speak with D.E. "real quick." *Id.* Fox "became kind of excited" or nervous, asked him not to enter the residence, and stated that D.E. may be sleeping. *Id.*

[5] Deputy Royce knocked on the door, D.E. asked who it was, and Deputy Royce identified himself. D.E. opened the door, peered around the corner, looked at Deputy Royce, said, "oh, thank God," and asked him to come inside. *Id.* at 93-94. Deputy Royce walked into the living room and could tell it was in a state of disarray and "looked like a wrestling match had gone on." *Id.* at 94. A mirror and pictures were on the floor, a footstool was across the room from a chair, and the drywall had a large hole in it. Deputy Royce also noticed two televisions "laying outside the back door" and "[n]either . . . were covered with snow or ice." *Id.* at 92. Deputy Royce observed that D.E. was disheveled, her hair was "a mess," she was wrapped in a blanket, and she had bruising and swelling on her face and neck. *Id.* at 95. D.E. also lifted her shirt and showed him injuries that occurred when Fox pushed her through the drywall. Deputy Royce asked her if she was okay, and she said that she was not but declined medical assistance.

[6] Deputy Royce questioned Fox who said he had not caused D.E.'s injuries, the injuries had occurred before he arrived, and he had noticed them the previous

day. When Deputy Royce asked Fox why he did not call for help or try to obtain medical attention for her, Fox said he did not have a cell phone. Deputy Royce noticed that Fox had a cell phone in his right front pants pocket. He asked Fox whose phone was in his pocket, and D.E., who had not given Fox permission to have her phone, stated it belonged to her.

[7] On February 8, 2022, the State charged Fox with: Count I, domestic battery as a level 5 felony; Count II, interference with the reporting of a crime as a class A misdemeanor; and Count III, theft as a class A misdemeanor.

[8] In April 2022, the court held a jury trial. On cross-examination, D.E. testified that Fox had her hair in one hand and hit her with the other hand with "[b]ack hand, fist, back hand, fist." *Id.* at 51. D.E. indicated that Fox and J.N. were at her apartment the evening before on February 3rd after she invited them inside, she told Fox that he could not stay, and Fox stayed for about twenty-five minutes. She also testified that J.N. stayed for the rest of the evening and Fox picked J.N. up the next morning. She stated that law enforcement interviewed her on February 4th and that she never told them that Fox stayed the night of February 3rd. On redirect examination, D.E. testified that she let J.N. stay with her because she felt sorry for her and "was afraid she was getting into what I've been into with him, something bad and tragic along the way." *Id.* at 59.

[9] Deputy Royce testified that Fox did not make a 911 call and that D.E. told him that Fox had injured her. On cross-examination, defense counsel asked if D.E. told him that she "had been arguing back and forth for the better part of an

afternoon" with Fox, and he answered affirmatively. *Id.* at 104. He also indicated that D.E. told him that Fox and J.N. "were asleep in the apartment the night before." *Id.* Deputy Royce, who was also a nurse, testified that he observed fresh bruising on D.E. The State also introduced and the court admitted photographs of D.E.'s injuries and the damage to the interior of her home. After the State rested, Fox moved for a directed verdict, and the court denied the motion.

[10] Fox testified that he went to D.E.'s apartment on February 3rd and that she had called him "probably fifty or sixty times" asking him to come over because it was an emergency and she needed his help. *Id.* at 123. When asked if there were some exhibits that showed how D.E. looked after an alleged attack, he answered: "Yeah. It was horrible." *Id.* at 124. He indicated that D.E. did not look like that when he picked her up on February 3rd. He testified he drove D.E., picked up J.N., and took them to Walmart. He stated that he stayed at D.E.'s home until 4:45 a.m. when he went to work, discovered the plant was closed, and drove back to D.E.'s apartment to pick up J.N. He testified he was at D.E.'s apartment for fifteen minutes, D.E. ordered him to leave, he left, and J.N. stayed. According to his testimony, he returned to D.E.'s residence and the apartment was "completely trashed." *Id.* at 129. He went out and entered his car, but his car was stuck, and he sat in his car for probably two hours. He indicated his phone was in D.E.'s apartment, he knocked on the door, D.E. would not answer, and he heard "yelling and screaming" coming from D.E.'s apartment. *Id.* at 132. He stated that he asked D.E. if he could use her phone

to call for roadside assistance and she allowed him to do so. When asked if he called roadside assistance, he answered: "No. [J.N.] – her sister had called her, said they was looking for her. I talked to [J.N.'s] sister on the phone, gave her the address to where we was at and they was close by." *Id.* at 133. When asked if he argued with D.E. all afternoon as testified to by Officer Royce, he answered: "That is not correct." *Id.* at 134. He testified that "[w]henever me and [J.N.] walked outside the apartment, [D.E.] said take these with you and threw the TVs out the front door and busted them in the yard." *Id.* at 140. On cross-examination, when asked if he was able to use D.E.'s phone, he answered: "No." *Id.* at 135.

[11] During rebuttal, Deputy Royce testified that Fox indicated to him that he had been there through the night, he asked Fox about the televisions, and Fox simply said they were broken. After the State's rebuttal, Fox again moved for a directed verdict, and the court denied the motion.

[12] The jury found Fox guilty of Count I, domestic battery as a class A misdemeanor, Count II, interfering with the reporting of a crime as a class A misdemeanor, and Count III, theft as a class A misdemeanor. Fox stipulated that he was previously convicted of strangulation against D.E. which elevated the conviction under Count I to a level 5 felony.

[13] At the sentencing hearing, Scott County Probation Officer Erin Schneider testified that she previously supervised Fox and that she prepared the presentence investigation report ("PSI"). She recommended a sentence of six

years executed in the Department of Correction ("DOC"). On cross-examination, she stated that sentence was appropriate based on her prior experience with Fox and because she did not feel that he was "appropriate for a probation or other sentence." *Id.* at 212. In her victim impact statement, D.E. asserted in part: "I am trying to find it in my heart to still be friends, but it is very hard, because at one time, I did love you and then, at one time, I really cared for you, but it seems like you took everything away from me by doing this." *Id.* at 215.

[14] Fox testified that he was not a criminal, that he was "led to a situation to be slaughtered like you'd lead a cow . . . to get his head cut off whenever you're ready to eat him and take him whole," he was a United States citizen, he believed his country "has gotten a little off track, because they're a little bit greedy sometimes and it is my job to get this thing back on track," and he was "going to fight for people that are being oppressed, people that's almost in to slavery, and people that's misled and misguided." *Id.* at 218-219. When asked what he believed was an appropriate sentence, Fox stated that he "worked every day" and he did not deserve a day in jail. *Id.* at 219. When his counsel asked if he had spoken with him about "a home detention type sentence," Fox stated: "There's no way I can do home detention here in this country." *Id.* at 220. When asked to answer yes or no to whether he asked the court to sentence him to a supervised home detention sentence, Fox answered affirmatively. The prosecutor requested concurrent sentences of six years on Count I and one year

each on Counts II and III. Fox's counsel requested a sentence of three years for Count I.

[15] The court found Fox's criminal history and that the harm, injury, loss, or damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense as aggravating circumstances. The court noted that imposition of a reduced sentence or suspension of the sentence would depreciate the seriousness of the crime. The court sentenced Fox to concurrent sentences of six years for Count I, one year for Count II, and one year for Count III.

Discussion

I.

[16] The first issue is whether the evidence is sufficient to sustain Fox's convictions. Fox asserts that D.E. was the sole witness and that her testimony contradicted his own testimony. He argues that D.E.'s testimony was contradictory to the statements she initially gave to law enforcement when she indicated that both Fox and J.N. had spent the night and that she had been arguing with Fox for most of the afternoon before any altercation. He contends that "D.E.'s version of the story makes no sense" and she provided no explanation for why he would batter her or why J.N. never reported seeing any battery. Appellant's Brief at 12. He also argues that the photos of damage to D.E.'s apartment and redness and scrapes on various parts of D.E.'s body were consistent with his report that D.E. was in the apartment causing destruction and injury to herself.

[17] Ind. Code § 35-42-2-1.3 provides that "a person who knowingly or intentionally . . . touches a family or household member in a rude, insolent, or angry manner . . . commits domestic battery, a Class A misdemeanor" and the offense is a level 5 felony if the person "has a previous conviction for a battery offense or strangulation (as defined in section 9 of this chapter) included in this chapter against the same family or household member." Ind. Code § 35-45-2-5 provides that "[a] person who, with the intent to commit, conceal, or aid in the commission of a crime, knowingly or intentionally interferes with or prevents an individual from . . . using a 911 emergency telephone system . . . commits interference with the reporting of a crime, a Class A misdemeanor." At the time of the offense, Ind. Code § 35-43-4-2 provided that "[a] person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class A misdemeanor."

[18] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

[19] We observe that the uncorroborated testimony of one witness is sufficient to sustain a conviction, even if the witness is the victim. *Ferrell v. State*, 565 N.E.2d 1070, 1072-1073 (Ind. 1991). The incredible dubiosity rule applies only

in very narrow circumstances. *See Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). The rule is expressed as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id. (citations omitted). Further, "witness testimony that contradicts witness's earlier statements does not make such testimony 'incredibly dubious.'" *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001), *cert. denied*, 534 U.S. 1105, 122 S. Ct. 905 (2002).

[20] Fox fails to show that D.E.'s testimony was inherently contradictory or so inherently improbable that no reasonable person could believe it. D.E. was thoroughly examined and cross-examined. The State also presented the testimony of Deputy Royce and photographs of D.E.'s injuries. Based upon our review of the evidence as set forth above and in the record, we conclude the State presented evidence of a probative nature from which the jury could find beyond a reasonable doubt that Fox committed the charged offenses.

II.

[21] The next issue is whether Fox's sentence is inappropriate in light of the nature of the offenses and his character. Fox challenges his sentence for domestic

battery as a level 5 felony and asserts the facts did not demonstrate actions that would constitute the worst of the worst and that he is a hard-working productive member of society who is interested in helping others.

[22] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "[A]ppellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Id.*

[23] Ind. Code § 35-50-2-6 provides that a person who commits a level 5 felony shall be imprisoned for a fixed term of between one and six years, with the advisory sentence being three years. Ind. Code § 35-50-3-2 provides that a person who commits a class A misdemeanor shall be imprisoned for a fixed term of not more than one year. The Indiana Supreme Court has observed the maximum possible sentences are generally most appropriate for the worst offenders. *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002) (citation omitted). The Court further stated "[t]his is not, however, a guideline to determine whether a

worse offender could be imagined," "[d]espite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario," and "[a]lthough maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the *class* of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders." *Id.*

[24] Our review of the nature of the offenses reveals that Fox grabbed D.E., "slung" her by her hair back into a wall, hit and punched her with one hand while he held her hair in his other hand, put her into a recliner, and continued to hit her. Transcript Volume II at 40. Fox then "grabbed [her] and he slung [her] back to the floor," pulled her toward the bathroom, and started a bath for her because she was covered with blood. *Id.* at 41. He told her "things [she] was going to say and things [she] was going to do." *Id.* D.E. continued to lie on the bed because she "couldn't take no more." *Id.* Fox later asked Deputy Royce not to go into D.E.'s residence. D.E.'s residence was in a state of disarray and "looked like a wrestling match had gone on" and there was a large hole in the drywall where Fox had pushed D.E. through the drywall. *Id.* at 94. D.E. suffered bruising and swelling to her face and neck area and injuries to her body. Fox also took D.E.'s cell phone without her permission. The trial court found that the harm, injury, loss or damage suffered by D.E. was significant and greater than the elements necessary to prove the commission of the offense.

[25] Our review of the character of the offender reveals the PSI states that Fox, who was born in 1967, "has a lengthy criminal history including several battery and

substance related offenses." Appellant's Appendix Volume III at 162. Fox's criminal history includes convictions for: two counts of public intoxication, possession of marijuana, two counts of conversion, and resisting law enforcement in 1996; failure to stop after an accident, disorderly conduct, conversion, and operating a vehicle while intoxicated in 1997; battery resulting in bodily injury in 2000; driving while suspended and burglary as a class C felony in 2001; battery as a class D felony in 2002; trespass in 2003; theft as a class D felony in 2004; possession of methamphetamine as a class D felony and possession of cocaine in 2006; driving while suspended in 2007; possession of cocaine and two counts of theft as class D felonies in 2008; possession of stolen property as a class D felony in 2009; invasion of privacy as a class A misdemeanor in 2011; auto theft and possession of a controlled substance as class D felonies in 2013; domestic battery as a class A misdemeanor in 2014; invasion of privacy as a level 6 felony in 2016; unlawful possession of a syringe, possession of methamphetamine, and being an habitual offender in 2017; and strangulation as a level 6 felony in 2019.

[26] With respect to Fox's criminal history, the trial court stated:

> He has a total of forty-seven different filed cases spreading across Scott, Jackson and Washington counties, with at least twenty-nine convictions, twelve of them for felonies. His criminal history includes a disdain for authority and/or a lack of an ability to abide by the Court's orders, with multiple arrests for misdemeanor and felony invasion of privacy, unauthorized absence from home detention, and an arrest for escape. Intermediate intervention, such as probation, home detention, and short-term imprisonment, have failed to prove effective.

> There is a C Felony burglary conviction, several revocations of probation, and, most concerning, at least five different instances of violence against women. . . . The Defendant's criminal history contains multiple crimes of violence, multiple crimes of dishonesty, multiple instances of a disdain for the Court's order and authority, and multiple substance related offenses.

Transcript Volume II at 228-229.

[27] The PSI indicates that Fox reported first using marijuana at the age of eighteen, he last used marijuana about three years earlier, he first used methamphetamine at the age of twenty-seven or twenty-eight, he last used methamphetamine three to five years earlier, and he had used substances intravenously. It indicated that Fox stated he had worked at AeroSpace in New Albany prior to his arrest. The Scott County Probation Department recommended a sentence of six years executed in the DOC. The PSI also indicates that Fox's overall risk assessment score using the Indiana risk assessment system tool places him in the high risk to reoffend category.

[28] After due consideration, we conclude that Fox has not sustained his burden of establishing that his sentence of six years on Count I to be served concurrent to one year each on Counts II and III is inappropriate in light of the nature of the offenses and his character.

[29] For the foregoing reasons, we affirm Fox's convictions and sentence.

[30] Affirmed.

Altice, J., and Tavitas, J., concur.