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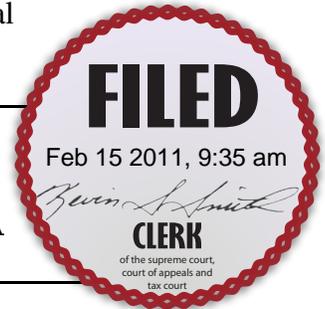
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**IN THE
COURT OF APPEALS OF INDIANA**



AUBREY DAVIS,)

Appellant-Defendant,)

vs.)

No. 49A02-1006-CR-672

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah F. Pierson-Treacy, Judge
Cause No. 49F19-1002-CM-14432

February 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Aubrey Davis appeals his conviction, after a bench trial, of battery, as a class A misdemeanor.

We affirm.

ISSUE

Whether the doctrine of incredible dubiousity requires that we reverse Davis' conviction.

FACTS

On February 24, 2010, Brenda Bethel, a resident of Ohio, was staying with her sister and brother-in-law, Davis, providing assistance with her sister's recovery after several surgeries. Davis returned home from work at approximately 6:00 p.m. and then left. At approximately 9:00 p.m., he returned to the home "staggering" and "slurring his words." (Tr. 12). Davis started playing "very loud" music, and repeatedly asked Bethel whether she liked it. *Id.* at 14. After Bethel told him he was being "rude," David told her "to get the f***ing hell out of his house," and called her a "f***ing b****." *Id.* at 15, 16. Bethel gathered her things, and her "sister started packing to go with [her]." *Id.* at 17. As she was "preparing [her] things to go," Bethel "accidentally knocked over a glass of Pepsi that was sitting [sic] on a table." *Id.* Davis told Bethel "to get the f*** down on the floor on [her] hands and knees and clean it up," which Bethel "proceeded to do." *Id.* at 18. She "got some paper towels" from the kitchen "and came back and was cleaning it up." *Id.* at 19.

Bethel “went . . . to the kitchen to get more paper towels,” and when she “turned to come back” to the spill, Davis was “approximately two feet, three feet” behind her. *Id.* She felt a blow to her back and fell, “land[ing] on the right side of [her] face.” *Id.* at 20. The impact “hurt a lot”; she thought her nose was broken and “saw stars for a couple of minutes.” *Id.* at 20. Bethel also testified that she “did not slip on the Pepsi spill” and was approximately fifteen feet from it when pushed from behind. *Id.* at 25.

Davis’ wife immediately called 9-1-1. Police and emergency medical assistance arrived. Davis’ wife asked Bethel not to press charges, and she agreed. Bethel declined medical treatment.

Officer Roger Tucheck, of the Indianapolis Metropolitan Police Department, arrived and found two females “talking about a male who was one of the female’s husband[,]” and that he “pushed one of the females down and injured her nose.” *Id.* at 31. When “the husband that they were describing came out,” Tucheck separated him “to find out his side of the story.” *Id.* at 31, 32. Tucheck had noticed Bethel’s “cut on her nose” and “redness around the nose.” *Id.* at 32. Davis was “obnoxious” to Tucheck and “uncooperati[ve].” *Id.* at 34, 37. Tucheck testified that Davis “staggered while he was standing,” had “slurred speech,” was “fumbling” in the effort to remove a cigarette from the package, and “mis-aimed in trying to get it up to his mouth.” *Id.* at 37.

On February 25, 2010, the State charged Davis with battery, as a class A misdemeanor. On May 25, 2010, the trial court held a bench trial. Bethel and Officer Tucheck testified to the above. Officer Linda Roeschlein also testified that she had responded to the Davis residence that evening, and that Davis was “very irate,” “worked

up,” and “very loud”; had “bloodshot eyes” and the “smell of alcoholic beverage coming from his breath when he was talking.” *Id.* at 43, 44.

Davis testified that after he had “asked” Bethel “to leave the house,” she had knocked over a Pepsi. *Id.* at 51. According to Davis, Bethel “ended up slippin’ in” the spilled Pepsi while he was “tryin’ to get her to the door.” *Id.* at 54. Davis testified that he “had [Bethel’s] bag in one hand and her arm in another” when they “both ended up falling.” *Id.* Davis testified that he had only consumed two beers that evening and that he “thought [he] was very cooperative” with Officer Tuchek. *Id.* at 62.

The trial court found Davis “did hit the victim from behind in her back, knocking her to the ground causing the injury.” *Id.* at 68. It further “specifically” found that neither “the defendant nor the victim slipped on the Pepsi.” *Id.* It found Davis “guilty as charged.” *Id.*

DECISION

Davis argues that his “conviction must be reversed under the doctrine of ‘incredible dubiosity’ because it stemmed from the inherently improbable narration of events by . . . Brenda Bethel,” and, thus, “the State did not meet its burden of proof.” Davis’ Br. at 5, 9. We cannot agree.

As Davis acknowledges, on an appellate challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *See Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007). We consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* Unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt, we affirm. *Id.* The

evidence need not overcome every reasonable hypothesis of innocence, and is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

Nevertheless, under “the incredible dubiousity rule,” the appellate court will impinge on the responsibility of the trier of fact to judge witness credibility. *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007). 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 dubiousity. 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.

In order to convict Davis of battery as a class A misdemeanor, the State was required to prove beyond a reasonable doubt that Davis (1) knowingly or intentionally touched Bethel, (2) in a rude, insolent or angry manner, (3) resulting in bodily injury. *See* Ind. Code § 35-42-2-1(a)(1)(A). Here, it is undisputed that as a result of interaction with Davis, Bethel suffered injuries to her nose and face. Further, Davis admitted that he was angry at Bethel and in physical contact with her at the time she sustained her injuries. Tucheck’s testimony that when he arrived, two females were “talking about a male who was one of the female’s husband,” and that the husband later determined to be Davis had “pushed one of the females down and injured her nose,” tr. 31, is corroborative of

Bethel's testimony. Bethel's testimony regarding Davis' apparently intoxicated condition at the time of the incident was also corroborated by the testimony of the two officers.

We do not find Bethel's testimony to be "inherently improbable." *Fajardo*, 859 N.E.2d at 1208. Unfortunately, the mix of anger and intoxication often is accompanied by inappropriate action. Bethel's testimony was not equivocal. There was no evidence that her testimony was coerced; in fact, she testified that she had agreed to her sister's request that she not press charges against Davis. Her testimony was not "wholly uncorroborated." *Id.* Moreover, we do not find Bethel's testimony of facts that establish her battery by Davis to be so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.*

Davis argues that "it is quite probable that Bethel's fall to the ground was truly an accident instead of [his] deliberate action." Davis' Br. at 8. Bethel expressly testified that she "did not slip on the Pepsi spill" and was approximately fifteen feet from it when pushed from behind. Tr. 25. Davis' testimony was to the contrary: that Bethel "ended up slippin' in" the spilled Pepsi while he was "tryin' to get her to the door." *Id.* at 54. Bethel testified that her fall was precipitated by a blow from behind, when Davis was "approximately two feet, three feet" behind her and no one else was nearby. *Id.* at 19. Davis testified that they were "side by side," and he was "leading her to the door" while holding her arm, when he "ended up slippin' in that Pepsi" and "we both ended up falling." *Id.* at 59, 54. "It is for the trier of fact to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve." *Kilpatrick v. State*, 746 N.E.2d 52, 61 (Ind. 2001).

The trial court found there was no “slip[] on the Pepsi” and that Davis “did hit [Bethel] from behind in her back, knocking her to the ground causing the injury.” (Tr. 68). Probative evidence supports this conclusion. Therefore, sufficient evidence supports his conviction.

Affirmed.¹

NAJAM, J., and BAILEY, J., concur.

¹ Having cited our Supreme Court’s most recent reiteration of the incredible dubiousity rule, we decline the State’s invitation to expressly limit challenges under the incredible dubiousity rule “to circumstances where the sole witness’s testimony provides a scenario that is physically improbable under the laws of science or nature, or the falsity is apparent without resulting to inferences or deductions.” State’s Br. at 6. The Court of Appeals is “not free to change the law of the state contrary to precedent of” our Supreme Court. *Marley v. State*, 747 N.E.2d 1123, 1130 (Ind. 2001).