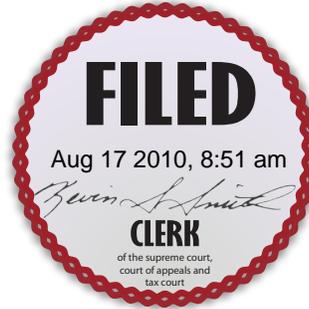


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GOLDEN CUMMINGS,)

Appellant-Defendant,)

vs.)

No. 49A02-0912-CR-1252

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Amy J. Barbar, Magistrate

Cause No. 49G02-0906-FC-59745

August 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Golden Cummings¹ appeals his conviction for Battery, as a Class C felony, following a bench trial. Cummings presents a single issue for review, namely, whether the evidence supports his conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 19, 2009, Cummings visited Alfred Rush. The two men made several trips to the liquor store, where Rush purchased gin and beer, then returned to Rush's apartment at 4039 Stratford Court in Indianapolis. Over the course of the afternoon and evening, the men consumed two pints and one fifth of gin, two forty-ounce beers, and either another forty-ounce beer or a six-pack of beer.

The men made their final walk to the liquor store at 11:30 p.m. During that trip, Rush and Cummings were joined by Rush's friend Cheryl Shelton. The three returned to Rush's apartment. By that time Cummings had missed the last bus home, so Rush agreed to let Cummings spend the night at Rush's apartment. Shelton retired to an upstairs bedroom to sleep. Cummings and Rush finished a fifth of gin, and shortly after midnight they went to sleep in the living room.

In the early morning hours of June 20, Rush awoke to find Cummings standing over him and hitting him with a long oak "patio stick." Appellee's Brief at 3. The patio stick was between two and one-half and three inches thick, and Rush used it to secure his patio door. Cummings hit Rush in the head with the patio stick several times. Rush

¹ On occasion Cummings is also referred to in the Record on Appeal as Gordan Cummings or Gordon Cummings. Our review of the Presentence Investigation Report shows that Cummings has used the alias of Gordan Cummings.

attempted to block the stick with his hand, then ran from the apartment to call for help. Cummings hit Rush several more times while Rush was running from the apartment.

Rush phoned the police from a neighbor's house. When Officer Sarah Romeril of the Indianapolis Metropolitan Police Department arrived at the scene, she found Rush covered in blood. There was "too much blood" to determine the source of the bleeding. Rush said he knew who had hurt him, but he was also mumbling and confused, so Officer Romeril could not "get a name out of him." Transcript at 51.

After medics and additional officers arrived, Officer Romeril investigated Rush's apartment. On the couch in the living room she saw a "massive pool of blood[,] and there was blood spatter on the walls and ceiling. Id. at 52. Another officer found Shelton hiding in a closet upstairs. Officer Aaron Hamer found a broken stick that was covered in blood. Rush was transported to the hospital, where he received staples and stitches to close a laceration on the top of his head and a cast on his left hand, where he had sustained three broken fingers during the attack.

On June 27, Rush saw Cummings in the neighborhood. He phoned the police to have them arrest Cummings "for what he did." Id. at 41. Officer Dwayne Runnels was dispatched to the area and located Cummings. Cummings gave a voluntary statement, in which he admitted that he had hit Rush but explained that he had been defending himself. Specifically, Cummings alleged that he had awakened to find Shelton picking his pocket, that he had hit Shelton, and that Rush had then hit Cummings. Cummings stated that he defended himself at that point.

On June 29, the State charged Cummings with battery, as a Class C felony. On August 24, the State filed an amended information that added a second charge of being an habitual offender. Cummings pleaded not guilty to both charges. Cummings waived a jury trial, and a bench trial was held before a magistrate on November 12. After the magistrate found Cummings guilty of battery as charged, Cummings changed his plea to guilty of being an habitual offender. The magistrate sentenced him to four years for battery, enhanced by four years for being an habitual offender, with credit for time served. Cummings now appeals his conviction.

DISCUSSION AND DECISION

Cummings contends that the evidence is not sufficient to support his battery conviction. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove the offense of battery, as a class C felony, the State was required to show beyond a reasonable doubt that Cummings knowingly or intentionally touched Rush in a rude, insolent, or angry manner with a deadly weapon, namely, the patio stick. See Ind. Code § 35-42-2-1. Here, Cummings admitted, and has never denied, that he hit Rush with the patio stick. Still, he challenges Rush's identification of him as the perpetrator as

well as the lack of any forensic evidence to prove who had wielded the patio stick. But these arguments are not only requests that we reweigh the evidence but also wholly without merit in light of Cummings' confession. These arguments must fail.

Cummings also raises an argument regarding voluntary intoxication under Indiana Code Section 35-41-3-5. Specifically, he states:

Although Cummings had been drinking on the night in question, the State did not pursue a theory of voluntary intoxication. The State presented no evidence of Cummings' blood alcohol level, and no independent witness testimony that Cummings was, in fact, impaired on the night in question. Instead, the State argued that Cummings admitted his culpability. Tr. 93-96. The problem with this position is that the State chose to elicit testimony from Cummings at trial, and then turned right around and impeached his credibility. Tr. 82-92. The State [cannot] have it both ways. Either Cummings was credible and his memory of a three-way altercation in which he defended himself is supported by the State's own affidavit for probable cause referencing Shelton's physical involvement^[2] or Cummings was intoxicated, rendering his testimony, and that of Rush, dubious.

Appellant's Brief at 10.

Cummings' reference to the voluntary intoxication statute is confusing. As Cummings acknowledges, Indiana Code Section 35-41-3-5 abolishes the voluntary intoxication defense. Instead, intoxication is a defense only if one is involuntarily intoxicated or does not know that a substance ingested might cause intoxication. See id. Cummings appears to be arguing that while the State relied on Cummings' confession, it also attempted to impeach his testimony and recollection by pointing out that he had been intoxicated. Thus, Cummings contends that "[t]he State cannot have it both ways." Appellant's Brief at 9. But, again, we cannot reweigh questions of credibility or reweigh

² The Probable Cause Affidavit includes Shelton's allegation that Cummings was upset because he thought someone had "stole from him[,] that he had hit her several times with a closed fist, that he had threatened to kill her, and that she had then run upstairs and had hidden in a closet. Appellant's App. at 17.

the evidence. Jones, 783 N.E.2d at 1139. As such, Cummings' argument regarding the State's reference to his intoxication must fail.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.