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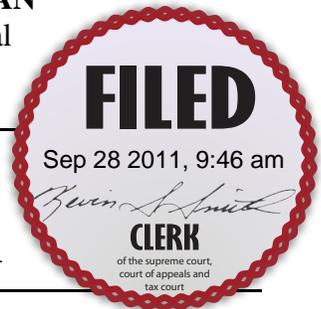
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**IN THE
COURT OF APPEALS OF INDIANA**



BRETT ZAGORAC,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 64A03-1011-CR-589

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-1002-FC-1706

MEMORANDUM DECISION – NOT FOR PUBLICATION

September 28, 2011

MAY, Judge

Brett Zagorac appeals his conviction of Class B misdemeanor battery,¹ arguing the evidence was insufficient to convict him. We affirm.

FACTS AND PROCEDURAL HISTORY

In the fall of 2009, five-year-old N.A. was having trouble recognizing his letters and numbers. His mother, Kelly, began looking for a tutor for him, and she found a tutor on Craigslist named B.J. Wilhelm. After a series of emails, “B.J.” started tutoring N.A. for one hour sessions at Kelly’s home. “B.J. Wilhelm” was, in fact, Brett Zagorac.

In December 2009, Kelly and N.A. were watching television when she began scratching N.A.’s back, which she did on occasion to “get him to take a nap.” (Tr. at 170.) N.A. told her his tutor, whom he called, “Mr. A,” (*id.* at 100), rubbed his back and patted his head and, when Mr. A touched him, he felt “uncomfortable.” (*Id.* at 170.) Kelly asked N.A. to demonstrate how Mr. A touched him on his back. N.A. “slid his hand underneath [Kelly’s] shirt . . . And started rubbing [her] back really, really slow.” (*Id.*)

Kelly told her brother-in-law Samuel, a police officer, about what N.A. told her, and asked Samuel to run “B.J.’s” license plate number. The license plate number indicated the car was registered to Zagorac. At Kelly’s request, Samuel was present during N.A.’s next tutoring session, and asked “B.J.” if his name was Brett Zagorac. Eventually, “B.J.” admitted

¹ Ind. Code § 35-42-2-1.

his real name was Brett Zagorac and that he used a fake name “B.J. Wilhelm” in the Craigslist ad.

The State charged Zagorac with Class C felony child molesting² and a jury found him guilty of the lesser-included offense of Class B misdemeanor battery. The court imposed a 180-day sentence.

DISCUSSION AND DECISION

When reviewing the sufficiency of evidence, we consider only the probative evidence and reasonable inferences supporting the conviction. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder’s role, and not ours, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when we are confronted with conflicting evidence, we consider it most favorably to the trial court’s ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference reasonably may be drawn from it to support the decision. *Id.* at 147.

Class B misdemeanor battery occurs when a person “knowingly or intentionally touches another person in a rude, insolent, or angry manner.” Ind. Code § 35-42-2-1.

² Ind. Code § 35-42-4-3(b).

Touching, however slight, may be a battery. *Impson v. State*, 721 N.E.2d 1275, 1285 (Ind. Ct. App. 2000). Zagorac does not dispute that he touched N.A.; rather, he claims the State did not present evidence he did so in a “rude, insolent, or angry manner.”³

The trial court informed the jury that insolent means “presumptuous and insulting in manner or speech, arrogant, audaciously rude or disrespectful, impertinent.”⁴ (Tr. at 299.) “Rude” means “offensive in manner or action: discourteous . . . coarse, vulgar.” <http://www.merriam-webster.com/dictionary/rude?show=0&t=1314281203> (last accessed August 25, 2011). Finally, “offensive” is defined as “giving painful or unpleasant sensations . . . causing displeasure or resentment.” <http://www.merriam-webster.com/dictionary/offensive> (last accessed on August 26, 2011).

Using those definitions, we conclude the State presented sufficient evidence that Zagorac touched N.A. in an insolent or rude manner. N.A. testified:

State: . . .did the tutor do anything that you didn’t like?
N.A.: Yes.
State: What did he do?
N.A.: He’d pat my head and rubbed my back.
State: Okay. Why did you not like that?
N.A.: Because I usually let my mom.
State: Okay. Your mom pats your head?
N.A.: Yes and –
State: Go ahead.

³ Neither party argues that Zagorac’s touching was angry. The legislature did not provide a statutory definition for either “rude” or “insolent,” and thus we use the plain meaning of each word. *See Fleming v. State*, 833 N.E.2d 84, 89 (Ind. Ct. App. 2005) (using plain meaning to define “impairment” pursuant to the rules of statutory interpretation).

⁴ This definition appears to be from <http://www.thefreedictionary.com/insolent> (last accessed August 25, 2011).

N.A.: She always rubs my back.

State: Okay. And is that different than how the tutor did it?

N.A.: Yes.

State: Why?

N.A.: I don't know.

(Tr. at 103-04.) N.A.'s mother, Kelly, testified N.A. told her, "I don't like it when [Zagorac] – when [Zagorac] rubs my back. It makes me uncomfortable." (Tr. at 170.) When Kelly asked N.A. to demonstrate how Zagorac touched him he "slid his hand underneath [her] shirt . . . and started rubbing [her] back really, really slow." (*Id.*)

Thus, the evidence indicates N.A. did not like the touching and Zagorac's touching made N.A. uncomfortable.⁵ This evidence supports the jury finding Zagorac guilty of battery.⁶ *See Johnson v. State*, 804 N.E.2d 255, 257 (Ind. Ct. App. 2004) (sustaining based on testimony of victim alone). Accordingly, we affirm Zagorac's conviction of Class B misdemeanor battery.

Affirmed.

NAJAM, J., concurs.

RILEY, J., dissents.

⁵ In his brief, Zagorac states, "Most importantly, N.A. never told Zagorac to stop [the touching], never told him he did not like the pats," (Br. of Appellant at 8), but lack of consent is not a statutory element of the offense of battery. *See Helton v. State*, 624 N.E.2d 499, 506 (Ind. Ct. App. 1993) (consent not an element in a battery, nor is it a defense).

⁶ Zagorac also alleges his conviction should be reversed because the trial court admitted evidence that was inadmissible due to the way it was obtained. We need not address that claim, however, because the evidence at issue was merely cumulative of other evidence properly admitted, namely the victim's testimony. *See Purvis v. State*, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005) (erroneous admission of evidence is harmless if it is cumulative of other evidence), *trans. denied*.

