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IN THE
COURT OF APPEALS OF INDIANA

DEREK A. BISHOP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 06A01-1012-CR-683
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Rebecca S. McClure, Judge
Cause No. 06D02-1008-FD-643

July 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Derek Bishop appeals his convictions for two counts of Class D felony Battery.[1] Specifically, Bishop contends that the trial court abused its discretion in admitting certain evidence at trial, and that the evidence is insufficient to support his convictions. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 8, 2010, Bishop and his then-girlfriend, Kayla Rose, engaged in an altercation over Bishop's alleged drug use while Rose's three-year-old son was standing next to Rose, "right on [her] leg." Tr. p. 54. During this altercation, Rose accused Bishop of hiding prescription pills in a small tobacco container and knocked the container out of Bishop's hand. Bishop pushed Rose in the chest and "smacked" her in the face with a closed fist, resulting in pain to Rose and leaving a red mark on her face. Tr. p. 55. Bishop then pushed Rose with sufficient force to make her "fall to the ground and knock [her] son over." Tr. p. 56. Rose and her son landed on the ground with Rose landing on her elbow, and her son falling "face first." Tr. p. 57. Rose's son cried as a result of being knocked to the ground and suffered "a big bump" on his forehead that remained for several days. Tr. p. 57. Immediately following the altercation, Bishop fled on his bicycle.

On August 23, 2010, the State charged Bishop with one count of Class D felony battery, and one count of Class A misdemeanor battery. The State subsequently sought to enhance the Class A misdemeanor charge to a Class D felony because Bishop had previously been convicted of battering Rose. Following trial, a jury found Bishop guilty of both Class D

[1] Ind. Code §§ 35-42-2-1(a)(2)(B) & -1(a)(2)(D) (2010).

felony and Class A misdemeanor battery. Bishop admitted that he had previously been convicted of battering Rose, and, as a result, the trial court granted the State's request to enhance Bishop's Class A misdemeanor conviction to a Class D felony. The trial court sentenced Bishop to an aggregate three-year sentence with two years executed and one year suspended to probation. This appeal follows.

DISCUSSION AND DECISION

I. Admission of Evidence

Bishop contends that the trial court improperly admitted evidence in violation of Indiana Evidence Rule 404(b). Specifically, he argues that the trial court should not have admitted evidence that he threatened Rose's boyfriend upon returning to the courtroom following a break in the trial proceedings because this evidence showed that he had a propensity for violence. However, upon review, we observe, and Bishop acknowledges, that Bishop did not challenge the admission of the evidence that he threatened Rose's boyfriend on Evidence Rule 404(b) grounds at trial. In acknowledging that he did not object to the admission of the challenged evidence on Evidence Rule 404(b) grounds at trial, Bishop concedes that generally, such a claim would be waived for appellate review. *See generally, Konopasek v. State*, 946 N.E.2d 23, 27 (Ind. 2011) (providing that a defendant may not argue one ground for an objection to the admission of evidence at trial and then raise new grounds on appeal). Nevertheless, Bishop argues that this court should review the trial court's decision to admit the challenged evidence because admission of the evidence relating to his threatening Rose's boyfriend during a break in trial proceedings resulted in fundamental

error.

"Fundamental error is a substantial, blatant violation of basic principles of due process rending the trial unfair to the defendant." *Oldham v. State*, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002) (quotation omitted). It applies only when the actual or potential harm cannot be denied. *Id*. Thus, "[i]n order to qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." *Sauerheber v. State*, 698 N.E.2d 796, 804 (Ind. 1998) (citing *Barany v. State*, 658 N.E.2d 60, 64 (Ind. 1995)).

In the instant matter, Rose testified that she feared Bishop. In support of Rose's claim that she feared Bishop, the State presented evidence that Rose feared Bishop because he threatened her on August 8, 2010, by saying that "[she] better not put him in jail again or he'll have people jump [her]." Tr. p. 83. The State also presented evidence that Rose feared Bishop because Bishop had, in Rose's presence, threatened Rose's boyfriend while on his way back into the courtroom following a break in trial proceedings. On appeal, Bishop does not challenge the admission of the evidence that he threatened Rose, only the admission of the evidence that he threatened Rose's boyfriend.

Upon review, we conclude that the evidence that Rose feared Bishop because he threatened her boyfriend while in her presence is cumulative of the other properly admitted evidence that she feared Bishop, *i.e.*, that Bishop had previously threatened Rose herself. Therefore, even assuming that the admission of the evidence that Bishop threatened Rose's boyfriend was erroneous, the admission of this cumulative evidence is, at most, harmless error. *See Truax v. State*, 856 N.E.2d 116, 124 (Ind. Ct. App. 2006) (providing that the

admission of cumulative evidence is harmless error). As such, the admission of this evidence did not amount to fundamental error because it was not so prejudicial so as to make a fair trial impossible. *See Sauerheber*, 698 N.E.2d at 804.

II. Sufficiency of the Evidence

Bishop also contends that the evidence was insufficient to support his convictions for Class D felony battery.

> The standard for reviewing sufficiency of the evidence claims is well settled. We do not reweigh the evidence or assess the credibility of the witnesses. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

Stewart v. State, 768 N.E.2d 433, 435 (Ind. 2002) (citations omitted). "[I]t is for the trier of fact to reject a defendant's version of what happened, to determine all inferences arising from the evidence, and to decide which witnesses to believe." *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006).

In order to convict Bishop of Class D felony battery against Rose, the State was required to prove that Bishop: (1) knowingly or intentionally; (2) touched Rose; (3) in a rude, insolent, or angry manner; (4) resulting in bodily injury to Rose; (5) after having previously been convicted of battering Rose. Indiana Code § 35-42-2-1(a)(2)(D). Likewise, in order to convict Bishop of Class D felony battery against Rose's son, the State was required to prove that Bishop: (1) knowingly or intentionally; (2) touched Rose's son; (3) in a rude, insolent, or angry manner; (4) resulting in bodily injury; (5) to Rose's son, who was less

than fourteen years of age; (6) while Bishop was at least eighteen years of age. Indiana Code § 35-42-2-1(a)(2)(B).

The evidence relating to Rose demonstrates that on August 8, 2010, Bishop struck Rose during an altercation over Bishop's alleged drug use. Bishop pushed Rose in the chest and "smacked" her in the face with a closed fist, resulting in pain to Rose and leaving a red mark on her face. Tr. pp. 55-56. After striking Rose, Bishop again pushed Rose with sufficient force to knock her to the ground where she landed on her elbow. Bishop subsequently admitted that he had previously been convicted of battering Rose.

The evidence relating to Rose's three-year-old son demonstrates that Rose's son was knocked to the ground during the altercation between Bishop and Rose. Rose's son was standing next to Rose, "right on [her] leg." Tr. p. 54. He "fell face first" to the ground when Rose fell after being pushed by Bishop, causing him to cry. Tr. p. 57. As a result of his fall, Rose's son suffered "a big bump" on his forehead that remained for several days. Tr. p. 57. Bishop was twenty years old at the time of his August 8, 2010 altercation with Rose. (Tr. 51) Upon review, we conclude that the State presented sufficient evidence to prove that Bishop committed Class D felony battery against both Rose and her three-year-old son. Bishop's challenge on appeal effectively amounts to a request that this court reweigh the evidence, which we will not do. *See Stewart*, 768 N.E.2d at 435.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.