

NOT DESIGNATED FOR PUBLICATION

No. 124,401

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAVON LEE BURSE,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; PATRICK H. THOMPSON, judge. Opinion filed March 3, 2023.
Affirmed.

Gerald E. Wells, of Jerry Wells Attorney-at-Law, of Lawrence, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Following trial, a jury convicted Javon Lee Burse of criminal restraint, domestic battery, criminal threat, and criminal deprivation of property. The charges stem from an incident involving Burse's ex-girlfriend, S.S. On appeal, Burse challenges his convictions, arguing the State failed to present sufficient evidence to enable the jury to find him guilty of those crimes. The law prohibits us from reweighing the evidence, reassessing witness credibility, and reconciling conflicting evidence, which is what Burse asks us to do. A review of the evidence in the light most favorable to the State demonstrates that it presented sufficient evidence to enable a reasonable fact-finder to convict Burse of the crimes charged. As a result, we affirm Burse's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Burse and S.S. told conflicting stories about the events that occurred on December 28 and 29, 2018. Those events formed the basis of the criminal charges against Burse. The two versions of the events are recounted below.

According to S.S., she and Burse were in a relationship for approximately three years but had broken up by December 2018. They were not communicating with each other, but Burse reached out to S.S. and said he wanted to retrieve some of his things, as well as see S.S. for her birthday, which was in late December.

To celebrate her birthday, S.S., who lived in Salina, invited some of her friends to go to a few bars. She also invited Burse.

The night of December 28 began with S.S. going to dinner with her friends, but Burse did not join them. S.S. said she consumed one beer at dinner, and then she and her friends went to a few bars, leaving the last bar when it closed around 2 a.m. When asked whether she was intoxicated during that portion of the night, S.S. said she "definitely was for part of the night, but then we had stopped drinking because they were closing." S.S. testified that she had control over her balance and that she had communicated with people, including Burse, using her phone throughout the night. At some point she stopped communicating with Burse because she believed he was angry with her.

After leaving the final bar around closing time, S.S. and her friends went to another friend's house, who happened to be Burse's cousin. S.S. did not consume any more alcohol at the cousin's house. S.S. resumed communicating with Burse by phone, letting him know that she was at his cousin's house. Shortly after Burse arrived, S.S. went outside to talk to him. S.S. said she did not want Burse to come inside because she knew he was mad.

By this time it was between 3 and 3:30 a.m. S.S. willingly entered Burse's vehicle, and he drove to the parking lot of Tony's Pizza Events Center. Burse told S.S. he wanted to go through her phone, and she eventually gave him the phone. After Burse made S.S. unlock the phone, he went through her messages and apps. She said that at some point, Burse reached over and hit her in the face with an open hand around her mouth and nose. She then told Burse she wanted to be taken home.

Instead of taking S.S. home, Burse drove to the parking lot of St. John's Military School and continued going through her phone. At one point S.S. opened the passenger door and attempted to exit Burse's vehicle, but he pulled her back in by her hair. S.S. told Burse she was going to vomit, hoping he would allow her to exit the vehicle. She then "leaned out and acted like [she] was going to throw up," at which point Burse told her "to get out of the car so he could beat [her] ass."

S.S. did not exit Burse's vehicle at that point because she was scared. She reiterated that she acted as though she needed to vomit so Burse would allow her to exit the vehicle; her consumption of alcohol did not make it such that she needed to do so. While the two were at St. John's, S.S. testified that Burse hit her on the nose, causing it to bleed; grabbed her by the throat; hit her in her left arm; and punched her multiple times, causing both her lips to bleed. Eventually they left St. John's and went to Burse's grandparents' house. On the way there, S.S. told Burse she wanted her phone back so she could call someone to come get her and take her home. Burse did not return the phone.

S.S. noticed it was between 5 and 6 a.m. when they arrived at Burse's grandparents' house, and she believed Burse's grandmother would be getting off work around that time. When they arrived, Burse continued going through S.S.'s phone, despite her asking him to return it. She asked Burse to allow her to go inside so she could wash the blood off her face. After sitting in the vehicle for approximately 30 minutes, Burse

picked up S.S. and carried her to the back door of the house. S.S. said she only briefly stepped inside the house because Burse's grandmother was inside, and Burse did not want his grandmother to see S.S. or to know she was there. Burse initially told his grandmother he was alone, but his grandmother heard S.S. asking Burse to return her phone. Burse returned S.S.'s phone after his grandmother told him to do so. At this point, S.S. and Burse were outside the home, and Burse's grandmother eventually came outside. S.S. said Burse's grandmother was upset and yelled and pushed Burse.

After S.S. got her phone back, she called her friend Sophia to come and pick her up. Sophia testified she did not initially notice anything about S.S.'s face. But when S.S. looked in one of the vehicle's mirrors, Sophia saw that S.S. had a swollen face and fat lips. Sophia also testified that S.S. had a knot on her forehead, scratches on her neck, and dried blood on her face and wrists.

S.S. went to her mother's house and changed clothes before going to the emergency room at a local hospital. When she arrived at the emergency room, S.S. told Nurse Kolby Martin what occurred. Martin performed a body exam and took photographs of S.S.'s injuries.

Martin testified that she observed bruising underneath S.S.'s right eye, tenderness on the right side of her forehead, bruising on her upper lip, bruising next to one of her eyebrows, bruising on both of her arms, an abrasion and redness on the left side of her neck, and an area of redness on the right side of her neck. Martin said S.S. identified Burse as the cause of all her injuries.

While at the hospital, Shawn Moreland, a police officer with the Salina Police Department, interviewed S.S. Moreland observed red marks on S.S.'s face and throat, as well as blood under her nose. During the interview, S.S. recounted the events of the night that led to her being in the hospital. Like Martin, Moreland took photographs of S.S.

Moreland also interviewed Burse's grandparents and took photographs of the vehicle S.S. said Burse drove.

While photographing Burse's vehicle, Officer Moreland noticed a spot on the passenger side door that appeared to be blood. Moreland swabbed the spot, and a forensic scientist later confirmed that the blood belonged to S.S.

Burse told a different version of events from that night. He said he started communicating with S.S. around Christmas, and the two talked consistently for the next few days. Burse knew S.S.'s birthday took place a couple days after Christmas, so he had given her a few gifts on her birthday. He also knew of S.S.'s plan to celebrate her birthday with friends on December 28, but he never planned to join them.

The night S.S. went out to celebrate her birthday, Burse said he met her at his cousin's house so he could get back a couple of the gifts he had given her. Burse needed the gifts so he could return them to have gas money for his return to San Antonio, Texas, where he attended school. Burse said S.S. told him she was at his cousin's house. When the two spoke, Burse said he could tell S.S. was intoxicated because she slurred her words. Burse testified he felt as though S.S. was not being honest about her birthday plans because she did not give him definitive answers when they communicated. Because of this, Burse planned to leave for San Antonio on December 29, 2018, instead of on New Year's Day.

When Burse arrived at his cousin's house, S.S. came outside and got in his vehicle. Burse asked whether she had been lying to him about her birthday celebration, and he told her he did not appreciate her "beating around the bush" with him.

Burse drove to the parking lot of Tony's Pizza Events Center so the two could continue their conversation. During that conversation, Burse said that S.S. turned and saw

that he had packed his belongings in the back seat, including some of the gifts he had given her. At that point, S.S. became upset and began yelling at him about the gifts. Burse explained to S.S. that he was done with whatever situation their relationship was currently in because he felt that she had lied to him. Burse said S.S. then tried to convince him she had not lied, and she gave him her phone, unlocked, to prove that. Burse then began looking through various social media apps and text messages on S.S.'s phone.

While going through S.S.'s phone, Burse discovered a photograph of a recently deleted conversation between S.S. and someone else. When S.S. realized what Burse was looking at, she tried to grab her phone back. As she did so, the phone came loose from Burse's grip and hit S.S. in between her nose and mouth. S.S. then started bleeding from her lip and began crying. After she stopped crying, the two agreed they should go clean up her lip, so Burse drove to his grandparents' house.

By the time they arrived at his grandparents' house, Burse said S.S.'s lip had stopped bleeding, and the two remained in the vehicle and discussed the status of their relationship for approximately 45 minutes. Instead of going inside the residence, Burse said he drove to St. John's because S.S. said she needed to vomit. Burse made the decision to go there because his grandparents did not allow him to have girls at the house, and he thought his grandmother would be returning home from work soon.

When they arrived at St. John's, Burse said S.S. immediately opened the door and leaned out as though she was about to vomit. Though she remained halfway out of the vehicle, S.S. never vomited. Burse eventually exited the vehicle and went to the passenger side to help S.S. get back in the vehicle. Burse said he could tell S.S. was intoxicated at that point. Once he got S.S. back inside the vehicle, Burse left St. John's and returned to his grandparents' house. He parked on the street this time because he thought his grandmother was still at work and would need to park in the driveway when she returned.

After he parked, Burse said the original plan was to go inside so S.S. could clean the dried blood off her face, and then he would drive her wherever she wanted to go. However, when they arrived, the two sat in his car and bickered back and forth for about 10 minutes. Burse said S.S. was angry during this time and yelled at him. At some point, Burse "apologetically reached over and . . . hit her in the arm" like a sibling might do to another sibling that got upset. Burse said he hit S.S. with the back of his hand on her left arm. Immediately afterwards Burse apologized, and the two decided to go inside. But just after exiting Burse's vehicle, S.S. told him she could not walk, so Burse carried S.S. to the stairs by the back porch.

Burse entered the back door of his grandmother's house and saw her sitting on the living room couch. Burse stood in the doorway and told his grandmother that S.S., who remained outside, was with him. As Burse's grandmother moved towards the door, Burse closed it, leaving S.S. outside. Just before closing the door, Burse returned S.S.'s phone. Burse said his grandmother never had to tell him to give S.S. her phone back. After a brief conversation with his grandmother, Burse went back outside and started walking towards his car so he could take S.S. wherever she wanted to go. Instead of getting in Burse's car, S.S. walked away and called someone to give her a ride.

Burse said that S.S. was not crying when she left his grandparents' house. He denied preventing S.S. from getting out of his vehicle, grabbing her throat, grabbing her hair, pushing her head against a window, or keeping her phone from her.

At the conclusion of trial, the jury acquitted Burse of aggravated domestic battery but convicted him of one count each of criminal restraint, domestic battery, criminal threat, and criminal deprivation of property. The district court later sentenced Burse to six months' imprisonment for his criminal threat conviction, six months in county jail for his criminal restraint conviction, six months in county jail for his criminal deprivation of

property conviction, and six months in county jail for his domestic battery conviction. The criminal threat and criminal restraint sentences ran consecutive, for a controlling sentence of 12 months' imprisonment. The criminal deprivation of property and domestic battery sentences ran concurrent. The court suspended Burse's prison sentence and placed him on probation for 12 months.

Burse timely appealed.

ANALYSIS

The State presented sufficient evidence to convict Burse of the crimes charged.

On appeal, Burse claims the State presented insufficient evidence to convict him of criminal restraint, domestic battery, criminal threat, and criminal deprivation of property.

Standard of Review

"When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. This court has also recognized that there is no distinction between direct and circumstantial evidence in terms of probative value. "A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom. If an inference is a reasonable one, the jury has the right to make the inference." [Citations omitted.]" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

"This is a high burden, and only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

Discussion

At the outset of this argument, it should be noted that Burse does not point to any errors of law. Instead, as the State points out, Burse essentially asks us to reweigh the evidence, reassess S.S.'s credibility, and reconcile conflicting evidence, which we cannot do. See *Aguirre*, 313 Kan. at 209. Additionally, Burse's argument focuses on his testimony regarding the phone striking S.S.'s face, not him. This argument only relates to the charge of domestic battery. No argument is made about any specific element of any other crime. Thus, we find he has waived any argument concerning his other convictions. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issues not briefed are deemed waived or abandoned). Nonetheless, we briefly address each crime on the merits.

Criminal Restraint

As stated above, the jury convicted Burse of criminal restraint. The statute defines criminal restraint as "knowingly and without legal authority restraining another person so as to interfere substantially with such person's liberty." K.S.A. 2018 Supp. 21-5411(a).

Here, S.S. testified that she entered Burse's vehicle after he arrived at his cousin's house. After Burse eventually hit her at Tony's Pizza Events Center, S.S. said she told him she wanted to be taken home. Instead of taking her home, Burse drove to St. John's. At some point while the two were there, S.S. attempted to get out of Burse's vehicle, but he prevented her from doing so by pulling her back in by her hair. Similarly, S.S. testified that Burse prevented her from leaving his presence by maintaining control of her phone, after originally obtaining control over it, until they arrived at his grandparents' house

much later that night. S.S. said she asked for her phone numerous times, but Burse only returned it after his grandmother told him to do so. Immediately after getting her phone back, S.S. called Sophia for a ride.

Looking at the evidence in the light most favorable to the State, a reasonable factfinder could have concluded Burse knowingly and without legal authority restrained S.S. so as to interfere substantially with her liberty. K.S.A. 2018 Supp. 21-5411(a); *Aguirre*, 313 Kan. at 209. The fact S.S. originally entered Burse's vehicle on her own accord does not refute this conclusion. See *State v. Reed*, No. 123,974, 2022 WL 628132, at *3 (Kan. App. 2022) (unpublished opinion) (finding it irrelevant whether a victim first consented to being in an offender's presence). As a result, we find the evidence sufficient to affirm Burse's criminal restraint conviction.

Domestic Battery

The jury convicted Burse of domestic battery. The subsection under which Burse was convicted defines domestic battery as "[k]nowingly or recklessly causing bodily harm to a person with whom the offender is involved or has been involved in a dating relationship or a family or household member." K.S.A. 2018 Supp. 21-5414(a)(1).

It is undisputed that Burse and S.S. were once in a dating relationship. As a result, the only other element the State had to prove to meet the statutory requirements was that Burse knowingly or recklessly caused S.S. bodily harm. See K.S.A. 2018 Supp. 21-5414(a)(1).

In his brief, Burse claims he did not cause S.S. bodily harm. Burse believes S.S.'s testimony demonstrates that he never struck S.S., and, consequently, the evidence is insufficient to convict him of domestic battery. S.S.'s testimony during the preliminary hearing served as the basis for this argument. During that hearing, S.S. testified about

Burse hitting her. When asked about Burse hitting her in the mouth, S.S. said, "Well, it hit me and both my lips were busted open." Burse argues this testimony

"lines up with Mr. Burse's rendition of what happened with the phone, *i.e.*, that [S.S.] grabbed the phone while Mr. Burse was reading something on it, and when she pulled the phone, it flung up in the air and the phone struck [S.S.] in the mouth and nose. It was [S.S.'s] action that caused the phone to strike her in the mouth, not Mr. Burse's doing."

During trial, S.S. was asked about this testimony on cross-examination:

"Q. Okay. So, when you were asked, what did he do to [your] mouth? Your response is, well, it hit me and both my lips were busted open, correct?"

"A. Yes.

"Q. You didn't say, [Burse] hit me, correct?"

"A. That's not what it says there, no.

"Q. And doesn't say, he hit me, correct?"

"A. No.

"Q. It says, it hit me, correct?"

"A. Yes.

"Q. And could that have been the phone that hit you?"

"A. The phone did not hit me.

"Q. Any reason why you use the term 'it' versus [Burse]?"

"A. I'm not sure.

"Q. Or it versus he struck me?"

"A. I'm not sure."

On redirect, S.S. again stated that the "it" referred to in the transcript from the preliminary hearing referenced Burse's open hand. As the State points out, S.S.'s testimony directly contradicts Burse's argument on appeal.

Additionally, S.S. testified about the injuries she attributed to Burse's actions during trial. Nurse Martin identified numerous injuries which were consistent with S.S.'s

version of events. And Burse himself admitted to hitting S.S. in the left arm with the back of his hand.

Under the standard of review, it is not this court's function to reevaluate the trial evidence. See *Aguirre*, 313 Kan. at 209. The testimony from S.S., Martin, and Burse, as well as the other evidence, satisfies the statutory requirement that Burse knowingly or recklessly caused S.S. bodily harm. See K.S.A. 2018 Supp. 21-5414(a)(1). As such, we find the evidence sufficient to affirm Burse's conviction for domestic battery.

Criminal Threat

The jury also convicted Burse of criminal threat. The subsection under which Burse was convicted defines criminal threat, in part, as any threat to "[c]ommit violence communicated with intent to place another in fear." K.S.A. 2018 Supp. 21-5415(a)(1).

During her testimony, S.S. stated Burse told her "to get out of the car so he could beat [her] ass." S.S. testified she was fearful of getting out of the car as a result. On cross-examination, S.S. admitted Burse might not have said those exact words, but she maintained that Burse "told [her] to get out of the car so he could beat [her] up."

Burse's only challenge to his criminal threat conviction concerns the sufficiency of the evidence. Viewing the evidence in the light most favorable to the State, S.S.'s testimony regarding what Burse told her satisfies the criminal threat statute. See K.S.A. 2018 Supp. 21-5415(a)(1); see also *Aguirre*, 313 Kan. at 209.

Criminal Deprivation of Property

Lastly, the jury convicted Burse of criminal deprivation of property. Our statutes define criminal deprivation of property as "obtaining or exerting unauthorized control

over property, with intent to temporarily deprive the owner of the use thereof, without the owner's consent but not with the intent of permanently depriving the owner of the possession, use or benefit of such owner's property." K.S.A. 2018 Supp. 21-5803(a).

S.S. testified that, because she was frightened of Burse, she gave him her phone after entering his vehicle. S.S. said she did so because she did not want to fight him for it. S.S. testified that her phone had a passcode, but Burse grabbed her hand and made her use her fingerprint to unlock the phone so he could go through it. According to S.S., Burse did not return her phone after originally obtaining control over it until they arrived at his grandparents' house much later that night. S.S. said she asked for the phone numerous times, but Burse only returned it after his grandmother told him to do so.

Looking at the evidence in a light most favorable to the State, a reasonable fact-finder could have concluded Burse obtained or exerted unauthorized control over S.S.'s phone, with intent to temporarily deprive S.S. the use thereof, without S.S.'s consent but not with the intent of permanently depriving S.S. of the possession, use, or benefit of such owner's property. K.S.A. 2018 Supp. 21-5803(a); *Aguirre*, 313 Kan. at 209.

In sum, S.S. and Burse testified to different versions of what occurred during the early morning hours of December 29, 2018. Plainly, the jury found S.S.'s version of events to be credible and convicted Burse of the charges outlined above. On appeal, we review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt; we do not reweigh the evidence, reassess witness credibility, or reconcile conflicting evidence. *Aguirre*, 313 Kan. at 209. We find the evidence is sufficient to support the jury's guilty finding for each crime.

Affirmed.