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IN THE
COURT OF APPEALS OF INDIANA

Michael Wayne Shepard,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 14, 2023

Court of Appeals Case No.
22A-CR-2029

Appeal from the Shelby Superior
Court

The Honorable David N. Riggins,
Judge

Trial Court Cause No.
73D02-2206-CM-000450

Opinion by Judge May
Judges Crone and Weissmann concur.

May, Judge.

[1] Michael Wayne Shepard appeals following his conviction of Class A misdemeanor resisting law enforcement.¹ Shepard raises two issues on appeal, which we consolidate and restate as whether the State presented sufficient evidence to support his conviction. We affirm.

Facts and Procedural History

[2] On June 20, 2022, Shelbyville Police initiated a traffic stop of Nikki Vanover, and during the traffic stop, Vanover reported Shepard was inside her house and she did not want him to remain there. The police learned there was an outstanding arrest warrant for Shepard to answer a charge of Level 6 felony possession of methamphetamine,² and they travelled to Vanover's house to serve the warrant. They observed someone shut the open front door and lock the deadbolt as they approached the house. The officers knocked and announced their presence, but no one answered. Vanover then gave consent for police to search her home. The SWAT team and a K-9 officer were also dispatched to the house.

[3] The officers found the ceiling attic access portal was open and determined Shepard was hiding in the attic. The officers repeatedly directed Shepard to

¹ Ind. Code § 35-44.1-3-1.

² Ind. Code § 35-48-4-6.1.

leave the attic, and the officers utilized a “pole camera”³ to observe Shepard’s movements in the attic. (Tr. Vol. II at 14.) When Shepard ignored the officers’ commands, police shot pepper spray canisters into the attic to try to persuade Shepard to come down. Instead of exiting the attic, Shepard moved to a place in the attic further away from the attic access point, and the officers continued to deploy chemical agents into the attic. Officer Jarod Scudder of the Shelbyville Police Department testified that while chemical agents were being deployed, the “pole camera” captured footage of “Shepard holding a small black object, looked like to his temple, in the shape of a handgun. It ended up not being a handgun.” (*Id.*) The object was a long-reach butane lighter.

[4] At some point, Shepard maneuvered over to the attic access point. He extended his two hands out over the access point, and a scuffle ensued as Officer Scudder attempted to grab Shepard’s left hand, and Officer Chase Holmes tried to get ahold of Shepard’s right arm. Shepard then fell facedown onto the floor. Officer Scudder “tried pulling specifically his right arm behind his back to, to put that one in ... restraints first.” (*Id.* at 15.) Officer Scudder wanted to take control of the right hand first because that was “the hand that it appeared to be [sic] the firearm was in, or what we construed to, could possibly be a firearm.” (*Id.*) However, Officer Scudder was not able to secure Shepard’s right hand because Shepard “pulled his arm up under his body and kind of

³ Officer Jarod Scudder of the Shelbyville Police Department described a “pole camera” as “a small camera on a pole that we put into the attic access, it has a wire that connects to the, to the pole part of the system. It has a small L.C.D. screen that you can see whatever the camera is seeing.” (Tr. Vol. II at 21-22.)

balled his, his hands up underneath of his chest.” (*Id.* at 16.) Officer Scudder then disengaged, and the K-9 officer deployed his police dog. The dog bit Shepard’s leg, and Shepard immediately put his hands behind his back to be handcuffed.

[5] On June 21, 2022, the State charged Shepard with Class A misdemeanor resisting law enforcement. The trial court held a bench trial on July 28, 2022. The trial court found Shepard guilty, and the trial court explained:

So I think, given the entire circumstances, that that, by keeping your hands in at the end of the day was enough, but also independently, I think that acting like you were gonna shoot yourself in the head, if, was enough to also be a [sic] active threat of violence that impeded their ability to lawfully execute their duties[.]

(*Id.* at 59-60.) The trial court then sentenced Shepard to a term of 180 days in jail.

Discussion and Decision

[6] Shepard contends the State failed to present sufficient evidence that he forcibly resisted law enforcement. We apply a well-settled standard of review when evaluating claims of insufficient evidence:

Sufficiency-of-the-evidence claims . . . warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility. Rather, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. We will affirm a conviction if there is

substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt.

Powell v. State, 151 N.E.3d 256, 262-63 (Ind. 2020) (internal citations omitted).

[7] Shepard was charged with violating Indiana Code section 35-44.1-3-1(a)(1), which provides:

A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;

* * * * *

commits resisting law enforcement, a Class A misdemeanor[.]

In that definition, “the word ‘forcibly’ is an essential element of the crime and modifies the entire string of verbs—resists, obstructs, or interferes—such that the State must show forcible resistance, forcible obstruction, or forcible interference.” *Walker v. State*, 998 N.E.2d 724, 726 (Ind. 2013). After examining cases that discussed the “forcibly” element, the *Walker* Court explained:

So in summary, not every passive—or even active—response to a police officer constitutes the offense of resisting law enforcement, even when that response compels the officer to use force. Instead, a person “forcibly” resists, obstructs, or interferes with a police officer when he or she uses strong, powerful, violent

means to impede an officer in the lawful execution of his or her duties. But this should not be understood as requiring an overwhelming or extreme level of force. The element may be satisfied with even a modest exertion of strength, power, or violence.

Id. at 727. “The force involved need not rise to the level of mayhem.” *Graham v. State*, 903 N.E.2d 963, 965 (Ind. 2009). For example, pushing away with one’s shoulders and stiffening up one’s arms is sufficient to constitute forcible resistance. *Id.* (approving holding in *Johnson v. State*, 833 N.E.2d 516, 517 (Ind. Ct. App. 2005)).

[8] In *Tyson v. State*, we held sufficient evidence supported a conviction of resisting law enforcement when the defendant refused to remove his hands from his pockets after being directed to do so by a police officer and resisted being handcuffed. 140 N.E.3d 374, 376-77 (Ind. Ct. App. 2020), *trans. denied*. Likewise, in *Lopez v. State*, we affirmed the defendant’s conviction of resisting law enforcement when Lopez pulled away from officers attempting to handcuff him and laid on top of his hands. 926 N.E.2d 1090, 1091 (Ind. Ct. App. 2010), *trans. denied*. We explained: “If the officers were unable to pull his arms out from under him, it is reasonable to infer that he was forcibly resisting their efforts rather than remaining entirely passive.” *Id.* at 1094.; *see also Williams v. State*, 959 N.E.2d 357, 358 (Ind. Ct. App. 2011) (holding the defendant’s act of “flipping her arms around” and pulling away when officers attempted to handcuff her was sufficient to support her conviction of resisting law enforcement), *trans. denied*.

[9] Shepard argues “[p]ulling your arm away from a police officer one time while you are lying prone on the floor is insufficient to establish forcible resistance.” (Appellant’s Br. at 6.) He likens his case to *Runnells v. State*, 186 N.E.3d 1181 (Ind. Ct. App. 2022). In that case, Runnells trespassed on a stranger’s porch, and the homeowner called the police to remove Runnells from her property. *Id.* at 1183. The responding officer attempted to handcuff Runnells. *Id.* at 1184. “Runnells, however, resisted by twice ‘pull[ing] away’ as Corporal Ducker tried to handcuff him. Corporal Ducker responded by forcing Runnells to the ground and restraining him.” *Id.* (brackets in original and internal citation to the record omitted). Another panel of this Court held the State presented insufficient evidence Runnells forcibly resisted because “[n]othing in [the arresting officer’s] testimony suggests any ‘strength, power, or violence’ in Runnells’ actions or otherwise proves beyond a reasonable doubt that Runnells acted forcibly.” *Id.* The panel in *Runnells* acknowledged our holding in *Johnson* but found “more instructive our Supreme Court’s decision in *K.W. v. State*, 984 N.E.2d 610 (Ind. 2013).”⁴ *Id.* at 1185.

[10] In *K.W.*, our Indiana Supreme Court explained: “Merely walking away from a law-enforcement encounter, leaning away from an officer’s grasp, or twisting and turning a little bit against an officer’s actions do not establish forcible

⁴ The *Runnells* panel referenced the Indiana Supreme Court’s approval of the holding in *Johnson* in *Graham*. 186 N.E.3d at 1185. However, the *Runnells* panel did “not find the ‘stiffening’ statement to be a guiding principle” because the statement: “(1) was not necessary to the Court’s decision; (2) is difficult to square with the Court’s subsequent holding in *K.W.*; and (3) appears at odds with other statements made by the Court over the years.” *Id.*

resistance.” 984 N.E.2d at 612 (citing *Spangler v. State*, 607 N.E.2d 720, 724 (Ind. 1993), *A.C. v. State*, 929 N.E.2d 907, 912 (Ind. Ct. App. 2010), and *Ajabu v. State*, 704 N.E.2d 494, 495-96 (Ind. Ct. App. 1998)) (internal quotation marks omitted). The Court held the State presented insufficient evidence of forcible resistance when a juvenile simply “turned to walk away, pulling against [a school liaison officer’s] grasp on his wrist.” *Id.* at 611. Yet, after *K.W.* was decided, our Indiana Supreme Court reiterated in *Walker* that the statute does not require “an overwhelming or extreme level of force” and “even a modest exertion of strength, power, or violence” will constitute forcible resistance. 998 N.E.2d at 727.

[11] In the instant case, Officer Scudder described Shepard’s actions in detail. When Officer Scudder tried to pull Shepard’s arm behind his back to handcuff him, Shepard “pulled his arm under his body and kind of balled his, his hands up underneath of his chest.” (Tr. Vol. II at 16.) Officer Scudder further elaborated that Shepard “was forcibly pulling his hands underneath of his body and moving his hands down towards his waistband where weapons are obviously kept sometimes[.]” (*Id.* at 27.) Shepard’s act of pulling his hand away from Officer Scudder constituted more than passive resistance. *Cf. A.C.*, 704 N.E.2d at 912 (holding there was insufficient evidence of forcible resistance when the State presented “no evidence that Officer Stratman had to struggle to handcuff A.C. Indeed, there is no evidence that Officer Stratman experienced any difficulty whatsoever in handcuffing A.C.”). Moreover, Shepard’s interactions with the officers before they attempted to place him in handcuffs indicated he

did not intend to cooperate. Shepard initially retreated into the interior of Vanover's house when he saw the police, and he secreted himself in the attic. Shepard ignored commands to exit the attic, and the officers were required to deploy multiple rounds of chemical agents to get Shepard to come out of the attic. While the officers deployed a police dog and obtained Shepard's compliance soon after Shepard refused to be handcuffed, a resisting law enforcement conviction should not turn on the level of force needed by law enforcement to bring the arrestee under control because such a practice would create a perverse incentive for law enforcement to prolong arrests and use more force than necessary to effectuate them. *See Lopez*, 926 N.E.2d at 1094 n.1 (cautioning "that relying only on the amount of force used by the police in subduing a defendant to determine whether the defendant 'forcibly resisted' may have the unwanted effect of encouraging the police to use excessive force"). Consequently, we hold the State presented sufficient evidence of forcible resistance to support Shepard's conviction. *See Miller v. State*, 591 N.E.2d 142, 145 (Ind. Ct. App. 1992) (holding sufficient evidence supported defendant's conviction of resisting law enforcement when defendant resisted being handcuffed).

Conclusion

[12] The State presented sufficient evidence Shepard committed the offense of resisting law enforcement when he pulled his hand away from an officer's grasp

and lodged it underneath his prostrate body. Therefore, we affirm the trial court's judgment.

[13] Affirmed.

Crone, J. and Weissmann, J., concur.