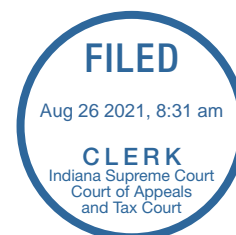


MEMORANDUM DECISION

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

Cody Leroy Archer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 26, 2021

Court of Appeals Case No.
21A-CR-223

Appeal from the Parke Circuit
Court

The Honorable Samuel A. Swaim,
Judge

Trial Court Cause No.
61C01-2003-F5-64

Bailey, Judge.

Case Summary

[1] In this interlocutory appeal, Cody Leroy Archer (“Archer”) appeals the denial of his motion to dismiss a charging information alleging he committed Battery by Means of a Deadly Weapon, as a Level 5 felony,¹ which charge was premised upon Archer ramming his vehicle into another occupied vehicle. He presents the sole issue of whether the trial court abused its discretion by finding that the facts of the information constituted an offense and denying the motion to dismiss, notwithstanding Archer’s contention that the State failed to allege that another person – as opposed to an inanimate object – was struck. We affirm.

Facts and Procedural History

[2] On March 8, 2020, at approximately 9:00 p.m., Parke County Sheriff’s Deputy Josh Milbourn (“Deputy Milbourn”) responded to a report of a road rage incident on westbound U.S. Road 36. A 9-1-1 caller had reported that he was in a vehicle and was being chased by another vehicle at a speed of around 100 miles per hour. Deputy Milbourn headed toward the reported location and clocked two vehicles traveling at a speed of 98 miles per hour. As he traveled east of the Raccoon Lake State Park entrance, he observed the vehicle in back strike the front vehicle.

¹ Ind. Code § 35-42-2-1(c)(1), (g)(2).

[3] Deputy Milbourn initiated a traffic stop of the vehicle in back, and eventually placed the driver under arrest. The driver was identified as Archer. The driver of the other vehicle was interviewed and reported that Archer's vehicle had struck his vehicle twice, once as they passed the park entrance and once within Deputy Milbourn's view. He further stated that he was experiencing back pain and would be seeking medical attention the next day.

[4] On March 9, 2020, Archer was charged with Battery. He was also charged with Intimidation² and Resisting Law Enforcement,³ as Level 6 felonies.⁴ On October 27, 2020, Archer moved to dismiss the battery count for lack of probable cause. He also petitioned for a bond reduction, as the remaining charges were for lower class felonies. On December 1, 2020, the trial court conducted a hearing; on the following day, it entered an order denying the motion to dismiss. Archer requested that the trial court certify its order for interlocutory appeal; on January 19, 2021, the trial court did so. This Court accepted jurisdiction of the interlocutory appeal on March 5, 2021.

Discussion and Decision

² I.C. § 35-45-2-1(a)(2).

³ I.C. § 35-44.1-3-1(a).

⁴ He was later charged with Operating a Vehicle with a Blood Alcohol Content of 0.15, as a Class A misdemeanor. *See* I.C. § 9-30-5-1(b).

Standard of Review

[5] Indiana Code Section 35-34-1-4(a)(5) provides that “The court may, upon motion of the defendant, dismiss the indictment or information [when] the facts stated do not constitute an offense.” In general, when a defendant files a motion to dismiss an information, the facts alleged in the information are to be taken as true. *State v. C.G.*, 949 N.E.2d 848, 850 (Ind. Ct. App. 2011), *trans. denied*. Questions of fact to be decided at trial or those facts constituting a defense are not properly raised by a motion to dismiss, because a hearing on the motion to dismiss is not a trial on the charged offense. *Id.*

The State is not required to include detailed factual allegations in a charging information.” *Laney v. State*, 868 N.E.2d 561, 567 (Ind. Ct. App. 2007), *trans. denied*. “An information that enables an accused, the court, and the jury to determine the crime for which conviction is sought satisfies due process. Errors in the information are fatal only if they mislead the defendant or fail to give him notice of the charge filed against him.” *Dickenson v. State*, 835 N.E.2d 542, 550 (Ind. Ct. App. 2005) (citations and quotation marks omitted), *trans. denied*. “[W]here a charging instrument may lack appropriate factual detail, additional materials such as the probable cause affidavit supporting the charging instrument may be taken into account in assessing whether a defendant has been apprised of the charges against him.” *State v. Laker*, 939 N.E.2d 1111, 1113 (Ind. Ct. App. 2010), *trans. denied*.

Gutenstein v. State, 59 N.E.3d 984, 995 (Ind. Ct. App. 2016), *trans. denied*.

[6] We review a trial court’s denial of a motion to dismiss a charging information for an abuse of discretion, which occurs only if the decision is clearly against

the logic and effect of the facts and circumstances. *Id.* at 994. A trial court also abuses its discretion when it misinterprets the law. *Id.*

Analysis

- [7] Pursuant to Indiana Code Section 35-42-2-1(c)(1), “a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner ... commits battery.” Under subsection (g)(2), the offense is elevated to a Level 5 felony if it is committed by means of a deadly weapon. A “person” in the context of Indiana criminal law “means a human being, corporation, limited liability company, partnership, unincorporated association, or governmental entity.” Ind. Code § 35-31.5-2-234(a). In relevant part, the State charged Archer as follows:

[O]n or about March 8, 2020, in Parke County, State of Indiana, Cody Leroy Archer did knowingly touch Victim 1 in a rude, insolent, or angry manner, said touching being committed with a deadly weapon, to-wit: motor vehicle.

(App. Vol. II, pg. 10.) Archer concedes, for purposes of this appeal, that a vehicle can be a deadly weapon and that the underlying incident here involved one vehicle striking a second vehicle.

- [8] Archer’s motion to dismiss facially alleged a lack of probable cause to support the battery charge; however, he did not challenge the probable cause affidavit. At the hearing, Archer argued that the facts stated in the charging information do not constitute the offense of battery because “there’s no allegation that either Archer’s truck or a truck that was struck hit another human being.” (Tr. Vol.

II, pg. 4.) Construing Archer’s argument to be that he could not be charged with battery because he didn’t personally touch the victim, the prosecutor responded: “you don’t have to personally touch as long as the mechanism that you put in motion does the touching.” (*Id.* at 5.) Archer again stated “there’s no allegation that either truck struck another human being” but he specifically conceded that both vehicles involved in the road rage incident were occupied. (*Id.*)

[9] In its order denying Archer’s motion to dismiss the battery charge, the trial court addressed Archer’s “apparent” argument that, because the probable cause affidavit indicated that Archer’s vehicle did not directly touch the victim, “then no touching occurred.” Appealed Order at 1. The trial court found this contention to be “wholly without merit” and observed: “It is well settled law that there need not be a direct touching between the victim and the perpetrator of a battery.” *Id.* In reaching its decision, the trial court relied upon *Henson v. State*, 86 N.E.3d 432 (Ind. Ct. App. 2017), *trans. denied*. In *Henson*, a panel of this Court affirmed a battery conviction where a driver had intentionally rammed his vehicle into gas pumps at a high rate of speed, ejecting his passengers and causing them injury. We explained that touching need not be direct:

our Supreme Court has stated, “[w]hile battery requires [a] defendant to have intended to touch another person, [he] need not personally touch another person since battery may be committed by the unlawful touching by [the] defendant or by any other substance put in motion by [the] defendant.” *Matthews v.*

State, 476 N.E.2d 847, 850 (Ind. 1985) (holding intent to touch satisfied where defendant fired bullets at officer).

86 N.E.3d at 439.

[10] But Archer’s claim of deficiency in the charging information is not predicated upon the absence of an allegation of direct touching. Rather, Archer claims that the information is fatally deficient as it relates to the target of the touching. He appears to concede, for purposes of this interlocutory appeal, that he intentionally operated his vehicle so as to collide with another vehicle. He does not argue that *Henson* was wrongly decided; indeed, he acknowledges that a touching need not be direct to satisfy the touching element of a battery offense. But he distinguishes the circumstances of his encounter, in that “other cases involved direct touching or touching by an object the defendant intended to touch with” and here, “it was vehicle with vehicle.” Appellant’s Brief at 11. Archer claims that it would be absurd to construe the phrase “another person” in the battery statute so as to include an inanimate object. Distilled to its essence, Archer’s argument is that the State did not explicitly allege, notwithstanding the forces put into motion, that “another person” had ultimately been touched.

[11] The facts of the charging information, taken as true, establish that the victim was touched and Archer committed the touching by his use of a motor vehicle. The probable cause affidavit adds the detail that the touching occurred when Archer’s vehicle struck a vehicle being driven by the victim. Thus, one inanimate object struck another and the second object was the only object in

contact with the person. Archer correctly points out that an inanimate object is not a person, but he ignores the fact that here the inanimate object was the carriage of the person, intimately connected to the person's body.

[12] In 1912, our Indiana Supreme Court reviewed a conviction for Assault and Battery, where a driver of a vehicle had operated his vehicle so as to strike a bicycle occupied by a rider. *Luther v. State*, 177 Ind. 619, 99 N.E. 640 (1912). Although the Court found insufficient evidence of criminal intent under the circumstances before it, the Court recognized that a collision committed intentionally could support such a conviction. *See id.* at 643. The applicable statute provided that “whoever, in a rude, insolent or angry manner, unlawfully touches another, is guilty of assault and battery.” *Id.* at 641 (quoting 45 Section 2242, Burns 1908). The Court defined Assault as “an inchoate violence to the person of another, with the present means of carrying the intent into effect” and Battery as “the carrying out of the intent by the actual infliction of the injury.” *Id.*

That an assault and battery may be committed upon one riding on a bicycle by another driving an automobile by the unlawful touching in collision is clear, for the force need not be direct. Thus striking a horse whereby the rider is thrown may be assault and battery. And so may be taking hold of the clothes of another to detain him, or striking the skirt of his coat, or a cane which he holds in his hand. The same is true of striking the horses attached to the vehicle of another in which he is riding.

Id. at 641-42. Here, likewise, the State alleged an “unlawful touching in collision,” *see id.*, in that Archer was alleged to have applied the force that

impacted a vehicle in which his victim was seated. The trial court did not misapply the law.

Conclusion

[13] Archer has not demonstrated that the trial court abused its discretion in denying his motion to dismiss the charging information alleging that Archer committed Battery, as a Level 5 felony.

[14] Affirmed.

Crone, J., and Pyle, J., concur.