

STATEMENT OF THE CASE

Christopher Smith appeals his conviction for Resisting Law Enforcement, as a Class A misdemeanor, following a bench trial. Smith raises a single issue for review, namely, whether the evidence is sufficient to support his conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the afternoon of August 10, 2008, Officer Peter Fekkes of the Indianapolis Metropolitan Police Department (“IMPD”) responded to a dispatch about a domestic disturbance at the Subway restaurant on West Washington Street in Indianapolis. When Officer Fekkes arrived, two other officers had already separated the parties involved, Smith and his wife, Stacy Smith. One of the other officers advised Officer Fekkes that she had run Smith’s name and determined there was a protective order in place against Smith as to his wife. Officer Fekkes “asked control to check a run history and confirm that there was a protective order” and was informed that there was a protective order in place that had been served. Transcript at 5.¹ As a result, Officer Fekkes advised Smith that he was under arrest for invasion of privacy.

When Officer Fekkes told Smith that he was under arrest, Smith “began to verbally protest saying it wasn’t fair, that—they hadn’t vacated [sic] or it had been dismissed[.]” *Id.* at 10. The officer told Smith that the report was to the contrary and to turn around and face the car. Officer Fekkes then handcuffed Smith’s right hand behind him. Officer Fekkes testified that when he

¹ There are two sets of page numbers in the Transcript. The citations in this decision refer to the handwritten page numbers.

went to grab the other arm . . . that's when he began to physically resist. I felt his shoulders tighten. His left arm pulled away from me. I then placed him in an arm bar, put my elbow in his back, forced him to the hood of the car and then Officer Cox assisted me in placing the other handcuff on his wrist.

Id. at 10. Officer Fekkes testified further that he was able to handcuff Smith “[a]fter using some force and [with] the assistance of another officer.” Id. at 11. The process of handcuffing Smith took “[a]pproximately thirty to forty seconds” to accomplish. Id. at 12.

The State charged Smith with invasion of privacy, as a Class A misdemeanor, and resisting law enforcement, as a Class A misdemeanor. The State subsequently dismissed the invasion of privacy charge citing “evidentiary problems.” Appellant’s App. at 23. At the conclusion of a bench trial on October 8, the court found Smith guilty of the remaining count as charged. The court then sentenced Smith to “ten days in the Marion County Jail, zero days suspended, giving credit for five days good time credit.” Id. at 57. Smith now appeals.

DISCUSSION AND DECISION

Smith contends that the evidence is insufficient to support his conviction for resisting law enforcement.² Specifically, he argues that the State failed to prove that he forcibly resisted law enforcement. We must disagree.

² Smith states in passing that he “committed no crime as the protective order had been dismissed” and that he was “unlawfully arrested.” Appellant’s Brief at 9. But on appeal Smith does not argue that the officer lacked probable cause to make the arrest. Thus, we limit our decision to whether the State proved that Smith forcibly resisted Officer Fekkes. In any event, Smith’s arrest was lawful even though the protective order had been dismissed. See Miller v. City of Anderson, 777 N.E.2d 1100, 1105 (Ind. Ct. App. 2002) (in negligence action against city, held that officers had probable cause to arrest citizen where county court system erroneously showed that protective order was in place at the time of arrest), trans. denied.

When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove that Smith resisted law enforcement, as a Class A misdemeanor, the State was required to prove beyond a reasonable doubt that he knowingly and forcibly resisted, obstructed, or interfered with Officer Fekkes, an IMPD law enforcement officer, while the officer was lawfully engaged in the execution of his duties as a law enforcement officer. See Ind. Code § 46-55-4-4(a). Our supreme court recently analyzed the resisting law enforcement statute in Graham v. State, No. 03S04-0809-CR-00507, 2009 Ind. LEXIS 341 (April 8, 2009). There the court observed that “the word ‘forcibly’ modifies ‘resists, obstructs, or interferes’ and that force is an element of the offense.” Id. at *4 (citing Spangler v. State, 607 N.E.2d 720 (Ind. 1993)). Citing to the decision in Spangler, the court explained that “one ‘forcibly resists’ when ‘strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.’” Id. at *4-*5 (quoting Spangler, 607 N.E.2d at 723). The court stated that “[i]t is error as a matter of law to conclude . . . that ‘forcibly resists’ includes all actions that are not passive.” Id. at *5 (quoting Spangler, 607 N.E.2d at 724). But the court further clarified that the “‘stiffening’ of one’s arms when an officer grabs hold to position [the

arrestee] for cuffing would suffice” for the use of force necessary to prove the charge of resisting law enforcement. Id. at *6.

Here, Officer Fekkes testified that Smith “began to physically resist” when the officer began to cuff Smith’s left hand. Transcript at 10. The officer “felt [Smith’s] shoulders tighten” and Smith pulled his left arm away from the officer. Id. Officer Fekkes was not able to completely handcuff Smith without the assistance of another officer. The officer’s testimony is sufficient to show that Smith forcibly resisted.

On appeal, Smith argues that he had suffered a rotator cuff injury in his left shoulder prior to this arrest, that that injury prevented him from moving his left arm behind his back, and that he “attempted to tell” the officers about his injury at the time of his arrest. Appellant’s Brief at 10. He also contends that it is “certainly possible that his arm twitched involuntarily” when Officer Fekkes attempted to cuff him. Appellant’s Brief at 10. But Officer Fekkes testified that Smith decried the unfairness of the arrest and that Smith said nothing about a shoulder injury while he was being handcuffed. In fact, the officer testified that Smith was “very animated” while waiting for transport and that, although Smith stated after being handcuffed that his shoulder hurt, he “had full mobility of both shoulders, from what [Officer Fekkes] could tell, while he was in handcuffs, at least what the handcuffs would provide.” Transcript at 15.

The trial court specifically noted that the case involved a question of credibility: “Today when I find you guilty, what I am saying is after having heard the evidence and the testimony of both Officer Fekkes and you and your wife, I’m saying that I find his evidence to be credible.” Transcript at 59. Smith’s argument amounts to a request that

we reweigh the evidence. Again, we cannot reweigh the evidence or judge the credibility of witnesses. Jones, 783 N.E.2d at 1139. Smith's contention must fail.

Smith also argues that "there was no struggle or fight, no refusal to comply with the officers." Appellant's Brief at 12. He also cites to the transcript in support of his contention that "[h]e was compliant with the officers." Id. at 9 (citing Transcript at 10-12). But, again, Smith asks us to reweigh the evidence. Further, we cannot find support for his contention in the portion of the transcript cited. There Officer Fekkes describes in detail how Smith resisted and that a second officer's assistance was required to handcuff Smith's left arm. We conclude that the evidence is sufficient to support Smith's conviction for resisting law enforcement.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.