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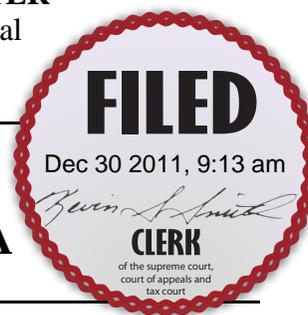
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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIS SIMMONS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 02A03-1106-CR-316

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Marcia L. Linsky, Magistrate
Cause No. 02D05-1104-CM-1910

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Willis Simmons appeals his convictions for Class A misdemeanor resisting law enforcement and Class B misdemeanor disorderly conduct. He argues that the evidence is insufficient for both convictions. Concluding that the evidence is sufficient, we affirm.

Facts and Procedural History

Around 11:20 p.m. on March 31, 2011, Fort Wayne Police Department Officers Martin Grooms and Jason Brown were dispatched to a house on Schaper Drive, which was in a quiet residential neighborhood, in response to a possible domestic battery in progress. As the fully-uniformed officers approached the house, they saw a man look out the front window. The officers took up a position behind a car and waited for additional officers to arrive. As the officers waited, Simmons walked out the front door and stood on the porch. When the officers directed Simmons to walk toward them with his hands in view, he responded, “Fu** you, I ain’t gotta do sh**.” Tr. p. 78. The officers again directed Simmons to walk toward them, but Simmons again said, “I ain’t gotta do sh**. You come to me.” *Id.*

At this point, several officers in marked cars arrived on the scene, and people exited the house and stood on the front porch. Believing the situation to be safe, the officers approached Simmons, who was sitting on a low brick wall on the edge of the porch, to explain why they were there and that they needed to make sure everyone was okay. Simmons responded in a “very loud” voice, “I don’t have to tell you sh**” and “Fu** you, I ain’t gotta tell you sh**.” *Id.* at 80-81. The officers repeatedly asked

Simmons to quiet down, but to no avail. The other occupants of the house also asked Simmons to be quiet, but he did not listen to them either.

The officers then explained to Simmons that they needed his identification in order to process their report, but Simmons responded, “Fu** you, I don’t gotta give you my I.D.” *Id.* at 82. At this point, the officers decided to arrest Simmons, who was still sitting, for disorderly conduct. As Officer Brown grabbed Simmons’ right arm, he told Simmons that he was under arrest and to stand up. Simmons, however, “forcibly pulled back away from him.” *Id.* at 83; *see also id.* at 96 (Officer Brown explaining that when he grabbed Simmons’ arm, Simmons “jerk[ed] away and pull[ed] backwards.”). Officer Grooms grabbed Simmons’ left arm, and both officers directed him to the ground. Once Simmons was on the ground, he had his right arm tucked underneath his body. Officer Brown attempted to get Simmons’ right arm out from underneath him, repeatedly yelling “Give me your right hand, give me your right hand.” *Id.* at 97. Simmons refused and “tighten[ed] his grasp.” *Id.* Eventually, Officer Brown “forcefully had to pry [Simmons’] arm out from underneath him,” at which point the officers arrested him and helped him to his feet. *Id.* at 84. All the while Simmons continued “cussing,” “yelling,” and “screaming.” *Id.* Once in the patrol car, Simmons continued yelling. *Id.* at 84-85.

The State charged Simmons with Class A misdemeanor resisting law enforcement and Class B misdemeanor disorderly conduct. Following a jury trial, Simmons was found guilty as charged. The trial court sentenced him to concurrent terms of ninety days in jail. Simmons now appeals.

Discussion and Decision

Simmons contends that the evidence is insufficient to support his convictions for Class A misdemeanor resisting law enforcement and Class B misdemeanor disorderly conduct.

When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. *Id.* When confronted with conflicting evidence, we consider it most favorably to the trial court's ruling. *Id.* We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* (quotation omitted). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

I. Resisting Law Enforcement

To convict Simmons of Class A misdemeanor resisting law enforcement as charged here, the State had to prove that he knowingly or intentionally forcibly resisted, obstructed, or interfered with Officer Brown while he was lawfully engaged in the execution of his duties. Appellant's App. p. 7; *see also* Ind. Code § 35-44-3-3(a)(1). Simmons challenges only the sufficiency of the evidence on the force element.

The Indiana Supreme Court addressed the evidence needed to support the force element of resisting law enforcement in *Graham v. State*, 903 N.E.2d 963 (Ind. 2009). There, the Court cited one of its earlier opinions, *Spangler v. State*, 607 N.E.2d 720 (Ind.

1993), and explained that a person forcibly resists law enforcement when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties. *Id.* at 965 (citing *Spangler*, 607 N.E.2d at 723). The *Graham* Court noted that the force involved need not rise to the level of "mayhem." *Id.* It cited *Johnson v. State*, 833 N.E.2d 516 (Ind. Ct. App. 2005), with approval. In *Johnson*, when an officer attempted to search a defendant in custody, the defendant "turned away and pushed away with his shoulders" while cursing and yelling. *Id.* at 517. When officers attempted to place him into a transport vehicle, the defendant "stiffened up," and the officers had to physically place him inside. *Id.* The *Graham* Court noted that the Court of Appeals in *Johnson* correctly held that the defendant's actions constituted forcible resistance. *Graham*, 903 N.E.2d at 966.

The evidence most favorable to the verdict here shows that as Officer Brown grabbed Simmons' right arm, he told Simmons that he was under arrest and to stand up. Simmons, however, jerked away from Officer Brown and pulled backwards. Tr. p. 96. Officer Grooms then grabbed Simmons' left arm, and both officers directed him to the ground. Once Simmons was on the ground, his right arm was tucked underneath his body. Officer Brown yelled at Simmons to give him his hand, but he refused and tightened his grasp. Finally, Officer Brown was able to forcefully pry Simmons' arm out from underneath him. All the while Simmons' cussing rants continued. We think this case is similar to *Johnson*, which our Supreme Court approved of in *Graham*. At the very least, Simmons' acts of resisting by jerking back from Officer Brown and by not releasing the arm underneath him but instead tightening his grasp was more than

“stiffening,” which our Supreme Court said in *Graham* constitutes forcible resistance. 903 N.E.2d at 966 (“We conclude that a fair reading of the evidence in this case does not reflect even the modest level of resistance described in *Johnson*. . . . While even “stiffening” of one’s arms when an officer grabs hold to position them for cuffing would suffice, there is no fair inference here that such occurred.”). And because of this, the cases upon which Simmons relies on appeal, including one not-for-publication decision,¹ are distinguishable. We conclude that the evidence is sufficient to support Simmons’ conviction for Class A misdemeanor resisting law enforcement.

II. Disorderly Conduct

To convict Simmons of Class B misdemeanor disorderly conduct as charged here, the State had to prove that he recklessly, knowingly, or intentionally made unreasonable noise and continued to do so after being asked to stop. Appellant’s App. p. 8; *see also* Ind. Code § 35-45-1-3(a).

“[T]he criminalization of ‘unreasonable noise’ was ‘aimed at preventing the harm which flows from the volume’ of noise.” *Whittington v. State*, 669 N.E.2d 1363, 1367 (Ind. 1996) (quoting *Price v. State*, 622 N.E.2d 954, 966 (Ind. 1993), *reh’g denied*). “The State must prove that a defendant produced decibels of sound that were too *loud* for the circumstances.” *Id.* “Whether the state thinks the sound conveys a good message, a bad message, or no message at all, the statute imposes the same standard: it prohibits context-inappropriate *volume*.” *Id.* The statute “is aimed at the intrusiveness and loudness of expression, not whether it is obscene or provocative.” *Price*, 622 N.E.2d at 960 n.6.

¹ We remind counsel that not-for-publication memorandum decisions from this Court “shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.” Ind. Appellate Rule 65(D).

In addition, the statute “proscribes only unreasonably noisy expression amounting to a public nuisance or, when political speech is at issue, amounting to a private nuisance.” *Id.* at 966. Notably here, Simmons “does not challenge the conviction as an infringement upon his right to free speech, rather he argues the evidence did not show that his conduct rose to the level of a public nuisance.”² Appellant’s Br. p. 7. But then, Simmons “readily concedes that his conduct likely posed a public nuisance, however, like *Price*, Simmons contends that his conduct was simply a ‘fleeting annoyance’ to the public at whole.” *Id.* at 8.

The evidence most favorable to the verdict shows that Simmons, who was outside, was very loudly yelling obscenities around 11:30 p.m. in a quiet residential neighborhood. On numerous occasions, the officers asked Simmons to lower his voice so he would not disturb his neighbors. Tr. p. 81. He continued. The occupants of the house, who had since come outside, also asked Simmons to quiet down. He did not heed their advice either. The officers then explained to Simmons that they needed to see his identification, but Simmons continued yelling, even when placed in the patrol car. Officer Brown described the scene as follows:

[W]e’re in a very quiet neighborhood, there are neighbors close by, it’s 11:30 at night. Very – he’s very much causing a disturbance inside the neighborhood and we’re trying to calm him down; that’s all we wanted him to do, calm down. Explained to him the situation on what’s going on, but he continues to – to be very boisterous and loud in a very quiet neighborhood.

Id. at 96.

² We do note that Simmons states, “[i]n summary,” that “he was simply exercising his right to ‘question and argue with police.’” Appellant’s Br. p. 8. This is not enough to trigger a political speech analysis.

Based upon this record, we conclude that evidence of probative value exists from which the trier of fact could have found Simmons guilty of Class B misdemeanor disorderly conduct because he produced decibels of sound that were too loud for the circumstances. See *Blackman v. State*, 868 N.E.2d 579, 584 (Ind. Ct. App. 2007) (concluding that the defendant “produced decibels of sound that were too loud for the circumstances”), *trans. denied*; *Johnson v. State*, 719 N.E.2d 445, 448 (Ind. Ct. App. 1999) (affirming conviction for disorderly conduct because Johnson’s “volume prevented the police officers from asking additional questions in an effort to resolve the situation.”). Accordingly, we conclude that the evidence is sufficient to support Simmons’ conviction for Class B misdemeanor disorderly conduct.

Affirmed.

ROBB, C.J., and NAJAM, J., concur.