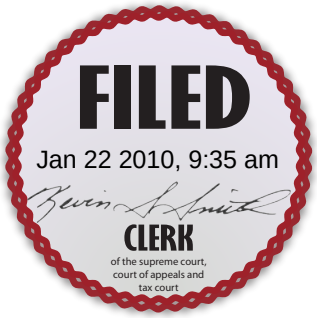

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IN THE
COURT OF APPEALS OF INDIANA

DALE BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0908-CR-441
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Becky F. Pierson-Treacy, Judge
The Honorable Steven J. Rubick, Magistrate
Cause No. 49F19-0904-CM-41881

January 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Dale Brown appeals his conviction of Resisting Law Enforcement,[1] a class A misdemeanor, challenging the sufficiency of the evidence as the sole issue on appeal.

We affirm.

The facts favorable to the conviction are that in the early morning hours on April 22, 2009, Officers Jonathan Burger and Jesse Russell of the Indianapolis Metropolitan Police Department were dispatched to Brown's apartment in response to a report of a disturbance between Brown and his wife. Officer Russell spoke to Brown on the stairs of the apartment entrance, while Officer Burger spoke to Brown's wife upstairs. At this time, Andre Davenport walked through the front entrance and confronted Brown about an unrelated matter. Brown told Davenport "not now or not today, something to that effect" and then Brown punched Davenport in the face. *Transcript* at 9. The blow knocked Davenport unconscious. Officer Burger ran down the stairs and told Brown to stop. Brown did not obey, but instead drew his fist back to strike the unconscious Davenport again. At that time, Officer Burger delivered an "open heel palm strike" to the lower part of Brown's face and pushed Brown away from Davenport and out the door. *Id*. at 9-10. The two began wrestling, with Officer Burger attempting to handcuff Brown and they both "went to the ground", where Officer Burger tried "to get … Mr. Brown's hands behind his back." As they struggled, Officer Burger repeatedly told Brown to "stop resisting." *Id*. at 23. Officer Russell came to Officer Burger's assistance and grabbed Brown's arm. At this point, they were able to place the handcuffs on Brown. After the handcuffs were in place, Brown

[1] Ind. Code Ann. § 35-44-3-3 (West, PREMISE through 2009 1st Regular Sess.).

stopped resisting and complied with the officers' instructions.

Brown was charged with resisting law enforcement as a class A misdemeanor. He was found guilty as charged following a bench trial and sentenced to twenty days in the Marion County Jail.

Brown contends the evidence was not sufficient to support the conviction. Specifically, he contends "there is no evidence Brown 'stiffened up' or used strong, powerful, violent means to avoid being placed in handcuffs." *Appellant's Brief* at 2. In other words, Brown contends there was not sufficient evidence to prove he "forcibly" resisted law enforcement. Our standard of review for challenges to the sufficiency of evidence is well settled.

> When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id*. at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

Brown cites two cases, *Graham v. State*, 903 N.E.2d 963 (Ind. 2009) and *Berberena v. State*, 917 N.E.2d 780 (Ind. Ct. App. 2009) trans. denied, in support of his argument that his actions in the instant case did not constitute forcible resistance within the meaning of I.C. § 35-44-3-3(a)(1). In *Graham*, the relevant facts were set out by our Supreme Court as follows:

> The officers carried Graham down off the porch and ordered him to present his arms for cuffing, which Graham refused to do. Detective William Howell described what happened this way: "I could hear them yelling at him give us your hands, give us your hands. He still resisted to give, not to give the hands. The idea is to put the hands behind the back in handcuffs. And I could hear them yelling at him to give, to give us your hands, give us your hands. He was still not complying even after physically being taken into custody. He was handcuffed at that point." The only SWAT team officer who testified at trial, Angela Maddox, said: "He was then ... we stepped him off the porch and then proned him out, belly down on the ground and, and then put his arms behind his back and handcuffed him." Asked whether Graham was cooperating with the officers who were trying to cuff him, she said, "It appeared so. I did not go hands on."

Id. at 965 (internal citations omitted). The Court concluded that these facts did not demonstrate "even a modest level of resistance." *Id*. at 966. In *Berberena*, the evidence was that a police officer ordered Berberena to put his hands behind his back, but Berberena failed to comply. The officer testified he "had to forcefully place [Berberena] against the wall of the building. [Berberena's] chest was facing the building, and [the officer] had to struggle with him to grab his hands and place them in handcuffs." *Berberena v. State*, 917 N.E.2d at 781. The majority concluded, with Judge Vaidik dissenting, that the officer's testimony that he struggled with Berberena was ambiguous in that "[the officer] did not testify, and there is no evidence, that Berberena stiffened his arms or otherwise 'made threatening or violent actions' to contribute to the struggle." *Id*. at 782.

In *Graham*, the Supreme Court clarified that "the force involved need not rise to the level of mayhem," *Graham v. State*, 903 N.E.2d at 965, but indicated that the "forcible" element is met when the evidence demonstrates that "the police ha[ve] to get physical" in order to secure the defendant's compliance. *Id*. at 966. In *Graham*, the evidence indicated

that the defendant's resistance to the attempt to handcuff him was merely passive; he did not comply with directions to present his wrists for cuffing, but did not offer active resistance or physically struggle with law enforcement officials in any way as they attempted to secure him. Based upon its interpretation of the term "struggle", the majority in *Berberena* reached the same conclusion. Are the facts of this case sufficiently similar to *Graham* and *Berberena* so as to render those cases applicable? We conclude they are not.

Officers Burger testified that Brown ignored his command to stop punching Davenport, and was in fact preparing to strike Davenport again when the officer physically intervened in order to prevent Brown from doing so. According to Officer Burger, a wrestling match ensued between him and Brown, during which Brown refused to submit to handcuffing. In fact, Officer Burger was finally able to handcuff Brown only after Officer Russell intervened and grabbed one of Brown's arms while Brown and Officer Burger wrestled. We are unable to countenance what surely is the real gist of Brown's argument for reversal here, i.e., that the wrestling match between him and Officer Burger was strictly a one-sided affair. Were it so, among other things, a second officer would not have been required to apply the handcuffs. Brown's resistance in this case, both with respect to the initial refusal to stop punching Davenport and continuing on to the wrestling match with Officer Burger while that officer was attempting to handcuff Brown, was characterized by far more physicality than was the case in *Graham* and *Berberena*. That is to say, his resistance was physical and active – not merely a passive refusal to submit his wrists for handcuffing.

In summary, the evidence demonstrated that Brown engaged in a wrestling match with

Officer Burger, during which he resisted the officer's attempt to handcuff him. This easily satisfies the "forcible" element of I.C. § 35-44-3-3(a)(1). The evidence was sufficient to support the conviction.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.