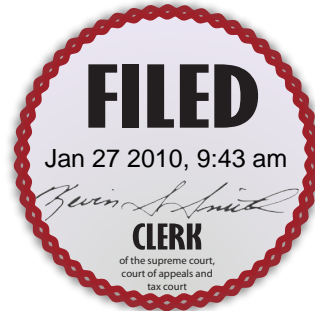


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

SUZY ST. JOHN
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

NICOLE DONGIEUX WIGGINS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FREDERIC SHIELDS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 49A04-0907-CR-401

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0901-CM-1181

JANUARY 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Frederic Shields appeals his conviction of resisting law enforcement, a Class A misdemeanor. We affirm.

ISSUE

Shields raises one multi-part issue for our review, which we state as the following issues:

- I. Whether the trial court abused its discretion by declining to give Shields tendered instructions pertaining to the propriety of a law enforcement officer's activity at the time of arrest.
- II. Whether the trial court abused its discretion by giving misleading jury instructions.

FACTS AND PROCEDURAL HISTORY

On January 3, 2009, Officer Caron Lile of the Indianapolis Metropolitan Police Department ("IMPD") was standing outside a police substation when she observed Shields drive by at a high rate of speed in the middle of the street. Officer Lile flagged Shields down, informed him that he was driving too fast, and asked him to slow down and drive on the correct side of the road. Despite Shields' agitation and argumentative nature, Officer Lile allowed him to drive away with only a warning.

Moments later, Officer Miguel Roa, also an IMPD officer, observed Shields turn left at a stop sign without using a turn signal. Officer Roa testified that he stopped the vehicle, told Shields why the stop had occurred, and asked him for his driver's license. Officer Roa further testified that Shields did not initially acknowledge Officer Roa's

presence and refused to tender any identification. Officer Roa also testified that when he again asked Shields for his identification, Shields again refused to produce any documentation and “dropped his hand in between his legs.” (Tr. at 51). Officer Roa testified that this movement caused him to become concerned for his safety, and he asked Shields to place his hand back on the steering wheel, which Shield initially did. However, Officer Roa testified that Shields “almost immediately” disregarded Officer Roa’s order and moved his hand back between his legs, again causing Officer Roa to fear for his safety. (Tr. at 52-53).

Officer Roa testified that he then tried to stop Shields from reaching between Shields’ legs, and he ordered Shields to exit his vehicle. Officer Roa further testified that when he told Shields to exit the vehicle, Shields “jerked his arm forcefully into the car,” causing the officer to lose his balance and fall into the car with Shields. (Tr. at 53). Officer Lile, who had arrived at the scene, testified that Shields and Officer Roa engaged in a “tug of war” in which the officer attempted to pull Shields out of the car and Shields tried to pull the officer into the car.

Officer Roa eventually gained control over one of Shields’ arms and pulled him out of the vehicle. Once out of the car, Shields became argumentative, began jerking his arms around, and made it difficult for Officer Roa to handcuff him. Officer Lile assisted Officer Roa in finally handcuffing Shields.

Shields testified that he complied with Officer Roa’s orders, and that he jerked Officer Roa’s arm because he was startled by the officer’s aggressiveness. Shields was

charged with resisting law enforcement, and at trial he tendered three jury instructions to assist the jury in determining whether Officer Roa's actions were proper. However, the trial court refused to give the instructions. Shields also objected to instructions given by the trial court. Shields was found guilty of the charged offense, and he now appeals.

DISCUSSION AND DECISION

I. TENDERED INSTRUCTIONS REGARDING OFFICER'S ACTIONS

Shields contends that the trial court abused its discretion by refusing to give his tendered jury instructions. Jury instruction is a matter within the trial court's discretion, and we review the trial court's decisions for an abuse of that discretion. *Cline v. State*, 726 N.E.2d 1249, 1256 (Ind. 2000). In reviewing a trial court's decision regarding tendered instructions, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that were given. *Chambers v. State*, 734 N.E.2d 578, 580 (Ind. 2000). A defendant is entitled to an instruction on any defense that has some foundation in the evidence, even if the evidence is weak and inconsistent. *Harrington v. State*, 413 N.E.2d 622, 624 (Ind. Ct. App. 1980).

In Indiana, a person commits Class A misdemeanor resisting law enforcement when he knowingly or intentionally forcibly resists, obstructs, or interferes with a law enforcement officer while the officer is lawfully engaged in the execution of the officer's duties. Ind. Code § 35-44-3-3(A)(1). Shields' theory, as expressed by the instructions,

was that Officer Roa was not “lawfully engaged in the execution of [his] duties” when he arrested Shields, and therefore, Shields argues that he could not have resisted law enforcement under the statute. Basically, Shields argues on appeal that there was a question of fact as to whether Officer Roa was lawfully engaged in the execution of his duties when he pulled Shields out of his vehicle during a traffic stop. Shields maintains that the jury was entitled to consider a defense that he did nothing to provoke Officer Roa’s actions.

In light of Shields’ alleged defense, he contends that the trial court abused its discretion in refusing to give Tendered Jury Instructions 1, 2, and 3. Tendered Jury Instruction No. 1 stated, “If a police officer makes an unreasonable seizure in violation of the Fourth Amendment, the officer is not lawfully engaged in the execution of his duties.” (Appellant’s App. at 54). Tendered Jury Instruction No. 2 stated, “A conviction for Resisting Law Enforcement cannot stand, if during the course of making a seizure, the officer was not lawfully engaged in the execution of his duties.” (Appellant’s App. at 53). Tendered Jury Instruction No. 3 stated, “If a police officer uses unconstitutionally excessive force in making an arrest, the officer is not lawfully engaged in the execution of his duties.” (Appellant’s App. at 52).

Our review of the transcript in this case discloses that in his opening statement, Shields’ counsel remarked, “So, did this man, did Fred Shields, use strong, powerful and violent means to the officer? That’s what you’re going to decide today. That’s what the crime of resisting law enforcement consists of.” (Tr. at 40). After the State presented

Officer Roa's testimony, Shields' counsel acknowledged through questions and statements to the officer that (1) In general, a traffic stop is a tense situation; (2) A police officer has to be alert when he pulls over a car; (3) A stop can be potentially dangerous; and (4) Officer Roa did not understand Shields' actions or statements." (Tr. at 65-66). Subsequent questioning of Shields by his counsel pertained to Shields' surprise and intent and not the legality or "unconstitutionally excessive force" of Officer Roa's actions. In closing argument, Shields' counsel acknowledged that Officer Roa believed that Shields was armed. Shields' counsel further stated that the issue "is whether Fred Shields tried to fight a fully-armed police officer." (Tr. at 136). Shields' counsel then stated:

Let's think about officer Roa's perspective. This is a tense situation. He told you when you have a traffic stop it's a tense scenario. He thinks Fred's armed. He thinks Fred's trying to hide something. That, again, explains why Officer Roa misreads Fred being startled, thinks he's got a different position on things. He thinks he's got somebody that's going to try to fight him that could be armed . . . He thinks he's got to get somebody out of the car that might be armed.

* * *

There are two elements that are critical elements. We are contesting that Fred Shields knowingly and forcibly resisted Officer Roa. We're saying that that didn't happen. First of all, we're saying that it wasn't "knowingly." He didn't expect to be detained for a traffic stop for not using his turn signal, and he reacted. He wasn't trying to fight Officer Roa. . . . Secondly, "forcibly," he was not there.

(Tr. at 137-38). It is clear from the transcript that there was no evidence presented to show that Officer Roa acted unlawfully or used excessive force.

The purpose of jury instructions is “to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” *Wilson v. State*, 842 N.E.2d 443, 445 (Ind. Ct. App. 2006), *trans. denied*. Here, the giving of the tendered instructions would have been both misleading and confusing, given the evidence and defense presented. Accordingly, the evidence did not support the giving of the tendered instructions, and the trial court did not abuse its discretion.

II. INSTRUCTIONS GIVEN BY THE TRIAL COURT

Shields contends that the trial court abused its discretion in the manner in which it instructed the jury. First, he argues that the trial court incorrectly gave Final Jury Instruction No. 22, which, in its final paragraph, defined “resist” as “stand against or withstand,” “obstruct” as “to interpose obstacles or impediments or in any manner prevent,” and “interference” as encompassing actions “calculated to hamper or impede police officers in performance of their duties.” (Appellant’s App. at 57). He maintains that the instruction does not emphasize current law which states that the forgoing actions are wrongful under our statutes only if the actions are accomplished by “strong, powerful, and violent means ... to evade a police officer’s rightful exercise of duties.” (Appellant’s Brief at 16) (citing *Graham v. State*, 903 N.E.2d 963, 965 (Ind. 1009); *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. Ct. App. 1993)).¹

¹ Shields also contends that the first paragraph of Final Jury Instruction No. 22 is incomplete. However, at trial Shields specifically stated that he had no objection to this paragraph. The issue is waived on appeal.

Our review of the record discloses that Final Jury Instruction No. 23 further expounded upon the definitions listed in Instruction No. 22, when it stated, “A defendant forcibly resists law enforcement *when strong, powerful, or violent means are utilized* to evade an officer’s lawful exercise of his duties. *Some form of violent action toward another is required*, and if the defendant does nothing more than stand his ground, this requirement is not satisfied.” (Appellant’s App. at 58) (Emphasis added). We do not accept Shields’ contention that the jury was confused by the combination of these instructions.

Shields further contends that the trial court abused its discretion in giving Final Jury Instruction No. 24, which states, “A private citizen may not use force in resisting a peaceful arrest by an individual who he knows, or has reason to know, is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful.” (Appellant’s App. at 59). Shields contends that the instruction is incomplete because it omits exceptions to the rule. This argument is actually a version of the argument rejected in our discussion of Issue I. At worst, the instruction is superfluous and, assuming it to be error, it is harmless.

Affirmed.

BRADFORD, J., and BROWN, J., concur.