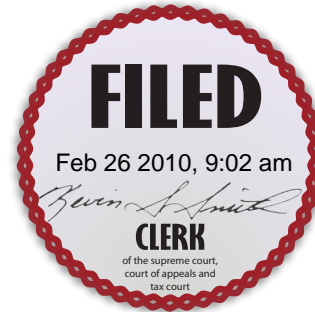


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KENYA FOY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0907-CR-692

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0901-CM-13470

February 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a bench trial, Appellant-Defendant Kenya Foy appeals her convictions for Class A misdemeanor Resisting Law Enforcement¹ and Class B misdemeanor Disorderly Conduct,² for which she received an aggregate sentence of 365 days in the Marion County Jail, with 361 days suspended, 180 to probation. Upon appeal, Foy challenges the sufficiency of the evidence to support her convictions. We affirm.

FACTS AND PROCEDURAL HISTORY

On January 19, 2009, Officers Lyle Semona and Nichole Gilbert of the Cumberland Police Department responded to a report of a fight involving subjects with guns, including a shotgun, at an apartment located at 810 Summerwood in Marion County. Upon arriving, Officer Semona, who was in full police uniform and identified himself as a police officer, saw an individual with a handgun run into the apartment.

Officer Semona followed the individual, a male, into the apartment. The male, who was pointing his gun at Officer Semona, was surrounded by several other individuals, including Foy. Officer Semona ordered the male to drop his handgun. In the process of placing the male into custody and escorting him outside, the handgun flew out of the male's hands and landed on the ground inside the doorway. The handgun lay approximately three to four feet from Foy. Upon subduing the male, Officer Semona attempted to retrieve the handgun, but in doing so, the male tried to stand up, forcing Officer Semona to focus his efforts on the male, not the gun.

¹ Ind. Code § 35-44-3-3 (2008).

² Ind. Code § 35-45-1-3 (2008).

Meanwhile, Foy, who was standing in the entryway of the apartment, was yelling and screaming and directing profane language at Officer Semona. Officer Semona asked her to back up, to permit him to control the male, but she did not comply. Foy did not touch Officer Semona, but she did not move out of the way. Foy continued yelling profanities, causing persons in neighboring apartments and across the street to come out.

Backup police Officer Gilbert, who was similarly dressed in full uniform, helped Officer Semona control the area. Officer Gilbert stood on the handgun and commanded the other individuals inside the apartment to remain still and keep their hands exposed. According to Officer Gilbert, Foy was right inside the door at the time, near the handgun. Officer Gilbert commanded Foy to “step back and stop,” but Foy continued yelling and did not remain still. Tr. p. 19. After Officer Gilbert detained another male, she twice commanded Foy to turn around and place her hands behind her back. Foy did not comply. Officer Gilbert then physically turned Foy around in attempt to handcuff her hands behind her back, causing Foy to attempt to turn back around to face Officer Gilbert and stiffen up. Officer Gilbert was eventually successful in placing Foy in handcuffs, and she forced Foy to sit on the apartment staircase until additional officers arrived. When other officers arrived, Officer Gilbert and another officer took Foy to Officer Gilbert’s police car. As Officer Gilbert escorted Foy to her car, she and her assisting officer were required to stand Foy up. Foy responded by planting her feet in the ground and yelling and screaming profanities. Officer Semona, who by this time was moving other suspects to his car a block away, could hear Foy screaming and yelling. He also heard her say, “I’m resisting, I’m resisting.” Tr. p. 13. As Officer Gilbert and her assisting officer

escorted Foy to Officer Gilbert's police car, Officer Semona observed Foy turn away, stop, or otherwise refuse to walk under her own free will. According to Officer Gilbert, Foy's action interfered with her investigation.

On January 22, 2009, the State charged Foy with Class A misdemeanor resisting law enforcement and Class B misdemeanor disorderly conduct. Following the State's presentation of evidence during the June 29, 2009 bench trial, defense counsel moved to dismiss pursuant to Indiana Trial Rule 41(B) in large part upon the grounds that the officers' entry into Foy's home violated her privacy rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution. The trial court denied defense counsel's motion on exigent circumstances grounds and ultimately found Foy guilty as charged. The trial court sentenced Foy to concurrent sentences of 365 days, with 361 days suspended, 180 to probation, for resisting law enforcement, and 180 days, with 176 days suspended, for disorderly conduct. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Foy challenges the sufficiency of the evidence to support her convictions. With respect to her conviction for resisting law enforcement, Foy argues that her actions did not rise to the level of forcible resistance and that the officers, who had entered her home without a warrant, were not engaged in the lawful execution of their duties. With respect to her conviction for disorderly conduct, Foy argues that there was no evidence that she continued yelling and screaming after being asked to stop and

that, in any event, she was engaging in protected political speech pursuant to Article I, Section 9 of the Indiana Constitution.

In evaluating the sufficiency of the evidence to support Foy's convictions, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

I. Resisting Law Enforcement

A. Forcible Resistance

Indiana Code section 35-44-3-3 provides that a person commits the crime of resisting law enforcement if she knowingly or intentionally “forcibly resists, obstructs, or interferes with a law enforcement officer” who is lawfully engaged in the execution of the officer's duties. Foy was charged with forcibly resisting, obstructing, or interfering with Officer Gilbert. In *Graham v. State*, 903 N.E.2d 963, 965-66 (Ind. 2009), the Indiana Supreme Court, reiterating that force is an element of the offense of resisting law enforcement, reversed a defendant's conviction on the grounds that his simple refusal to present his arms for cuffing did not establish the necessary force. In reaching this

conclusion, however, the *Graham* court noted that a defendant's use of relatively minor force, such as stiffening his arms when an officer grabs them to cuff them, does establish the requisite force. *Id.* at 966.

Foy analogizes her circumstances to those in *Graham*, and argues that her actions were not adequately forcible to sustain her conviction for resisting law enforcement. Here, unlike in *Graham*, Foy used her physical strength not only to stiffen her body,³ which under *Graham* is adequate force, but also to directly oppose Officer Gilbert's efforts to contain her. After ignoring Officer Gilbert's commands to remain still, Foy physically turned her body to face Officer Gilbert, in direct opposition to Officer Gilbert's efforts to turn Foy around in order to handcuff her. In addition, Foy forced officers to stand her upright and force her to walk, all the while screaming obscenities. We are convinced that Foy's use of violent and physical efforts to oppose Officer Gilbert constituted forcible resistance pursuant to Indiana Code section 35-44-3-3.

B. Lawful Execution of Duties

Generally, officers must obtain a search warrant to search a person's house. *Vitek v. State*, 750 N.E.2d 346, 348 (Ind. 2001). One well recognized exception to the warrant requirement is for an entry under emergency circumstances. *Id.* at 348-49. It is not necessary for police to have a warrant to enter a residence when the circumstances suggest a reasonable belief that a person within the premises is in need of aid. *Id.*

³ Contrary to Foy's contention that her "stiffening" was unrelated to Officer Gilbert's efforts to handcuff her, Officer Gilbert testified that Foy "stiffened up" as she physically turned her around and placed her in handcuffs. Tr. p. 21.

Here, Officers Semona and Gilbert were dispatched to the scene of a reported fight involving subjects with guns, and an individual with a handgun was seen running into Foy's apartment. The facts of (1) a reported fight involving guns; (2) the officers' observation of an individual holding a handgun running into Foy's apartment; and (3) the reported existence of at least one other gun on the scene demonstrate the presence of exigent circumstances justifying the officers' warrantless entry into Foy's apartment for purposes of rendering aid. *See id.*

To the extent Foy argues that this exigent circumstances justification somehow ended once one of the suspected guns was under Officer Gilbert's control, we cannot agree. Officers were aware that at least one other gun was reportedly at the scene; the parties inside the apartment, including Foy, failed to comply with officers' efforts to control the area; and Foy herself was disruptive and uncooperative. These facts demonstrate not only that the exigent nature of the circumstances was ongoing and justified the officers' continuing efforts at the scene, but also that there was ultimately probable cause for Foy's arrest. *See* Ind. Code § 35-33-1-1 (2008) ("A law enforcement officer may arrest a person when the officer has ... probable cause to believe the person is committing a misdemeanor in the officer's presence.") Having concluded that Officers Semona and Gilbert did not violate Foy's Fourth Amendment rights and were engaged in the lawful execution of their duties, we decline Foy's challenge on this ground.

II. Disorderly Conduct

A. Unreasonable Noise

Indiana Code section 35-45-1-3 provides, in pertinent part, that “[a] person who recklessly, knowingly, or intentionally ... makes unreasonable noise and continues to do so after being asked to stop ... commits disorderly conduct, a Class B misdemeanor.” For purposes of the disorderly conduct statute, noise is unreasonable if it is too loud for the circumstances. *See Johnson v. State*, 719 N.E.2d 445, 448 (Ind. Ct. App. 1999). A loud noise may be found to be unreasonable if it disrupts police investigations. *Id.*

Foy contends that while the record demonstrates she was yelling and screaming, it lacks evidence that she did so after being asked to stop. Contrary to Foy’s contention, the record demonstrates that Foy “continued yelling” after Officer Gilbert arrived on the scene, secured the handgun, and asked Foy to “step back and to stop.” Tr. pp. 19-20. In addition, Officer Semona requested that Foy, who was yelling and screaming as soon as Officer Semona entered the apartment, “back up” out of his way so he could control the male holding the gun and otherwise contain the situation. Tr. p. 8. Yet Foy responded by remaining in Officer Semona’s space and continuing to yell and scream obscenities at him. These facts and all reasonable inferences therefrom demonstrate that Foy’s efforts to make noise were in direct opposition to the officers’ commands that she cease. We are satisfied that the “being asked to stop” element of the offense was met.

B. Protected Speech

Article I, Section 9 of the Indiana Constitution provides, “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak,

write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.”

In evaluating whether the State has violated Article I, Section 9, we employ a two-step analysis. *Blackman v. State*, 868 N.E.2d 579, 584 (Ind. Ct. App. 2007), *trans. denied*. First we must determine whether the State action restricted a claimant’s expressive activity. *Id.* at 584-85. Second, if it has, we must decide whether the restricted activity constituted an abuse of the right to speak. *Id.* at 585.

With respect to the first prong, Foy must demonstrate that the State restricted her expressive activity. Foy’s conviction for yelling, screaming and swearing at police officers during an investigation constitutes the required restricted State action. *See id.*

With respect to the second prong, when reviewing the State’s determination that a claimant’s expression was an abuse of the right to free speech under the Indiana Constitution, we generally must find only that the determination was rational. *Id.* However, if the expressive activity that precipitated the disorderly conduct conviction was political in nature, the State must demonstrate that it did not materially burden the claimant’s opportunity to engage in political expression. *Id.* An individual’s expression which focuses on the conduct of a private party, including the speaker herself, is not political expression. *Id.*

The only evidence at trial regarding the content of Foy’s speech was that she used obscenities and stated, while being escorted to Officer Gilbert’s police car, “I’m resisting, I’m resisting.” Tr. p. 13. Foy’s speech focused upon her own conduct and therefore was

not political in nature. Accordingly, we need only find that the State's determination that Foy's comments were an abuse of her right to free speech was a rational one.

We conclude that it was. The State could have rationally concluded that Foy's loud, persistent, and obscenity-laden screaming and yelling while officers sought to secure a scene in which they were surrounded by multiple uncooperative persons, one gun, and at least one other undisclosed gun, in a relatively small space, interfered with their ability to function as law enforcement officers and constituted an abuse of the right to free speech. *See J.D. v. State*, 859 N.E.2d 341, 344 (Ind. 2007) (concluding that loud over-talking of police officers is not constitutionally protected speech).

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.