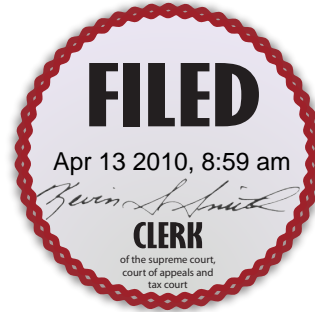


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DOMINICK D. WALKER,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 02A03-0909-CR-439

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0903-FD-270

April 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Dominick Walker appeals his convictions, following a bench trial, of resisting law enforcement as a Class D felony and as a Class A misdemeanor. For our review, Walker raises two issues, which we consolidate and restate as whether sufficient evidence supports Walker's Class D felony conviction. We also address sua sponte whether Walker's convictions violate double jeopardy. Concluding sufficient evidence supports Walker's Class D felony conviction, but his Class A misdemeanor conviction violates double jeopardy, we affirm in part, reverse in part, and remand.

Facts and Procedural History

On March 13, 2009, officers from the Fort Wayne Police Department were dispatched to the scene of a hit and run accident. Officers Johnson and Hughes, driving separately, drove in the direction witnesses had indicated the vehicle involved in the accident had fled. A few blocks away, the officers spotted a dark colored Pontiac Grand Prix, which matched the description given by witnesses of the vehicle involved in the accident. Three people, including Walker, were walking away from the car toward the front porch of a nearby house. Officers Johnson and Hughes exited their vehicles, asked the three men to stop, and began walking toward them. The men, however, sped up their pace and went into the house. Officer Hughes ran to the front door and tried unsuccessfully to prevent it from closing. Officer Hughes then kicked in the door but did not enter the house.

In the meantime, Officer Hoffman had arrived on the scene and went to secure the rear of the house. As he turned the back corner, Officer Hoffman saw Walker standing

just outside the house with the screen door open. At that time, Officer Hoffman did not know Walker was one of the three men who were seen running into the house by the other officers. Officer Hoffman began walking toward Walker and said, “Show me your hands. Stop. Police.” Transcript at 38. Walker looked at Officer Hoffman with a startled expression and immediately tried to go into the house. Officer Hoffman repeated, “Stop. Police. Show me your hands,” and grabbed the handle of the screen door as Walker tried to close it. Id. The two struggled with the door until the plate glass window in the top half of the door shattered. The shattered glass struck Officer Hoffman creating a large gash on his chin that required several stitches. Walker fled back into the house where he was eventually apprehended by one of the other officers.

The State charged Walker with resisting law enforcement as a Class D felony and a Class A misdemeanor. The information for the Class D felony alleged Walker forcibly resisted, obstructed, or interfered with Officer Hoffman, causing bodily injury. The information for the Class A misdemeanor alleged Walker intentionally fled from Officer Hoffman. Walker waived his right to a jury, and the trial court conducted a bench trial on July 28, 2009, after which it found Walker guilty of both counts. After a sentencing hearing on August 30, 2009, the trial court sentenced Walker to one and one-half years with 180 days executed and the remainder suspended to probation for the Class D felony and 180 days, all suspended, for the Class A misdemeanor, the two sentences to run concurrently. Walker now appeals.

Discussion and Decision

I. Standard of Review

Walker argues insufficient evidence supports his conviction for resisting law enforcement as a Class D felony. When reviewing sufficiency of the evidence claims:

[we] must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. [T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations and quotations omitted) (emphasis in original).

II. Resisting Law Enforcement

In order to convict Walker of resisting law enforcement as a Class D felony, the State must prove beyond a reasonable doubt that Walker knowingly or intentionally forcibly resisted, obstructed, or interfered with Officer Hoffman while Officer Hoffman was lawfully engaged in the execution of his duties, and while committing the offense, Walker caused bodily injury to Officer Hoffman. Ind. Code § 35-44-3-3. Walker raises two challenges to his conviction: 1) the evidence does not support a finding that Officer Hoffman was lawfully engaged in the execution of his duties; and 2) the evidence does not support a finding that Walker forcibly resisted Officer Hoffman.

A. Lawful Execution of Duty

Walker first contends Officer Hoffman had no legal right to enter the residence, and therefore, Walker was within his rights to resist the unlawful entry. Walker is correct that the general rule forbidding forceful resistance does not apply when the arrest is attempted by means of a forceful and unlawful entry into a citizen's home. See Adkisson v. State, 728 N.E.2d 175, 178 (Ind. Ct. App. 2000); Casselman v. State, 472 N.E.2d 1310, 1316 (Ind. Ct. App. 1985). However, Walker is incorrect in his assertion that he is not required to obey a police officer's order to stop if he believes it is unlawful. "In Indiana, an individual may not flee from a police officer who has ordered the person to stop, regardless of the apparent or ultimate lawfulness of the officer's order." Dandridge v. State, 810 N.E.2d 746, 749 (Ind. Ct. App. 2004), trans. denied. Thus, when Walker attempted to go back into the house, he committed the crime of resisting law enforcement by fleeing after being ordered to stop. See Ind. Code § 35-44-3-3(a)(3). As such, Officer Hoffman acted within his lawful duty to attempt to arrest Walker. See Ind. Code § 36-8-3-6(c)(2) (police officer's official duties include arresting, without process, "all persons who within view violate statutes"). In addition, Walker's flight created exigent circumstances justifying Officer Hoffman's entry into the residence to arrest Walker. See Snellgrove v. State, 569 N.E.2d 337, 340 (Ind. 1991) ("Traditionally, exigent circumstances [to justify a warrantless entry of a home] have been found present where ... a suspect is fleeing or likely to take flight in order to avoid arrest"). As a result, Walker's argument that Officer Hoffman had no legal right to enter the residence fails.

B. Forcible Resistance

A private citizen may not use force to resist a peaceful arrest by a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful. Cole v. State, 878 N.E.2d 882, 886-87 (Ind. Ct. App. 2007). A person forcibly resists when “strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.” Spangler v. State, 607 N.E.2d 720, 723 (Ind. 1993). However, the force involved need not rise to the level of mayhem. Graham v. State, 903 N.E.2d 963, 965 (Ind. 2009). Here, Walker tugged on the screen door against the opposite tugging by Officer Hoffman with a force powerful enough to cause the door to flex, breaking the plate glass window. Such force clearly rises to a level sufficient to support Walker’s conviction of forcibly resisting law enforcement. In addition, Officer Hoffman’s injuries directly resulted from Walker’s forcible resistance, which caused the plate glass window to break. As a result, sufficient evidence supports Walker’s conviction of resisting law enforcement as a Class D felony.

III. Double Jeopardy

We next address sua sponte whether Walker’s Class A misdemeanor conviction is barred by double jeopardy. See Smith v. State, 881 N.E.2d 1040, 1047 (Ind. Ct. App. 2008) (“We raise the issue sua sponte because a double jeopardy violation, if shown, implicates fundamental rights.”). Article 1, Section 14 of the Indiana Constitution provides, “No person shall be put in jeopardy twice for the same offense.” Two or more offenses are the same offense for double jeopardy purposes if, “with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the

essential elements of one challenged offense also establish the essential elements of another challenged offense.” Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis original).

The State alleged in the charging information for the Class A misdemeanor that Walker “did knowingly or intentionally flee from [Officer] Hoffman.” Appendix to the Brief of Defendant-Appellant at 10. Officer Hoffman testified when he first saw Walker, he was standing “inside the [open] screen door but fully outside the residence.” Tr. at 40. After Officer Hoffman ordered him to stop, Walker “began immediately trying to back step into the house ... [and] was trying to close the door.” Id. at 38. This testimony constitutes the only evidence of Walker’s attempt to flee from Officer Hoffman. However, this same evidence supports the forcible resistance necessary to convict Walker of the Class D felony. Had Walker been completely beyond the screen door when Officer Hoffman first ordered him to stop, we would have found sufficient evidence of flight prior to the attempt to keep Officer Hoffman from entering the house. However, because Walker was standing inside the open screen door, his steps backward while struggling to close the door against Officer Hoffman constitute a single act of resisting law enforcement. As such, Walker’s conviction for resisting law enforcement as a Class A misdemeanor fails the actual evidence test and violates double jeopardy.¹ See, e.g., Brown v. State, 830 N.E.2d 956, 965 (Ind. Ct. App. 2005) (concluding fleeing on foot in addition to fleeing in a vehicle constitutes a single act of resisting law enforcement and does not support separate convictions for fleeing and fleeing by means of a vehicle).

¹ We point out that Walker could have been convicted of the Class A misdemeanor based upon his flight from Officers Johnson and Hughes in the front of the house. However, the State did not allege that action in the charging information nor did it argue that as a basis for Walker’s conviction at trial.

Conclusion

Sufficient evidence supports Walker's conviction of resisting law enforcement as a Class D felony, and the conviction is affirmed. However, the two convictions of resisting law enforcement violate double jeopardy. Therefore, we reverse Walker's conviction of resisting law enforcement as a Class A misdemeanor and remand this case to the trial court to vacate the conviction and accompanying sentence.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and KIRSCH, J., concur.