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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-233

DONYEL PORTER APPELLANT V. STATE OF ARKANSAS APPELLEE	OPINION DELIVERED FEBRUARY 15, 2023 APPEAL FROM THE POPE COUNTY CIRCUIT COURT [NO. 58CR-20-818] HONORABLE JAMES DUNHAM, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Donyel Porter appeals his convictions on two counts of second-degree battery in violation of Arkansas Code Annotated section 5-13-202(a)(4)(A) (Supp. 2021). He challenges the sufficiency of the evidence supporting the convictions, specifically contending that the State failed to prove that (1) he had the "knowing" mens rea required by the second-degree-battery statute and (2) his actions caused the officers' injuries. We affirm.

I. *Facts and Procedural History*

This case involves the commission of an alleged second-degree battery by Porter that occurred on September 30, 2020, when two Russellville police officers, Bryan Robinson and Alex Shipley, responded to an alleged shoplifting-in-progress complaint at a local Walmart store. Porter was apprehended and arrested, and on January 11, 2022, a bench trial was held.

Officers Shipley and Robinson testified for the State. Officer Shipley noted that on September 30, 2020, he and Officer Robinson responded separately to the shoplifting-in-progress complaint. Police dispatch provided a description of the suspect received from the asset-protection employee and reported that the suspect had fled the scene on foot but was still in the general area. Not far from Walmart, the officers located Porter, whose physical appearance and clothing matched exactly the suspect's description.

Officer Shipley testified that Officer Robinson waved Porter down and got out of his patrol car to talk to him, with Officer Shipley arriving about twenty seconds later. Officer Shipley testified that once they made contact with Porter, he angled his body away from them like he was going to run, appeared nervous, avoided eye contact, and was like "a deer-in-headlights." Both officers were in full uniform and driving marked patrol units at the time of the incident, but neither had drawn a gun or Taser, been combative, or threatened Porter. Officer Shipley asked Porter for his ID, but Porter told Officer Shipley that he did not have it on him.

Not wanting to get in a foot pursuit, the officers stated almost simultaneously, "Put your hands behind your back; you're under arrest." Officer Shipley testified that Porter attempted to turn and flee but ran directly into Officer Robinson's grasp, as Officer Robinson had taken position several feet behind Porter. Officer Robinson wrapped his arms around Porter in a "bear hug" to keep him from running away. Officer Shipley stated that once Officer Robinson grabbed him, Porter "went ballistic" and flailed his arms in an

attempt to break free from the grasp. Officer Shipley stated that he immediately jumped in and "grabbed [Porter] like on his shoulder, like neck area" and pulled Porter toward him.

In accordance with his training, Officer Shipley pulled both Officer Robinson and Porter toward him in a jiu-jitsu type maneuver—and they ended up falling to the ground—in order to handcuff Porter and better control the situation. Despite the officers' commands to stop resisting, Porter continued to forcefully flail his body around on the ground, making it impossible for the officers to handcuff him. The two officers fought with him for forty seconds before they were able to handcuff him. The officers searched him and found the ID he had denied having when he initially was questioned.

Officer Shipley testified that, during the fight, the concrete was "chewing [his] hands up, chewing [his] knees up." He suffered bloody abrasions to his hands and knees. Officer Robinson's testimony about the incident with Porter was consistent with Officer Shipley's, and both officers testified that they would not have been injured if Porter had stopped resisting once he was brought to the ground. As a result of the altercation, Officer Robinson suffered bleeding on his knuckles, and he was treated at the hospital for his wounds. At the time of trial, he still had two scars from the injury. The State introduced photographs showing the injuries the officers sustained during Porter's arrest, including of Officer Shipley's knees and bleeding knuckles and palm and Officer Robinson's bleeding knuckles.

At the close of the State's case, Porter moved for a dismissal on all charges. Regarding the battery charges, Porter's counsel argued:

> [O]n the battery in the second degree, the State must show a prima facie case that the person knowingly causes physical injury to, or incapacitates, a person that he or she knows to be a law enforcement officer. Physical injury means impairment of physical condition, infliction of substantial pain, or infliction of bruising, swelling, or visible marks.
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> It's undisputed by both officers that the injuries occurred because of the concrete, or asphalt. The officer—the person that caused them to go to that concrete was the Officer Shipley. The only affirmative action that Mr. Porter took in this entire thing without being controlled by the officers is to pull back. That—there's no way he knowingly would understand that by pulling back that these officers would be injured at some point in time. He never had any intention to go to the ground. That was Officer Shipley that did that. At that point in time, his arms are pinned.
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> There's nothing in the report that says anything about kicking anybody, and there's nothing that shows that the kicking caused any injuries in any of the pictures. They said – no one testified that I got kicked and, therefore, these injuries occurred. The only reason that these injuries occurred is because Officer Shipley took all three of them to the ground and began maneuvering Mr. Porter around. Mr. Porter was not—there's no way anyone can say that Mr. Porter was in control of what happened while Officer Robinson and Officer Shipley are on top of him controlling what's happening. And as they both said, this happened within seconds. There's no way Mr. Porter could knowingly have conducted any of this. The only thing he knowingly did was take a step back.
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> Then at that point in time, the officers controlled what happened. They did what they were trained to do: control, subdue, and it happened to be on concrete, which they took the actions to get onto. There's nothing in here that, even once they got off of him and handcuffed, that Mr. Porter was perfectly fine. There's nothing in this that was not controlled—there's no violent action that was not controlled or initiated by Officer Shipley that [led] to the injuries on the concrete. He did not want to go to the concrete. Both officers even stated, We want—we were the ones that wanted to go to the concrete.

The motion was denied as to the two counts of second-degree battery as well as the single count of resisting arrest.

Porter testified in his own defense, stating that he became extremely nervous when Officer Shipley approached while Officer Robinson was talking with him, "with his hand on

his side like towards his weapon." He testified that he simply stepped back because he was nervous. He denied swinging his arms or kicking his legs and testified that he said to the officers, "I am not resisting."

At the close of all the evidence his counsel renewed the motion to dismiss, arguing:

> [T]he State has not made its burden. It is clear and undisputed that the officers are the ones that initiated the physical contact. The defendant could not have knowingly thought that injury would occur when the officers initiated physical contact with him, nor did he ask that he initiate any physical contact with anybody. The only thing that's shown is that the – Mr. Porter took a step backwards where he was bear hugged. Then Officer Shipley took them to the concrete, and they began maneuvering his body. There's no way that he would knowingly cause physical injury from being controlled by the officers, nor is there any evidence that he resisted arrest.

The circuit court again denied the motion, finding that there was

> sufficient evidence from which a finder of fact could determine that [Porter] kicked and fought and wrestled with the officers after Officer Shipley told him that he was under arrest. [Porter] turned and had his—or moved and had his altercation with Officer Robinson. And both officers testified that [Porter] used force and violence to wrestle with them and to—and would not submit.

Porter was convicted on the resisting-arrest and second-degree-battery charges and sentenced pursuant to a January 19, 2022 sentencing order. For each of the second-degree-battery convictions, he was sentenced as a habitual offender to ninety-six months' imprisonment with seventy-six months' suspended imposition of sentence.[1] He also was

[1]There is a discrepancy between the oral order and the sentencing order regarding the length of the suspended impositions of sentence for the second-degree-battery convictions. In such cases, the written sentencing order controls. *Ellis v. State*, 2019 Ark. 286, at 6, 858 S.W.3d 661, 664–65.

sentenced to twelve months in jail for resisting arrest, with all sentences to run concurrently. He filed a timely notice of appeal on February 1.

II. *Standard of Review and Applicable Law*

A motion to dismiss at a bench trial is identical to a motion for directed verdict at a jury trial in that it is a challenge to the sufficiency of the evidence. *Colen v. State*, 2022 Ark. App. 148, 643 S.W.3d 274. In a nonjury trial, a motion to dismiss must be made at the close of all the evidence and must state the specific grounds relied on for dismissal; if the defendant moves for dismissal at the close of the prosecution's case, the motion must be renewed at the close of all the evidence. Ark. R. Crim. P. 33.1(b) (2022). Failure to challenge the sufficiency of the evidence at the times and in the manner required constitutes a waiver of any argument pertaining to the sufficiency of the evidence to support the judgment. Ark. R. Crim. P. 33.1(c) (2022).

The denial of a motion to dismiss is affirmed if there is substantial evidence, direct or circumstantial, to support the conviction. *Marek v. State*, 2021 Ark. App. 447, 635 S.W.3d 785. Substantial evidence is evidence that is sufficient to compel a conclusion one way or the other beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the verdict, considering only evidence supporting the verdict. *Id.* Moreover, we do not weigh the evidence presented at trial, as that is a matter for the fact-finder, nor do we assess the credibility of the witnesses. *Id.* The fact-finder is not required to believe any witness's testimony, especially the self-serving testimony of the accused, because the accused

is the person most interested in the outcome of the trial. *E.g.*, *Adams v. State*, 2020 Ark. App. 107, at 11, 594 S.W.3d 884, 891.

A person commits second-degree battery if he "knowingly without legal justification, causes physical injury to or incapacitates a person [he] knows to be a law enforcement officer . . . while the law enforcement officer . . . is acting in the line of duty." Ark. Code Ann. § 5-13-202(a)(4)(A) (Supp. 2021). Arkansas Code Annotated section 5-2-202(2) (Repl. 2013) defines "knowingly" as follows:

> A person acts knowingly with respect to:
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> (A) The person's conduct or the attendant circumstances when he or she is aware that his or her conduct is of that nature or that the attendant circumstances exist; or
>
> (B) A result of the person's conduct when he or she is aware that it is practically certain that his or her conduct will cause the result[.]

III. *Discussion*

A. Requisite Mens Rea

Porter argues that there is insufficient evidence to support his second-degree-battery convictions because the State did not prove that he had the requisite mens rea element of second-degree battery. Specifically, he submits that he did not have knowledge that his actions would cause any physical injury to the law enforcement officers. Porter explains that when Officer Robinson exited his patrol vehicle and asked Porter to stop, he complied. Porter claims that he knew that the incident at the store would possibly trigger an encounter with law enforcement officers; however, he did not think that he had done anything up to that point that would amount to him breaking the law. Porter explains that while he was

complying with the order to stop, he was approached stealthily and from behind by Officer Shipley, whose first action in this encounter was to yell that Porter, who is already being described as "nervous," was under arrest.

Porter states that when he turned, he saw that Officer Shipley had his hand on his service weapon and that his biological reaction to such startling stimuli was to increase the distance between himself and the stressor that caused his feeling of apprehension. He argues that was not a substantial step toward evading arrest but merely taking a step back to see the whole picture.

Porter states that the officers acted as if this was an attempt to escape, and as soon as Porter took that one step backward, he was immediately grabbed from behind by Officer Robinson. He questions how a reasonable person would believe a step backward from an officer's startling order officer is conduct that is practically certain to cause bodily harm to the officers. He notes that this court has held that

> a criminal defendant's intent or state of mind is seldom apparent. One's intent or purpose, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by direct evidence but may be inferred from the facts and circumstances. Because intent cannot be proved by direct evidence, the fact-finder is allowed to draw on common knowledge and experience to infer it from the circumstances. Because of the difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts.

Benton v. State, 2020 Ark. App. 223, at 6, 599 S.W.3d 353, 357–58 (citations omitted). Porter argues that he had no knowledge that any action he had taken up to this point would

eventually cause the officers to suffer abrasions from rolling around on concrete, nor did he fight or do anything except respond to physical action against him in a nonviolent manner.

We disagree and hold that substantial evidence supports the circuit court's finding that Porter did have the requisite mental state necessary to support the second-degree-battery convictions. Viewing the evidence in the light most favorable to the State, there is evidence before us that could support the finding that Porter knowingly caused the officers' injuries. Porter had fled the Walmart location and was apprehended by the officer as he was still running from that incident. Porter took a step away when he was informed that he was under arrest, and without knowing an officer was just behind him, Porter was prevented from fleeing when Officer Robinson caught him in a bear hug. There was conflicting testimony between that of the officers and Porter as to whether Porter immediately began to thrash his arms and legs, trying to break free from Officer Robinson's hold. Both officers testified that his thrashing continued after Officer Shipley pulled both Officer Robinson and Porter to the ground, an action Officer Shipley took to try to mitigate against injury, in accordance with his police training.

Porter does not challenge his conviction for resisting arrest, a crime which, by definition, occurs when a person uses or threatens to use physical force or any other means that creates a substantial risk of physical injury to any person. Ark. Code Ann. § 5-54-103(a) (Repl. 2016). There was significant testimony at trial regarding Porter initially fleeing from the Walmart loss-prevention officer, encountering Officer Robinson as he continued running from the scene, losing sight of Officer Robinson, and then encountering Officer

Shipley. When Officer Shipley told Porter that he was under arrest because he matched the description they had been provided, Porter turned away from Officer Shipley, who was trying to arrest him and somehow bumped into or ran into Officer Robinson, who then restrained him. When Officer Shipley brought them all to the ground, it was Porter's obligation, under the law, to submit. The circuit court found that it was clear beyond a reasonable doubt that Porter intended the ordinary consequences of his struggle and attempt to resist that ensued. He did not submit and continued to resist and kick and would not give the officers his arms to be handcuffed. The entire event resulted in the injuries to the officers' hands and knees, which would certainly have been something a person would expect under the circumstances. Accordingly, the circuit court did not err in finding that Porter acted with the requisite knowledge that his resisting arrest could cause physical injury to either the officers or himself.

B. Cause of Officers' Injuries

Porter next claims that the natural and probable consequences of him taking a single step backward is not what caused the officers' injuries. He asserts that he was fully and completely complying with the officers before his backward step, and he did not threaten or attempt to use physical force to resist arrest. He maintains that he was merely frightened by Officer Shipley's order and that his backward step did not create a substantial risk of physical injury to anyone.

He further argues that but for Officer Shipley's takedown, neither he nor Officer Robinson would have ended up on the concrete, which caused their minor injuries. Porter maintains that the injuries sustained were caused by the officers themselves.

Porter notes that "physical injury" is defined as the "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma." Ark. Code Ann. § 5-1-102(14) (Supp. 2021); *see also Benton*, *supra*.

He cites *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983), in which an officer sustained abrasion injuries, and this court held that the evidence was insufficient to support a conviction of battery in the third degree because the evidence did not show that the injuries to the victim caused him "substantial pain." In *Kelley*, the injury did not require medical attention and was described by one witness as a "fingernail scratch." *Id.* Under the relevant statute, a person commits battery if the person causes physical injury to another person.

> In determining whether an injury inflicts substantial pain the trier of fact must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted. The finder of fact is not required to set aside its common knowledge and may consider the evidence in the light of its observations and experiences in the affairs of life.

Armstrong v. State, 35 Ark. App. 188, 191, 816 S.W.2d 620, 622 (1991) (quoting *Holmes v. State*, 15 Ark. App. 163, 166, 690 S.W.2d 738, 740 (1995)).

Porter submits that when Officer Robinson—there was testimony about Robinson being a larger man than Porter—"bear hugged" him, any reasonable person would have believed that the officer was in control of the situation. However, while Officer Robinson had Porter in a bear hug with his arms down at each side, Officer Shipley decided to employ his jiu-jitsu training and take both Officer Robinson and Porter to the ground. Porter urges

that this action, the takedown, is the but for, proximate, and actual cause of the abrasion injuries suffered by the officers.

Porter reiterates that the cause of the injuries was simply the size of these men and the force of gravity when falling to the pavement. Porter claims that he did not grab their hands, legs, or any part of their bodies and grind them against the pavement, they did so while in control of their own bodies and the situation at hand.

We disagree and hold that the officers' injuries were the natural and probable cause of Porter's refusal to comply with police orders. If he had not resisted, the injuries would not have happened because the injuries were the result of the officers' skin moving back and forth against the concrete, which Officer Shipley described as "chewing up" his skin. Officer Robinson even required treatment at a hospital for his injuries and had scars at the time of trial over a year later. Under these circumstances, substantial evidence supports the circuit court's conclusion that Porter knowingly caused Officer Shipley's and Officer Robinson's injuries.

Porter's contention that neither of the officers would have been injured "[h]ad Officer Shipley just helped restrain him and put handcuffs on him while physically controlled by Officer Robinson" is not well taken. And specifically, his argument that the officers did not sustain a "physical injury" as required for conviction has no merit.

Porter's argument that the officers' injuries cannot sustain a finding that "physical injury" occurred was not made below; thus, it is unpreserved and cannot be reached. *E.g.*, *Neal v. State*, 2020 Ark. App. 245, at 3–4, 601 S.W.3d 135, 137. Alternatively, even if

reached, it has no merit. As stated above, "'Physical injury' means the impairment of physical condition; infliction of substantial pain; or infliction of bruising, swelling, or a visible mark associated with physical trauma[.]" Ark. Code Ann. § 5-1-102(14). Scratches and abrasions are sufficient to meet the definition of physical injury. *E.g.*, *Conner v. State*, 75 Ark. App. 418, 420, 58 S.W.3d 865, 867 (2001). In determining whether the physical injury exists for the offense of battery, the fact-finder may consider the severity of the attack and the sensitivity of the area of the body to which the injury was inflicted. *E.g.*, *Linn v. State*, 84 Ark. App. 141, 144, 133 S.W.3d 407, 409 (2003). Additionally, the circuit court may rely on its common knowledge, experiences, and life observations in making its decision. *E.g.*, *id.*

To support his argument, Porter cites only to cases decided prior to the 1999 amendment to the statutory definition of "physical injury" to include the "infliction of bruising, swelling, or visible marks associated with physical trauma." *See Conner*, 75 Ark. App. at 419–20, 58 S.W.3d at 866–67 (discussing implication of the statutory change and holding that scratches and bruises from being dragged and that did not require medical care or missing work met the definition of "physical injury"). Under both the statutory definition and under *Conner*, the injuries sustained by the officers in this case meet the definition of "physical injury."

The State further contends that Porter's main argument—that the evidence failed to prove he caused the physical injuries to the officers—in fact supports the circuit court's conclusion that he did cause the injuries. Based on the detailed account from both officers as to the struggle required to subdue and apprehend Porter, we hold that the evidence

supports the circuit court's finding that it was Porter's resisting arrest that resulted in the officers' physical injuries. The circuit court was not required to accept Porter's self-serving testimony to the contrary when it weighed the credibility of the witnesses. *See, e.g.*, *Adams*, 2020 Ark. App. 107, at 11, 594 S.W.3d at 891. Because substantial evidence supports the convictions, we affirm.

Affirmed.

HARRISON, C.J., and KLAPPENBACH, J., agree.

Eugene Clifford, for appellant.

Leslie Rutledge, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.