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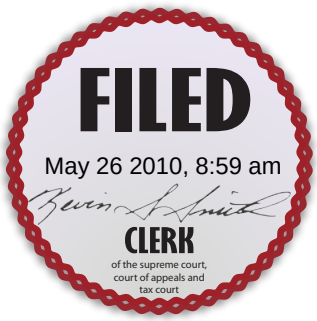

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF L.W.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0911-JV-1119
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Ann Moores, Judge
The Honorable Gary Chavers, Magistrate
Cause No. 49D09-0907-JD-002173

May 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

L.W. was adjudicated a delinquent child for committing resisting law enforcement, which would be a Class A misdemeanor if committed by an adult. L.W. appeals the adjudication and argues that the evidence is insufficient to prove that he committed resisting law enforcement. We affirm.

Facts and Procedural History

On July 17, 2009, Indianapolis Metropolitan Police Department Officer Andrew Girt ("Officer Girt") was asked to check on the welfare of a person who was believed to be intoxicated. When the officer arrived at the apartment complex, he observed L.W. lying face down on the front porch of the residence. Officer Girt had to shake L.W. to wake him. The officer then identified himself as a police officer, and the officer was in uniform. L.W. responded by swearing profanely at Officer Girt.

Officer Girt helped L.W. to his feet, and attempted to place him in handcuffs. L.W. tried to push and pull away from the officer using a "strong arm technique." Tr. pp. 5, 7. The officer told L.W. to stop resisting, but L.W. continued to resist. Officer Girt was eventually able to place L.W. in handcuffs, and L.W. was arrested.

At the denial hearing held on September 30, 2009, the juvenile court adjudicated L.W. a delinquent child for committing resisting law enforcement, which is a Class A misdemeanor if committed by an adult. The dispositional hearing was held on that same date, and the court placed L.W. on formal probation. L.W. now appeals.

Standard of Review

Our standard of review of a claim of insufficient evidence is well settled. When reviewing the sufficiency of the evidence in a juvenile adjudication, we neither reweigh

the evidence nor judge the credibility of the witnesses. K.S. v. State, 849 N.E.2d 538, 543 (Ind. 2006). We consider only the evidence most favorable to the juvenile court's judgment and the reasonable inferences to be drawn from that evidence. Id. We will affirm if there is substantial probative evidence to support the delinquency adjudication. Id.

Discussion and Decision

L.W. argues that the evidence is insufficient to establish that he committed resisting law enforcement, which is a Class A misdemeanor if committed by an adult. Indiana Code section 35-44-3-3 (2004) provides that "[a] person who knowingly or intentionally . . . forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties . . . commits resisting law enforcement[.]" L.W. argues that the State failed to prove that he "forcibly" resisted and that the officer was "lawfully engaged" in the execution of his duties.

First, we address L.W.'s argument that he did not "forcibly" resist by pulling or pushing away from Officer Girt. Our supreme court examined the element of "forcibly resisting" in Spanger v. State, 607 N.E.2d 720, 723 (Ind. 1993), and concluded that one "forcibly resists" when "strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties." The court reversed Spangler's conviction after concluding that his refusal to accept service of process from an officer, and walking away from the officer in the face of demands that he accept a protective order was not forcible resistance. Our supreme court also reversed a resisting

law enforcement conviction where the defendant was convicted for refusing to present his arms for handcuffing. Graham v. State, 903 N.E.2d 963, 965-66 (Ind. 2009).

Yet, in Graham, the court noted that "'stiffening' of one's arms when an officer grabs hold to position them for cuffing" constitutes "forcible resistance." Id. at 966. The court cited with approval our court's opinion in Johnson v. State, 833 N.E.2d 516, 517 (Ind. Ct. App. 2005), wherein we concluded that the defendant "forcibly resisted" by pushing away from the officer with his shoulders and stiffening up when the officers attempted to place the defendant in a police vehicle.

Relying on Graham, our court reversed a resisting law enforcement conviction in Berberena v. State, 914 N.E.2d 780 (Ind. Ct. App. 2009), trans. denied. In that case, the officer ordered the defendant to place his hands behind his back, and when the defendant did not comply, the officer pushed the defendant against the wall of a building. The officer then engaged in a brief struggle with the defendant to grab his hands and place them in handcuffs. However, there was no evidence that the "defendant stiffened his arms or otherwise 'made threatening or violent actions' to contribute to" the brief struggle. Id. at 782. Therefore, we concluded that "[b]ecause there was no evidence that Berberena's opposition was forceful rather than merely difficult, the evidence is insufficient to support his conviction." See also Colvin v. State, 916 N.E.2d 306, 309 (Ind. Ct. App. 2009), trans. denied (reversing a resisting law enforcement conviction because the "evidence [did] not support a reasonable inference that Colvin did more than passively resist the officers").

Unlike the defendants in Graham and Berberena, L.W. did more than passively resist. After the first handcuff was placed on his arm, L.W. used what Officer Girt described as a "strong arm technique" to push and pull away from the officer. Specifically, the officer testified that L.W. was "[t]rying to pull away from me and push me away at the same time." Tr. p. 5. The officer struggled with L.W. for approximately forty seconds before he was able to secure the second handcuff. From this evidence, we conclude that the State proved that L.W. "forcibly resisted."

We now turn to L.W.'s argument that Officer Girt was not "lawfully engaged" in the execution of his duties. Specifically, L.W. argues that the officer did not have probable cause to arrest him for the offense of public intoxication or possession of alcohol by a minor. However, "[t]he general rule in Indiana is that '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.'" Row v. Holt, 864 N.E.2d 1011, 1017 (Ind. 2007) (quoting Shoultz v. State, 735 N.E.2d 818, 823 (Ind. Ct. App. 2000), trans. denied (observing that even if the arrest for an offense was invalid, resisting is still an independent offense). Indiana Code section 35-44-3-3 "does not give the individual the prerogative to resist an arrest for which he believes there is insufficient probable cause or is otherwise unlawful." Dora v. State, 783 N.E.2d 322, 327 (Ind. Ct. App. 2003), trans. denied.

Our court has recognized the following exception to the general rule: "the rule that a citizen may not resist a peaceful, though illegal, arrest was not 'intended as a blanket

prohibition so as to criminalize any conduct evincing resistance where the *means used* to effect an arrest are unlawful.'" Shoultz, 735 N.E.2d at 823 (quoting Casselman v. State, 472 N.E.2d 1310, 1316 (Ind. Ct. App. 1985) (emphasis in original)). We have held that a police officer is not "lawfully engaged" in the execution of his or her duties when the officer unlawfully enters a residence or uses unconstitutionally excessive force to effect an arrest. Id. (citations omitted).

Here, Officer Girt proceeded to the residence in question after he was asked to check on the welfare of an allegedly intoxicated person. When he arrived, he observed L.W. lying face down on the porch of the apartment complex, and had difficulty waking L.W. L.W. had to be shaken several times before he was coherent. The officer therefore reasonably believed that L.W. was intoxicated. The fact that the record does not establish whether Officer Girt had a reasonable belief that seventeen-year-old L.W. was a minor at the time of the arrest is not important. Because the means used to effect the arrest were not unlawful, Officer Girt was "lawfully engaged" in the execution of his duties when he arrested L.W.

For all of these reasons, we conclude that the evidence was sufficient to prove that L.W. committed resisting law enforcement, which is a Class A misdemeanor if committed by an adult. Accordingly, we affirm the juvenile court's delinquency adjudication.

Affirmed.

RILEY, J., and BRADFORD, J., concur.