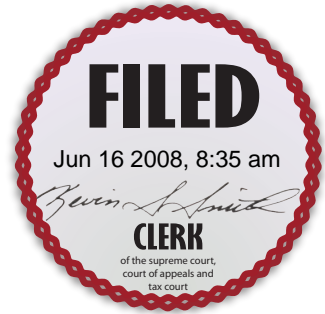


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA E. GALE,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 03A01-0712-CR-612

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Roderick D. McGillivray, Judge
Cause No. 03D02-0511-CM-1523

June 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Joshua Gale appeals following his convictions for Criminal Trespass as a Class A misdemeanor;¹ Battery Resulting in Bodily Injury as a Class A misdemeanor;² and Resisting Law Enforcement as a Class A misdemeanor,³ for which he received an aggregate two-year sentence in the Bartholomew County Jail. Upon appeal, Gale challenges the sufficiency of the evidence to support his conviction for resisting law enforcement. In addition, Gale challenges his sentence by arguing that the trial court failed to consider as a mitigator the hardship of his imprisonment on his dependents, and that the court failed to justify its imposition of consecutive sentences. We affirm.

FACTS AND PROCEDURAL HISTORY

In the light most favorable to the State, the record reveals that in the afternoon or evening of October 13, 2005, Gale, without permission, walked into a residence at 122 North Brooks Street in Columbus. At the time, Phillip Capps was lying on a mattress in a bedroom at the residence. Gale approached Capps, tried to kick him in the head, held him in a choke hold, and elbowed him in his mouth. As a result, Capps sustained a bloody lip and a scratch on the side of his neck. Gale subsequently left the premises.

Columbus Police Department Officer Mark Ward responded to the scene and observed scratches on Capps's neck and a red mark behind his ear. Officer Ward sent additional officers to locate Gale. Columbus Police Department Officer Eric Kapczynski, who was assisted by one Officer Burton, found Gale at a house at 545 McClure Street.

¹ Ind. Code § 35-43-2-2(a)(5) (2005).

² Ind. Code § 35-42-2-1(a)(1)(A) (2005).

³ Ind. Code § 35-44-3-3(a)(1) (2005).

While attempting to arrest Gale and escort him to their police vehicle, Gale pulled away from Officers Kapczynski and Burton, physically resisting their efforts to escort him. Officers Kapczynski and Burton were required to pull Gale toward their vehicle. After placing Gale into Officer Burton's police vehicle, and following it toward the jail, Officer Kapczynski observed Gale banging on the police vehicle's inner partition and loudly yelling and screaming, causing Officer Burton to stop the vehicle, exit, and subdue Gale with pepper spray. Officer Burton was then able to proceed to the jail without incident.

On November 8, 2005, the State charged Gale with criminal trespass (Count 1), battery resulting in bodily injury (Count 2), resisting law enforcement (Count 3), and criminal mischief (Count 4). Following a December 6, 2007 bench trial, the trial court found Gale guilty of criminal trespass, battery, and resisting law enforcement (Counts 1-3) and acquitted him of criminal mischief (Count 4). The court imposed a one-year executed sentence for each conviction, with Gale's sentence for battery (Count 2) to run consecutive to his sentence for trespass (Count 1), and his sentence for resisting law enforcement (Count 3) to run concurrent to his sentences for Counts 1 and 2, for an aggregate sentence of two years in the Bartholomew County Jail. This appeal follows.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Gale's first challenge is to the sufficiency of the evidence to support his conviction for resisting law enforcement. Our standard of review for a sufficiency-of-the-evidence claim is well-settled. We will not reweigh the evidence or judge the credibility of witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We

will 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.* Reasonable doubt is a doubt which arises from the evidence, the lack of evidence, or a conflict in the evidence. *Id.*

Indiana Code section 35-44-3-3 provides that a person commits the crime of resisting law enforcement if he knowingly or intentionally “forcibly resists, obstructs, or interferes with a law enforcement officer” who is lawfully engaged in the execution of his duties.

Gale bases his challenge upon *Spangler v. State*, 607 N.E.2d 720, 722-25 (Ind. 1993), wherein the Indiana Supreme Court held that a defendant’s “uncooperative state” and refusal to accept service of process were not “forcible” resistance sufficient to satisfy Indiana Code section 35-44-3-3. In arriving at this conclusion, the Court observed that the defendant’s refusal had involved “no strength, power, or violence directed towards the law enforcement official,” nor did it involve any “movement or threatening gesture made in the direction of the official.” *Spangler*, 607 N.E.2d at 724.

Gale’s actions, in contrast, in no way mirror the nonphysical, nonviolent nature of the defendant’s actions in *Spangler*. Not only did Gale exert physical strength and power in an effort to impede the arresting officers’ efforts to escort him to the police vehicle, he screamed and yelled and banged on the partition once inside the vehicle such that Officer Burton was required to stop the vehicle and subdue him. The fact that the partition

prevented any physical contact between Gale and Officer Burton does not, of course, mitigate his culpability. The question is only whether Gale's actions forcibly interfered with law enforcement activity. Gale's physically pulling away from the officers and his violence inside the police vehicle, causing Officer Burton to stop and exit the vehicle, are sufficient evidence to support Gale's conviction for resisting law enforcement. *See Small v. State*, 632 N.E.2d 779, 783 (Ind. Ct. App. 1994) (finding sufficient evidence of resisting law enforcement where defendant used power and strength to pull away from arresting officers), *trans. denied*.

II. Sentencing

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007).

A. Mitigating Factor

Gale challenges the trial court's alleged failure to consider the hardship to his dependents as a mitigating factor in his sentence. Indiana Code section 35-50-3-2 (2005) provides that "[a] person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year" In contrast with felony sentencing statutes which provide for a sentencing range with an advisory sentence, this statute provides for only a maximum allowable sentence. A trial court is therefore not required to articulate and balance the aggravating and mitigating factors when imposing sentence on a misdemeanor conviction. *Creekmore v. State*, 853 N.E.2d 523, 527 (Ind. Ct.App. 2006), *clarified on denial of reh'g by Creekmore v. State*, 858 N.E.2d 230 (Ind. Ct. App. 2006)

(on unrelated issue). Accordingly, we find no abuse of discretion in the trial court's alleged failure to consider the mitigator of hardship to Gale's dependents.

B. Consecutive Sentences

Gale's final challenge is to the trial court's alleged failure to articulate an aggravating factor in support of its imposition of consecutive sentences for Counts 1 and 2. Indiana Code section 35-50-1-2(c) (2005), which provides that the trial court "shall determine whether terms of imprisonment shall be served concurrently or consecutively," does not distinguish between felony and misdemeanor sentences. *See Cuyler v. State*, 798 N.E.2d 243, 246 (Ind. Ct. App. 2003), *trans. denied*. The Indiana Supreme Court has held that a trial court must find at least one aggravating circumstance to justify the imposition of consecutive sentences. *Ortiz v. State*, 766 N.E.2d 370, 377 (Ind. 2002). In addition, the court must articulate, explain, and evaluate the aggravating circumstances that support the sentence. *Lander v. State*, 762 N.E.2d 1208, 1215 (Ind. 2002).

In imposing Gale's sentence, the trial court stated the following:

All right Mr. Gale, I don't believe you have any remorse for any of the things that you've done here. I believe that you are taking classes in the DOC and I think they are teaching you what to say but I don't think they are changing your way of thinking or your actions in any way, shape, or form.

Tr. p. 155. Because the trial court was not required to justify each misdemeanor sentence with aggravators and mitigators, we conclude that its reference to the lack-of-remorse aggravator was in support of its imposition of consecutive sentences. A defendant's lack of remorse can constitute an aggravating circumstance. *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003). During the sentencing hearing, Gale claimed to be remorseful but

equivocated about his involvement in the crimes. In addition, also during the sentencing hearing, Gale allegedly used his middle finger to make a profane gesture at Officer Ward. We acknowledge that the “lack of remorse” aggravator has been described by the Supreme Court to be a “modest” aggravator. *See Georgopoulos v. State*, 735 N.E.2d 1138, 1145 (Ind. 2000). Here, however, the trial court used it merely to impose an aggregate sentence of two years rather than one. In addition, in light of the above circumstances, the trial court was within its discretion to consider Gale’s lack of remorse to be particularly egregious. Accordingly, we find no abuse of discretion in the trial court’s imposition of consecutive sentences in Counts 1 and 2.

Having concluded that Gale’s conviction for resisting law enforcement was supported by sufficient evidence and further, that his challenges to his sentence are without merit, we affirm his convictions and aggregate two-year sentence imposed by the trial court.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.