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IN THE
COURT OF APPEALS OF INDIANA

LAVAR TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0706-CR-297
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0609-FD-966

December 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Lavar Taylor appeals his convictions, after a jury trial, of resisting law enforcement, a class A misdemeanor, and possession of cocaine within 1,000 feet of a family housing complex, a class B felony.

We affirm.

ISSUES

1. Whether the trial court abused its discretion when it admitted into evidence testimony regarding Taylor's refusal to comply with orders by law enforcement officers and the cocaine found in Taylor's pocket.

2. Whether the trial court erred when it refused Taylor's tendered instruction concerning a statutory defense to the possession charge.

FACTS[1]

At approximately 1:00 a.m. on September 15, 2006, Officers Ronald Kaszas and James Burns of the South Bend Police Department were patrolling the area of the LaSalle Park Homes ("the LaSalle"). The LaSalle is a complex of 150 government housing units, including 2-, 3- and 4-bedroom apartments, in which many families reside. The LaSalle is posted for "no trespassing," and the officers were alert for loiterers. (Tr. 131). Having observed a strange vehicle with an out-of-town license plate and multiple occupants parked in a LaSalle lot, they approached on foot to investigate. The officers (both in uniform) were determining the vehicle occupants' identities when Taylor walked around the corner.

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[1] We bring to the attention of Taylor's appellate counsel that "[a] table of contents shall be prepared for every Appendix" and "shall specifically identify each item contained in the Appendix." Ind. Appellate Rule 50(C).

Standing "right at the corner" of a LaSalle apartment building, at a distance of 90-100 feet from the officers, Taylor "start[ed] yelling, f*** the police. Get the f*** out of here," and "What are you bothering them for?" (Tr. 134, 133, 171). Officer Kaszas "told him [to] quiet down, go on home." (Tr. 171). Taylor "began yelling, again, f*** the police." (Tr. 134). "After he said it the second time, . . . [the officers] repeated [their instructions back to him to quiet down and go home," and "he said it again." (Tr. 172). The officers completed their interaction with the occupants of the vehicle. Kaszas believed that Taylor might be intoxicated, and they instructed Taylor "to come to [them], to find out what his problem was." (App. 111[2]). Taylor turned and walked away, "yelling, f*** the police." *Id.*

Officer Burns followed on foot, and Taylor began to run. Burns asked him to stop. Burns "repeated . . . over and over, stop, police, stop running." (Tr. 173). In the meantime, Kaszas had driven his squad car to try to intercept Taylor. Kaszas could hear Burns yelling at Taylor to stop, and he drove to where Burns had indicated Taylor was running. Taylor "came around the corner of a building," and Kaszas yelled, "Stop, police, get on the ground." (Tr. 135). Taylor "turned and ran straight to an apartment door." *Id.* With Kaszas "still yelling for him to stop, get on the ground," Taylor "grab[bed] the door handle with his hand and hit[] it with his shoulder." (Tr. 136). Kaszas believed Taylor was "breaking in" and deployed his taser. *Id.* Taylor fell to the ground. Kaszas arrested Taylor for disorderly conduct and resisting law enforcement.

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[2] Testimony identified as contained in the Appendix is testimony from the April 30, 2007, hearing on Taylor's motion to suppress.

Burns arrived and conducted a search of Taylor incident to his arrest. In the pocket of Taylor's pants, Burns found three baggies containing a white rock-like substance – which the field test showed positive for cocaine. Subsequent testing showed that the baggies contained 1.27 grams of cocaine.

On September 19, 2006, the State charged Taylor with disorderly conduct, a class B misdemeanor; resisting law enforcement, a class A misdemeanor; and possession of cocaine, a class D felony. Subsequently, the State added a charge of possession of cocaine within 1,000 feet of a family housing complex,[3] a class B felony.

On October 10, 2006, Taylor filed a motion to suppress evidence – arguing that "police did not have cause to stop and frisk" him. (App. 76). At the suppression hearing on October 23, 2006, the officers testified consistent with the foregoing as to the yelling and the chase. Taylor testified that he "didn't say anything . . . at all" to the officers when he saw them in the LaSalle parking lot, and "they didn't say nothing to [him]." (App. 140). Taylor admitted that the officers "told [him] to stop," and he "kept on going" and "wasn't going to stop." *Id.* Taylor's counsel argued that "if nothing was said by Taylor," the officers had "no cause to stop him"; and even if "the officers were telling the truth," Taylor's yelling was "political speech" protected by the First Amendment so as to "invalidate the entire stop and anything subsequently found." (App. 145, 147). The trial court denied Taylor's motion to suppress, opining that the officers "had reason to believe" that Taylor's "screaming, f*** the police, at 1:00 a.m. in the morning, in a

[3] A "family housing complex" is defined at Indiana Code section 35-41-1-10.5. No one argues that the Lasalle fails to meet this statutory definition.

residential neighborhood where the residences are close together and the defendant was near one of the buildings" was disorderly conduct, and that Taylor's "own testimony" indicated that he failed "to stop after being ordered to do so." (Tr. 147, 149).

A jury trial was held on November 30 and December 1, 2007. At the outset, before any testimony was heard, Taylor objected to the admission of evidence "for the same reason as the motion," to which the trial court responded, "Okay." (Tr. 123, 124).[4] Officers Kaszas and Burns testified to the events at the LaSalle as indicated above. The baggies found in Taylor's pocket (and their contents) were admitted, and the jury heard evidence that the baggies contained 1.27 grams of cocaine. Taylor testified that he had seen the officers in the parking lot but "ignored" them, (Tr. 270); he said nothing to them, and they said nothing to him. According to Taylor, he then was walking back to the LaSalle apartment where his girlfriend lived and "somebody told him to stop," but he "kept on going." (Tr. 281). When he was "five feet away" from her front door, he saw Kaszas, who "jump[ed] out" of his squad car and shot Taylor with the taser gun. (Tr. 283). Taylor denied that Burns found baggies of cocaine in his pocket.

Taylor requested that the jury be instructed on the statutory defense to the offense of possession within 1,000 feet of a family housing project.[5] The trial court refused the instruction, finding it unsupported by the evidence. The jury acquitted Taylor on the

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[4] Taylor's counsel stated that the objection was "just for the record" and that he "m[ight] object later on, at the appropriate time." (Tr. 124-25). However, there was no further objection in this regard during the course of testimony by the two officers.

[5] The language of the provision is provided subsequently, in the discussion of the instruction issue.

disorderly conduct charge, but it found him guilty of the charges of resisting law enforcement and possession of cocaine within 1,000 feet of a family housing complex.[6]

DECISION

1. Admission of Evidence

Taylor first argues that the trial court "improperly denied" his motion to suppress evidence because he "engaged in protected political speech directed at police officers regarding their treatment of other citizens." Taylor's Br. at 8. Because his "speech was protected," Taylor concludes, the officers "had no cause to attempt to stop him and any items subsequently found on his person should have been suppressed." *Id.*

Although Taylor frames his issue as the denial of his motion to suppress, he appeals following a completed trial. Therefore, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005); *Turner v. State*, 862 N.E.2d 695, 699 (Ind. Ct. App. 2007). Nevertheless, the standard of review of ruling on the admissibility of evidence is essentially the same whether the challenge is made by pretrial motion to suppress or by trial objection. *Id.* We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Id.* However, we must also consider the uncontested evidence favorable to the defendant. *Id.*

Taylor cites *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996), and its statement that under the Indiana Constitution, protected political expression is that

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[6] The jury also found Taylor guilty of the offense of possession of cocaine, a class D felony. The trial court initially entered judgment on this conviction but later vacated it.

commenting on government action, such as "criticizing the conduct of an official acting under color of law." Taylor asserts that his statement to police concerned their treatment of the vehicle occupants, and the State concedes that Taylor's "statements about police activity were likely 'political speech'" under the Indiana Constitution. State's Br. at 6.

However, we note that according to *Whittington*, we "judge the nature of expression by an objective standard, and the burden of proof is on the claimant to demonstrate that his . . . expression would have been understood as political" speech that is protected by the Indiana Constitution. *Id.* The repeated refrain of Taylor's comments was "f*** the police." Based upon the particular facts and circumstances surrounding this case, we are hard pressed to find that the continued his use of such vulgar comments was anything other than an expression of Taylor's anger, and perhaps animus, toward law enforcement.

Moreover, even if some of Taylor's statements – that the officers should "stop bothering" the occupants of the car – were protected political speech, Indiana's constitutional "right to speak is qualified" by the responsibility to not "abuse" that right. *Whittington*, 669 N.E.2d at 1368. In *J.D. v. State*, 859 N.E.2d 341, 344 (Ind. 2007), "J.D.'s alleged political speech consisted of persistent loud yelling over and obscuring of [an officer]'s attempts to speak and function as a law enforcement officer." J.D.'s yelling "obstructed and interfered with" the officer's performance of her legal function. *Id.* Therefore, "J.D.'s alleged political speech clearly amounted of an abuse of the right to free speech." *Id.* Similarly, in *Blackman v. State*, 868 N.E.2d 579 (Ind. Ct. App. 2007), *trans. denied*, an officer stopped a vehicle in which Blackman was a passenger. Upon

being asked to step out of the vehicle, Blackman shouted at the officer. When asked to leave the scene, Blackman "raised her voice increasingly louder and louder using profane language," interfering with the officers' performance of their duties. *Id.* at 587. We noted that one's "right to speak" was of "paramount importance," but that one's expression of "protected political speech does not obviate one's responsibility to act in a civilly responsible manner." *Id.* at 588. Thus, when an individual has expressed "even protected opinions," the individual "must quiet down thereafter to enable police officers to do their work." *Id.* at 588. Accordingly, we found Blackman had abused her right to speak. *Id.*

Here, Taylor was asked repeatedly by both officers to be quiet and to leave the area where they were engaged in performing their official duties. Taylor refused, and continued to yell. Further, his yelling took place at 1:00 a.m. and immediately alongside an apartment building in a housing complex occupied by numerous families. Even if Taylor's yelling constituted expressions of protected political speech, we find that he did so in a manner that abused his free speech rights. Therefore, the trial court did not abuse its discretion when it admitted evidence of events occurring after Taylor's yelling at the officers.

2. Instruction

Taylor next argues that the trial court erred when it refused to instruct the jury on the statutory defense to a charge of possession of cocaine within 1,000 feet of a family housing complex. Specifically, the statute provides that it is a defense to the charge that the person

> (1) . . . was briefly in, on, or within one thousand (1,000) feet of . . . a family housing complex . . . ; and
> (2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the family housing complex at the time of the offense.

IND. CODE § 35-48-4-16(b). Taylor argues that he was entitled to this instruction because the evidence (1) established that he was only in the complex for a brief 1-1½ minute period from the time he first yelled at the officers until he was apprehended by Kaszas after having earlier left his girlfriend's apartment on an errand, and (2) did not establish the presence of any children at the time of the offense. We disagree.

Instructing the jury is a matter assigned to trial court discretion. *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005). An abuse of discretion occurs when the instructions as a whole mislead the jury as to the law in the case. *Id.* When evaluating whether the trial court erred in refusing an instruction, we examine (1) whether the instruction sets out the law; (2) whether the evidence supports the giving of the instruction; and (3) whether the substance of the instruction is covered by the other instructions that were given. *Brown v. State*, 830 N.E.2d 956, 966 (Ind. Ct. App. 2005).

The instruction proffered by Taylor accurately reflected the statutory provision. However, the statutory defense requires both that the defendant have been "briefly" in the family housing complex and that at the time of the offense, there were no young people present. The trial court found testimony "that actually he stayed with his girlfriend there, they had had a fight, he went to [the store] and was returning home," led it to conclude "that it certainly was more than a brief period of time that he was in that area." (Tr. 286).

As to the second statutory fact for this defense, in *Stringer v. State*, 853 N.E.2d 543, 549 (Ind. Ct. App. 2006), we found that the trial court did not abuse its discretion when it refused the instruction; there, the only testimony in that regard was that it was "unknown whether anyone under the age of eighteen" was present at the time of the offense. Here, however, we find that there is more evidence in this regard. Kaszas testified that "families live" at the LaSalle. (Tr. 132). Burns testified that at the LaSalle, "there's families and children around at that time of night." (Tr. 183). Further the LaSalle manager testified that its apartments included 2-, 3-, and 4-bedroom units, leading to the strong inference that such units' occupants included children.

We conclude that the trial court did not abuse its discretion when it refused Taylor's proffered instruction because the evidence did not support giving it.

Affirmed.

MAY, J., and CRONE, J., concur.