



Francheska McGraw appeals her conviction of Disorderly Conduct,<sup>1</sup> a class B misdemeanor, challenging the sufficiency of the evidence supporting that conviction.<sup>2</sup>

We affirm.

The facts favorable to the conviction are that on March 30, 2010, McGraw was a back-seat passenger in a car being driven by Kenya Matthews. There was one other passenger in the car. Officer Andrew Sheler of the Indianapolis Metropolitan Police Department observed Matthews's car exceeding the speed limit and initiated a traffic stop. Officer Robert Guinn arrived to assist Officer Sheler. Officer Sheler approached the driver's window and obtained her information. While he was doing this, Officer Guinn, who was standing near the rear door on the passenger side, signaled to him that the back-seat passenger was carrying a handgun. Officer Sheler asked the occupants of the vehicle whether there was anything in the car that he should know about. After several seconds, McGraw told the officer that she was carrying a handgun, but had a permit for it. Officer Sheler, still standing near the driver, asked McGraw where the handgun was located. She responded by moving her hand toward her right hip, where Officer Sheler presumed the gun was located. Officer Sheler raised his voice and instructed McGraw to get her hand off of the gun and to get out of the car. He opened the rear driver's-side door and placed his hand on his handgun. Officer Guinn observed as McGraw kept her hand on her gun while she got out of the vehicle. Officer Sheler yelled at McGraw that "it's a good way for [you] to get

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<sup>1</sup> Ind. Code Ann. § 35-45-1-3 (West, Westlaw through 2010 2nd Regular Sess.).

<sup>2</sup> McGraw also presents the issue of whether her verbal protestations during the incident were protected political speech under article 1, section 9 of the Indiana Constitution. As we will explain below, we need not address this claim.

[yourself] shot if [you do not] take [your] hand off the gun.” *Transcript* at 12.

After McGraw exited the vehicle she briefly took her hand off of her gun, but began “yelling” “in a very loud and angry voice” to the other occupants of the vehicle, “watch this harassment” and “I can’t believe this harassment.” *Id.* at 12-13. As McGraw continued to yell, Officer Sheler instructed her to put her hands on the trunk of the car. She refused to comply and instead reached for her gun again with her right hand, “literally gripping it with her fingers around the butt end of the gun.” *Id.* at 15. Officer Sheler grabbed her left arm and told her to get her hand off of the gun and to place her hands behind her back. She refused and continued to struggle with the officer. While holding McGraw’s left hand, Officer Sheler tried to push her right hand off of the gun. All the while, McGraw continued to yell “very loudly” that the officers were harassing her. *Id.* at 18. In fact, according to Officer Sheler, “[a]bout every other word was harassment”. *Id.* at 14.

McGraw was ultimately subdued and placed under arrest. She was charged with resisting arrest as a class A misdemeanor and disorderly conduct as a class B misdemeanor. She was convicted of the latter charge following a bench trial and sentenced to 180 days in jail, all but 2 of which were suspended.

McGraw contends the evidence was not sufficient to support the conviction. Our standard of review in this instance is well settled:

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

*Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

We note at the outset that the charging information setting out the disorderly conduct charge alleged that McGraw committed the offense set out in I.C. § 35-45-1-3 in the following respects: “[E]ngag[ed] in fighting or in tumultuous conduct; and/or [made] unreasonable noise and continued to do so after being asked to stop[.]” *Appellant’s Appendix* at 14. We will focus upon the allegation of fighting or tumultuous conduct.

Pursuant to I.C. § 35-45-1-1 (West, Westlaw through 2010 2nd Regular Sess.), “‘Tumultuous conduct’” means conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property.” This court has held that “tumultuous conduct” as defined by I.C. § 35-45-1-1, “contemplates physical activity on [the defendant’s] part rising to the level that either people are seriously injured or property substantially damaged, or that either is likely to occur.” *Gebhard v. State*, 484 N.E.2d 45, 47-48 (Ind. Ct. App. 1985).

In this case, as the incident unfolded, McGraw’s anger mounted and she began to yell. She repeatedly refused commands to take her hand off of her handgun, even after her verbal dispute with the officers escalated into a physical confrontation. The officers were also armed, of course. McGraw’s persistent refusal to take her hand off of her weapon while she angrily yelled and physically struggled with them placed her at risk of being shot – an outcome that Officer Sheler specifically warned her about in the confrontation’s early stages. Clearly, this constituted physical activity that rose to the level that serious injury was likely to occur, either to herself or one of the officers. *See Bailey v. State*, 907 N.E.2d at 1007

(holding that disorderly conduct may be found where “defendant’s moves are likely to provoke the opposing party to respond with actions that would lead to serious bodily injury”). Moreover, McGraw’s physical struggle with Officer Sheler while he attempted to handcuff her took place near the trunk of Matthews’s car on the side of a heavily traveled road. McGraw’s efforts threatened to propel Officer Sheler and her into the path of oncoming traffic.

The charging information relating to this conviction alleged disorderly conduct as it is defined in I.C. § 35-45-1-3(a)(1) (tumultuous conduct) and (a)(2) (unreasonable noise). Having affirmed the conviction under (a)(1), we need not address whether the conviction was also proper under an alternate basis, i.e., (a)(2).

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.