

STATEMENT OF THE CASE

Dwayne Eversley appeals his convictions for invasion of privacy, as both a Class D felony and a Class A misdemeanor, and resisting law enforcement, as both a Class D felony and a Class A misdemeanor, following a jury trial. Eversley raises the following three issues for our review:

1. Whether the trial judge was biased against Eversley;
2. Whether the trial court abused its discretion when it permitted the State to introduce into evidence passing references to two outstanding warrants against Eversley and to the specific name of the arresting police officers' unit, the Violent Crimes Unit; and
3. Whether the trial court abused its discretion when it refused Eversley's proffered jury instructions.

We affirm.

FACTS AND PROCEDURAL HISTORY

In early 2005, Eversley and Asian Lindsey began dating. Their relationship lasted about three and one-half years, and they had a daughter together. After their relationship ended, on November 10, 2009, Lindsey obtained a protective order against Eversley and, on January 10, 2010, she obtained a no-contact order against him.

On March 17, 2010, while both the protective order and the no-contact order were still in effect, Eversley called Lindsey from a restricted number. Eversley said he wanted to see their daughter. About fifteen minutes later, Eversley called Lindsey again and told her that he would meet her at her apartment.

Immediately following that conversation, Lindsey called Detective Christine Mannina of the Violent Crimes Unit of the Indianapolis Metropolitan Police Department

(“IMPD”). Detective Mannina and Lindsey had had prior communications regarding Eversley, whom Detective Mannina had been investigating because of two warrants he had against him. Lindsey told Detective Mannina that Eversley was going to meet her at her apartment, and Detective Mannina drove over to Lindsey’s apartment complex.

Thereafter, while Detective Mannina was at the complex waiting for Eversley, Eversley called Lindsey and told her that he “had a bad feeling so he wasn’t going to show up” because he had “seen detective cars in front of the apartment complex.” Transcript at 85-86. While she was talking with Eversley, Lindsey invited Detective Mannina into her apartment. Lindsey relayed to Detective Mannina Eversley’s concerns and that Eversley instead wanted to meet at the Cottages of Fall Creek (“the Cottages”), which was about a seven-minute drive from Lindsey’s apartment. Lindsey agreed, and she and Detective Mannina drove to the Cottages in separate vehicles. Four other IMPD officers also went to the Cottages to try and apprehend Eversley.

Less than an hour later, officers observed Eversley at the Cottages. Detective Steven Scott first approached Eversley, identifying himself as a police officer and ordering Eversley to show his hands. Instead, Eversley dropped his cell phone and ran. Detective Scott gave chase, repeatedly ordering Eversley to stop. Three of the other officers joined in the chase, all ordering Eversley to stop. While climbing over a fence, Eversley got caught and “fell head first on the . . . the ground on the other side of the fence.” Id. at 147-48. Undeterred, Eversley “jumped back [up] and continued to run.” Id. at 148.

Eventually, Eversley stumbled and Detective Tanya Eastwood “was able to push him back down with [her] foot and get on top of him.” Id. According to Detective Eastwood, Eversley

was . . . trying to get me off of him; he was trying to get away. He continued to try to get up and run.

* * *

He was trying to get me off of him with his free hand, his free arm and his legs. He was trying to get his legs underneath him, kicking his legs, trying to rollover. And all I did at that point—all I was able to do with my size was just try to hang on and keep him from continuing to get any further away or get to the point where he could do any more damage to me.

Id. at 148-49. Detective Eastwood “struggle[d]” with Eversley for “a short time,” during which several of Eversley’s “movements ma[d]e contact” with Detective Eastwood. Id. at 149. Two other officers then caught up and helped gain control of and arrest Eversley. Later, Detective Eastwood noticed that she had “some scratches that were bleeding and painful.” Id. at 151.

On April 23, 2010, the State charged Eversley with two counts of invasion of privacy, one as a Class D felony and one as a Class A misdemeanor, and two counts of resisting law enforcement, one as a Class D felony and one as a Class A misdemeanor. At the beginning of his jury trial on June 24, Eversley’s counsel engaged the court in the following brief colloquy:

Mr. Wiley (for Eversley): Judge, just for clarification, I know you said if he’s convicted of either [sic] the resist and the invasion of privacy you’d run them consecutive. If he were to plead open then we’d have to obviously negotiate that.

The Court: Right.

Mr. Wiley: Would you—would that change your feelings about that or—

The Court: It depends on what kind of argument you'll make.

Mr. Wiley: Certainly. And I guess that's something we can negotiate as well.

* * *

The Court: [I]t would be something that we would discuss . . . in argument, yeah.

Id. at 343-44.

Eversley did not enter into a plea. At the ensuing trial, the State introduced into evidence the fact that Eversley had two outstanding warrants, although the State was not permitted to introduce the warrants themselves into evidence or to explain the allegations underlying those warrants. The trial court also permitted the State to ask the testifying detectives whether they were members of IMPD's Violent Crimes Unit, although the State was not allowed to elaborate as to why members of the Violent Crimes Unit were involved in Eversley's surveillance and arrest. In defense, Eversley claimed that his resistance to the law enforcement was justified because the officers used excessive force. The trial court, however, did not permit Eversley's proffered jury instructions to support that claim. The trial court gave multiple rationales for its decision, including the theory that Eversley presented no evidence in support of his assertion that the officers used excessive force.

The jury found Eversley guilty as charged. The trial court entered its judgments of conviction and sentenced Eversley to two years for each of the felony convictions, to be served consecutively. The court ordered the remaining convictions to be served

concurrent with the felony convictions, for an aggregate executed term of four years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Judicial Bias

Eversley first argues that the trial court judge's "predisposition to impose maximum consecutive sentences on multiple counts before it heard any evidence" creates a reasonable basis for questioning the judge's impartiality. Appellant's Br. at 7. As our Supreme Court has stated:

Merely asserting bias and prejudice does not make it so. The law presumes that a judge is unbiased and unprejudiced. And to rebut that presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy. Such bias and prejudice exists only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding.

Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002) (citations omitted). "The test for determining whether a judge should recuse himself or herself . . . is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality." James v. State, 716 N.E.2d 935, 940 (Ind. 1999); see also Ind. Judicial Conduct Rule 2.11(A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . .").

Eversley likens his case to the following facts from a recent decision of our Supreme Court:

Hollinsworth argues that comments by the trial court during the bench trial showed the court was not impartial. For example, at the beginning of the trial, the court granted a recess so the parties could discuss a plea agreement, but no agreement resulted, and the trial began. After the

State called its first witness, Hollinsworth informed the Court that she did not want a trial and now wanted to accept the State's proffered plea agreement. The Court exhibited impatience and stated that if Hollinsworth were found guilty, "she's going to jail for a year." The trial court further stated, "I don't know if I want to take your plea. I'd rather just go to trial, I think. I don't like being jerked around at all, all right?" Also, while reviewing Hollinsworth's criminal history at sentencing, the trial court noted that Hollinsworth had been charged with theft and battery while the instant suspended license case had been pending. When her attorney stated, "Those are only alleged charges," the trial court responded, "Sure they are."

Hollinsworth v. State, 928 N.E.2d 201, 201-02 (Ind. 2010).

Comparing the facts of Eversley's case to those in Hollinsworth lacks credibility. Here, while the trial judge indicated a preference for consecutive sentences in a brief exchange with Eversley's counsel before the trial, the judge expressly qualified herself, noting that any sentence imposed would be subject to the arguments of counsel. Those comments do not create a reasonable question as to the judge's impartiality. See James, 716 N.E.2d at 940. And it is also worth noting that the judge did not, in fact, impose the maximum possible sentence here. This issue is without merit.

Issue Two: Admission of Evidence

Eversley next contends that the trial court abused its discretion under Indiana Evidence Rule 404(b) when it admitted into evidence alleged prior bad acts. Specifically, Eversley asserts that it was prejudicial error to allow into evidence the fact that he had two warrants against him at the time of his arrest and to allow the detectives who testified to state that they were members of IMPD's Violent Crimes Unit. Our standard of review of a trial court's findings as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs

if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Indiana Evidence Rule 404(b) limits the admission of prior bad acts into evidence and reads in relevant part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ind. Evidence Rule 404(b). Evidence is excluded under Rule 404(b) only when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. Pavey v. State, 764 N.E.2d 692, 704 (Ind. Ct. App. 2002) (citing Sanders v. State, 724 N.E.2d 1127, 1130-31 (Ind. Ct. App. 2000)), trans. denied.

In assessing the admissibility of 404(b) evidence, the trial court must: (1) determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect. McClendon v. State, 910 N.E.2d 826, 832 (Ind. Ct. App. 2009), trans. denied. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Evid. R. 403.

In ruling on Eversley's motion to exclude the evidence in question, the trial court stated as follows:

I am going to allow the State to go down the road that there was . . . a warrant and that is why [the police officers] set up . . . their surveillance. [The State] cannot say what the warrant was for

* * *

. . . I'm going to deny [the motion to suppress the detectives' testimonies that they were with the Violent Crimes Unit]. They have a right to say what unit they were in. It would be the same thing if they were homicide detectives or if they were . . . something mundane that has nothing to do with domestic violence. . . .

* * *

. . . I don't think that they should be able to go through a twenty minute dissertation about what they do in the Violent Crimes Unit, but I think saying that that's the unit they work in [is admissible]

* * *

I'm going to allow the State to talk about what unit they work in, give a brief description about what they do and how they, you know, without talking about prior bad acts, you know, leading up to the surveillance. But it needs to be short and just enough so that the jury understands the component of what these people do.

Transcript at 25, 34, 39. In other words, the trial court permitted the State to give context to its surveillance of Eversley. The State was not permitted to enter the warrants themselves into evidence or to discuss the allegations underlying those warrants. And while the State was permitted to inquire with the officers as to the identity of their IMPD unit, again, the State was not permitted to discuss the allegations underlying why officers from the Violent Crimes Unit were involved in the surveillance of Eversley.

As such, the trial court did not abuse its discretion when it permitted the State to introduce the evidence in question in the limited manner it did. The existence of the two warrants and the officers' placement in the Violent Crimes Unit was contextual evidence

relevant to explain the circumstances of Eversley's arrest. That limited use of the evidence was not offered to prove the "forbidden inference" of demonstrating Eversley's propensity to commit the charged crimes. See Pavey, 764 N.E.2d at 704. And its probative value is not substantially outweighed by the danger of unfair prejudice. See Evid. R. 403. We cannot say the limited admission of this evidence was erroneous.

Issue Three: Jury Instructions

Finally, Eversley contends that the trial court abused its discretion when it denied his tendered jury instructions. As we have discussed:

"The purpose of a jury instruction 'is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.'" Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001) (quoting Chandler v. State, 581 N.E.2d 1233, 1236 (Ind. 1991)). Instruction of the jury is left to the sound judgment of the trial court and will not be disturbed absent an abuse of discretion. Schmidt v. State, 816 N.E.2d 925, 930 (Ind. Ct. App. 2004), trans. denied. Jury instructions are not to be considered in isolation, but as a whole and in reference to each other. Id. The instructions must be a complete, accurate statement of the law which will not confuse or mislead the jury. Id. at 930-31. Still, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. Id. at 933 (citing Dill, 741 N.E.2d at 1233).

Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). Further:

In reviewing a challenge to a jury instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court.

Simpson v. State, 915 N.E.2d 511, 519 (Ind. Ct. App. 2009) (quotation omitted), trans. denied.

Here, Eversley's defense to the charges of resisting law enforcement was that the officers used excessive force when they arrested him. In denying his tendered instructions to that effect, the trial court stated, among other things, that Eversley had failed to present an evidentiary foundation to support the giving of those instructions. We agree with the trial court.

“The law does not allow a peace officer to use more force than necessary to effect an arrest.” Wilson v. State, 842 N.E.2d 443, 446 (Ind. Ct. App. 2006), trans. denied. If an officer uses unconstitutionally excessive force in making an arrest, the officer is not lawfully engaged in the execution of his duties and the citizen may use reasonable force to repel the officer. Shoultz v. State, 735 N.E.2d 818, 823-24 (Ind. Ct. App. 2000), trans. denied. The question of whether an officer has used excessive force is analyzed objectively by considering the reasonableness of the force in light of the facts and circumstances confronting the officer. Id. at 824. Generally, a defendant's claim of lawful force to repel excessive force requires the defendant to show that he began to forcibly resist the officer only after the officer used excessive force against the defendant. See id.

Here, the only evidence of force between Eversley and the arresting officers shows that the officers acted reasonably in response to Eversley's conduct. Detective Eastwood stated that she had to push Eversley down while he was fleeing to arrest him, and once he was down she struggled to hold on to him. Two other detectives testified that they had to grab Eversley's arms to handcuff him because he was not cooperative. And the only evidentiary explanation of Eversley's head injuries was the detectives' testimonies that he

had fallen on his head while trying to get over a fence during his flight from the officers. Objectively reviewing the facts and circumstances shows that the officers' use of force was reasonable. There is simply no evidence that Eversley's use of force against the officers was in response to excessive force by the officers.

Eversley also contends that he was entitled to the following jury instruction on the definition of "forcible": "One forcibly resists law enforcement when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties." Appellant's App. at 90; see Graham v. State, 903 N.E.2d 963, 965 (Ind. 2009). But any error in the denial of that proffered instruction was harmless. With or without that instruction, Eversley's conviction for resisting law enforcement is so clearly sustained by the evidence that the jury could not properly have found otherwise. See Williams, 891 N.E.2d at 630. Thus, there is no reversible error on this issue.

Conclusion

In sum, we hold that there is no legitimate basis for Eversley's claim of judicial bias. We also hold that the trial court did not abuse its discretion in the admission of the evidence or in its denial of Eversley's proffered jury instructions. Hence, we affirm Eversley's convictions.

Affirmed.

ROBB, C.J., and CRONE, J., concur.