**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.**

FILED
May 19 2011, 8:46 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

**STEVEN KNECHT**
Vonderheide & Knecht, P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**KARL M. SCHARNBERG**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| ROBERT A. NELSON, JR., | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 91A02-1012-CR-1291 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Jeffrey R. Smith, Special Judge
Cause No. 91D01-1003-FC-21

**May 19, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Robert A. Nelson, Jr., appeals his conviction for Class C felony disarming a law enforcement officer. He contends that the evidence is insufficient to show that he made a conscious attempt to take an officer's gun. Finding that the evidence shows that Nelson both knowingly and intentionally attempted to take the officer's gun, we affirm.

## Facts and Procedural History

Nelson was asked to meet with his probation officer, Michael Schroeder, at the White County Probation Department. The purpose of the meeting was to have a probation revocation warrant served on Nelson because he left Home with Hope in violation of his probation. At the meeting, Nelson admitted to violating his probation by leaving the home and going to Muncie. After about ten minutes, Schroeder called in Special Deputy Court Officer Brandon McLeland to his office so he could serve the warrant on Nelson.

After Officer McLeland served Nelson with the warrant, Nelson asked to make a phone call to his mother. After several minutes, Officer McLeland asked Nelson to end the call. Nelson refused. Officer McLeland then made several more requests which went unheeded. When Officer McLeland tried to grab Nelson's phone, a struggle ensued. Officer McLeland tried to restrain Nelson with handcuffs, but Nelson resisted by standing up and tucking his hands near his waist. In the meantime, Gina Goodman, the chief probation officer, heard a scuffle from her nearby office. She hit her panic button and proceeded to Schroeder's office to see what was going on. Soon, the struggle spilled into the lobby of the probation department, and Officer McLeland and Nelson fell onto the

copy machine. Finally, Officer McLeland was able to pin Nelson on the ground. At this point, Nelson was face down on the ground with Officer McLeland on his back and Goodman's knees on his shoulders. During this time, Officer McLeland and Goodman yelled at Nelson to show his hands and stop resisting. While Officer McLeland was trying to get Nelson's arms out from underneath him in order to handcuff him, Goodman yelled, "Your gun." Tr. p. 35. Officer McLeland looked down at his holster and saw that Nelson had "[his] gun pulled." *Id.*; *see also id.* at 19 ("[Nelson] had his hand on the handle of the gun and was tugging on it, as if you were going to pull the gun out of the holster."), 50 ("[Nelson] reached from his right side—he had his hands underneath him, he reached up with his right hand and pulled on [Officer McLeland's] gun, which was in his holster."), 54 ("[Nelson's] hand was pulling on Officer McLeland's gun from the holster."). Goodman then "began hitting on Nelson's hand which was on the gun" and yelled, "He's getting your gun." *Id.* at 50. At that point, help arrived. A deputy sheriff told Nelson to stop resisting or he would use his taser. Nelson immediately complied.

The State charged Nelson with Class C felony disarming a law enforcement officer, Class D felony battery on a law enforcement officer, and Class D felony resisting law enforcement. A bench trial was held, following which the trial court found Nelson guilty of Class C felony disarming a law enforcement officer, Class B misdemeanor battery as a lesser-included offense of the Class D felony, and Class D felony resisting law enforcement. The court sentenced Nelson to five years for disarming a law enforcement officer, 180 days for Class B misdemeanor battery, and two years for Class D felony resisting law enforcement, to be served concurrently. Nelson now appeals.

## Discussion and Decision

Nelson contends that the evidence is insufficient to support his conviction for Class C felony disarming a law enforcement officer. He does not challenge his other two convictions.

When reviewing the sufficiency of the evidence, appellate courts must consider only the probative evidence and reasonable inferences supporting the judgment. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146–47 (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at 147 (quotation omitted). "[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the [judgment]." *Id.* (quotation omitted).

In order to obtain a conviction for Class C felony disarming a law enforcement officer, the State had to prove that Nelson, who knew that Officer McLeland was an officer, knowingly or intentionally attempted to take a firearm from Officer McLeland without his consent and while he was engaged in the performance of his official duties. Ind. Code § 35-44-3-3.5(b); *see also* Appellant's App. p. 6 (charging information). Nelson argues that the State did not present sufficient evidence to show that he made a

conscious attempt to take Officer McLeland's gun. Appellant's Br. p. 10. Although Nelson concedes that he may have touched Officer McLeland's gun, he claims that Schroeder's, Officer McLeland's, and Goodman's testimony that they saw Nelson's hand on the gun and/or pulling on the gun is "not credible." *Id.* This argument places this Court in the role of fact-finder and asks us to reweigh the evidence and assess the credibility of the witnesses. This, however, is not our role. Based on the testimony of any one of these three witnesses, the evidence is sufficient.

As for Nelson's argument that the charging information provided that Nelson "knowingly and intentionally" attempted to take a firearm from Officer McLeland instead of "knowingly or intentionally," we find it to be without merit. Although the State alleged both levels of culpability instead of alternate levels of culpability, we find that the State has met its burden as to each level. That is, Officer McLeland testified that Nelson pulled his gun, Goodman testified that Nelson pulled on Officer McLeland's holstered gun, and Schroeder testified that Nelson's hand was on Officer McLeland's gun and he was tugging on it. This testimony rules out any sort of incidental contact and shows both a knowing and intentional act. *See* Ind. Code § 35-41-2-2 (a), (b) ("A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so. A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." (formatting altered)). We therefore affirm Nelson's conviction for Class C felony disarming a law enforcement officer.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.