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IN THE
COURT OF APPEALS OF INDIANA

ANTIONE A. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1010-CR-1162
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 18
The Honorable Reuben B. Hill, Judge
The Honorable Teresa Hall, Commissioner
Cause No. 49F18-1004-FD-34285

June 1, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Antione A. Smith (Smith), appeals his convictions for Count I, battery, a Class D felony, Ind. Code § 35-42-2-1; and Count II, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3.

We affirm.

ISSUES

On appeal, Smith raises three issues, which we consolidate and restate as the following two:

(1) Whether the trial court properly admitted testimony by a police officer that Smith bit him; and

(2) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Smith committed a battery.

FACTS AND PROCEDURAL HISTORY

On April 28, 2010, Indianapolis Metropolitan Police Department Officer Daniel Brezik (Officer Brezik) received a radio dispatch regarding a disturbance at a residence on Flap Lane in Marion County, Indiana. He arrived at the scene of the disturbance and found a woman sitting in the driver's seat of a four-door Dodge vehicle in the garage of the home and Smith standing outside of the vehicle next to the passenger-side door. Officer Brezik approached the Dodge and observed a hammer on the floor of the garage. Officer Brezik informed Smith that he would be performing a pat down to make sure that Smith did not have any more weapons. As soon as Officer Brezik began the pat down, Smith placed his left

hand into his left pants pocket. Officer Brezik ordered Smith to remove his hand from his pocket, but Smith ignored him and a struggle ensued between Smith and Officer Brezik.

As Officer Brezik struggled with Smith on the ground, he radioed for more officers to join him at the scene. Officer Brezik then tried to handcuff Smith, but Smith brought his left hand from his pocket in a fist and appeared to place something in his mouth. Officer Brezik asked Smith what he placed in his mouth, but Smith turned away from him and would not open his mouth. Officer Brezik then issued loud verbal commands to Smith to open his mouth, but Smith kept his jaw clenched. About that time, police officers Anthony Patterson (Officer Patterson) and Riderson (Officer Riderson) arrived at the scene. Officer Brezik tried to hold Smith's head to keep it from flailing and to see inside of his mouth, but as he did so, Smith bit him on the hand. Officer Patterson deployed his taser, and Smith released Officer Brezik's hand from his mouth.

After this incident, the Officers could not find any contraband either on Smith or in the area around him. As a result of Smith's bite, though, Officer Brezik's hand became discolored and he experienced pain and slight swelling in his finger.

On April 29, 2010, the State filed an Information charging Smith with Count I, battery, a Class D felony, I.C. § 35-42-2-1, and Count II, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3. On September 8, 2010, a bench trial was held. At the close of the evidence, the trial court found Smith guilty on both Counts. On September 29, 2010, the trial court held a sentencing hearing and sentenced Smith to two years in the Indiana Department of Correction (DOC) for Count I, with 185 days suspended and 185 days

probation. The trial court also sentenced Smith to one year of imprisonment with 328 days suspended for Count II, with the sentence to run concurrent to Smith's sentence for Count I.

Smith now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admissibility of the Evidence*

As a preliminary issue, we must first address the State's argument that Smith has waived his claim. Smith argues that it was improper for the trial court to admit Officer Brezik's testimony that Smith bit him because there was no probable cause for Officer Brezik to search Smith's mouth. The State contends, though, that Smith waived his claim when he failed to object to this testimony at trial.

The Indiana Supreme Court has previously held that a defendant's failure to object to the admission of evidence at trial waives the issue for review unless its admission constitutes fundamental error. *Konopasek v. State*, --N.E.2d--, *3 (Ind. May 5, 2011). An error is fundamental if it is "so prejudicial to the rights of a defendant that a fair trial is rendered impossible." *Beeler v. State*, --N.E.2d--, *2 (Ind. Ct. App. Apr. 27, 2011) (quoting *Wilson v. State*, 931 N.E.2d 914, 919 (Ind. Ct. App. 2010)). The Indiana Supreme Court has recently emphasized that the fundamental error exception is "extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (quoting *Matthews v. State*, 849 N.E.2d 578, 587

(Ind. 2006)). This exception is available only in "egregious circumstances." *Delarosa v. State*, 938 N.E.2d 690, 694 (Ind. 2010).

In *Delarosa*, the supreme court confronted a situation where the defendant, Delarosa, had failed to object to the admission of testimony at trial and then claimed on appeal that the admission of the testimony was fundamental error. *Id.* The testimony in question related to statements by Delarosa's co-conspirators after committing murder. *Id.* at 695. On review, the supreme court held that the trial court's admission of the testimony was not fundamental error because the jury did not convict Delarosa of murder based solely on the testimony. *Id.* Instead, the testimony "corroborated with the testimonies of unchallenged witnesses and with the other evidence introduced at trial." *Id.*

Officer Brezik's testimony here is similar to the testimony the supreme court reviewed in *Delarosa.* As in *Delarosa*, Officer Brezik's testimony was not the sole basis for Smith's conviction for battery. Officer Brezik's testimony corroborated the physical evidence of discoloration and swelling in Officer Brezik's fingers, as well as Officer Patterson's testimony that he had heard Officer Brezik tell Smith "ouch, you know you [are] biting me, let me go." (Transcript p. 30). Smith also presented his version of events at trial, which lowered the potential that the trial court's admission of Officer Brezik's testimony would harm Smith. The trial court had the opportunity to determine that Smith's testimony was more credible than Officer Brezik's, but chose not to do so. These factors indicate that Smith was not denied the opportunity for a fair trial. We conclude, therefore, that the admission of

Officer Brezik's testimony was not fundamental error and Smith waived his claim by failing to object at trial.

Notwithstanding waiver, Smith's claim fails for the same reasons that the admission of the testimony was not fundamental error. In arguing that there was no probable cause for Officer Brezik to search his mouth, Smith makes a claim under Article I, Section 11 of the Indiana Constitution that his constitutional rights have been violated. Article I, Section 11 provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

We have determined that the purpose of this section is to "protect from unreasonable police activity those areas of life that Hoosiers regard as private." *Trotter v. State*, 933 N.E.2d 572, 580 (Ind. Ct. App. 2010). The legality of a governmental intrusion under this section turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. *Id.* Although there may be other relevant considerations, the reasonableness of a search or seizure turns on a balancing of the following: (1) the degree of concern, suspicion, or knowledge that a violation has occurred; (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs. *Id.*

Smith argues that the supreme court's decision in *Grier* is on point because there the supreme court held that "[t]he application of force to a detainee's throat to prevent

swallowing of suspected contraband violates the constitutional prohibitions against unreasonable search and seizure" as promised by Article I, Section 11. *Grier v. State of Indiana*, 868 N.E.2d 443, 445 (Ind. 2007). However, two versions of events came to light at trial. Smith testified that he did not bite Officer Brezik and that Officer Brezik inappropriately put his hand in Smith's mouth. Officer Brezik, though, testified that he was merely trying to hold Smith's head to keep it from flailing when Smith opened his mouth and bit him. At the time, Officer Brezik was "holding [Smith's] chin area" and just trying to open his mouth enough to see inside. (Tr. p. 19).

Because there were two versions of events, the trial court weighed the evidence and engaged in a credibility determination. The trial court judge specifically stated:

> [W]hen I look at testimony…[I] have to look at the credibility of the witnesses equally. I have two officers that did not hear each other's testimony, that basically state the same facts. And then I have Mr. Smith who contradicted himself between direct and cross examination.

(Tr. p. 49). When we review a trial court's ruling on the admissibility of evidence resulting from an allegedly illegal search, we do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Reinhart v. State*, 930 N.E.2d 42, 45 (Ind. Ct. App. 2010). When we consider the facts here in the light most favorable to the trial court, we conclude that Officer Brezik did not conduct a search of Smith's mouth. Accordingly, we do not find that the trial court violated Smith's constitutional rights under Article I, Section 11.

II. *Sufficiency of the Evidence*

Next, Smith argues that the State did not produce sufficient evidence to prove beyond a reasonable doubt that he committed a battery when he bit Officer Brezik. The standard of review for a sufficiency of the evidence claim is that this court should only reverse a conviction when reasonable persons would not be able to form inferences as to each material element of the offense. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied.* As stated above, this court does not reweigh evidence or judge the credibility of witnesses. *Id.* at 213. In addition, we only consider the evidence most favorable to the verdict and the reasonable inferences stemming from that evidence. *Id.*

In order to establish that Smith committed battery, the State was required to prove beyond a reasonable doubt that he "knowingly or intentionally touch[ed] another person in a rude, insolent, or angry manner…." I.C. § 35-42-2-1. A battery is a Class D felony if it "results in bodily injury to: [] a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of the officer's official duty." I.C. § 35-42-2-1(a)(2).

Smith argues that he did not bite Officer Brezik and that Officer Brezik could have scraped and rubbed his hand against Smith's teeth while he was searching Smith's mouth. As stated above, this argument essentially asks us to reweigh the evidence and credibility of witnesses, which we cannot do on appeal. *Perez*, 872 N.E.2d at 213. Moreover, as we have already concluded, there is sufficient evidence that Smith bit Officer Brezik. Officer Brezik testified that he "tried to hold [Smith's] head from flailing and [Smith] opened his mouth and

bit [Officer Brezik] on [his] hand." (Tr. p. 19). Officer Brezik also suffered pain, slight bruising under his fingernail, redness, and swelling. This evidence is all consistent with a bite. As the bite constituted a "rude, insolent, or angry" touching of a law enforcement officer, Smith committed battery as a Class D felony. I.C. § 35-42-2-1.

CONCLUSION

Based on the foregoing, we conclude that (1) the trial court properly admitted testimony by a police officer that Smith bit him; and (2) the State presented sufficient evidence to prove beyond a reasonable doubt that Smith committed a battery.

Affirmed.

DARDEN, J., and BARNES, J., concur.