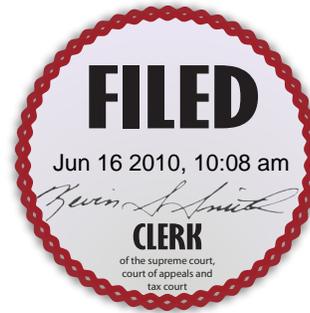


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID MAZHANDU,  
Appellant- Defendant,

vs.

STATE OF INDIANA,  
Appellee- Plaintiff,

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No. 49A02-0909-CR-890

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Rebekah Pierson-Treacy, Judge  
Cause No. 49F19-0905-CM-050450

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**June 16, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

David Mazhandu was convicted, following a bench trial, of resisting law enforcement, a Class A misdemeanor. Mazhandu appeals his conviction, raising one issue for our review: whether the evidence is sufficient to support his conviction. Concluding the evidence is sufficient, we affirm.

## Facts and Procedural History<sup>1</sup>

On the evening of May 22, 2009, Officer Daniel Brezik of the Indianapolis Metropolitan Police Department responded to a report of an illegally parked truck. When Officer Brezik arrived on the scene, he found a box truck parked in front of a fire hydrant, so he called for a tow truck and waited for it to arrive. As David Heatherly, the tow truck driver, was getting the truck onto his wrecker and Officer Brezik was writing a ticket, Mazhandu arrived on the scene. Mazhandu was the owner of the box truck, and he asked both Officer Brezik and Heatherly that his truck not be towed. At some point, Officer Brezik authorized the truck to be released if Mazhandu made arrangements with Heatherly to pay for the tow.

While Heatherly and Mazhandu were discussing payment for release of the truck, Officer Brezik was completing the parking citation. He twice asked Mazhandu for his identification. Mazhandu refused to give his identification, and “based on his actions,” transcript at 11, Officer Brezik then twice asked him to turn and face away from the officer. Mazhandu again refused to comply, so Officer Brezik “grabbed his right arm and spun him around . . . [a]nd had him put his hands on the truck.” Id. at 14. Mazhandu

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<sup>1</sup> We heard oral argument on May 5, 2010, at West Lafayette Junior/Senior High School in West Lafayette, Indiana. We thank the faculty, staff, and students for their hospitality and counsel for their presentations.

turned to face Officer Brezik again, putting his hands on the officer's chest and pushing him away. Officer Brezik pulled Mazhandu to the ground because Mazhandu had made a "forcible action" against him. Id. at 19. Mazhandu was on his back, and Officer Brezik knelt on his chest, asking him to roll over and put his hands behind his back "upwards at [sic] ten" times. Id. at 39. Heatherly, who had turned and walked away from Officer Brezik and Mazhandu to finish securing the truck on his wrecker, heard a commotion and turned back to see Mazhandu on the ground with Officer Brezik over him. Heatherly testified he saw Mazhandu on his stomach with one hand behind his back. Heatherly heard Officer Brezik order Mazhandu to put his other hand behind his back "a couple times," id. at 24, but Mazhandu did not freely offer his other arm. Officer Brezik testified he and Mazhandu struggled for approximately two minutes, during which time they moved from one side of the street to the other and Mazhandu refused several orders to produce his hands. Upon hearing Officer Brezik radio that he had a resister, Mazhandu allowed Officer Brezik to handcuff him.

The State charged Mazhandu with resisting law enforcement, a Class A misdemeanor. Following a bench trial at which Officer Brezik, Heatherly, and Mazhandu testified, the trial court found Mazhandu guilty and sentenced him to six days at the Marion County Jail. Mazhandu now appeals his conviction.

## Discussion and Decision

### I. Standard of Review

Mazhandu argues insufficient evidence supports his conviction of resisting law enforcement. Our standard of review for sufficiency of the evidence claims is well settled:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. 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 to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnotes, and citations omitted) (emphasis in original).

### II. Resisting Law Enforcement

Mazhandu was charged with violating Indiana Code section 35-44-3-3(a), which provides:

A person who knowingly or intentionally:  
(1) forcibly resists, obstructs, or interferes with a law enforcement officer . .  
. while the officer is lawfully engaged in the execution of the officer's  
duties;  
\* \* \*  
commits resisting law enforcement . . . .

Mazhandu challenges Officer Brezik's testimony as incredibly dubious and also challenges the evidence that he "forcibly resisted" Officer Brezik.

### A. Incredible Dubiosity

Mazhandu first claims Officer Brezik's testimony is so contradictory and improbable that we should apply the incredible dubiosity exception to the sufficiency standard of review. In rare cases where "a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence," we may impinge upon the fact finder's function to judge the credibility of a witness. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). For testimony to be so inherently improbable that it is disregarded on the basis of incredible dubiosity, "the witness must present testimony that is inherently contradictory, wholly equivocal or the result of coercion, and there must be a complete lack of circumstantial evidence of the defendant's guilt." Clay v. State, 755 N.E.2d 187, 189 (Ind. 2001).

Mazhandu contends Officer Brezik's testimony is contradictory and illogical. Specifically, Mazhandu claims it is highly improbable Officer Brezik struggled for two minutes with Mazhandu and rolled from one side of the street to the other while holding Mazhandu to the ground when Officer Brezik indicated he was "on top of [Mazhandu] restraining him the whole time." Tr. at 19. Mazhandu also claims it is highly improbable Mazhandu could roll around on the ground during the struggle and also refuse Officer Brezik's orders to roll over and present his arms. Mazhandu also contends Officer Brezik's testimony is uncorroborated by Heatherly's testimony, in that Heatherly testified he heard Officer Brezik order Mazhandu to put his hands behind his back "a couple times" where Officer Brezik testified he issued the order approximately ten times; Heatherly testified the struggle lasted approximately thirty seconds whereas Officer

Brezik testified it lasted two minutes; and Heatherly did not indicate the struggle moved from one side of the street to the other.

Having reviewed the trial transcript, we cannot say Officer Brezik's testimony is incredibly dubious. Discrepancies between Officer Brezik's and Heatherly's testimony do not trigger application of the rule; rather, they are relevant to the weight of the evidence and the credibility of each witness's testimony. Stephenson v. State, 742 N.E.2d 463, 497 (Ind. 2001) (“[I]nconsistencies in the testimony of two or more witnesses . . . do not make the evidence ‘incredible’ as a matter of law.”), cert. denied, 534 U.S. 1105 (2002). This particular attack on Officer Brezik's testimony is just an invitation to reweigh the evidence and judge the credibility of the witnesses for ourselves. See White v. State, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006) (“By claiming contradictory testimony, instead of inherent contradictions within one witness' own testimony, [defendant] is actually asking us to reweigh the evidence and assess the witnesses' credibility.”), trans. denied. Moreover, there is nothing inherently contradictory or improbable about Officer Brezik's testimony that he and Mazhandu engaged in a struggle wherein Mazhandu moved about while resisting Officer Brezik's commands to present his arms. Officer Brezik's recitation of events is not so improbable as to run counter to human experience. See Campbell v. State, 732 N.E.2d 197, 207 (Ind. Ct. App. 2000) (“Incredibly dubious or inherently improbable testimony is that which runs counter to human experience, and which no reasonable person could believe.”). Accordingly, we decline to apply the incredible dubiousity exception.

## B. “Forcible” Resistance

Mazhandu also contends there is insufficient evidence he forcibly resisted Officer Brezik. “One forcibly resists when strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.” Graham v. State, 903 N.E.2d 963, 965 (Ind. 2009) (quotation omitted). The force involved “need not rise to the level of mayhem,” id., but does not include “all actions that are not passive,” Spangler v. State, 607 N.E.2d 720, 724 (Ind. 1993). “Force” may include refusing to move when directed, so as to require officers to forcibly move the defendant from one place to another or lift him onto his feet. See, e.g., Guthrie v. State, 720 N.E.2d 7, 9 (Ind. Ct. App. 1999) (sufficient evidence of resisting law enforcement where defendant refused to get out of jail wagon, was forcefully removed from the wagon and placed on ground but refused to get up, and was lifted to his feet but refused to walk, resisting officers’ efforts by leaning back and stiffening his legs), trans. denied. The force element is not satisfied, however, if a defendant does nothing more than walk away or stand his ground. See, e.g., Spangler, 607 N.E.2d at 724 (insufficient evidence of resisting law enforcement where defendant vehemently refused to accept service of process and turned and walked away from officer); Ajabu v. State, 704 N.E.2d 494, 496 (Ind. Ct. App. 1998) (insufficient evidence of resisting when defendant, although twisting and turning a little, merely claimed ownership of and held onto a flag the officer was trying to take from his hands).

Mazhandu compares the facts of this case to those of several cases in which convictions for resisting law enforcement were reversed on appeal. In Graham, the defendant refused to present his arms for handcuffing when ordered to do so, but there

was no evidence from which it could be inferred that he so much as stiffened his arms to make it more difficult for officers to handcuff him. 903 N.E.2d at 966. In Berberena v. State, 914 N.E.2d 780 (Ind. Ct. App. 2009), trans. denied, the defendant did not comply with an officer's commands to put his hands behind his back, and the officer "had to struggle with him to grab his hands and put them in handcuffs." Id. at 781. This court reversed the defendant's conviction for resisting law enforcement, holding the officer's testimony was ambiguous and did not support an inference the defendant stiffened his arms or otherwise used force in opposing the officer's attempts to handcuff him. Id. at 782-83. And in Colvin v. State, 916 N.E.2d 306 (Ind. Ct. App. 2009), the defendant refused to comply with any commands, including that he take his hands out of his pockets, and officers "physically had to place him on the ground and handcuff him." Id. at 307. We reversed the conviction for resisting law enforcement because the evidence showed only that the defendant did not comply with officers' commands and the officers had to use force to make the arrest. Id. at 309. Mazhandu also argues the facts of his case are distinguishable from those of Johnson v. State, 833 N.E.2d 516 (Ind. Ct. App. 2005), where we affirmed the defendant's resisting law enforcement conviction based upon evidence he turned and pushed away from officers with his shoulders as they attempted to search him and then "stiffened up" and refused to get into a transport vehicle, requiring officers to physically place him inside the vehicle. Id. at 517.

We note first that both Mazhandu, in refusing to provide his identification, and Officer Brezik, in grabbing Mazhandu's arm and spinning him around in response, were acting unreasonably. Once Officer Brezik and Mazhandu were on the ground, however,

Mazhandu did not simply passively stand his ground like the defendants in Graham and Colvin. And unlike the testimony in Berberena, it is reasonable to infer from Officer Brezik's testimony regarding the length and breadth of the struggle and Heatherly's testimony that Mazhandu did not freely offer his arm to Officer Brezik, that Mazhandu directed strength, power, and violence against Officer Brezik in keeping his arm away. See Lopez v. State, 2010 WL 1920338 at \*3 (Ind. Ct. App., May 13, 2010) (although defendant charged with resisting law enforcement claimed he simply refused to uncross his arms, officers testified they were unable to put his arms behind his back, and "it is reasonable to infer that he was forcibly resisting their efforts rather than remaining entirely passive.").

As the State conceded at oral argument, this is not the most egregious example of resisting law enforcement. Nonetheless, we think this case is more similar to Johnson, in which turning and pushing away and stiffening up in response to officers was considered forceful means of resisting, than any of the passive resistance cases Mazhandu cites. Mazhandu's reference to his own testimony and those parts of Heatherly's testimony that do not agree with Officer Brezik's testimony is nothing more than an invitation for us to reweigh the evidence, which we will not do. See Drane, 867 N.E.2d at 146. There is sufficient evidence from which the finder of fact could find Mazhandu guilty of resisting law enforcement.

### Conclusion

Officer Brezik's testimony is not subject to the incredible dubiousity exception to our sufficiency standard of review, and the evidence supports a finding that Mazhandu

forcibly resisted Officer Brezik in the performance of his official duties. Mazhandu's conviction is therefore affirmed.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.