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IN THE
COURT OF APPEALS OF INDIANA

KENYA STOCKING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0810-CR-916
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather A. Welch, Judge
Cause No. 49F09-0705-FD-073791

July 7, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kenya Stocking ("Stocking") was convicted in Marion Superior Court of Class A misdemeanor criminal trespass, Class A misdemeanor resisting law enforcement, and Class B misdemeanor disorderly conduct. Stocking was ordered to serve an aggregate sentence of 365 days, with 359 days suspended to probation. Stocking appeals and argues that her convictions are not supported by the evidence. Concluding that the State presented sufficient evidence to establish that Stocking committed the offenses of criminal trespass, resisting law enforcement, and disorderly conduct, we affirm.

Facts and Procedural History

On April 26, 2007, the dean of student services for Creston Middle School suspended Stocking's son and revoked his bus riding privileges. Later that day, after school hours, Stocking entered the school. Stocking had previously been instructed to refrain from entering Warren Township District School property, unless she sought and received permission from the principal or dean of the school.

Upon observing Stocking in the school, Dean Rusununguko reminded Stocking that she was not allowed on school property. Tr. p. 20. Stocking ignored the dean and continued onto the guidance counselor's office. When she reached the office, Stocking used the phone to call Carol Graham, the secretary to the Associate Superintendent of Secondary Education. Dean Rusununguko told Stocking to hang up the phone, but once again, she ignored him. Ms. Graham also told Stocking she was not allowed on school property, and told her to leave school grounds or she would be arrested. Tr. p. 97.

Marion County Sheriff's Deputy David Mulkey ("Officer Mulkey") responded to the school's call for assistance. Stocking was still on the phone when the officer arrived,

and Officer Mulkey ordered her to hang up the phone. When Stocking refused, the officer approached her and hung up the phone himself. Officer Mulkey then attempted to escort Stocking from the school building, but Stocking jerked away. The officer could not subdue Stocking, and eventually sprayed her with "fox spray" and placed her in a "bear hug." Stocking continued to struggle and the two fell to the ground. The officer was then able to position himself on top of Stocking and handcuff her.

Stocking continued to kick her feet, yell, and shout profanities. She was then taken to a conference room where she spat on the floor and knocked over a glass of water. Other officers who responded to the dispatch repeatedly told her to quiet down, but Stocking continued to shout profanities.

On May 1, 2007, Stocking was charged with criminal trespass and resisting law enforcement, as Class D felonies, and with Class B misdemeanor disorderly conduct. A jury trial was held on July 9, 2008, and Stocking was found guilty as charged.

At the sentencing hearing held on September 2, 2008, the trial court entered judgment of conviction for the criminal trespass and resisting law enforcement counts as Class A misdemeanors. Stocking was then sentenced to an aggregate sentence of 365 days, with 359 days suspended to probation. Stocking now appeals. Additional facts will be provided as necessary.

Standard of Review

Stocking argues that the evidence was insufficient to support her convictions. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind.

2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

I. Criminal Trespass

Stocking argues that the State failed to prove that she committed criminal trespass because she had a bona fide reason to be on school property. To prove that Stocking committed criminal trespass, the State was required to prove that Stocking, not having a contractual interest in the property, knowingly or intentionally entered the real property of another person after having been denied entry by the other person or that person's agent.[1] Ind. Code § 35-43-2-2 (2004); Appellant's App. p. 21.

First, Stocking argues that she never received the letter from Warren Township notifying her that she was to refrain from entering school property.[2] However, even if she did not actually receive the letter, she was aware that a letter was sent to her and Ms. Graham had discussed the contents of that letter with her previous to the date of the incident at issue in this appeal. Tr. p. 95. Moreover, if Stocking had a "bona fide" reason to enter Creston Middle School, she was required to obtain permission from school administrators before entering, which she failed to do.

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[1] The offense is elevated to a Class D felony, if the trespass is committed on school property. I.C. § 35-43-2-2.

[2] Ms. Graham testified that she and Ms. Stocking specifically discussed the letter and whether it was still in effect. Stocking indicated that she believed it was no longer in effect because it was issued in the previous year even though the letter stated that it was in effect starting December 13, 2005, with no effective end date. Tr. p. 98. Moreover, we need not address Stocking's claims that the letter did not offer "her an opportunity to present her objections" as this has no bearing on the issue of whether she committed the offense of criminal trespass. See Appellant's Br. at 8.

On April 26, 2007, Stocking was told by both Dean Rusununguko and Ms. Graham that she was not allowed on school property. Ms. Graham told her that she needed to leave the premises or she would be arrested. Tr. p. 97. Accordingly, the State proved that Stocking was denied entry to Creston Middle School, that she was told to leave, and that she refused to do so. Stocking's argument to the contrary is merely a request to our court to reweigh the evidence and the credibility of the witnesses, which we will not do. For all of these reasons, we conclude the State presented sufficient evidence to prove that Stocking committed criminal trespass.

II. Resisting Law Enforcement

Next, Stocking argues that the State presented insufficient evidence to establish that she resisted law enforcement. To prove that Stocking committed resisting law enforcement, the State was required to prove that Stocking knowingly or intentionally forcibly resisted, obstructed, or interfered with a law enforcement officer while the officer was lawfully engaged in the execution of the officer's duties. Ind. Code § 35-44-3-3 (2004); Appellant's App. p. 21.

Stocking argues that her conviction for resisting law enforcement should be reversed because she "followed the arresting officer's orders and only resisted when unnecessary force was used." Appellant's Br. at 11. In support of this argument, Stocking cites to her own testimony at trial. Again, Stocking has asked our court to reweigh the evidence and the credibility of the witnesses, which we will not do.

Officer Mulkey testified that as he attempted to escort Stocking from the middle school building, she started to tighten up and jerk back. The officer told her to stop

resisting as he tried to pull her out of the guidance counselor's office. Tr. pp. 66-67. When Stocking refused to comply, the officer sprayed her with "two short bursts" of "fox spray." Id. at 67. Stocking, who was "irate" during this encounter, continued to resist, and the officer placed her in a "bear hug." Stocking continued to struggle, and she and the officer fell to the ground. Officer Mulkey was then able to position himself on top of Stocking and handcuff her. Id. at 68-69. Stocking continued to kick and struggle even after she was in handcuffs. The officer testified that the amount of force he used was in accordance with his training and police policy. Id. at 72-73. This evidence is sufficient to support Stocking's resisting law enforcement conviction.[3]

III. Disorderly Conduct

Finally, Stocking challenges her disorderly conduct conviction. To prove that Stocking committed disorderly conduct, the State was required to prove that Stocking recklessly, knowingly, or intentionally made unreasonable noise and continued to do so after she was asked to stop or recklessly disrupted a lawful assembly of persons. Ind. Code § 35-45-1-3 (2004); Appellant's App. p. 22.

Stocking asserts that her expressions constituted political speech, which is protected under Article One, Section Nine of the Indiana Constitution. We employ a two-part analysis to determine whether the State has violated the free speech protections found in Article One, Section Nine. Blackman v. State, 868 N.E.2d 579, 584 (Ind. Ct.

[3] We cannot conclude that Officer Mulkey's use of the "fox spray" constituted "excessive force" especially in light of the fact that Stocking physically refused to leave the school building. See Shoultz v. State, 735 N.E.2d 818, 824 (Ind. Ct. App. 2000), trans. denied ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

App. 2007), trans. denied. "First, we must determine whether state action has restricted a claimant's expressive activity; second, if it has, we must decide whether the restricted activity constituted an 'abuse' of the right to speak." Id. at 584-85.

Generally, we review the State's determination that a defendant's expression was an abuse of the right of free speech under the Indiana Constitution only for whether that determination was rational. Id. at 585. However, if the expressive activity was political in nature, the State must demonstrate that it did not materially burden the defendant's opportunity to engage in political expression. Id. "Expressive activity is political if its aim is to comment on government action, including criticism of an official acting under color of law." Id. If an individual's expression focuses on the conduct of a private party, including the speaker himself, it is not political. Id. In the context of confrontations with police officers, a speaker's defense of his or her own conduct generally is not political. Shoultz v. State, 735 N.E.2d 818, 826 (Ind. Ct. App. 2000), trans. denied.

The defendant bears the burden of proving that the expressive activity was political; if the expression is ambiguous, we must find that the expression was not political and must review the State's restriction of the expression under standard rational basis review. Blackman, 868 N.E.2d at 585. If a defendant successfully demonstrates that his or her speech was political, the burden shifts to the State to show that it did not materially burden the defendant's opportunity to engage in political expression. Id. The State can do so by producing evidence that the expression inflicted particularized harm analogous to tortious injury on readily identifiable private interests, or in other words that the expression caused actual discomfort to persons of ordinary sensibilities or that it

interfered with an individual's comfortable enjoyment of his or her privacy. Id. "Evidence of mere annoyance or inconvenience is not sufficient." Id.

Stocking argues that because her "expressions were made in response to her arrest, they must be considered protected political speech." Appellant's Br. at 15. However, Stocking never cites to any specific statements she made to the arresting officer.[4] Officer Mulkey and Officer Charles Curl testified that Stocking was irate, yelling loudly and shouting profanities. From this evidence, we cannot conclude that Stocking has demonstrated that her speech was political. Therefore, we review the State's restriction of her expression under a rational basis review.

Officer Curl testified that when he arrived at the school, Stocking was using foul language in a loud voice causing disruption to the individuals present in the school office. Tr. p. 134. Stocking briefly calmed down and was placed in a chair, but then she "resumed . . . her tirade." Id. at 135. The volume of Stocking's voice, was near the top of the scale, a "7 or 8" out of 10. Id. at 141. Stocking refused to quiet down after she was told to do so.

"Police officers conducting a legitimate investigation must be able to perform their duties without unreasonable interruption." Blackman, 868 N.E.2d at 588. Moreover, it is reasonable to infer that Stocking's tirade and continued use of profanities in a loud voice also interfered with the school's office staff's ability to do their jobs. Therefore, the State rationally concluded that Stocking's conduct constituted an abuse of the right to speak,

[4] The only evidence concerning any specific statement is Stocking's own testimony that during her struggle with Officer Mulkey, she shouted "that's not necessary" and "I'm not resisting." Tr. p. 158. However, it appears that the jury concluded that Stocking's testimony lacked credibility given the guilty verdict on each charge.

and her arrest for disorderly conduct did not violate Article One, Section Nine. Furthermore, this evidence is sufficient to support Stocking's disorderly conduct conviction.

Conclusion

The State presented sufficient evidence to prove that Stocking committed criminal trespass, resisting law enforcement, and disorderly conduct. Accordingly, her convictions are affirmed.

Affirmed.

RILEY, J., and KIRSCH, J., concur.