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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1011-CR-1268
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kimberly J. Brown, Judge
The Honorable Teresa A. Hall, Master Commissioner
Cause No. 49G16-0909-FD-83939

September 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Michael Smith appeals his conviction for resisting law enforcement as a class D felony.[1]

We affirm.

ISSUE

> Whether the trial court abused its discretion in refusing Smith's tendered jury instructions.

FACTS

On September 25, 2009, Smith picked up his then-girlfriend, Karla Tolbert, at her parents' house and took her to his house, where they spent the night. The following morning, Smith took Tolbert's cell phone from her and started "going through [Tolbert's] phone." (Tr. 65).

Despite Tolbert's repeated demands, Smith refused to give the phone back to her. Tolbert therefore took a cup of coffee and "acted like [she] was going to throw it on [Smith], but [she] didn't." (Tr. 67). An angry Smith grabbed Tolbert around the arms and told her she was "'going to clean this fucking shit up.'" (Tr. 67-68). Smith then "flung [Tolbert] onto the bed," straddled her, and yelled at her. (Tr. 68). Tolbert told him to get off her and let her go home. Instead, Smith took Tolbert's glasses off and tried

[1] Ind. Code § 35-44-3-3(b).

to put a blanket over her face. Smith continued yelling at Tolbert, calling her a "'fucking cunt'" and threatening to kill her. (Tr. 69).

Despite her pleas, Smith refused to let Tolbert leave or use the telephone, and he continued to threaten and berate Tolbert. Tolbert attempted to appease Smith by discussing marriage. Eventually, he agreed to take her home.

The next day, Smith telephoned Tolbert at home to arrange to get twenty dollars Tolbert's daughter had borrowed from him. At around midnight, Smith arrived at Tolbert's home. Tolbert walked out to Smith's truck and threw a wadded up twenty-dollar bill into the truck. After Tolbert went back inside, Smith telephoned her several times and refused to leave. When Smith threatened to commit suicide, Tolbert telephoned his mother, which infuriated Smith. He threatened to kill Tolbert and drive his truck into her house. At one point, he left but soon returned. Tolbert's daughter telephoned 9-1-1. She reported that Smith had a knife in his truck.

Indianapolis Metropolitan Police Officers Lewis Warren, Bruce Carter, and Matthew Cook arrived at Tolbert's residence in fully marked police vehicles. Almost as soon as they arrived, Smith jumped out of his truck. Despite Officer Cook's orders to "[g]et on the ground" and show his hands, Smith "bolted" and ran between two houses. (Tr. 144). Officer Warren ordered Smith to stop; Smith, however, continued running as Officer Warren chased after him.

Officer Warren soon caught up with Smith and grabbed him around the torso, pinning his arms in "a football tackle." (Tr. 132). Smith then began "jerking his body

back and forth." (Tr. 132). As Officer Warren held onto Smith, Smith continued "[j]erking his arms, and pulling forward[,] dragging" Officer Warren toward a ravine. (Tr. 132). Both men fell four to six feet into the brush-filled ravine. A branch "jabbed [Officer Warren] right below [his] eye, and split it open." (Tr. 132).

Officer Warren fell on top of Smith and as he tried to hold Smith down, Smith "jerk[ed] and tr[ied] to pull away" and refused to put his hands behind his back despite several commands to do so. (Tr. 132). Eventually, Officers Cook and Carter were able to handcuff Smith. Officer Warren's wound required several stitches.

On September 30, 2009, the State charged Smith with Count 1, class D felony criminal confinement; Count 2, class D felony intimidation; Count 3, Class D felony resisting law enforcement; Count 4, class A misdemeanor domestic battery; Count 5, class A misdemeanor battery; and Count 6, class A misdemeanor resisting law enforcement. On September 2, 2010, the State moved to dismiss Counts 2 and 4, and the trial court held a jury trial on the remaining counts. The jury found Smith guilty on all counts. Following a sentencing hearing on November 5, 2010, the trial court sentenced Smith to a split sentence of 218 days to be executed with the balance suspended to probation.

Additional facts will be provided as necessary.

DECISION

Smith asserts that the trial court abused its discretion in refusing his tendered jury instructions on class D felony resisting law enforcement. Specifically, he argues that the

trial court's instructions failed "to inform the jury how to interpret the element of force within the crime Resisting Law Enforcement" and did not "adequately explain to a jury what level of force is necessary" to find that he committed class D felony resisting law enforcement. Smith's Br. at 10, 11.

> The trial court has broad discretion in the manner of instructing the jury and we review its decision thereon only for an abuse of that discretion. We review the refusal of a tendered instruction by examining whether the tendered instruction correctly states the law, whether there is evidence in the record to support giving the instruction, and whether the substance of the tendered instruction is covered by other given instructions. Jury instructions are to be considered as a whole and in reference to each other. The ruling of the trial court will not be reversed unless the instructions, when taken as a whole, misstate the law or mislead the jury. Before a defendant is entitled to a reversal, he must affirmatively show that the erroneous instruction prejudiced his substantial rights.
>
> . . . .
>
> The purpose of an 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. In instructing a jury, the trial court has a statutory duty to state to the jury all matters of law that are necessary for its information in giving its verdict.

Snell v. State, 866 N.E.2d 392, 395-96 (Ind. Ct. App. 2007) (internal citations omitted). "[E]rrors 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." *Williams v. State*, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008).

Citing to *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993), which provides that "[f]orcibly resists" means to use "strong, powerful, violent means" to evade a law enforcement official's rightful exercise of his or her duties, Smith tendered the following

jury instruction: "One forcibly resists law enforcement when strong, powerful, and/or violent means are used to evade a law enforcement official's rightful exercise of his or her duties." (App. 68). He also proffered the following instruction: "The use of force is an essential element of resisting law enforcement." (App. 69).

Without objection, the trial court gave the following instruction:

> FINAL INSTRUCTION NO. 19
>
> The crime of Resisting Law Enforcement is defined by statute as follows: A person who knowingly or intentionally forcibly resists, obstructs, or interferes with a law enforcement officer while the officer is lawfully engaged in the execution of his duties as a[n] officer; and the person uses a vehicle to commit the offense; or the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person commits Resisting Law Enforcement, a Class D felony.
>
> Before you may convict [Smith], the State must prove each of the following beyond a reasonable doubt:
>
> 1. The Defendant, Michael Smith
> 2. did knowingly
> 3. and forcibly resist, obstruct, or interfere with Bruce Carter and/or Lewis Warren, law enforcement officers with the Indianapolis Metropolitan Police Department
> 4. while said officers were lawfully engaged in their duties as law enforcement officers.
> 5. And, that while doing so, said Defendant inflicted bodily injury on another person, that is Lewis Warren, said injury consisting of pain and/or a laceration.
>
> If the State failed to prove each of the elements beyond a reasonable doubt, you must find [Smith] not guilty of resisting law enforcement, a Class D felony, as charged in Count II.

(App. 72-73). In addition, the trial court instructed the jury that "[t]he term 'forcibly' is a word descriptive of the type of resistance, obstruction, or interference proscribed by the law." (App. 80). Smith agreed to this instruction.

Indiana Code section 35-44-3-3 provides that a person who knowingly or intentionally "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. It is a class D felony if, while committing the offense, the person "inflicts bodily injury on or otherwise causes bodily injury to another person . . . ." I.C. § 35-44-3-3(b)(1)(B).

To support a conviction for resisting law enforcement, the evidence must establish that "strength, power, or violence" was directed toward a law enforcement official or there was a "movement or threatening gesture made in the direction of the official." *Spangler*, 607 N.E.2d at 724. The force involved, however, "need not rise to the level of mayhem." *Graham v. State*, 903 N.E.2d 963, 965 (Ind. 2009). While "refusing to present one's arms for cuffing" does not constitute forcible resistance, merely "'stiffening' of one's arms when an officer grabs hold to position them for cuffing would suffice[.]" *Id*. at 966.

In this case, Officer Warren testified that as he attempted to apprehend Smith, Smith "jerk[ed] his body back and forth" with enough force to pull Officer Warren into a ravine. (Tr. 132). Officer Warren further testified that upon being pulled into the ravine by Smith, he suffered a deep laceration under his eye.

Given the evidence regarding the element of force in this case, a reasonable jury would have rendered a guilty verdict on the count of class D felony resisting law enforcement even if Smith's tendered instructions had been given. Accordingly, any error, if error at all, in the trial court's refusal of Smith's tendered instructions was harmless. *See Williams*, 891 N.E.2d at 630 (finding harmless error in refusing the tendered instructions where the evidence clearly supported the convictions).

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.