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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH FAIRROW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1012-CR-765
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda Brown, Judge
Cause No. 49F10-1003-CM-16347

September 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Joseph Fairrow appeals his convictions of Disorderly Conduct[1] as a class B misdemeanor and Resisting Law Enforcement[2] as a class A misdemeanor, challenging the sufficiency of the evidence.

We affirm.

The facts favorable to the conviction are that on March 2, 2010, Fairrow was driving a white semi-tractor trailer. At approximately 11:30 p.m., Officer Tice of the Indianapolis Metropolitan Police Department observed Fairrow fail to make a complete stop at a stop sign in a populated area and initiated a traffic stop. Officer Tice requested Fairrow's license and registration. After obtaining the information, Officer Tice notified Fairrow that he was being stopped for failing to stop at a stop sign. Fairrow gave Officer Tice a Texas temporary plate and the title for the vehicle. The Texas plate had expired on December 22, 2009. Officer Tice then ran the VIN on the vehicle and did not discover any Indiana information on the vehicle. Officer Tice prepared three citations for failure to register, driving with expired plates, and disregarding a stop sign. Officer Tice also decided to tow the vehicle as it had been months since the temporary plates had expired.

Officer Stewart arrived as Officer Tice was prepared to give the citations to Fairrow. Officer Tice requested that Fairrow step out of the vehicle and upon Fairrow's failure to comply Officer Tice ordered Fairrow out of the vehicle. As Officer Tice attempted to explain the situation Fairrow became argumentative and began to yell at the officers. Officer

[1] Ind. Code Ann. § 35-45-1-3 (West, Westlaw current through 2011 1st Regular Sess.).
[2] Ind. Code Ann. § 35-44-3-3 (West, Westlaw current through 2011 1st Regular Sess.).

Tice attempted to calm Fairrow and explain the situation. When Fairrow would not calm down, Officer Tice told Fairrow to gather his belongings from the vehicle and leave. Officer Tice then performed an inventory of the vehicle, noticing a crowbar on the seat and a few bags.

Fairrow then looked in the vehicle and claimed that Officer Tice illegally searched his belongings. Officer Tice denied the allegation and again informed Fairrow that it would be best for him to calm down and leave the scene. As Fairrow continued to yell at Officer Tice, Officer Tice again ordered Fairrow to leave. Fairrow refused to follow the order to leave and dove back into the vehicle as Officer Tice approached. Officer Tice, recalling the crowbar on the seat and knowing that he had not thoroughly checked under the seats, quickly grabbed Fairrow to prevent him from obtaining a weapon that might be used against the officers. As Officer Tice pulled Fairrow down from the vehicle Fairrow struggled with Officer Tice and continued to yell.

Officer Tice noticed lights beginning to come on in the neighborhood and gave Fairrow the ultimatum of leaving the scene or going to jail. Fairrow did not alter his behavior, but continued to struggle and yell. Officer Tice took Fairrow to the ground and Officer Stewart placed Fairrow's right arm in handcuffs. Fairrow struggled and resisted with his left arm moving it away from the officers grasp, tucking the arm under his body, and moving his body to prevent cuffing. Officer Tice was eventually able to gain possession of Fairrow's arm and place him in handcuffs. The officers then linked their two sets of handcuffs together.

On March 3, 2010, the State charged Fairrow with disorderly conduct as a class B misdemeanor and resisting law enforcement as a class A misdemeanor. After a bench trial, Fairrow was convicted of both counts. On November 30, 2010, the trial court sentenced Fairrow to 365 days with 60 days executed and 305 suspended to probation for the class A misdemeanor resisting law enforcement conviction. The trial court sentenced Fairrow to a concurrent term of 180 days with 8 executed and 172 suspended for the class B misdemeanor disorderly conduct conviction. The trial court further ordered Fairrow to complete anger management classes.

On appeal, Fairrow contends the evidence was not sufficient to support the conviction of disorderly conduct. Our standard or review for sufficiency of the evidence is well settled.

> When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." *Id*. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009).

To sustain a conviction for disorderly conduct the State was required to prove beyond a reasonable doubt that Fairrow knowingly or intentionally engaged in fighting or in tumultuous conduct, and/or made unreasonable noise and continued to do so after being asked to stop. *See* I.C. § 35-45-1-3. Fairrow contends that his speech constituted protected political speech. We employ a two-step analysis to determine the constitutionality of the State's action in limiting speech: first we determine whether state action has restricted a

claimant's expressive activity and then we decide whether the restricted activity constituted an abuse of the right to speak. *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996).

Here, it is clear that the officers limited Fairrow's expressive activity by arresting him for making unreasonable noise based on his loud talking during Officer Tice's traffic stop. We thus turn to the second step in our analysis. Fairrow has the burden of proving that the State could not reasonably conclude that the restricted expression was an abuse. *Id.* at 1369. Fairrow argues that his speech was political under an objective standard as he challenged Officer Tice's basis for issuing citations and authority to search, the reason for his arrest, and the force used to arrest him.

We find Fairrow's situation analogous to *J.D. v. State*, 859 N.E.2d 341 (2007). In *J.D.*, an officer approached a juvenile in an effort to discover how to handle a situation, but the juvenile loudly interrupted the officer's attempts to speak and did not heed requests to stop yelling. The juvenile continued to yell after the officer threatened her with arrest, so she was arrested. On appeal of her adjudication as a delinquent, *J.D.* challenged the sufficiency of the evidence, arguing her conduct constituted political speech. The Supreme Court affirmed the adjudication holding that J.D.'s alleged political speech consisted of persistent yelling over and obscuring of the officer's attempts to speak and function as a law enforcement officer and amounted to an abuse of the right to free speech. J.D.'s speech thus subjected her to accountability under Article 1, Section 9, of the Indiana Constitution.

The reasoning in *J.D. v. State* is instructive here and we similarly find that Fairrow's loud over-talking of the officer was not constitutionally-protected speech. We therefore reject Fairrow's claim of insufficient evidence.

Fairrow further contends the evidence was not sufficient to support the conviction of resisting law enforcement. To sustain a conviction for resisting law enforcement the State was required to prove that Fairrow 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. *See* I.C. § 35-44-3-3. Our Supreme Court has made clear that, pursuant to I.C. § 35-44-3-3, any action to resist, obstruct, or interfere must be done with force. *Spangler v. State*, 607 N.E.2d 720 (Ind. 1993). In the context of resisting law enforcement, our Supreme Court has defined "forcibly" as "when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties." *Id.* at 723. On appeal, Fairrow argues that the State failed to prove that he used force to resist the officers.

In *Johnson v. State*, 833 N.E.2d 516, 517 (Ind. Ct. App. 2005), a defendant in custody "pushed away with his shoulders while cursing and yelling" when an officer attempted to search him. When the officer attempted to put the defendant into a police vehicle, the defendant "stiffened up" and the police officer had to exert physical force to put the defendant in the car. *Id*. Our Supreme Court approved of this court's conclusion that the defendant's actions constituted sufficient forcible resistance to sustain a conviction for resisting law enforcement. *See Graham v. State*, 903 N.E.2d 963 (Ind. 2009). In *Graham*, the Court noted that "even 'stiffening' of one's arms when an officer grabs hold to position them for cuffing would suffice" to establish forcible resistance. *Id.* at 966. The Court nevertheless reversed the defendant's conviction for resisting law enforcement finding that

no fair inference could be drawn from the facts that the defendant forcibly resisted even by stiffening his arms.

The facts in this case show that Fairrow used force by struggling with the officers and resisting with his left hand as the officers attempted to place him in handcuffs. Fairrow even tucked his hand under his body and turned away from the officers while on the ground. Fairrow's conduct establishes beyond a reasonable doubt that Fairrow forcibly resisted, obstructed, or interfered with the officers when they attempted to place him in handcuffs. The evidence presented is sufficient to sustain Fairrow's conviction of resisting law enforcement.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.