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IN THE
COURT OF APPEALS OF INDIANA

LAMARQUE ROSS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-CR-202
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Barbara Collins, Judge
Cause No. 49F08-0809-CM-216475

October 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a bench trial, Lamarque Ross was convicted of battery on a law enforcement officer and resisting law enforcement, both Class A misdemeanors, and sentenced to concurrent terms of 365 days for each conviction, with 362 days suspended. Ross now appeals, raising two issues that we consolidate into one: whether the evidence is sufficient to support his convictions. Concluding that the evidence is sufficient to support both convictions, we affirm.

Facts and Procedural History

On the evening of September 17, 2008, four Indianapolis Metropolitan Police Department ("IMPD") officers in an unmarked police vehicle responded to numerous calls about drug activity in the 3300 block of North Downey Street in Indianapolis and saw four black males walking down the middle of the street. When officers asked them to stop, one of the men took off running. Officer Chad Mann followed, eventually finding the man hiding under a van on a street to the east of Downey. A baggie of cocaine was also found under the van. Officer Mann placed the man under arrest for possession and identified him as Marquees Ross. Additional officers responded to the scene and people in the neighborhood began to gather. Two of the people who gathered at the scene were Marquees's mother, Markeyta Ross, and his brother, Ross, who lived on Downey Street. Ross has been deaf since infancy.

Markeyta approached the scene "screaming, yelling, very upset." Transcript at 12. Ross "was not really yelling but making noises . . . [and] was agitated as well." Id. at 15.

"[T]o get [Marquees] away from the situation," id. at 16, Officer Mann put him in a squad car and took him back to Downey Street where he had originally made contact and where other officers were still interviewing the other three men. Markeyta and Ross also returned to Downey Street. Markeyta was yelling and screaming profanity in protesting Marquees's arrest. Officer David Wisneski spoke to Markeyta, asking her to calm down. When she did not calm down, Officer Wisneski decided to escort her from the scene. He took her arm to guide her away, but she began struggling to release her arm by shaking it violently. Officer Mann observed the struggle and came to assist, taking Markeyta's free arm. As the two officers attempted to subdue and handcuff Markeyta, Ross, who to that point had been merely observing, grabbed Officer Wisneski's arm and "pulled it back forcibly." Id. at 37. Ross's deafness had been made known to the officers prior to this. Officers gave Ross a "palm strike" to the center of the chest and motioned for him to stop and step back. Ross again clasped Officer Wisneski's arm and pulled it back. Officer Chris Duckworth then saw Ross "walking in a very aggressive manner" toward Officer Mann, who had his back turned. Officer Duckworth approached and kicked Ross in the stomach, knocking him to the ground. Officer Wisneski testified that both a palm strike and a strike to the stomach are approved actions officers may take to subdue a person who has interfered with an officer or is resisting. Officer Duckworth then motioned for Ross to remain on the ground. Ross, however, jumped up and took a fighting stance with his hands in fists. Officers then took Ross to the ground, where he struggled for thirty to forty seconds before officers were able to get his hands behind his back and handcuff him. Approximately five to ten minutes after officers subdued

Ross, he began vomiting and an ambulance was called to the scene. Both Ross and Markeyta testified that Ross grabbed Officer Wisneski's shoulder in a manner common to the deaf community to get his attention because he wanted information about what was happening.

Ross was charged with battery on an officer and resisting law enforcement, both Class A misdemeanors. He and Markeyta were tried in a single proceeding, at the conclusion of which Ross was found guilty as charged. He now appeals his convictions.

Discussion and Decision

I. Standard of Review

Ross contends that the evidence is insufficient to prove he committed either battery on an officer or resisting law enforcement. In reviewing sufficiency of the evidence claims:

> [we] 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. [T]he 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) (citations and quotations omitted) (emphasis in original).

II. Battery

Ross was charged with violating Indiana Code section 35-42-2-1(a)(1)(B), which provides:

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
> (1) A Class A misdemeanor if:
>
> * * *
>
> (B) it is committed against a law enforcement officer . . . while the officer is engaged in the execution of the officer's official duty . . . .

Ross concedes that he touched Officer Wisneski, but argues that he did not knowingly or intentionally do so in a rude, insolent, or angry manner. There was testimony from Ross and Markeyta that Ross touched Officer Wisneski in order to gain his attention in a manner common to the deaf community. However, there was also testimony from two officers that Ross "pulled [Officer Wisneski's] arm back," tr. at 21, "grabbed [his] arm and pulled it back forcibly," id. at 37, and "clasped [his] arm and pulled it back," id. at 39.

As the trial court did,[1] we acknowledge that the situation was likely confusing for Ross: his mother was visibly distressed, he witnessed both his brother and his mother being arrested, and he could not hear what was being said to aid in his understanding of what was occurring.[2] However, the evidence most favorable to the judgment supports a finding that Ross touched Officer Wisneski in a more forceful manner than would be necessary simply to

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[1] In announcing its finding of guilt, the trial court stated, "[A]s to Lamarque, that's a little harder situation. However, I do believe he knew what he was doing, I do believe that they told him by physical means enough to keep him away." Tr. at 145.

[2] Ross argues in his brief that he had the "mental understanding of a five year old child [and a] five year old would certainly have been confused and frightened at [such] a scene." Brief of Appellant at 10. Officer Duckworth testified that Markeyta "told us on the scene [Ross] could not do sign language, that he had the mental capacity of a five year old." Tr. at 69. Markeyta, however, testified that Ross does understand sign language although "there's a lot of things that he don't [sic] understand because he didn't have to deal with that [in every day life]." Id. at 87. Other than Officer's Duckworth's statement, which was contradicted by Markeyta's testimony, there is no evidence that Ross had such severely limited intellectual capacity.

get his attention. In addition, even if we assume Ross touched Officer Wisneski's arm the first time only to get his attention, he grabbed Officer Wisneski's arm a second time even after he had gained the officers' attention and they had motioned for him to stop and stay back. Ross's argument is merely a request for us to reweigh the evidence, which we will not do. See Filice v. State, 886 N.E.2d 24, 36 (Ind. Ct. App. 2008), trans. denied.

III. Resisting Law Enforcement

Ross also argues that the evidence was insufficient to support his conviction for resisting law enforcement because officers used excessive force against him. Ross was charged with resisting law enforcement pursuant to Indiana Code section 35-44-3-3(a)(1), which provides:

> 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, a Class A misdeameanor . . . .

Ross contests the "while the officer is lawfully engaged in the execution of [his] duties" element of the crime. In Indiana, an individual may not resist an arrest that he believes is unlawful. Dora v. State, 783 N.E.2d 322, 327 (Ind. Ct. App. 2003), trans. denied. However, a citizen has the right to resist an officer who has used unconstitutionally excessive force in effecting an arrest. Shoultz v. State, 735 N.E.2d 818, 823 (Ind. Ct. App. 2000), trans. denied. Claims that law enforcement officers have used excessive force in the course of an arrest are analyzed under the Fourth Amendment to the United States Constitution and its "reasonableness" standard. Id. (citing Graham v. Connor, 490 U.S. 386, 395 (1989)). The

reasonableness inquiry is an objective one: were the officer's actions objectively reasonable in light of the facts and circumstances confronting him or her, without regard to underlying intent or motivation? Id. at 824. Relevant facts and circumstances to consider include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Id.

In Shoultz, we reversed a conviction for resisting law enforcement. Id. at 825. The officer in question followed a motorcyclist he witnessed making an unsafe start to a motorcycle club. Shoultz came out of the clubhouse and began yelling and swearing at the officer. The officer told Shoultz to be quiet and go back in the clubhouse. When Shoultz did not do so, the officer decided to arrest him for resisting law enforcement because he was interfering with the officer's investigation of the motorcyclist. The officer directed Shoultz to put his hands on the wall of the clubhouse. Shoultz did not comply and the officer told Shoultz that if he did not keep his hands on the wall, he would spray him with pepper spray. The officer sprayed Shoultz in the left eye, which further enraged Shoultz. The officer then warned Shoultz that he would hit him with his flashlight, which was metal, fifteen to eighteen inches long, and bigger around than a billy club. When Shoultz still refused to cooperate, the officer hit him on the back of the leg and then, after a final warning, on the head with the flashlight. Shoultz fell to the ground, bleeding profusely from his head. On appeal, we analyzed the Graham factors and held that the force used by the officer was objectively unreasonable and unconstitutionally excessive. Id. at 824. Shoultz never

threatened the officer with violence or made any threatening gestures and the only other person outside – the motorcyclist – was cooperating with the officer's directions; neither Shoultz nor anyone else touched the officer before the officer used pepper spray and his flashlight to subdue Shoultz; the officer never informed Shoultz that he was going to be arrested or attempted to handcuff him before using force; the purported crime for which the officer was attempting to arrest Shoultz was a misdemeanor; and the officer did not follow the police department guidelines in his use of force. In sum, "excessive force was used against a person who never verbally or physically threatened [the officer] with harm, who was not forcibly resisting law enforcement or attempting to escape, who was being arrested . . . for interfering with the investigation of a class C infraction." Id. at 825.

In this case, Ross physically touched Officer Wisneski twice by grabbing and pulling his arm; he was not cooperative with officers' instructions – given both by spoken word and by motion – to stop and stay back; he took a combative stance against the officers with his fists raised; upon being taken to the ground, he struggled with officers by attempting to push off the ground, pulling his arms under his body, and trying to break free of their grip; and he was ultimately arrested for his own battery upon a police officer. Further, officers testified they were following department guidelines in their use of force. Unlike the officer in Shoultz, the officers in this case used reasonable force in response to Ross's use and threat of force and we cannot say that the officers' actions were objectively unreasonable.

Conclusion

Sufficient evidence supports Ross's convictions for battery and resisting law enforcement.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.