

## STATEMENT OF ISSUES

1. The first question is whether there was sufficient evidence to find Graham guilty of Resisting Arrest as an A Misdemeanor. There was no indication that he forcibly resisted arrest. The prosecutor did not mention *forcible* resisting in her opening or closing statements.

2. The second question is whether the trial court erred when it ordered restitution without first inquiring into Graham's ability to pay and without fixing the manner of performance.

3. The third question is whether Graham's convictions for Criminal Mischief and Criminal Recklessness violate the Indiana Constitution's Double Jeopardy Clause.

## STATEMENT OF CASE

### *Nature of the Case*

This is a criminal appeal by Jeffrey A. Graham (Defendant).

### *Course of the Proceedings*

On December 20, 2005, the Bartholomew County Prosecutor filed three counts against Graham under cause number 03D01-0512-FD-02059. Appellant's Appendix (App.) 1-6. Count 1 was for Criminal Recklessness as a D felony. App. 2. Count 2 was for Resisting Law Enforcement as an A misdemeanor. App. 3. Count 3 was for Criminal Mischief as an A misdemeanor. App. 3. All counts related to an incident alleged to have occurred on or about December 14, 2005. App. 2-6. The State also filed a Motion for a No Contact order. App. 7. The court issued a Bench Warrant for Graham on December 20, 2005, setting a bond of \$250,000 or 10 per cent cash. App. 8. That warrant was returned served as of the same date. App. 9. The Pretrial No Contact Order was issued on December 22, 2005. App. 10-11.

Attorney Benjamin Loheide was appointed counsel and filed a Motion for Bond Reduction or Release on Recognizance or to Pre-Trial Home Detention on December 29, 2005. App. 12-13, 26. On January 3, 2006, the court set the matter for hearing on January 9, 2006. App. 14. Loheide entered his appearance for Graham on January 5, 2006. App. 15.

At the initial hearing on January 9, 2006, the court set trial by jury for April 25, 2006. App. 16-18. The court also denied Graham's request for release on his own recognizance or bond reduction. App. 19.

On January 23, 2006, Graham bonded out by paying a cash bond of Twenty-five Thousand and Five Dollars (\$25,005.00). App. 20-21. Kenneth Graham, the defendant's brother, provided the money. App. 22, 28. Loheide filed his Motion to Withdraw Appearance on February 2, 2006. App. 23. On March 6, 2006, the court found that defendant Graham was no longer indigent but ordered that Loheide would remain as counsel until another attorney was hired. App. 26.

On March 9, 2006, Kenneth Graham filed a letter with the court regarding the bond money. App. 28. On March 21, 2006, the Defendant filed a Verified Motion for Partial Release of the bond to pay attorney fees and retained Loheide's services as counsel. On April 3, 2006, the court ordered that partial release of Defendant's bond for \$500.00. App. 30.

On April 3, 2006, trial by jury was reset for August 15, 2006. App. 31. On July 25, 2006, the State requested a continuance of the jury trial. App. 44. The trial was reset to February 13, 2007. App. 46.

On January 22, 2006, the court released the \$25,000.00 bond posted by defendant's brother as follows: \$3,500 to Loheide for attorney fees; \$1,000 to be held in the clerk's trust

fund for fees and costs; and the balance released to defendant's brother, Kenneth Graham. App. 48. On May 7, 2007, trial by jury was reset for July 17, 2007. App. 49. Due to a congested calendar, the trial was reset to September 25, 2007. App. 50.

On September 21, 2007, Graham filed a Motion in Limine to Exclude Evidence of Criminal Convictions. App. 57-58. He also filed a Motion in Limine Concerning other Misconduct Evidence. App. 59-60. The State also filed a Motion in Limine regarding its witness, Adam Sharp. App. 61-62. The jury was chosen and sworn on September 25, 2007. App. 63; Transcript (Tr.) pp. 1-102.

#### *The Convictions*

On September 27, 2007, the jury found Graham guilty of Count 1, Criminal Recklessness, a D felony. App. 112. The jury also found Graham guilty of Count 2, Resisting Law Enforcement, and Count 3, Criminal Mischief, both A misdemeanors. App. 113-114, 118. The court ordered also a presentence records check. App. 118. The court set the matter for sentencing on October 24, 2007, and at the State's request remanded Graham to the local jail with no bond. App. 118; Tr. 493-499.

#### *Sentencing/Disposition Below*

On October 4, 2007, Loheide filed a Motion for Release of Bond to Pay Attorney Fees. App. 119-122. At sentencing on October 24, 2007, the court granted that motion. App. 123. At sentencing, the court considered the Pre-Sentence Report filed by the Probation Department and heard testimony from the victim, Adam Sharp. App. 124; Tr. pp. 507-516.

The Court then sentenced Defendant to Indiana Department of Correction (DOC) for thirty-two (32) months on Count 1; to Bartholomew County Jail for one (1) year on Count

2; and to Bartholomew County Jail for one year on Count 3, all counts to run consecutively. App. 124. No time was suspended on Count 1. *Id.* The balance of the time on Count 2 was suspended. *Id.* All of the time on Count 3 was suspended. *Id.* The defendant was to receive credit for 132 days spent in confinement (66 actual days) to be applied towards Count 2. App. 125.

After incarceration, Graham will be on probation for eighteen (18) months. *Id.*, App. 130. Probationary terms include that he pay a \$100.00 initial probation user's fees; a \$100.00 probation administration fee; and a \$30.00 monthly probation user's fee for every month on probation. *Id.* He must also pay restitution of \$1,700.00 to Adam Sharp. *Id.* Other terms of probation include that he refrain from the use of alcoholic beverages and that he not possess or have in his residence a firearm while on probation. App. 125-126, 130.

The court also ordered Graham to pay \$160.00 in court costs and released the bond to pay \$500.00 attorney fees to Loheide and \$340.00 towards the money owed to Sharp for restitution. App. 128, 130; Tr. p. 544. That would leave a balance of \$1,360.00 owing to Sharp. Tr. p. 544.

Finally, the court appointed Donald J. Dickherber for purposes of appeal. App. 128.

#### *Proceedings post-sentencing*

On November 15, 2007, Graham by counsel filed his Notice of Appeal. App. 139-146.

The Clerk of Bartholomew Circuit Court filed her Notice of Completion of Clerk's Record on November 16, 2007. App. 147-148. On February 15, 2008, the Court Reporter for Bartholomew Superior Court 1 filed a Verified Motion for Extension of Time to File

Transcript. App. 155-157. On February 27, 2008, the Court of Appeals granted the Motion for Extension of Time to and including March 28, 2008. App. 158-159. The Court of Appeals later granted a final extension to April 15, 2008.

The Court Reporter filed her Notice of Filing of Transcript on April 15, 2008. App. 160. The Clerk of Bartholomew Circuit Court filed her Notice of Completion of Transcript on April 15, 2008. Appellant's App. App. 161-162.

### **STATEMENT OF FACTS**

Graham was charged with three counts, one D felony and two A misdemeanors. The jury found him guilty of all three charges. The facts as to the three counts, considering only the evidence most favorable to the court's decision, as well as all reasonable inferences to be drawn therefrom, include the following.

Count 1 alleged that Graham "recklessly, knowingly or intentionally" performed an act that created a substantial risk of bodily injury to Adam Sharp while armed with a deadly weapon. App. 2; Indiana Code § 35-42-2-2(c)(2). On December 14, 2005, Sharp was driving his 1989 GMC Jimmy. Tr. pp. 136-138. Sharp was eastbound towards North Hinman Street in an east-west alley that runs between his mother's house on Reo Street and Graham's house on North Hinman in Columbus. Tr. pp. 139-142, 268. Graham's house at 32 North Hinman is on the south side of the alley. Tr. pp. 145, 268. As Sharp neared North Hinman Street, Graham stepped out from behind a large tree in his yard. Tr. pp. 142, 145. Graham was a couple feet away from the tree ahead of and to Sharp's right. Tr. p. 145.

Sharp saw that Graham had a shotgun and that it was pointed at him. Tr. pp. 143, 146. Graham fired the shotgun at the grill of Sharp's Jimmy. Tr. pp. 422. Graham's first

shot hit the passenger side front bumper and turn signal lens. Tr. pp. 209-210, 367. Sharp ducked and accelerated to get away, spinning his tires in the snow and ice covered alley. Tr. pp. 142-143, 211. Graham fired two more times. Tr. pp. 143, 422. Either the second or third shot (or both) hit the passenger side front tire from behind. Tr. pp. 200, 370. Graham reached the street and drove quickly off. Tr. pp. 125-126. According to Graham, he had shot at Sharp's vehicle so he could confront Sharp and find out why he was provoking him. Tr. pp. 426-427, 430. He thought Sharp had driven several times through the alley past Graham's house and onto Graham's property. Tr. p. 419-420. The shots were all fired in a matter of seconds. Tr. pp. 125, 431. The tracks suggest that Sharp had driven through only once. Tr. p. 213.

Count 2 alleges that Graham "did knowingly and forcibly" resist, obstruct or interfere with law enforcement officers of the Columbus Police Department while they were lawfully engaged in their duties as law enforcement officers. App. 3; I.C. 35-44-3-3(a)(1). When police responded to Sharp's 9-1-1 call from a gas station, Graham sat in his home in the dark and did not respond to their knock on his door. Tr. pp. 197-198, 301. When contacted by the SWAT team negotiator by telephone, Graham at first refused to come out of his house. Tr. pp. 274-277. When he finally came out onto his porch, Graham refused to come off the porch. Tr. pp. 277-279, 425. He refused to put his hands up. Tr. pp. 319-321, 426. His response was, "Fuck you." Tr. p. 321. He said it not once but twice. Tr. pp. 321, 400. The SWAT team thought he was turning to go back into his house and one member on orders from her supervisor shot Graham four times in his thighs with "less lethal" rounds ("bean bags" fired from a shotgun). Tr. pp. 321-322.

As Graham started to go down, several officers rushed him and pulled him down off the porch. Tr. pp. 322, 324. The SWAT team officer who had shot the bean bags thought Graham appeared to be cooperating with the officers who were trying to handcuff him. Tr. pp. 324-325. On her report she described Graham as offering “passive resistance.” This meant that he responded to their commands by doing nothing. Tr. pp. 327-328. He did not demonstrate “active aggression.” Tr. p. 328. Graham also showed “defensive aggression” – when he said “fuck you” he was saying he was not going to comply with their commands, not going to deal with them at that time. Tr. pp. 328-329.

Count 3 alleges that Graham “recklessly, knowingly or intentionally” without Sharp’s permission damaged his property, the GMC Jimmy, in an amount greater than \$250.00 but less than \$2,500.00. App. 4; I.C. 35-43-1-2(a)(1). Sharp got one estimate that it would cost twelve hundred to thirteen hundred dollars to repair his vehicle. Tr. p. 151.

At sentencing Sharp advised the court that he did the work himself at a cost of \$1,700.00 in parts plus his labor because he could not afford to pay the one time cost of about \$1,250.00. It cost him fifty percent more to do the work himself than the repair shop would have charged for parts and labor, Sharp said, because he could not get the same low prices for parts that the shop could. The court asked for no receipts for these parts – and the State offered no evidence of either the parts or the original estimate – and the court did not question Graham as to his ability to pay either the \$1,250.00 or the \$1,700.00 but ordered Graham to pay the higher amount as a term of probation. The court did not specify the manner of performance for Graham’s payment.

Other facts will be added as necessary for the argument.

## SUMMARY OF ARGUMENT

A. There is insufficient evidence to prove that Graham forcibly resisted law enforcement officers. They shot him four times in his thighs with “less lethal” rounds, then dragged him off his porch as he started to go down. The statute defining Resisting Law Enforcement requires that a defendant knowingly and *forcibly* resist, obstruct or interfere with law enforcement officers. The State did not produce evidence of forcible resistance by Graham. The State never argued to the jury that Graham had forcibly resisted. The State appeared to accept the notion that resistance in any form was enough. Thus, the jury – although instructed that the State had to prove forcible resistance – never heard any evidence as to or argument about forcible resistance.

The court in sentencing Graham on this count did not remember the facts correctly. This conviction should be vacated.

B. The trial court erred when it ordered restitution without first inquiring into Graham’s ability to pay and without fixing the manner of performance. Such an inquiry and instruction by the court is required by the statute that governs this aspect of sentencing.

C. The third question is whether Graham’s convictions for both Criminal Mischief and Criminal Recklessness violate the Indiana Constitution's Double Jeopardy Clause. Under the "actual evidence" test, these offenses were not established by separate and distinct facts. There is a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of the first offense were also used to establish all of the essential elements of the second offense. To determine what facts were used, we consider the evidence, charging information, final jury instructions, and arguments of counsel.

## ARGUMENT

**A. There was insufficient evidence to convict the defendant of Resisting Law Enforcement because there was no evidence to show that he forcibly resisted law enforcement officers.**

**The State never argued to the jury that Graham had forcibly resisted.**

### **1. The Standard of Review**

The Standard of Review for sufficiency of the evidence is well settled. The Court on Appeal will neither weigh the evidence nor resolve questions of credibility. It will look only to the evidence and the reasonable inferences therefrom which support the verdict. If from that viewpoint there was evidence of probative value from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt, the court on appeal will affirm the conviction. *Spangler v. State*, 607 N.E.2d 720, 724 (Ind. 1993).

**2. The statute under which Graham was convicted requires more than resistance.**

**It requires forcible resistance.**

There is insufficient evidence to prove that Graham forcibly resisted the law enforcement officers who shot him four times in his thighs with “less lethal” rounds, then dragged him off his front porch as he started to go down. The statute defining Resisting Law Enforcement requires that a defendant knowingly and *forcibly* resist, obstruct or interfere with law enforcement officers. The State did not produce evidence of forcible resistance.

The statute under which Graham was charged in count 2 provides that a person “who knowingly or intentionally: (1) *forcibly* resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of

the officer's duties. . . commits resisting law enforcement, a Class A misdemeanor. . .” I.C. 35-44-3-3(a)(1), emphasis supplied; App. 3.

Indiana’s Supreme Court has considered this statute and found that the statute requires the State to prove forcible resistance:

When construing a statute, the Court must also examine the grammatical structure of the clause or sentence in issue. Here, the legislature placed the modifier "forcibly" before the verb "resists," and "resists" was the first in a string of verbs. If the legislature had intended only to modify "resists," then "forcibly" would have appeared after the verb, and the statute would have instead read "resists forcibly, obstructs, or interferes." We agree with the Third District Court of Appeals that "forcibly" modifies the entire string of verbs in that particular section of the statute, due to the placement of the adverb before the string of verbs in that particular clause. *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993), internal citations omitted.

The court next considered the appropriate meaning of the term "forcibly" as it is used in this statute.

As this is a penal statute, it is to be strictly construed against the State. Our final objective is to determine and effect legislative intent. The word "forcibly" is an adverb that modifies the verbs which follow it. "Forcibly" is a word descriptive of the type of resistance, obstruction, or interference, proscribed by law. Resistance, obstruction, or interference, with force is the action the statute addresses. Here, the Court must consider exactly what constitutes force, as applied in the statute. *Spangler*, 607 N.E.2d at 723, internal citations omitted.

Indiana’s Supreme Court concluded: We believe that one "forcibly resists" law enforcement when *strong, powerful, violent means* are used to evade a law enforcement official's rightful exercise of his or her duties. *Id.*, emphasis added.

### **3. The facts show there was no forcible resistance by Graham.**

The State alleged in its information that “Graham *continued* to forcibly resist officers as they attempted to handcuff him.” App. 6. But the State does not allege any forcible resistance

by Graham *before* they handcuffed him on December 14, 2005. The State's information alleges only that after *negotiations* with the SWAT team, Graham *agreed* to come out of his residence. *Id.* Then Graham *refused* oral commands to come off the porch and surrender. After bean bag rounds were deployed, Graham was apprehended. *Id.* There is no hint in any of this of *forcible* resistance. Thus, the information is incorrect when it states that he "*continued* to forcibly resist."

The police set up with their SWAT team on the north side of the house in the alley just off the porch. Tr. p. 268. It took about twenty or thirty minutes to get a negotiator to the scene. Tr. p. 272. During that time, the house remained dark and absolutely nothing happened. *Id.* The police were understandably concerned about this situation. Tr. p. 273. But Graham was not forcibly resisting anyone.

After negotiations were established by telephone, Graham at first refused to come out. Tr. pp. 273-275. After about fifteen minutes, a second negotiator persuaded him to come out on the porch. Tr. 274-275. He followed directions, came out on to the porch, and was cooperating with instructions from the officers talking to him from across the street. Tr. pp. 277-278. That cooperation stopped when the SWAT team made verbal contact. Tr. p. 278.

The four officers in the SWAT team were just a few feet from Graham. Tr. p. 279. The officers across the street could hear the SWAT team telling him to get down, get down on the ground. *Id.* He refused to obey in that he did not get down. *Id.* Instead, he turned to the officers and said, "Fuck you." *Id.* "[H]e didn't draw a fist or anything like that." Tr. p. 280. But there were multiple officers ordering him to get down "and his response was fuck you." *Id.*

The SWAT officer next to the porch who fired the “less lethal” rounds recalls that the SWAT team made “three loud repetitive verbal commands to get his hands up, step down off the porch.” Tr. pp. 320-321. Then the defendant turned, said “Fuck you,” and turned as if to go into his residence. Tr. p. 321. That’s when she was given the order “to impact.” *Id.* She complied and shot a round into Graham’s upper thigh. *Id.* Nothing happened so she shot him a second, third and fourth time. Tr. pp. 321-322. The he started to go down and hold his thighs. Tr. p. 322. None of this suggests any forcible resistance on Graham’s part.

The prosecutor then asked if the defendant’s refusal to comply with the verbal commands interfered with or obstructed her duties as a law enforcement officer. Tr. pp. 323-324. The officer did not agree that it obstructed them but it meant they had to go to a different plan. Tr. p. 324. The prosecutor did not ask if Graham had *forcibly* resisted, obstructed or interfered with her duties.

The prosecutor then asked if the officers on the scene had been unable to investigate the incident because of fear for their own safety. *Id.* Graham had doubtless interfered with the investigation by not coming out of his house immediately. He had not *forcibly* interfered.

At that point, with Graham starting to go down after four “less lethal” shots into his thighs, the officer went “hands on.” *Id.* That means they “physically place their hands on that person, take him down.” *Id.* They “stepped him off the porch and then proned him out, belly down on the ground and, and then put his arms behind his back and handcuffed him.” *Id.*

There was forcible activity from the moment the bean bag rounds were fired and seconds later the officers went “hands on”– but it is not Graham who is being forcible. The

officers were understandably concerned about the possibility of Graham arming himself (*Id.*) but that does not make his failure or refusal to obey a command forcible resistance.

This is the point where the prosecutor apparently hoped to establish such resistance. It is the only allegation of forcible resistance in the information. App. 6 (“Graham continued to forcibly resist officers as they attempted to handcuff him.”).

The officer who had fired the shots had just stated that they “put his arms behind his back and handcuffed him.” Tr. p. 324. The prosecutor asked, however, “Did the defendant cooperate with the officers who were *trying* to handcuff him.”

The officer said, “It appeared so.” Tr. p. 325. The other two or three guys were handcuffing him so she went into the building to clear the house. *Id.*

Thus, the idea that Graham, after being shot four times with “less lethal” rounds designed to incapacitate him, *forcibly* resisted the two or three officers who took him off the porch did not come from the officer closest to the scene. There was no evidence presented from any of the officers who did take him to the ground.

Once Graham was on the ground, the officer across the street could hear the officers who took Graham down yelling at him, “Give us your hands, give us your hands.” Tr. p. 281. We have seen that the officers may tend to yell their commands two or three times. The fact that they yelled “Give us your hands” more than once does not imply that he was *forcibly* resisting. The officer said that Graham “still resisted to give, not to give the hands.” *Id.*

“The idea is to put the hands behind the back in handcuffs,” the officer explained. So “he was still not complying.” *Id.* Then, “He was handcuffed at that point.” *Id.* The officer across the street thought that Graham was *not complying* because he could hear the officers

yelling, “Give us your hands.” There is no evidence in this chain of events that suggests that Graham did not give them his hands. But not complying is not the same as “forcibly resisting.”

It is difficult to see that the officer across the street even provides evidence of resistance. He certainly does not suggest forcible resistance. This is not evidence that Graham used *strong, powerful, violent means* to evade a law enforcement official's rightful exercise of his or her duties. *Spangler*, 607 N.E.2d at 723.

As Graham was taken off the porch and “proned,” he presumably would have no way of knowing what they wanted him to do next until the officers said *something*. What they said was “give us your hands.” The officer describing what he heard from across the street at night said this meant that Graham was supposed to put his hands behind his back so they could handcuff him that way. *Id.*

A layperson might suggest that a statement like “put your hands behind your back” would make it clear what was wanted of the defendant. The fact that the officers yelled at him to “give us your hands” does not mean he was resisting or refusing to put his hands behind his back. It means that in their way they were telling him what to do next. It does not even imply that he was *forcibly* resisting. Soon enough Graham was indeed handcuffed with his hands behind him. Tr. pp. 281, 324-325.

There is no evidence that he even *resisted* being handcuffed. *Id.* There is no evidence at all from any officer immediately involved in the arrest. The officer close to the scene who did not jump up to take him off the porch – the one who shot him with the less lethal rounds – thought Graham appeared to be cooperating with the officers who took him down to the ground. Tr. pp. 324-325. She described him in her report as passively resistant. Tr. pp. 327-328.

He did not respond at all. He did not do anything. Tr. p. 328. She thought he had been defensively resistant – because he had made a turn towards his residence. *Id.* She had not seen “active aggression” at all. He did not form a fist or come at them with a weapon. *Id.* She considered the “fuck you “ comment as “defensive aggression” – it meant he wasn’t going to comply. Tr. pp. 328-329.

The prosecutor was content – after all, the officer was describing forms of resisting her commands as a law enforcement officer. Tr. p. 329. It may be that the prosecutor had lost track of or forgotten the notion of “*forcibly* resisting.” She seemed to be attempting to prove mere resistance, not forcible resistance.

#### **4. The prosecutor did not argue that there had been forcible resistance.**

During her opening statement to the jury, the prosecutor described the scene this way:

“[A]fter quite a while finally the defendant comes out on his front porch and he’s pacing.” Tr. p.117.

We know this is wrong. The defendant was not pacing when he came out after talking to the negotiators. The “pacing” is from another time, a witness who saw Graham walking back and forth on his front porch *before* the officers arrived on the scene. Tr. pp. 172-174. Then her officer characterized this earlier walking around as “pacing.” Tr. p. 294.

But the prosecutor has Graham walking back and forth on his porch with the SWAT team and the other officers present:

The Defendant finally comes out of the house and is walking back and forth and they’re saying come out, put your hands up, and get down on the ground. And the Defendant stands with his back to his house and goes fuck you and moves to go back into his house. At that time, a SWAT team member armed with less lethal ammunition (inaudible) shoots the Defendant four times to keep him from going back into that house. The Defendant was

apprehended, taken into an ambulance, taken to the hospital, have injuries treated, and the police go into the house. Tr. pp. 117-118.

That was all that the prosecutor had to say to the jury in her opening statement about the crime of resisting law enforcement. Tr. pp. 114-118. There is nothing there about *forcibly* resisting arrest.

In her closing argument, the prosecutor presented no evidence of forcibly resisting law enforcement. She noted that the defendant had admitted he had resisted law enforcement. Tr. p. 447. She certainly did not say anything about Graham *forcibly* resisting law enforcement officers. Instead, she said, “And he admitted that he resisted the orders of the police. *There’s* resisting law enforcement.” *Id.* emphasis added.

As we have seen, that is simply wrong as a statement of the law as to the *crime* of resisting law enforcement. It is a correct statement as far as it goes and seems to make sense – “resisting” is “resisting.” The problem is that the statute requires that there be *forcible* resisting or there is no crime. The prosecutor seems to have forgotten that element of the crime.

In her closing, she mentioned in passing that Graham had not come out of his house – as part of her discussion that he had not acted in self defense. Tr. p. 451. She mentioned the “fuck you” comment as part of her discussion of him being at fault. Tr. p. 454.

During the second part of her closing statement, as to Resisting Law Enforcement, she noted that one of the officers had knocked on the door (defendant had denied this). Tr. p. 476. Again, there is nothing in his refusal to answer the knock on the door that shows forcible resistance. The prosecutor is proving resistance, only. And that is all she attempted to prove to the jury as to Count 2, Resisting Law Enforcement as an A Misdemeanor.

The prosecutor argued that it was enough that Graham had admitted he resisted law enforcement. In fact, she never asked him if he had done anything that would have amounted to forcible resistance of a law enforcement officer. She asked if he had sat inside and not answered the door. Tr. p. 423. When he went out on the porch, the officers ordered him to get down and he refused. Tr. p. 425. And he said, “Fuck you.” *Id.* Twice. Once after being shot with one of the less lethal rounds. *Id.*

After he had been shot a couple times, he recalled hearing one of them yell, “Take him down.” Tr. p. 426. “And that’s when. . .that’s the end.” *Id.* The prosecutor asked him again if he had failed to comply when ordered to raise his hands and come off the porch. *Id.*

*But she did not ask if he had forcibly resisted.*

Graham was in fact handcuffed. He had been shot four times by incapacitating rounds. Two or three officers dragged him to the ground from the porch. There was a lot of force applied to him. That does not mean he forcibly resisted the officers. He was doubtless someone who caused the officers a great deal of concern because he had already fired a shotgun in the city at a vehicle going by his house.

But he eventually came out of his house and did not forcibly resist. Without *forcible* resistance there is no “resisting law enforcement.” The prosecutor told the jury that Graham had resisted law enforcement – that it was obvious because he had even said he had resisted law enforcement. But she never suggested or argued to the jury that Graham “forcibly” resisted law enforcement or used any degree of force to resist the officers.

She did not say it in her opening statement and she did not say it in her closing argument. She appeared to have forgotten that it was part of what the State had to prove if it

was to prove the defendant had resisted law enforcement. As a result, there was insufficient evidence to convict the defendant of Resisting Law Enforcement as an A misdemeanor.

**5. The trial court’s memory of the evidence  
as to Resisting Law Enforcement was incorrect.**

The trial court at sentencing called it “probably the second most disturbing resisting law enforcement that I’ve ever had because I don’t recall any time when the officers discharged the beanbags . . . And they fired on you four times and your response was “F” you. [Those are] not the words that I would interpret as somebody who intends to be compliant.” Tr. p. 532.

The judge has taken the extreme force used by the officers (he does not recall any time when the officers have used the bean bags) to suggest that *Graham* has resisted. The judge is correct that Graham did not appear to intend to be compliant. But the statute requires forcible resistance – not passive noncompliance.

“Now . . . you said that, and you did it, and in light of a fully armed SWAT squad, you refused to comply. Most of the cases I get in resisting law enforcement are driving away, running away, something like that, relatively simple. But you’re armed with a firearm.” Tr. pp. 532-533. The judge goes on: “*He’s armed with a firearm*, there’s a full SWAT squad out there and he’s telling them ‘F’ you.” Tr. p. 533, emphasis added. “I think *they would have been probably justified in using lethal force*. For your sake, you are very fortunate that they did not.” *Id.*

At this point the judge has simply recalled the facts incorrectly. Graham had discharged his shotgun some time earlier – but he did not bring any firearm with him to the porch. Tr. pp. 277-279. He did not resist while armed with a shotgun. He was instead himself shot

(“impacted”) by “less lethal” rounds fired by a shotgun when he turned to go towards his front door. There would certainly not have been any reason for an officer to use lethal force under these circumstances. It is even possible that they could have simply overpowered Graham without resorting to the use of bean bags. But we are not second-guessing their decision in the moment. We are just noting that there were no *strong, powerful, violent means* used by Graham.

The reason most resisting law enforcement charges involve someone fleeing is that there is a separate part of the Resisting Law Enforcement statute. “A person who knowingly or intentionally: *flees from a law enforcement officer* after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop commits resisting law enforcement, a Class A misdemeanor. . . I.C. 35-44-3-3(a)(3), emphasis added. This part of the statute does *not* require forcible resistance.

That was not the charge in this case. The charge against Graham required proof of forcible resistance, obstruction, or interference with a law enforcement officer. App. 3. As part of his preliminary and final instructions, the judge read the statute that includes those requirements. Tr. pp. 109, 480. As for Resisting Law Enforcement, the court instructed the jury that the second element was “forcibly resisted, obstructed or interfered with a law enforcement officer or a person assisting the officer.” Tr. p. 480; App. 88.

The jury found Graham guilty of Resisting Law Enforcement as an A Misdemeanor. App. 113. It should not have – because there was no evidence that Graham had forcibly resisted any law enforcement officer.

Defendant respectfully asks that the court on appeal remand with instructions to vacate the conviction for Count 2. Because the 132 days credit for time served prior to sentencing (sixty-six actual days) were applied to this count, those days should be applied to the felony sentence. Tr. p. 534. The sentence for count 3 was suspended in its entirety. *Id.*

**B. The trial court erred when it ordered Graham to pay \$1,700.00 in restitution but did not inquire into his ability to pay or set the manner of performance.**

The trial court erred when it ordered restitution without first inquiring into Graham's ability to pay and without fixing the manner of performance. *Shepard v. State*, 839 N.E.2d 1268, 1270-1271 (Ind. Ct. App. 2005). I. C. 35-38-2-2.3(a)(5) provides that when restitution is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance. *Id.* On remand, the trial court should determine whether Graham can or will be able to pay a total of \$1,700.00 in restitution and fix the manner of performance. *Id.*

The court placed Graham on probation for eighteen months. Tr. 534. The probation period will begin when he is released from Department of Correction on the felony charge. *Id.* Standard conditions of probation will apply – plus Graham will be required to pay restitution in the amount of \$1,700.00. Tr. pp. 534-535. The trial court recognized that this amount was higher than the amount of the one estimate he had heard at trial. Tr. p. 535. Sharp provided the estimate of \$1,253.56 as an exhibit when he testified at sentencing. Tr. p. 512.

The court made no inquiry at all as to Graham's economic circumstances. Nor did it fix the manner of performance for Graham. Both omissions were a violation of the statute. *Shepard*, 839 N.E.2d at 1270-1271; I. C. 35-38-2-2.3(a)(5).

**C. The convictions for Criminal Recklessness and Criminal Mischief  
violate the Indiana Constitution's Double Jeopardy clause.**

**1. The Actual Evidence Test.**

The third question is whether Graham's convictions for both Criminal Mischief and Criminal Recklessness violate the Indiana Constitution's Double Jeopardy Clause. That Clause, found in Article 1, Section 14 of the Indiana Constitution, "was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." *Stewart v. State*, 866 N.E.2d 858, 863 (Ind. Ct. App. 2007), quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). Two or more offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause, if, with respect to *either* the *statutory elements* of the challenged crimes or the *actual evidence* used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Stewart*, 866 N.E.2d at 864, internal citations omitted.

Under the "actual evidence" test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. *Id.* To determine what facts were used, the court on appeal considers *the evidence, charging information, final jury instructions, and arguments of counsel.* *Id.*, emphasis added.

**2. The elements and facts of the Criminal Recklessness and Criminal Mischief charges.**

To convict Graham of Count 1, Criminal Recklessness as a Class D felony, according to the final jury instructions and the charging information, the State must have proved the defendant recklessly, knowingly, or intentionally, performed an act that created a substantial risk of bodily injury to Adam Sharp, and that the act was committed while armed with a deadly weapon, a shotgun. I.C. 35-42-2-2(c)(2); App. 2, 87. Neither the charging information nor the final instructions specified what that act was. App. 2. The act had to be one committed while armed with his shotgun, however. *Id.*

To convict Graham of Count 2, Criminal Mischief as a Class A misdemeanor, according to the final jury instructions and the charging information, the State must have proved the defendant recklessly, knowingly, or intentionally, damaged or defaced the property of Adam Sharp without his consent, and the pecuniary loss was at least two hundred fifty dollars, but less than two thousand five hundred dollars. I.C. 35-43-1-2(a)(1); App. 4, 89. The charging information specified that Graham damaged Sharp's 1989 GMC Jimmy. App. 4. The facts are clear that the Graham damaged Sharp's vehicle only by shooting it with his shotgun. See, e.g., Tr. pp. 183-188.

Under the circumstances of our case, as in *Stewart*, the elements are not identical but there is substantial overlap. *Stewart*, 866 N.E.2d at 864. The only act that could have damaged Sharp's vehicle was the firing of the shotgun. The act that created the substantial risk of bodily harm to Sharp must have been caused while armed with the shotgun. I.C. 35-42-2-2(c)(2). The obvious act that would have created the substantial risk of harm was the firing of that shotgun.

In our case, there were three shots fired. They came within seconds of each other. Tr. pp. 125, 431. In *Stewart*, the record was unclear as to “whether Stewart fired one or more than one shot towards Dancy's vehicle.” *Stewart*, 866 N.E.2d at 864-865. That question was not the deciding factor in *Stewart*, however. “Clearly, Stewart's act of firing at Dancy's vehicle was what the State intended to rely on to support both the attempted murder/battery charge and the criminal recklessness charge.” *Stewart*, 866 N.E.2d at 864.

The same can be said in our case. It is Graham’s firing at the vehicle that the State intended to rely on to support both the Criminal Recklessness and Criminal Mischief charges. The State did not say what the act was in Count 1 but specified Graham’s shotgun. App. 2. The State said in Count 3 that the damage was the damage caused by the shotgun to Sharp’s Jimmy. App. 4.

### **3. The supporting affidavit for the two counts.**

One supporting affidavit covered all three counts against Graham. App. 5-6. The reporting officer said he was investigating a shooting incident. App. 5, par. 2. In paragraph 3 of the affidavit, the officer states, in part: “Graham pointed the shotgun at the windshield of Sharp’s vehicle, yelling words to the effect of ‘I’ve got you now.’ Graham lowered the shotgun slightly and fired the weapon several times at Sharp’s vehicle.” App. 5.

Next, in paragraph 4, the officer states: “Sharp’s vehicle was struck causing damage to the right front fender, bumper, marker light, and tire. Damage to the vehicle is estimated at less than \$2,500 but more than \$500.” *Id.*

The rest of the affidavit takes up the story of the arrest and the statement by Graham. App. 5-6. According to the officer's statement in the affidavit, "[Graham] admitted that . . . he fired several times at the grill of the vehicle with a shotgun . . . in an attempt to disable the vehicle so that he could then physically assault the driver." App. 6, par. 8.

Thus the final instructions, charges and supporting affidavit suggest that there is a reasonable possibility the jury used the same evidence to establish all of the elements of both criminal recklessness and criminal Mischief and to convict Graham of both crimes, in violation of the Indiana Double Jeopardy Clause. *Stewart*, 866 N.E.2d at 865.

#### **4. The Prosecutor's arguments as to the two charges.**

The arguments of counsel support this unfortunate suggestion. The prosecutor's opening statement began like this:

[W]hen Adam Sharp drove by in the alleyway next to this Defendant's house, the Defendant stepped out from behind the tree and *he raised the shotgun that he held in his arms and shot at Adam Sharp, hitting his vehicle in the front right turn signal lens with a round going into the engine compartment.* Adam, shocked, he sees the Defendant raising that shotgun, *doesn't know what to do and then he sees the Defendant shoot at his vehicle,* Adam ducks down and puts the gas on, does a three sixty in the yard, and floors it to get out of there. As he's leaving, he hears shots two and three from behind him. *The evidence will show that at least one of those shots hit the mud flap and the tire from behind, hit the mud flap and the tire of Adam Sharp's vehicle.* Tr. p. 115, emphasis added..

The prosecutor describes shots that alarm the victim and damage the vehicle. She repeats the story seconds later:

[H]e slows down and then all of a sudden he sees this man with a shotgun raised right at him. And he hears the man say something, words to the effect of I've got you now you son of a bitch, and *then Adam saw*

*that person fire at his vehicle. And Adam ducked down, floors it, he gets out of there and he's shocked, he hears two more shots. Tr. p. 116, emphasis added.*

That's all there is for this part of the story. The rest of the prosecutor's opening statement concerns the difficulties between Graham and the police department afterwards.

At closing the prosecutor made the same argument but tied the two counts together more specifically. She began it this way:

On December fourteenth, two thousand and five, this defendant, Jeffrey Graham, hid behind the tree in his yard and he held that shotgun and he waited until Adam Sharp drove by his property. And he saw Adam Sharp's vehicle and *he stepped out from behind that tree and he holds that shotgun up and he fires at it. Not once, not twice, three times. And hit Adam Sharp's vehicle in the front turn signal lens, and he hit it from behind when he shot that second or third shot and it went through the mud guard and in the back of that tire.* And then police respond to this serious threat and he refused to comply. He refused to come to door. He refused to put his hands up. He refused to step off the porch. He says, "Fuck you" not once, but twice. And then he is taken down with less lethal rounds. *He committed the crime of criminal recklessness with a dangerous weapon, resisting law enforcement, and criminal mischief. Tr. p. 446, emphasis added..*

The prosecutor again used the same set of facts to prove both the criminal recklessness and the criminal mischief. She added this a few seconds later:

The defendant took the stand and told you that he intentionally shot Adam Sharp's vehicle. *He intentionally shot not once, not twice, but three times. He used his shotgun to hit Adam Sharp's vehicle. He admitted that he did that three times. And he admitted very likely there were two shots that damaged Adam's vehicle. There's the criminal mischief. There's the criminal recklessness. Tr. p. 447, emphasis added.*

We do not want to put too much emphasis on one dramatic line – but here the prosecutor clearly equates the two crimes for the jury. Graham admitted that he shot the vehicle – he was guilty therefore of both criminal mischief and criminal recklessness.

The defendant is responsible for all that he did. *For shooting at Adam causing great risk to Adam, using a deadly weapon, the shotgun.* He is responsible for damaging the vehicle and he is responsible for resisting police. Tr. p. 454, emphasis added.

Here the prosecutor has again clarified for the jury: Graham shot at Adam, “causing great risk to Adam, using a deadly weapon, the shotgun.” *Id.* The shots caused the substantial risk that was the basis of the criminal recklessness. He also shot and damaged the vehicle. She finished this way:

Evidence of criminal mischief, well you have the victim’s testimony that he took his vehicle and he got an estimate and it’s gonna cost around twelve hundred and fifty dollars to repair. That’s enough. You don’t need more. Tr. p. 475.

The court advised her she had one minute left and the prosecutor finished this way:

You have a lot of evidence. You can look at the tracks. Who cares. Now that you have the defendant’s words, who cares whether the cartridge was in the tracks before or after. *The defendant told you what he did. He fired at Adam three times with this loaded shotgun. He caused a risk of deadly bodily injury to Adam. He damaged his vehicle and he refused to cooperate or to comply with officer commands.* Who cares whether Adam was a foot inside the yard or not. It’s an alley. It’s at night. There is snow on the ground. There’s no curbs. Who cares if Adam was a foot inside the yard. Adam told you he had come equal to the porch when this defendant stepped out and shot at him. Thank you. Tr. p. 477, emphasis added.

Clearly, the prosecutor is arguing to the jury, Graham is guilty of Criminal Recklessness because he fired three times at Adam – causing a risk of deadly bodily injury to Adam. And the same shots damaged the vehicle – so he is guilty of Criminal Mischief.

**5. The State intended to rely on Graham’s act of firing at Sharp’s vehicle to support both the criminal recklessness and criminal mischief charges.**

As noted above, “Clearly, Stewart's act of firing at Dancy's vehicle was what the

State intended to rely on to support both the attempted murder/battery charge and the criminal recklessness charge.” *Stewart*, 866 N.E.2d at 864. In our case, similarly, the State intended to rely on Graham’s act of firing on Sharp’s vehicle to support both the Criminal Recklessness and Criminal Mischief charges.

In *Stewart*, as noted above also, the question of multiple shots arose. The court on appeal dismissed the State’s argument that one of the shots was the basis for one of the charges and another or other shots the basis for the other charge. The court on appeal observed: “During opening and closing arguments at trial . . . the State made no such hairsplitting attempt to differentiate evidence supporting the attempted murder/battery charge from evidence supporting the criminal recklessness charge.”

As we have seen the prosecutor in the case at bar also made no attempt to differentiate the evidence between the two charges against Graham.

In our case, the trial court suspended the twelve-month sentence on this A misdemeanor count in its entirety but placed Graham on probation for eighteen months. Tr. p. 534. In *Stewart*, under similar circumstances, it was “necessary to remand with directions to vacate Stewart’s judgment of conviction for [the less serious offense] in order to remedy this double jeopardy violation. *Stewart*, 866 N.E.2d at 865. Thus, as in *Stewart*, the less serious of the two charges against Graham (the A misdemeanor Criminal Mischief) should be vacated.

If the court on appeal agrees with Defendant that the other A misdemeanor conviction for Resisting Law Enforcement should also be vacated (see our first argument, above), we would note that the only conviction left is the D felony Criminal Recklessness.

The trial court initially sentenced Graham to thirty–two months on this count. Tr. p. 534.

The order for restitution for damage to the vehicle to be paid as a condition of probation was based on the Criminal Mischief count. Tr. p. 534-535.

For all these reasons, Defendant respectfully asks the court on appeal to remand to the trial court – with such instructions as it deems appropriate under these circumstances.

### **CONCLUSION**

Defendant respectfully asks the court on appeal to remand to the trial court with instructions to vacate the convictions for Count 2, Resisting law Enforcement, and Count 3, Criminal Mischief; for a hearing as to Restitution if appropriate; and for such other actions as the court on appeal may deem appropriate.

Respectfully submitted,

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### **CERTIFICATE OF WORD COUNT**

I verify that this brief from page 1 through and including the Conclusion, including all headings, footnotes, and quotations, but excluding the Table of Contents, Table of Authorities, signature block, Certificate of Word Count, Certificate of Service and the Appealed Orders, contains 8,502 words as determined by the word count of the word processing system used to

prepare this brief, specifically Microsoft Word 2000, less than the 14,000 words permitted by Appellate Rule 44(E).

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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Brief has been served upon the Attorney General of Indiana by delivering a copy of the same to his office at the Office of the Attorney General, Indiana Government Center South, Fifth Floor, 402 West Washington Street, Indianapolis, IN 46204-2794, this 14<sup>th</sup> day of May 2008.

I affirm under the penalties of perjury that the foregoing representations in the Certificate of Service are true.

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