

IN THE
INDIANA COURT OF APPEALS

No. 03A04-0712-CR-00668

JEFFREY A. GRAHAM,)	
)	Appeal from Bartholomew Superior Court I
Defendant/Appellant)	
)	
v.)	Cause No. 03D01-0512-FD-02059
)	
STATE OF INDIANA)	
)	The Honorable Chris D. Monroe, Judge
Plaintiff/ Appellee)	

APPELLANT’S REPLY BRIEF

STATEMENT OF THE ISSUES (FROM APPELLEE’S BRIEF)

I. Whether proof that Graham did not allow himself to be handcuffed, combined with proof that he fled from law-enforcement officers, is sufficient to sustain his conviction for resisting a law-enforcement officer.

II. Whether Graham, who did not object to the trial court’s order of restitution and who invited the trial court to make such an order, may appeal on the grounds that the trial court should not have made a restitution order without inquiring into his ability to pay restitution.

III. Whether the Indiana Constitution protects Graham from punishment for criminal recklessness and criminal mischief because he fired a shotgun at a vehicle three times, damaging the vehicle in an amount over \$250.00, and posing a substantial risk of bodily injury to the driver.

SUMMARY OF THE ARGUMENT

I. Generally, the issues addressed in Appellee's brief were those addressed in Appellant's brief and Appellant's arguments will not be repeated here. The State's argument as to the first issue, however, suggests that whether Graham was shown to have fled from law enforcement officers was somehow relevant to the charge and conviction of Graham in this case. As shown below and in Appellant's brief, the State was required to prove in our particular case that Graham resisted law enforcement "forcibly." Whether he might have fled was never a question for the prosecutor or for the jury.

II. The State argued in its Appellee's brief that Graham had waived review of the trial court's restitution order because he did not object to the order during his sentencing hearing and had not filed a post-sentencing motion. Appellee's Brief, pp. 6, 10-12. Having filed supplementary authority to the contrary, the State appears to have reconsidered its position on this issue.

III. In its Appellee's brief, the State's treatment of the argument Defendant raised regarding the violation of the Double Jeopardy clause appears to be incomplete. It does not address the argument made in Appellant's brief. In addition, the State's discussion of *Stewart v. State*, 866 N.E.2d 858 (Ind. Ct. App. 2007), discussed by Defendant in his brief at length, does not appear to address the point made by the appellate court in *Stewart*.

ARGUMENT

I. The State did not prove that Graham resisted law enforcement officers “forcibly.”

Generally, the issues addressed in Appellee’s brief were addressed in Appellant’s brief and those arguments will not be repeated here.

The State recognizes in its first issue that the statute regarding resisting law enforcement requires that Graham’s resistance, obstruction, or interference, must have been done “forcibly.” Appellee’s Brief, p. 8. Further, the State recognizes that “forcibly” requires evidence that the defendant used “strong, powerful, violent means.” *Id.*

The State then argues that the jury “*may have inferred forceful resistance* by virtue of his aggressive *verbal* behavior, *defiance* of the officers’ commands, and the fact that . . . *Graham was repeatedly commanded to cooperate* with handcuffing.” Appellee’s Brief, pp. 6, 8, emphasis added. “With respect to this argument, however, the State is constrained to note” that the only SWAT-team officer who testified at trial told the jury that “Graham *appeared to be cooperating* with the officers’ attempts to handcuff him and that his resistance to their authority was confined to his disobedience and attempt to go back inside the house.” Appellee’s Brief, p. 8, emphasis added.

In short, the State’s own assessment of the evidence shows that there was no evidence of forcible resistance by the Defendant. Thus, there were no “*discrepancies or conflicts* in the evidence” to resolve. *Id.*

The State’s second argument as to this count is that the resisting law enforcement statute has a subsection (a)(3) allowing a person to also be charged with resistance for fleeing. Appellee’s Brief, p. 9. The State suggests that Defendant “acknowledges” this part of the statute in Appellant’s brief. *Id.* This “acknowledgement” is taken out of context, however. Defendant noted this part of the

statute to explain the trial court's comment at *sentencing* that most of his cases of resistance involved fleeing on foot or in a car. See Appellant's Brief at pages 18-19.

The State argues on appeal that in turning back towards the house "Graham fled from the officers." Appellee's Brief, p. 9. Our point in the brief was not that the statute would have allowed the jury to consider the fact that he had turned back towards the house. Whether or not Graham fled was not an argument used by the prosecutor in the course of the trial. See Appellant's brief, pp. 15-18, section 4, titled "The prosecutor did not argue that there had been forcible resistance."

There would have been no point to such an argument by the prosecutor. The information charged only knowing and forcible resistance, citing subsection (a)(1) of the statute, not subsection (a)(3). App. 3; I.C. 35-44-3-3(a)(1) and (a)(3).

At sentencing, however, the judge's memory of the offense was completely at variance with the facts that had been presented to the jury. Regarding Graham's charge of forcible resisting, the trial court had noted:

"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." Appellant's Brief, p. 18.

This was not a trial to the court but a trial to a jury. And the court advised the jury that the instructions of the court are the best source in determining what the law is. Final Instruction 2, App. 85. Those instructions never suggest that the jury should consider whether Graham fled the officers.

The court advised the jury as to count 2 that the information filed by the State charged that Graham "*did knowingly and forcibly resist, obstruct, or interfere with law enforcement officers. . .*" Final Instruction 3, App. 86, emphasis added. As to the statute, the trial court advised the jury that it

read in pertinent part “as follows” – and then described the crime of *forcibly* resisting a law enforcement officer. Final Instruction 5, App. 88. The trial court did not mention fleeing as part of the statute. *Id.* In this same instruction, the trial court listed the elements of forcible resistance. *Id.* There were no elements relating to fleeing. *Id.* There is no mention in the instructions that it is against the law to flee a police officer or that such activity is considered “resisting law enforcement.”

In short, although there is in fact a subsection (a)(3) that relates to fleeing a police officer, at Graham’s trial the jury was unaware of it. The state did not charge him with fleeing. The court did not mention fleeing in its instructions. The State did not argue fleeing. And there is simply no way under these circumstances that a reasonable jury could have found that beyond a reasonable doubt Graham had committed resisting law enforcement – by fleeing. Even if we were to agree that his turn to the door might have been “fleeing,” this was just not an issue before the jury. As far as the information, the court’s instructions, and the prosecutor’s argument are concerned, Graham’s turn to the door was a non-event – unless a turn can be construed as *forcible* resistance.

The State argues that this is a simple variance between “proof and pleading” that should only be considered fatal to Graham’s conviction if “it misled the defendant in the preparation and maintenance of his defense with resulting harm. . .” Appellee’s brief, p. 9, citing *Wallace v. State*, 878 N.E. 2d 1269, 1275-1277 (Ind. Ct. App. 2008). The facts in *Wallace* or not at all like the facts in our case. *Wallace* cited *Winn v. State*, 748 N.E.2d 352, 356 (Ind. 2001). *Winn* is also not like our case.

In *Wallace* there were unimportant factual differences. However, the court found, “Wallace was in violation of his duty to register.” *Wallace*, 878 N.E. 2d at 1277. In *Winn* the concern was that “the State failed to prove the specific factual allegation that the defendant refused to let [M.S.] leave

while he lay next to her with a rifle. While this is an essential difference between the proof and pleading, [the court found] that the specific facts alleged were surplusage and as such could have been "entirely omitted without affecting the sufficiency of the charge against the defendant." *Winn*, 748 N.E.2d at 356, internal citation omitted.

In short, these cases do not address the concern in Graham's case. In our case, the State may have charged Graham with the wrong crime, resisting by "fleeing" not by "forcibly resisting." If they had intended to charge him with committing resisting law enforcement by fleeing, they should have charged him with that crime. Then they could have attempted to produce evidence that that was the crime he committed. And they could have argued that that was the crime he committed. As it stands, they did none of those things.

Given the facts of Graham's case – the information that does not mention fleeing, the facts which do not suggest fleeing, the prosecutor who does not argue fleeing, and the court that does not instruct as to fleeing – the variance in this case would have misled the defendant in both the preparation and the maintenance of his case. The resulting harm is apparent. According to the State's argument on appeal, Graham was convicted of a crime – "forcibly" resisting law enforcement – by proof that he fled law enforcement officers. And the State says this is acceptable without any charging information, instructions, argument to the jury, or attempt to prove that he resisted law enforcement by fleeing.

Graham respectfully suggests that the situation in his case is not like that in either *Wallace* or *Winn*. This conviction for "forcibly" resisting law enforcement should not be allowed to stand.

II. The trial court erred when it made Defendant's payment of restitution a condition of probation but did not inquire into his ability to pay or set the manner of performance.

The State argued in its Appellee's brief that Graham had waived review of the trial court's restitution order because he did not object to the order during his sentencing hearing and had not filed a post-sentencing motion. Appellee's Brief, pp. 6, 10-12. The State submitted a Supplemental Authority, however, on June 23, 2008, citing *Laker v. State*, 869 N.E.2d 1216, 1220 (Ind. Ct. App. 2007) for its holding that "the issue of whether a trial court has exceeded its authority in ordering restitution *may be raised for the first time on appeal.*" Emphasis added.

Laker cited I. C. 35-38-2-2.3(a)(5), the statute cited in Appellant's brief. *Id.*, Appellant's Brief, p. 20. The statute 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.*

In its brief, the State recognized the possibility that Graham had not waived review of this issue. Appellee's Brief, p. 12. As noted by the State, the trial court could also make its order of \$1,700.00 a judgment of restitution as part of Graham's sentence rather than as a term of his probation. *Id.*

III. The State's argument as to "Double Jeopardy" does not address accurately either *Stewart* or the Appellant's argument.

In its Appellee's brief, the State mischaracterizes part of the argument Defendant raised regarding the violation of the Double Jeopardy clause. Appellee's Brief, pp. 14-15; Appellant's Brief, pp. 22-28. Appellant had discussed *Stewart v. State*, 866 N.E.2d 858 (Ind. Ct. App. 2007) at length. Appellant's Brief, pp. 21-24, 27-28. The State characterizes the decision in *Stewart* as one where the defendant was convicted of attempted battery with a deadly weapon and criminal

recklessness based on proof that the defendant “fired a gun at a vehicle in which five persons were riding, thereby attempting to shoot each of them and thereby posing a risk of bodily injury to each of them.” Appellee’s Brief, p. 14, citing *Stewart*, 866 N.E.2d at 865-866.

This statement and the citation by the State are misleading in that they suggest that the appellate court’s concern in *Stewart* – perhaps for double jeopardy purposes – was the number of people in the car. The number of people was important, however, only when it came to sentencing *Stewart*. “The existence of multiple victims of a crime is an appropriate justification for increasing the sentence for that crime.” *Stewart*, 866 N.E.2d at 866.

Moreover, the *Stewart* court did not accept the convictions for attempted battery with a deadly weapon and criminal recklessness. “Additionally, his conviction for criminal recklessness must be vacated because of double jeopardy concerns.” *Stewart*, 866 N.E.2d at 867.

In *Stewart* the State charged that *Stewart* had fired his weapon at a car with people in it, a Class C felony attempted battery with a deadly weapon. *Stewart*, 866 N.E.2d at 864. The State also charged *Stewart* with performing an act that created a substantial risk of bodily injury to another person while armed with a deadly weapon, a class D felony criminal recklessness. *Id.* “During opening and closing arguments at trial, however, the State made no such hairsplitting attempt to differentiate evidence supporting the attempted murder/battery charge from evidence supporting the criminal recklessness charge.” *Id.* The appellate court was talking about the shots fired, not the number of people in the car. *Id.*

As a result, the appellate court had “little hesitation in concluding that there is a reasonable possibility the trial court utilized the same evidence [the shots fired] to establish all of the elements

of both attempted battery and criminal recklessness and to convict Stewart of both crimes, in violation of the Indiana Double Jeopardy Clause.” *Stewart*, 866 N.E.2d at 865.

Similarly, as we noted in Appellant’s brief, at trial the State in our case made no attempt to differentiate evidence supporting the charges of criminal recklessness and criminal mischief against Graham. We quote the prosecutor at length several times in our brief. Appellant’s brief, pp. 24-27.

The State argues that the State was using other evidence to prove the criminal mischief charge against Graham, pointing to the prosecutor’s argument as to how she had shown the *amount* of the damage. Appellee’s brief, pp. 14-15. The State appears to have moved back to the “same elements” prong of double jeopardy. See the State’s description of the double jeopardy argument at Appellee’s Brief, pages 13-14, and Defendant’s description of that argument at Appellant’s Brief, pages 21-23.

The State suggests that the prosecutor’s description of evidence as to the amount required to repair the vehicle is evidence “required to prove criminal mischief.” Appellee’s Brief, pages 14-15. Thus, the prosecutor cites the victim’s estimate of the damage to his vehicle as twelve hundred and fifty dollars. Appellee’s Brief, p. 14; Appellant’s brief, p. 26. The State also notes that the prosecutor mentioned an officer’s testimony that the victim told him that each of the tires cost three hundred. Appellee’s Brief, p. 14.

But evidence as to an amount of damage is not evidence *of* criminal mischief. Evidence as to the amount of repair work does not explain why that work was done. A showing that one had to have three hundred dollars worth of repairs to one’s vehicle is not proof of criminal mischief.

For criminal mischief, there must be some act by some defendant that caused the damage that required those repairs. And that was the charge in count 3 of this case – that Graham damaged

the victim's property. App. 86. Count 1 had charged that Graham performed an act that created a substantial risk of bodily injury to another person while armed with a deadly weapon. *Id.*

The act that damaged the victim's 1989 GMC Jimmy and the act that created a substantial risk of bodily injury was the same act – the firing of the shotgun. That was what the prosecutor said to the jury in her opening and closing remarks. See Appellant's Brief, pp. 24-27. That is our argument regarding the actual evidence used to convict Graham.

The State's argument does not accurately address the point made by the appellate court in *Stewart* and it does not accurately address the argument made in Appellant's brief.

CONCLUSION

As he did in the Conclusion of his brief, 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 reply 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, and the Certificate of Service, contains 2,886 words as determined by the word count of the word processing system used to prepare this brief, specifically Microsoft Word 2000, less than the 7,000 words permitted by Appellate Rule 44(E).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Reply 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, 302 West Washington Street, Indianapolis, IN 46204-2770, this 1st day of July 2008.

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

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