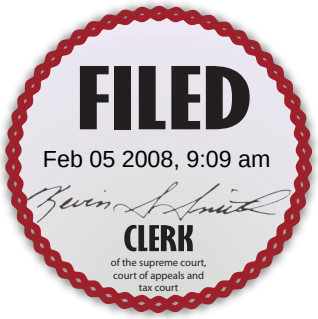

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF K.W.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0706-JV-307
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Beth Jansen, Judge
Cause No. 49D09-0702-JD-586

February 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

K.W. appeals from her adjudication as a juvenile delinquent.

We affirm.

ISSUE

Whether the evidence was sufficient to sustain K.W.'s adjudication as a juvenile delinquent.

FACTS

On February 24, 2007, William Arnold (Arnold), assistant director of public safety, was on routine patrol inside the Washington Square Mall[1] when he encountered two young girls. The girls were wearing the hoods of their jackets covering their heads in violation of the mall policy prohibiting such conduct. Arnold approached the girls and instructed them to remove their hoods. The girls, later identified as K.W. and G.B., complied. As Arnold made his rounds through the interior of the mall, he again encountered K.W. wearing her hood covering her head. Arnold later testified that K.W. was "sitting up at Target, arms folded, head down and she had the hoodie over her head. [. . .] I asked her again to remove the hood and if she didn't, she would have to leave the mall because of safety reasons." (Tr. 10).

K.W. "got loud" and demanded to know why she had to remove her hood. (Tr. 10). She became "agitated," "started making a scene," "raised her voice . . . [a]bove conversation level," and was "attracting attention to everybody that was around the area." (Tr. 10, 11). Arnold radioed for assistance and also sought a "ban form" generally issued

[1] The Washington Square Mall is the property of the Simon Property Group, Incorporated ("Simon Property Group").

to persons to be banned from mall premises. (Tr. 11). When Arnold asked K.W. to identify herself, she "gave [him] several different names and was just very uncooperative." (Tr. 12). She persisted in her loud shouting and "was blocking the front door, the handicap door, of the mall's main entrance right next to Target."[2] (Tr. 12).

Officer Robert Batkin ("Officer Batkin") of the Indianapolis Metropolitan Police Department was also working as a security officer on the mall premises that evening. At approximately 5:45 p.m., he overheard a "loud and boisterous" disturbance and was approaching the Target store to identify the source when he received Arnold's call for assistance. (Tr. 22). Officer Batkin proceeded to Arnold's location where he, too, attempted to elicit from K.W. her correct identifying information; however, Arnold and Officer Batkin "were getting the same answer over and over, different name, different [telephone] number." (Tr. 12).

Officer Batkin ultimately obtained G.B.'s identifying information.[3] As Officer Batkin spoke on the telephone with G.B.'s father, K.W. started to leave the mall. Officer Batkin advised K.W. that she was not free to leave until his investigation was complete. K.W. stopped and returned to Officer Batkin's location. Subsequently, and despite Officer Batkin's second order that she stop, K.W. left the mall. G.B. then ran out a side exit but was apprehended by Officer Batkin. In the meantime, K.W. had traveled

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[2] Target is an anchor store at the Washington Square Mall. One set of doors in Target abuts the interior portion of the mall. Another set of doors in Target leads to the parking lot. K.W. was apparently blocking the latter set of doors.

[3] A twenty year-old male approached Arnold and Officer Batkin as they questioned K.W. and G.B. He identified himself as G.B.'s brother, verified the girls' identities, and telephoned his father for Officer Batkin.

approximately seventy-five to ninety feet into the parking lot before encountering other security officers, who were stationed there. On seeing them, K.W. returned to the scene of Officer Batkin's investigation, where Officer Batkin handcuffed both K.W. and G.B. As they were escorted past mall patrons, K.W. and G.B. "hollered and screamed," with K.W. screaming that she was being arrested for wearing her hood. (Tr. 13). Arnold attempted several times to quiet the youths to no avail. Likewise, Officer Batkin told the girls to be quiet "at least three or four times." (Tr. 23).

On February 26, 2007, the State filed a petition, alleging that K.W. was a delinquent child for committing the offenses of resisting law enforcement and disorderly conduct, which would be crimes if committed by an adult. On April 30, 2007, the juvenile court held a fact-finding hearing. After Arnold and Officer Batkin testified to the foregoing facts, K.W. took the stand on her own behalf. During her testimony, she (1) admitted that she provided Arnold and Officer Batkin with a false name; (2) denied ever being told to stop or that she wasn't free to leave until an adult arrived to take her home, adding that Arnold and Officer Batkin "made that up" (Tr. 32); and (3) stated that she had merely taken offense with Officer Batkin's tone and demeanor during the incident. With regard to her "holler[ing] and scream[ing]" as she was escorted through the mall (Tr. 13), K.W. testified as follows:

> We walking through the mall and everybody looking at us like we was stealing. Yes I did say, 'Ain't nobody stealing, we in here because we had our hoods on.' Cause people looking at us like that."

(Tr. 29).

The juvenile court found the State's allegations to be true, stating,

> As to Count 1, resisting law enforcement, I will enter a true finding . . . . I believe the State has in fact met its burden and showed me beyond a reasonable doubt that all elements contained there are true. As to count 2, I do not find that [K.W.'s] statements were, or could be characterized as political speech. I believe what she was saying was to bystanders, and merely she made those utterances in an effort to avoid further embarrassment as she was marched through the mall. I don't believe she had indicated that she had loudly said, "We weren't stealing." "It was just because of our hoodies." I believe that that does not fall within the category of [ ] political speech. It was designed to avoid further embarrassment. Therefore, I will enter a true finding as to count 2, disorderly conduct also.

(Tr. 37). The juvenile court conducted a dispositional hearing on May 21, 2007, after which it placed K.W. on probation. K.W. now appeals.

DECISION

K.W. argues that the evidence was insufficient to support her adjudication as a juvenile delinquent. She contends that the State failed to prove that she resisted law enforcement and committed disorderly conduct.

When the State seeks to have a juvenile adjudicated as a delinquent for committing an act that would be a crime if committed by an adult, the State must prove every element of the offense beyond a reasonable doubt. *Johnson v. State*, 719 N.E.2d 445, 448 (Ind. Ct. App. 1999). In reviewing the sufficiency of the evidence with respect to juvenile adjudications, our standard of review is well settled. *K.D. v. State,* 754 N.E.2d 36, 38-39 (Ind. Ct. App. 2001). We apply the same sufficiency standard used in criminal cases. *Id*. We neither reweigh the evidence nor judge the credibility of witnesses. *Id*. The State must prove beyond a reasonable doubt that the juvenile committed the charged offense. *Id*. We examine only the evidence most favorable to the

judgment along with all reasonable inferences to be drawn therefrom. *Id*. We will affirm if there exists substantive evidence of probative value to establish every material element of the offense. *Id*.

K.W.'s challenge to the sufficiency of the evidence is two-fold. First, she contends that her statements were protected speech under Article I, Section 9 of the Indiana Constitution and therefore, do not constitute disorderly conduct. She also argues that the evidence is not sufficient to prove beyond a reasonable doubt that she committed the offense of resisting law enforcement.

I. Article I, Section 9

We first address K.W.'s contention that her statements were protected political speech. Indiana Code section 35-45-1-3 provides, in relevant part, "A person who recklessly, knowingly, or intentionally . . . makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct, a Class B misdemeanor."

Article I, Section 9 provides, "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." The right of free speech protected in Section 9 is expressly qualified by the clause "but for the abuse of that right, every person shall be responsible."

When reviewing whether the State has violated Article I, Section 9, we employ the following two-step analysis. *Whittington v. State,* 669 N.E.2d 1363, 1367 (Ind. 1996). First, we must determine whether state action has restricted a claimant's expressive

activity; second, if it has, we must decide whether the restricted activity constituted an "abuse" of the right to speak. *Id*.

The first prong requires K.W. to demonstrate that the State restricted her expressive activity. "[T]he right to speak clause focuses on the restrictive impact of state action on an individual's expressive activity." *Id*. at 1368. Article I, Section 9 is implicated when the State poses a direct and significant burden on the claimant's expression. *Id*. K.W. has made a prima facie showing that the State's actions restricted her expressive activity when Officer Batkin told her to be quiet as she voiced her objections to the mall policy prohibiting patrons from wearing the hoods of their jackets covering their heads while on the premises.

Under the second prong of the analysis, K.W. must prove that "the State could not reasonably conclude that the restricted expression was an 'abuse' of [her] right to speak, and therefore, the State could not properly proscribe the conduct, pursuant to its police power, via the disorderly conduct statute." *Id*. Generally, when we review the State's determination that a claimant's expression was an abuse of the right of free speech under the Indiana Constitution, we need only find that the determination was rational. *Madden v. State*, 786 N.E.2d 1152, 1156 (Ind. Ct. App. 2003). However, if the expressive activity that precipitated the disorderly conduct conviction was political in nature, the State must demonstrate that it did not materially burden the claimant's opportunity to engage in political expression.

> Where the claimant successfully demonstrates that his speech was political, the burden shifts to the State to show that it did not materially burden the claimant's opportunity to engage in political expression. "The

> State can do so by producing evidence that the expression inflicted particularized harm analogous to tortious injury on readily identifiable private interests." *U.M. v. State*, 827 N.E.2d 1190, 1192 (Ind. Ct. App. 2005). In order to demonstrate such particularized harm, the State must show that the expression caused actual discomfort to persons of ordinary sensibilities or that it interfered with an individual's comfortable enjoyment of his privacy. *Madden*, 786 N.E.2d at 1156. Evidence of mere annoyance or inconvenience is not sufficient. *Id*.
>
> Expressive activity is political if its aim is to comment on government action, including criticism of an official acting under color of law. *U.M.*, 827 N.E.2d at 1192 (citing *Whittington*, 669 N.E.2d at 1370). However, where the individual's expression focuses on the conduct of a private party, including the speaker himself, it is not political. *Id*. We apply an objective standard when we review the nature of expression. *Id*. The claimant bears the burden of proving that the expressive activity was not an abuse of his right to free speech by showing that his expression was political. *Id*. If the expression is ambiguous, we must find that the expression was not political and must review the State's restriction of the expression under standard rational review. *U.M.*, 827 N.E.2d at 1192-93.

Blackman v. State, 868 N.E.2d 579, 585 (Ind. Ct. App. 2007) (some internal citations omitted).

K.W. argues that she engaged in protected political speech challenging the mall's policy prohibiting the wearing of hoods on the premises, and therefore, her statements could not constitute disorderly conduct. We disagree. First, K.W. has not demonstrated that her speech was political in nature. As noted above,

> Expressive activity is political if its aim is to comment on government action, including criticism of an official acting under color of law. *U.M.*, 827 N.E.2d at 1192 (citing *Whittington*, 669 N.E.2d at 1370). However, where the individual's expression focuses on the conduct of a private party, including the speaker himself, it is not political. *Id*.

K.W.'s "holler[ing] and scream[ing]," audible from quite a distance, began when Arnold instructed her for the second time to remove her hood as required under Simon Property

Group's mall policy. (Tr. 13). The record reveals that in response, K.W. "got loud" and demanded to know why she had to remove her hood. (Tr. 10). She became "agitated," "started making a scene," "raised her voice . . . [a]bove conversation level," and was "attracting attention to everybody that was around the area." (Tr. 10, 11). K.W. persisted in screaming her challenge to the mall policy, despite Arnold's repeated orders that she stop.

At this stage of the incident, there was no government involvement whatsoever. Arnold was a private party -- an employee of Washington Square Mall -- charged simply with enforcing its security policies. Likewise, Washington Square Mall is the private property of Simon Property Group, which welcomes invitees onto its premises provided that they comply with its rules -- one of which, for safety-related reasons, prohibits the wearing of hoods covering patrons' heads. K.W.'s outbursts focused on the conduct of Arnold -- in instructing her against wearing her hood on her head -- and Simon Property Group, the source of the challenged policy. As neither Arnold nor Simon Property Group is a government actor, K.W.'s expression was not political in nature.

Moreover, K.W.'s own testimony indicates that as she was escorted past gawking mall patrons, her outbursts were focused on herself and largely motivated by her discomfort and embarrassment at being perceived as a thief. At trial, K.W. testified,

> We walking through the mall and everybody looking at us like we was stealing. Yes I did say, 'Ain't nobody stealing, we in here because we had our hoods on.' Cause people looking at us like that."

(Tr. 29). Evidently, the gravity and potential consequences of K.W.'s situation hit home as she was being escorted through the mall. By her own admission, K.W. screamed and

shouted because she wanted to let mall-goers know that she was not a thief. Thus, her expression was not political in nature.

Based upon the foregoing, we conclude that K.W. has not met her burden of demonstrating that she engaged in protected political speech. Accordingly, we review the State's restriction of the expression under standard rationality review. In so doing, we find that Officer Batkin's conduct was reasonable under the circumstances.

The record reveals that on the evening of the incident, Officer Batkin heard a "commotion" involving "[v]ery loud voices . . . . arguing with someone." (Tr. 17). Officer Batkin was approaching the source of the noise disturbance when Arnold radioed for assistance. At the scene, Officer Batkin encountered Arnold questioning two very young and belligerent girls, who were "holler[ing] and scream[ing]." (Tr. 13). K.W. and G.B refused to either identify themselves or to provide their parents' names and contact information to Arnold. Officer Batkin intervened and asked the girls to identify themselves to him. Both girls provided false names, which raised his level of concern. Officer Batkin was hesitant to release the youths to someone other than their parents. At trial, Officer Batkin was asked under cross-examination why he had not simply released K.W. to G.B.'s twenty year-old brother. He responded,

> Because [K.W.] was 13 years old for one, and I wanted to make sure that a parent was aware that she was with that particular individual, and allowed to be with that individual.
>
> * * *
>
> I felt that there was a problem because she could not give me her full name. She could not tell me her address and she could not tell me her phone number. Or her names of her parents, as we asked her. I felt that there was a severe problem there.

(Tr. 23-24).

As Officer Batkin investigated further, K.W. walked away from him and started to leave the mall. Officer Batkin informed K.W. that she was not free to leave the scene until he completed his investigation. K.W. returned to Officer Batkin's location. After Officer Batkin resumed his investigation, K.W. disregarded a second order from him demanding that she stop, and she left the mall. She reached approximately seventy-five to ninety feet into the parking lot, and returned to Officer Batkin only because she observed that several other security officers were stationed in the parking lot. Officer Batkin then handcuffed K.W. outside the Target entrance. As he and Arnold transported K.W. through the mall to the security office, K.W. became "very verbal about the fact that the officers were giving her a hard time about her hoodie and . . . she was explaining to people in the mall, screaming of course. * * * [T]hat she was being arrested for wearing her hoodie in the mall." (Tr. 21). Officer Batkin instructed K.W. at least three or four times to lower her voice to no avail. In light of the foregoing, we conclude that Officer Batkin's conduct was reasonably objective under the circumstances.

K.W. has failed to prove that the State could not have reasonably concluded that her restricted expression was an abuse of her right to speak because she has not demonstrated that she was engaged in protected political speech at the time of the underlying incident. Accordingly, we reject K.W.'s contention that her adjudication as a delinquent child for committing disorderly conduct violated Article I, Section 9 of the Indiana Constitution.

II. Resisting Law Enforcement

Next, K.W. argues that the evidence is not sufficient to prove beyond a reasonable doubt that she committed the offense of resisting law enforcement because "[f]or whatever reason [she] walked away, she was not trying to evade or escape arrest as she returned both times Officer Batkin told her to." K.W.'s Br. 4-5. Again, we disagree.

Indiana Code section 35-44-33-3(a)(3) provides,

> (a) A person who knowingly or intentionally:
>
> * * *
>
> (3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop;
>
> commits resisting law enforcement, a Class A misdemeanor . . . .

Officer Batkin testified that as he attempted to ascertain K.W.'s identity, she started to leave the mall. He advised K.W. that she was not free to leave. Obviously, K.W. heard and understood Officer Batkin's order because she heeded it and returned to his location. Subsequently, K.W. again walked away from Officer Batkin, disregarding his second order that she stop. This time, she traveled approximately seventy-five to ninety feet into the mall parking lot before she observed several security officers and decided to return to Officer Batkin.

As the State notes in its brief, "[t]he only element K.W. challenges with respect to this offense is that of flight from the officer." State's Br. 4. K.W. argues that she "was not trying to evade or escape arrest [because] she returned both times Officer Batkin told her to," and further, that Officer Batkin never had to pursue her. K.W.'s Br. 4-5. K.W.'s argument lacks merit. The language of Indiana Code section 35-44-33-3(a)(3) merely

requires proof that the defendant failed to stop after being ordered to do so by an officer. The State presented substantial evidence to support K.W.'s adjudication as a juvenile delinquent for resisting law enforcement.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.