

Following a bench trial, Timothy McKain was convicted of Resisting Law Enforcement as a class A misdemeanor.¹ The sole issue on appeal is, did sufficient evidence support his conviction?

We affirm.

The facts most favorable to the conviction reveal that during the early morning hours of February 19, 2006, Officers James Wailes and Bruce Smith of the Indianapolis Police Department were dispatched to 29 North Wallace Street, Indianapolis, in response to a domestic disturbance complaint. Upon arriving at that location, the officers came into contact with McKain's wife, Grace, who was in "hysterics", and found McKain calmly sitting on a couch. *Transcript* at 6. The officers separated McKain and his wife, and Officer Smith questioned Grace as to what had occurred. After speaking with Grace, Officer Smith decided to take McKain into custody.

Officer Smith approached McKain and asked him to stand up from the couch and put his hands behind his back. McKain did not cooperate, but instead began to argue with Officer Smith. When Officer Smith attempted to take McKain's arm, McKain pulled away from Officer Smith. According to Officer Wailes's testimony, "Officer Smith then took out his department issued taser and applied a drive stun to the chest of Mr. McKain." *Id.* at 7. The officers then took McKain by the arms and pulled him off of the couch. McKain fell to the floor and held his arms underneath his chest so as to prevent the officers from placing him in handcuffs. Officer Smith applied a second drive

¹ Ind. Code Ann. § 35-44-3-3 (West, PREMISE through 2007 1st Regular Sess.).

stun to McKain's back, after which McKain cooperated by pulling his arms out from under his chest and allowing the officers to place him in handcuffs.

On February 19, 2007, the State charged McKain with domestic battery in two parts, as a class A misdemeanor and class D felony, and battery, in two parts, as a class a misdemeanor and class D felony, and with one count of resisting law enforcement as a class A misdemeanor. A bench trial was held April 9, 2007. Prior to trial, the State moved to dismiss all charges except for the resisting law enforcement charge. At the conclusion of the evidence, the court found McKain guilty of resisting law enforcement. The trial court subsequently sentenced McKain to 180 days, with 170 days suspended. McKain filed the instant appeal, arguing the evidence is insufficient to support his conviction for resisting law enforcement.

Upon review of a claim of insufficient evidence, we will neither reweigh evidence nor judge the credibility of witnesses. *Williams v. State*, 798 N.E.2d 457 (Ind. Ct. App. 2003). Rather, we consider only the evidence that supports the conviction and the reasonable inferences to be drawn therefrom to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

McKain contends that the evidence failed to establish that he used the requisite force against Officer Smith. McKain maintains that the evidence established only that he passively resisted the officers, which he asserts cannot support the conviction.

Resisting law enforcement is defined in I.C. § 35-44-3-3, in pertinent part, as follows:

A person who knowing 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 his duties as an officer commits resisting law enforcement, a Class A misdemeanor.

The word “forcibly” modifies “resists,” “obstructs,” and “interferes”; it does not modify only “resists”. *Shoultz v. State*, 735 N.E.2d 818 (Ind. Ct. App. 2000) (citing *Spangler v. State*, 607 N.E.2d 720 (Ind. 1993)). A person uses force, for purposes of the resisting law enforcement statute, when the person “uses strong, powerful, violent means to evade a law enforcement official’s rightful exercise of his or her duties” or makes threatening gestures toward the official. *Id.* (citing *Spangler v. State*, 607 N.E.2d 720); see also *Wellman v. State*, 703 N.E.2d 1061 (Ind. Ct. App. 1998). “Force” in this context may include refusing to rise or move where directed, so as to require officers to forcibly move the defendant from one place to another or to lift him onto his feet. See, e.g., *Johnson v. State*, 833 N.E.2d 516 (Ind. Ct. App. 2005); *Guthrie v. State*, 720 N.E.2d 7 (Ind. Ct. App. 1999); *Ajabu v. State*, 704 N.E.2d 494 (Ind. Ct. App. 1998). The force element is not satisfied, however, if a defendant does nothing more than stand his or her ground. See *Ajabu v. State*, 704 N.E.2d 494.

In *Spangler v. State*, 607 N.E.2d 720, our Supreme Court reversed the defendant’s conviction for resisting law enforcement, finding insufficient evidence of force where he resisted service of process by repeatedly and firmly refusing to accept service of process and walking away from an officer. In contrast, in *Guthrie v. State*, 720 N.E.2d 7, this court affirmed the defendant’s conviction for resisting law enforcement, finding the defendant exerted sufficient force by refusing to get out of the jail wagon, necessitating

that he be forcibly removed and placed on the ground; refusing to get off the ground, requiring the officers to lift him; and refusing to walk while leaning his back and stiffening his legs so that the officers had to ultimately carry him in to the receiving area. The court concluded that the defendant “did resist in some meaningful way that extended beyond mere passive resistance.” *Id.* at 9. Similarly, in *Johnson v. State*, 833 N.E.2d 516, this court affirmed a conviction for resisting law enforcement, finding the defendant exerted sufficient force when he turned and pushed away with his shoulders while cursing and yelling at an officer who attempted to search him prior to being transported. Defendant then stiffened up, requiring the officers to physically place him in the transport vehicle.

Here, as in *Guthrie* and *Johnson*, McKain actively and forcibly resisted Officer Smith by pulling away when Officer Smith attempted to take his arm and place him in custody. Even after being hit with a taser, McKain refused to comply with Officer Smith’s instructions. The officers ultimately had to pull McKain to the floor where he held his arms under his chest, preventing the officers from taking his arms and placing him in handcuffs. Only after a second hit with a taser did McKain pull his arms out from under his body and allow Officer Smith to place him in handcuffs. McKain’s conduct was sufficient to establish the “forcibly” element of resisting law enforcement. We therefore conclude the evidence is sufficient to sustain his conviction for resisting law enforcement.

Judgment affirmed.

SHARPNACK, J., and RILEY, J., concur.