NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MATEEN IBN HALEEM	:	
Appellant	:	No. 1119 MDA 2022

Appeal from the Judgment of Sentence Entered July 11, 2022
In the Court of Common Pleas of York County Criminal Division at No(s): CP-67-CR-0005646-2020

BEFORE: BOWES, J., NICHOLS, J., and PELLEGRINI, J.*

MEMORANDUM BY BOWES, J.: **FILED: NOVEMBER 22, 2023**

Mateen Ibn Haleem appeals from the aggregate judgment of sentence of two years of probation and a $100 fine, which was imposed after his bench trial conviction of one count each of resisting arrest, criminal trespass, and disorderly conduct. We reverse his conviction for disorderly conduct, vacate his judgment of sentence, and remand for resentencing.

This case stems from Appellant's attempts, in the vestibule and lobby of Pennsylvania State Police ("PSP") York Station, to prevent PSP troopers from (1) questioning his adult son outside of his presence; and (2) placing Appellant under arrest. We glean the following from the testimony presented at trial as well as video recordings from York Station. The lobby of York Station is open to the public twenty-four hours a day. ***See*** N.T. Trial, 6/6/22, at 10-11, 29.

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* Retired Senior Judge assigned to the Superior Court.

At approximately 11:15 p.m. on October 28, 2020, Appellant went to York Station to be interviewed regarding a theft that he had reported. He was accompanied by his wife, Tanika Turner, and adult son, Da'shin Haleem. At Appellant's request, Corporal Matthew Kabacinski interviewed Appellant in the lobby of the PSP station about the theft. ***Id***. at 11-12.

During this conversation, Trooper Krystal Dugan, who was in the adjacent communications room, observed what she believed to be Da'shin video-recording the interaction between Appellant and the corporal on his cell phone. ***Id***. at 11. She came out to the lobby to notify Da'shin that recording within the barracks was prohibited and to stop recording. ***Id***. at 12-13, 30-31. After she returned to the communications room, Da'shin continued to record the interview between Appellant and Corporal Kabacinski, prompting Trooper Dugan to ask for his cell phone and question him about the recording. ***Id***. at 31.

At that point, Appellant stopped cooperating in the theft interview, took his son's phone, and became argumentative and angry. ***Id***. at 13, 31-32. As a result, the troopers asked Appellant to leave the building multiple times, while simultaneously attempting to retain Da'shin to be interviewed about the video recording. ***Id***. at 13-14, 32-33. Appellant refused to leave without Da'shin, "continued to kind of be aggressive[,]" and attempted to prevent the troopers from interviewing Da'shin. ***Id***. at 14-15, 32-33. Appellant exited the lobby into the vestibule but the troopers prevented Da'shin from following. Appellant then turned around and charged through the door at the corporal,

who extended a hand to stop Appellant from proceeding further into the lobby. ***Id***. at 33. Appellant leaned his body weight into the corporal's hand in opposition. ***Id***. Throughout, Appellant was talking and becoming more agitated. When Appellant grabbed Da'shin's arm, Corporal Kabacinski told Appellant he was under arrest for criminal trespass. ***Id***. at 15, 32-33.

The actions surrounding the effectuation of that arrest occurred in rapid succession. Corporal Kabacinski instructed Appellant to turn around and put his hands behind his back. Appellant responded by pushing against the corporal's hand forcefully, prompting the corporal to shove Appellant back into the vestibule area. Believing that Appellant brought his closed fists "up ready to fight" in reaction to the push, several other troopers entered the lobby and rushed into the vestibule to take Appellant into custody. ***Id***. at 15-16, 33-34. Corporal Kabacinski pulled Appellant to the ground. While the troopers attempted to handcuff him, he kicked and "kept on pulling his arms underneath his body and not allowing [the troopers] to put his hands behind his back to place him in handcuffs." ***Id***. at 22, 35, 58. According to the corporal, it required a "substantial amount" of force to place Appellant under arrest. ***Id***. at 35-36.

Based on the foregoing, Appellant was charged with resisting arrest, criminal trespass, and two counts of disorderly conduct. He waived his right to a jury trial and proceeded to a bench trial on June 6, 2022. In addition to testimony from Corporal Kabacinski and Trooper Dugan, the Commonwealth introduced security video footage of the lobby and vestibule areas. At the

conclusion of trial, the court found Appellant guilty as noted above. It acquitted him of the second disorderly conduct charge because it did not find support in the videos that Appellant had taken a fighting stance. Appellant was subsequently sentenced to two years of probation for resisting arrest and one concurrent year of probation for criminal trespass, and ordered to pay a $100 fine for disorderly conduct.[1]

This timely filed appeal followed. Both Appellant and the trial court complied with Pa.R.A.P. 1925. Appellant presents the following issue for our review:

> Whether there was insufficient evidence to convict [Appellant] of resisting arrest or disorderly conduct where [he] did not create the risk of substantial injury nor did the situation require substantial force to overcome his resistance, additionally, there was insufficient evidence presented that he intended or recklessly created a situation that would cause public alarm, inconvenience, or annoyance?

Appellant's brief at 4.

Although Appellant presents a single issue, he is raising two distinct claims: sufficiency of the evidence as to resisting arrest and sufficiency of the evidence as to disorderly conduct. We review both of Appellant's challenges as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence

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[1] We note that while Appellant discharged his privately-retained counsel at his sentencing hearing and elected to proceed *pro se*, he is represented in the instant appeal by the York County Office of the Public Defender.

> to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Richard, 150 A.3d 504, 516 (Pa.Super. 2016) (citation omitted).

We first address Appellant's claim that the evidence was insufficient to convict him of resisting arrest, mindful of the following legal principles.

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa.C.S. § 5104. Thus, "resisting arrest contains alternative bases for liability, *i.e.*, acts creating a substantial risk of injury or requiring substantial force to overcome." ***Commonwealth v. Finnecy***, 135 A.3d 1028, 1035 (Pa.Super. 2016) (cleaned up).

Appellant alleges that "there was insufficient evidence that he put the troopers at risk of substantial injury or that he resisted to an extent that

required substantial force." Appellant's brief at 12. The trial court opined that the evidence was sufficient to sustain his conviction because his "behavior required the troopers to employ substantial force in order to secure [Appellant's] hands behind his back." Trial Court Opinion, 10/13/22, at 14. As there was no evidence that Appellant put the troopers at risk of bodily injury and because the trial court found Appellant guilty based upon his conduct requiring substantial force to overcome, it is that element on which we shall focus.

In determining whether there was sufficient evidence to establish that Appellant employed means requiring substantial force, we observe that passive resistance can be enough to uphold a resisting arrest conviction so long as substantial force is required to overcome the resistance. For example, we have affirmed such convictions where the defendant passively resisted officers' attempts to arrest her by locking arms and legs with her husband, forcing the officers to use substantial force to separate them. ***See Commonwealth v. Thompson***, 922 A.2d 926, 928 (Pa.Super. 2007); ***see also Commonwealth v. Kimble***, 284 A.3d 899 (Pa.Super. 2022) (non-precedential decision) (concluding that defendant created both a substantial risk of injury and employed means requiring substantial force to overcome where the defendant tucked his arms away from officers after they secured one handcuff on his wrist and, continued to pull his arms beneath his body while lying in an active lane of traffic, requiring the officers to employ substantial force to overcome his continued resistance). Indeed, this Court

eschewed any requirement of "the aggressive use of force[,] such as a striking or kicking of the officer[,]" to sustain resisting arrest convictions. ***Commonwealth v. Miller***, 475 A.2d 145, 156 (Pa.Super. 1984) (cleaned up); ***see also id*** at 156 n.4 (declining to follow dictum in prior cases that inferred as "an essential element of the crime of resisting arrest that the actor strike or kick the arresting officer" because "[s]uch an interpretation is contrary to the express language" of the statute).

Here, the troopers testified that they had to employ substantial force to effectuate Appellant's arrest because he: (1) knocked Corporal Kabacinski's hands away following the shove; (2) took a fighting stance; (3) had to be taken to the ground by the troopers; (4) kicked; and (5) disobeyed commands and kept his hands under his body to resist the troopers' attempts to handcuff him. ***See*** N.T. Trial, 6/6/22, at 15-16, 22, 33-36, 58.

Appellant counters that the evidence did not support that he assumed a fighting stance after being pushed and, instead, demonstrated that he dropped to the ground immediately.[2] ***See*** Appellant's brief at 12-13. He argues that having his hands under his body while the troopers were attempting to place handcuffs on him was the result of being in an awkward

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[2] As noted *supra*, the trial court specifically found that the evidence did not support the conclusion that Appellant took a fighting stance. Additionally, we observe that Appellant vacillates between averring that he was "tackled by four troopers" and that he voluntarily "dropped to the floor as soon as he saw the three other troopers coming towards him[.]" ***See*** Appellant's brief at 13-15. As discussed *infra*, the video evidence does not support the latter averment.

situation in a crowded place with multiple troopers on top of him, not a deliberate effort on his part to resist being handcuffed. ***Id***. at 14-16. Finally, he emphasizes that even if he was trying to keep his hands beneath his body, such resistance did not require substantial force to overcome as the arrest took less than one minute to effectuate. ***Id***. at 14, 16.

At first blush, the video evidence could be viewed as lending credence to some of Appellant's arguments because the encounter escalates quickly and some angles are obscured, making it difficult to discern the order and precision of the parties' movements. However, viewing the encounter frame-by-frame through the proper prism of the light most favorable to the Commonwealth as verdict winner, we conclude that the video evidence corroborates, rather than contradicts, the troopers' testimony.

To wit, the video demonstrates that Appellant's hands are clenched in fists from the time of the corporal's shove to when the corporal attempts to first bring Appellant to the ground and the other troopers start to make their way into the vestibule. ***See*** Commonwealth Exhibit 1 (Front Vestibule Video, 10/28/20, at 23:15:20-23:15:22). The corporal is initially unsuccessful in pulling Appellant to the ground as his hand slips on Appellant's sweatshirt at the same time Appellant braces himself in the corner and grabs the exterior doorframe. ***See id***. at 23:15:22-23:15:23. Next, four more troopers enter the vestibule and Corporal Kabacinski is able to bring Appellant to the ground by pulling his left arm forward. ***Id***. at 23:15:23-23:15:24. While it is unclear from the video exactly what happens next because the troopers block the view

of what Appellant is doing, it is evident that two troopers are on the ground with Appellant while three oversee from above. Appellant kicks one of the troopers as he is pulled prone onto his stomach, and thereafter three troopers have their undivided attention on Appellant as they hold him in place, extract his hands, and handcuff him. ***Id***. at 23:15:24-23:16:07.

We reject Appellant's overly restricted focus on the swiftness with which he was ultimately placed in handcuffs following his initial refusal to comply as evidence that he did not employ means requiring substantial force. Securing Appellant in handcuffs required three troopers actively involved in restraining him and removing his hands from beneath his body, as well as three additional troopers on standby overseeing the arrest and acting as a law-enforcing presence. It was this precise use of substantial force, *i.e.* three troopers actively pulling Appellant to the ground, restraining him, and retrieving his arms, that was required to overcome Appellant's resistance and permitted him to be handcuffed in less than a minute. That there were sufficient troopers present to use substantial force to overcome his resistance in a short amount of time, as opposed to one trooper who may have had to resort to more drastic measures and take a longer time to subdue Appellant, does not negate the substantiality of his efforts to avoid being handcuffed.

Rather, our review of the certified record in the light most favorable to the Commonwealth as verdict winner supports the trial court's conclusion that the Commonwealth presented sufficient evidence to establish the elements of resisting arrest beyond a reasonable doubt. ***See Thompson***, ***supra*** at 928

(concluding evidence was sufficient to establish substantial force element for resisting arrest where officer struggled to pull defendant apart from her husband, with whom she had interlocked her arms and legs, and refused to produce her hands for cuffing when commanded multiple times to do so, instead holding her arms tightly beneath her husband, and the efforts to restrain the defendant and her husband left the officer "exhausted"); ***Commonwealth v. Simmons***, 258 A.3d 514 (Pa.Super. 2021) (non-precedential decision) (finding evidence sufficient to establish that defendant employed means requiring substantial force to overcome for conviction of resisting arrest where defendant clenched his fists and arms by his sides and three officers were not able to handcuff him until they brought him to the ground using a knee strike). Accordingly, Appellant is not entitled to relief on this issue.

We next review Appellant's claim that the evidence was insufficient to convict him of disorderly conduct. Appellant was convicted of disorderly conduct pursuant to 18 Pa.C.S. § 5503(a)(4), which provides as follows: "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor." 18 Pa.C.S. § 5503(a)(4). Stated simply, disorderly conduct comprises two elements: intent and an action. Appellant was charged under § 5503(a)(4), and therefore, to satisfy the act requirement, the Commonwealth was required to prove that Appellant

"create[d] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor." 18 Pa.C.S. § 5503(a)(4).

As for the intent element, all subsections of the disorderly conduct statute require proof of the same intent, *i.e.*, "that the defendant had one of two alternative mental states: 'intent to cause public inconvenience, annoyance or alarm, **or** recklessly creating a risk thereof.' 18 Pa.C.S. § 5503 (emphasis added)." ***Commonwealth v. Coniker***, 290 A.3d 725, 735 (Pa.Super. 2023) (cleaned up). "The Commonwealth can thus sustain a disorderly conduct conviction with evidence that the defendant recklessly created a risk of public inconvenience, annoyance, or alarm, even if he lacked the intent to do so." ***Id***. (cleaned up). "Public" is defined as "affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of public business or amusement, any neighborhood, or any premises which are open to the public." 18 Pa.C.S. § 5503(c). "Under the statute, whether a defendant's words or acts rise to the level of disorderly conduct hinges upon whether they cause or unjustifiably risk a public disturbance. The cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult and disorder." ***Commonwealth v. Hock***, 728 A.2d 943, 946 (1999) (cleaned up). Nonetheless, we have held that "being in public is merely necessary, but not alone sufficient, to convict of disorderly conduct. The Commonwealth must prove the particular act requirement[.]" ***Commonwealth v. Forrey***, 108

A.3d 895, 899 (Pa.Super. 2015) (discussing the intent element in a case charging disorderly conduct under § 5503(a)(2)).

Here, we focus on the intent element. The conduct at issue occurred between troopers directing Appellant to exit the station and the ultimate effectuation of his arrest. Appellant argues that he had no intent to cause public inconvenience, annoyance, or alarm, nor did he recklessly create such a risk. ***See*** Appellant's brief at 16. He contends that he was merely questioning the rationale of the troopers for detaining his son and that the ensuing scuffle "was not entirely his fault and was over in less than a minute due to his quick submission."[3] ***Id***. at 16-17. Appellant argues that there was no evidence that he intended for his behavior to reach any members of the public outside of the troopers present and his family, and he was not "behaving in a way that was meant to cause public annoyance." ***Id***. at 17, 19. Thus, the salient question is whether the evidence established that Appellant intended to cause, or recklessly created a risk of, public inconvenience, annoyance, or alarm.

Although non-precedential, we find this Court's decision in ***Commonwealth v. Adeniran***, 219 A.3d 258, 2019 WL 2578601 (Pa.Super.

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[3] As discussed *supra*, Appellant's "quick submission" was the result of the substantial efforts of multiple troopers to take him into custody.

2019) (non-precedential decision), particularly helpful.[4] In that case, Adeniran arrived at a police department headquarters before it opened to the public for the day. ***Id***. at *1. Intoxicated, she entered the front vestibule and repeatedly tried to access the station to charge her cell phone. ***Id***. She was asked to leave multiple times and, after refusing to do so, was arrested for disorderly conduct and public drunkenness.[5] ***Id***. Upon review, we concluded that there was no evidence that Adeniran's actions occurred in public as it was undisputed that, at the time of the arrest, the station was not open to the public, and there was "no testimony that any civilians were either directly outside the station or in the vestibule area[.]" ***Id***. at *3. Therefore, because

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[4] The learned dissent finds the instant case analogous to ***Commonwealth v. Whritenour***, 751 A.2d 687 (Pa.Super. 2000), a § 5503(a)(1) case. ***See*** Concurrence and Dissent at 4-6. Respectfully, we disagree. While the street in question in ***Whritenour*** was gated and not generally accessible to the entire public, it was nonetheless a residential street where civilians resided. ***See Whritenour***, ***supra*** at 688 ("[T]he road was located in a neighborhood, whatever its legal constitution, and was traversed by members of the community and their invitees or licensees. This 'public,' albeit a limited one, included residents of the homes in the community, their guests and employees, as well as visitors attending religious events, users of the public library located in the community, and delivery people of all kinds."). A gated community is wholly different from an empty vestibule of a police station as it pertains to the meaning of "public." Instead, for the reasons discussed *infra*, we find ***Commonwealth v. Adeniran***, 219 A.3d 258, 2019 WL 2578601 (Pa.Super. 2019) (non-precedential decision), to be a more apt comparison.

[5] We observe that once inside a holding cell, Adeniran became combative. However, the portion of ***Adeniran*** concerning what occurred in the holding cell, a private room within the police station, is inapposite to the facts herein. Accordingly, we do not discuss that portion of the memorandum but instead focus on her conduct within the vestibule of the station, which is akin to the facts of this case.

the Commonwealth failed to adduce sufficient evidence that she intended to cause or recklessly created a risk of public inconvenience, we reversed her disorderly conduct conviction.

The encounter herein began in a strikingly similar fashion to that in ***Adeniran***. Appellant, after being asked to leave the station multiple times, refused to vacate the lobby. His attempts to intervene in the interviewing of Da'shin occurred in the lobby and the doorway between the lobby and the vestibule. The subsequent conduct regarding his arrest, described at length above, occurred solely in the front vestibule area of the PSP station. While the York Station lobby was open to the public at the time Appellant committed the supposedly disorderly acts, unlike in ***Adeniran***, unlike the esteemed dissent, we do not find this difference dispositive. There were no members of the public in the vestibule or the lobby, there was no evidence that there were members of the public immediately outside the station, and the only individuals exposed to Appellant's conduct were the troopers and Appellant's wife and son. Moreover, given the late hour, it was not likely that another member of the public would enter the PSP station. In other words, the Commonwealth did not establish that the conduct "**affect**[**ed**] **or** [**was**] **likely to affect** persons in a place to which the public or a substantial group has access[.]" 18 Pa.C.S. 5503(c) (emphasis added). Therefore, by his conduct, he could not have intended to cause, or recklessly cause a risk of, public inconvenience, annoyance or alarm, as required by § 5503(a)(4). Accordingly, even in the light most favorable to the Commonwealth as verdict

winner, there was insufficient evidence to support Appellant's disorderly conduct conviction.

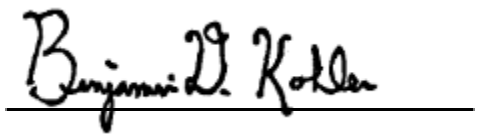
For the aforementioned reasons, we vacate Appellant's disorderly conduct sentence and reverse that conviction. So as not to disturb the trial court's sentencing scheme, we vacate the remainder of Appellant's judgment of sentence and remand for resentencing. ***See Commonwealth v. Thur***, 906 A.2d 552, 569 (Pa.Super. 2006) (directing that remand is necessary when our disposition disturbs the trial court's overall sentencing scheme, but is unnecessary where our disposition does not so upset the court's sentencing scheme).

Judgment of sentence vacated. Conviction for disorderly conduct reversed. Case remanded for resentencing. Jurisdiction relinquished.

Judge Pellegrini joins this Memorandum.

Judge Nichols files a Concurring and Dissenting Memorandum.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/22/2023