IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

VICTORIA ALEXIS KING,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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CASE NO: 2014-AP-46-A-O
Lower Case No. 2013-MM-565-A-E

Appeal from the County Court
for Orange County, Florida
Carolyn B. Freeman, County Court Judge

Robert Wesley, Public Defender
and Lauren Kilgore, Assistant Public Defender
for Appellant

Jeffrey Ashton, State Attorney
And Carol Levin Reiss, Assistant State Attorney
for Appellee

Before WHITEHEAD, J. KEST, MYERS, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Victoria King appeals her conviction for resisting an officer without violence and battery. A University of Central Florida police officer testified at her trial that he initiated a traffic stop after observing an inoperative tail light on Appellant's car. After speaking with her, he returned to his patrol car to write a ticket. He approached her car again to ask her to sign the ticket and to give her a copy. She had rolled the window up most of the way and refused his repeated requests to roll it down further. He then ordered her to exit the car but she refused. He reached inside the narrow window opening to unlock her door. She hit the button to close the window, trapping his arm. As the officer pulled his arm out, the window broke and glass shards cut his arm. He and

another officer removed Appellant from her car. She resisted their attempts to handcuff her as they took her into custody.

Appellant contends that the trial court erred in denying her motion for judgment of acquittal on the charge of resisting an officer. A de novo standard of review applies. *Huck v. State*, 881 So. 2d 1137, 1144 (Fla. 5th DCA 2004). The trial court should deny a motion for judgment of acquittal if the State presents competent evidence to establish each element of the offense. *State v. Odom*, 56 So. 3d 46, 49 (Fla. 5th DCA 2011).

Appellant argues that when the officer ordered her to roll down the window and to get out of her car, he was not engaged in the execution of a lawful duty since he had already completed his duty of writing the traffic citation. A conviction for resisting an officer must be based on an obstruction of the officer's execution of a lawful duty. *Maldonado v. State*, 992 So. 2d 839, 843 (Fla. 2d DCA 2008). In the absence of reasonable suspicion of illegal activity, an officer issuing a traffic ticket is not engaged in his lawful duty when he detains a driver longer than necessary to complete the ticketing process. *Whitfield v. State*, 33 So. 3d 787, 790 (Fla. 5th DCA 2010).

Here, the State presented competent evidence that the officer had not completed issuing the ticket when he directed Appellant to roll down her window and exit the car. He testified that he had not yet filled out all the information on the citation, was still holding Appellant's driver's license, and had not handed the ticket to Appellant. There was no evidence of any prolonged delay in this process. Appellant does not even argue that there was but simply contends the officer went beyond his duty by asking her to roll her window down further when he could have slipped the ticket through the narrow opening and let her go on her way.

An officer may ask a driver to exit his or her vehicle during a lawful traffic stop, even in the absence of evidence that the driver is engaged in any illegal activity. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)*; State v. Herron*, 68 So. 3d 330, 331 (Fla. 3d DCA 2011); *State v. Olave*, 948 So. 2d 995 (Fla. 4th DCA 2007). Thus, while engaged

in the process of issuing the ticket, the UCF officer could lawfully ask Appellant both to roll down her window and to exit her car. He was not obligated to slip the ticket and her license through the narrow opening she had left for him. A driver's refusal to obey a lawful command to exit a car may be a basis for a charge of resisting an officer. *State v. Mahoy*, 575 So. 2d 779, 781 (Fla. 5th DCA 1991); *see also Rinaldo v. State*, 787 So. 2d 208, 212 (Fla. 4th DCA 2001) (a driver's refusal to obey the lawful commands of an officer during a traffic stop may constitute the offense of obstructing or opposing an officer). The trial court did not err in denying the motion for judgment of acquittal because the State presented competent evidence that the officer was engaged in a lawful duty and issued a lawful command which Appellant disobeyed.

Appellant also challenges the trial court's jury instructions for the battery. The information charged that Appellant had committed a battery either by intentionally striking or touching the officer against his will or by intentionally causing him bodily harm. While the parties were discussing jury instructions, the prosecutor argued that there was evidence that Appellant used the window to touch the officer so the first theory of touching or striking was supported. There was evidence that the officer was injured by the window so the second theory was also supported. Over defense counsel's objection, the court gave a jury instruction that included these alternative theories of battery, instructing that the State had to prove Appellant "intentionally touched or struck Timothy Isaacs against his will ***or*** [Appellant] intentionally caused bodily harm to Timothy Isaacs."

When an objection has been made, "the standard of review for jury instructions is abuse of discretion, but that discretion, as with any issue of law, is strictly limited by case law." *Bell v. State*, 152 So. 3d 714, 717 (Fla. 4th DCA 2014). Appellant contends that by giving the jury these alternatives, the court created the possibility that the verdict was not unanimous—that some jurors may have convicted on one theory and some on the other. "As a state constitutional matter,

a criminal conviction requires a unanimous verdict in Florida." *Robinson v. State,* 881 So. 2d 29, 30 (Fla. 1st DCA 2004).

However, in the cases she cites in support of her claim that the verdict may not have been unanimous, the error was that the jury was allowed to pick between two or more factual instances which did not constitute a single event—two different escapes (*Perly v. State,* 947 So. 2d 672 (Fla. 4th DCA 2007) and two or more different sexual acts on a child (*Robinson,* 881 So. 2d at 29; *State v. Dell'Orfano*, 651 So. 2d 1213 (Fla. 4th DCA 1995)). It could not be discerned in these cases whether the jury had unanimously agreed on which act or acts the defendant committed.

Here, there was one single act which was alleged to be the battery, with two alternative ways of describing that one act. Appellant was accused of intentionally pushing the window power button to close the window while the officer's arm was inside the car. It could be said either that she intentionally struck or touched him through the instrumentality of the window or that she intentionally caused bodily harm through the instrumentality of the window. But there was one single act alleged and the jury could not have found Appellant guilty of the battery unless they had unanimously decided that she intentionally committed the act of closing the window on the officer's arm. They were not asked to choose among several possible incidents of battery or erroneously given the opportunity to convict Appellant of an uncharged crime. The trial court's jury instructions did not improperly create the possibility of a non-unanimous verdict.

It is therefore **ORDERED AND ADJUDGED** that the trial court is **AFFIRMED.**

DONE AND ORDERED in Orange County, Florida this 14th day of July, 2015.

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REGINALD K. WHITEHEAD
Presiding Circuit Judge

J. KEST and MYERS, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **the Honorable Carolyn B. Freeman,** Orange County Courthouse, 425 North Orange Avenue, Orlando, Florida 32801**; Carol Levin Reiss, Assistant State Attorney,** 435 N Orange Avenue, Orlando, Florida 32801-1526; and to **Lauren Kilgore, Assistant Public Defender**, 415 N. Orange Avenue, Orlando, Florida 32802-1673 this 14th day of July, 2015.

/S/
Judicial Assistant