

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

APRIL M. SCHUMACHER,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13641
Trial Court No. 4FA-19-00338 CR

MEMORANDUM OPINION

No. 7015 — June 29, 2022

Appeal from the Superior Court, Fourth Judicial District,
Fairbanks, Earl A. Peterson, Judge.

Appearances: Barbara Dunham, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Madison M. Mitchell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge ALLARD.

April M. Schumacher was charged with multiple counts of third-degree assault and one count of resisting arrest following an incident at her home in which she

mistook two judicial services officers for prowlers.¹ (The officers were there to serve a civil summons.)

After the State presented its evidence at trial, Schumacher moved for a judgment of acquittal on the assault and resisting arrest charges. The trial court denied this motion. The jury subsequently acquitted Schumacher of the assault charges but convicted her of the resisting arrest charge. Schumacher now appeals, arguing that there was insufficient evidence presented at trial to support her conviction for resisting arrest and that the trial court erred when it denied her judgment of acquittal on that charge.

On appeal, the State concedes that there was insufficient evidence and that the motion for judgment of acquittal on the resisting arrest charge should have been granted. When the State concedes error in a criminal case, this Court has an independent duty to evaluate whether the State's concession is well-founded.²

We have reviewed the record in this case and we agree that the State's concession is well-founded. A person is guilty of resisting arrest under AS 11.56.700(a)(1) if, "knowing that a peace officer is making an arrest," and "with the intent of preventing the officer from making the arrest, the person resists personal arrest . . . by force." As we have repeatedly held, "mere non-submission" is insufficient to prove resisting arrest.³ Therefore, a person who passively resists the arrest or fails to

¹ AS 11.41.220(a)(1)(A) and AS 11.56.700(a)(1), respectively.

² See *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (holding that when the government concedes error in a criminal appeal, the appellate court has an obligation to "independently review the [trial court] proceedings . . . to insure that the [concession of] error . . . is supported by the record on appeal and has legal foundation").

³ See *Eide v. State*, 168 P.3d 499, 502 (Alaska App. 2007); *Howard v. State*, 101 P.3d 1054, 1059 (Alaska App. 2004).

cooperate in being handcuffed is not guilty of resisting arrest.⁴ Instead, there must be proof that the person used force and that the force was directed at the officer, knowing that the officer was making an arrest and with the intent to prevent the officer from making the arrest.⁵

Here, the evidence at trial showed only that Schumacher passively resisted the arrest and there was no evidence of force directed at the arresting officer once she was aware that she was being placed under arrest. Thus, because the evidence presented at trial was insufficient to support a conviction for resisting arrest, the trial court erred when it failed to grant Schumacher's motion for judgment of acquittal on that charge.

The judgment of the superior court is REVERSED.⁶

⁴ See *Eide*, 168 P.3d at 501-02 (holding that evidence defendant "turtled" his body — *i.e.*, put his arms and wrists underneath his torso — to avoid being handcuffed was insufficient to support a conviction for resisting arrest even though officers had to use a stun gun to achieve arrest); *Howard*, 101 P.3d at 1059 (holding that minimal incidental contact with officer while fleeing was insufficient to support a conviction for resisting arrest); see also *Hoover v. State*, 2013 WL 3811803, at *4 (Alaska App. July 17, 2013) (unpublished) (holding that defendant clenching his arms and refusing to put his hands behind his back was insufficient to support a conviction for resisting arrest); *Bultron v. State*, 2011 WL 5627897, at *4-5 (Alaska App. Nov. 16, 2011) (unpublished) (holding that defendant placing his arms underneath his body and refusing to submit to the arrest was insufficient to support a conviction for resisting arrest); *Nicholai v. State*, 2006 WL 2847853, at *3 (Alaska App. Oct. 4, 2006) (unpublished) (holding that defendant pulling his hands away from arresting officer in an attempt to avoid handcuffs was insufficient to support a conviction for resisting arrest).

⁵ See AS 11.56.700(a)(1); *Fallon v. State*, 221 P.3d 1016, 1021 (Alaska App. 2010).

⁶ Because Schumacher's conviction is being reversed for insufficiency of the evidence, double jeopardy attaches to the reversal and the State may not retry Schumacher. See *Burks v. United States*, 437 U.S. 1, 18 (1978).