[Cite as *Columbus v. Clark*, 2015-Ohio-2046.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 14AP-719
v.	:	(M.C. No. 2014 CRB 2311)
Teresa M. Clark,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 28, 2015

Richard C. Pfeiffer, Jr., City Attorney, and *Melanie R. Tobias*, for appellee.

Bellinger & Donahue, and *Kerry M. Donahue*, for appellant.

APPEAL from the Franklin County Municipal Court

SADLER, J.

{¶ 1} Defendant-appellant, Teresa M. Clark, appeals from the judgment entered by the Franklin County Municipal Court convicting and sentencing her for resisting arrest under Columbus General Offenses Code 2321.33. For the following reasons, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} On February 2, 2014, Columbus Police Officers Brad Foulk and Ryan Wise were dispatched to investigate a report of an unresponsive female in a dark minivan parked at a Rally's restaurant. Foulk and Wise arrived at Rally's in uniform driving a marked police cruiser. They observed a vehicle fitting the dispatcher's description parked

legally, but with the engine still running and headlights illuminated, and a female[1] "slumped over" in the driver's seat with her seatbelt on. (Tr. 202.)

{¶ 3} In an attempt to wake her, the officers knocked and pounded on the window of the vehicle, screamed, rocked the vehicle, shined a flashlight on her face, turned on the police cruiser lights and sirens, and repeatedly blared a bullhorn siren. The fire department and paramedics who had arrived at the scene around the same time as the police tried similar tactics to wake appellant, including sounding the truck's air horn, to no effect. Concerned for her health, the fire department used a "lock-out tool" to open the vehicle's door. (Tr. 233.) The paramedics eventually woke appellant by physically shaking her shoulder several times. The paramedics saw an open can of beer in the console next to her and assumed her deep unconscious state was alcohol related, but did not smell alcohol on her breath. According to paramedics, they interacted with appellant for approximately two minutes and then appellant refused any further care.

{¶ 4} After the paramedics finished speaking with appellant, Foulk approached the driver-side doorway of the vehicle, observed an open container of beer in the console, and detected the light odor of alcohol coming from the vehicle. When he spoke to appellant directly, Foulk said he smelled a stronger odor of alcohol and noticed that she had bloodshot eyes and uncoordinated head movements. Both Foulk and Wise noticed that she slurred her speech. In Foulk's and Wise's opinion, based on their basic OVI training, work, and personal experience waking up people, appellant's behavior was more akin to someone who had passed out under the influence of alcohol than a person who had been asleep.

{¶ 5} Appellant told Foulk she was tired and wanted to go home. According to Foulk, in order to further his investigation into a suspected OVI, he asked appellant to step out of the vehicle. Appellant responded that she could not get out because she could not take off her seat belt which, according to Foulk, she "fumbled with" unsuccessfully. (Tr. 168.) Foulk reached over appellant to unbuckle the seat belt, smelled a stronger odor of alcohol on her breath, and stepped back to allow her to exit. However, according to the officers, appellant insisted that she would not get out of the vehicle. In line with his

[1] While testifying, both officers identified appellant as the female in the vehicle.

training on safety in vehicle situations, Foulk said he pulled appellant out of the vehicle by her left arm without having the arm "locked out," which, according to his training, constituted a "zero" level use of force.[2] (Tr. 174.) Appellant tried, unsuccessfully, to dive back in the vehicle.

{¶ 6} Once removed, the officers stated that appellant became "belligerent" and "aggressive," struggling and "flailing" her arms in a manner that prompted the officers to pin her against the side of her vehicle in order to secure handcuffs on her. (Tr. 171.) Because of her uncooperative behavior, the officers were unable to administer a field sobriety test. Instead, Foulk and Wise placed appellant in the back of their police cruiser and continued their investigation by checking the vehicle and speaking to Rally's employees.

{¶ 7} When they returned from the restaurant, the officers believed appellant had removed her handcuffs. According to Wise, a person who removes their handcuffs while in the back of the police cruiser creates a safety hazard because the handcuffs may be used as a weapon or as a tool to break the cruiser's windows or the unrestrained passenger could access hidden weapons or destroy evidence. Foulk opened the cruiser door, ascertained that the handcuffs were indeed removed, and instructed appellant to turn her body and place her hands behind her back in order to be recuffed. According to the officers, appellant refused to move and stated she would not follow his directions. Foulk pulled her from the cruiser by her arm, without her arm "locked out." (Tr. 174.) According to the officers, appellant again became "combative" and "aggressive." (Tr. 174, 225.) She pulled away from the officers and kicked. The officers were able to get a handcuff on one of her wrists, and as the officers tried to place the second handcuff, appellant kicked Foulk in the leg. The officers eventually got both handcuffs on appellant, but she continued to kick at the officers. Wise employed a "Level 1" use of force grounding technique in which he grabbed her leg as she kicked and lifted it up in order to

[2] According to Wise, the police force is trained according to a "use of force continuum." (Tr. 199.) Level 1 is the lowest level of hands-on type of force to control or resist a person's movements, such as locking out an arm or using a grounding technique. Level 2 is the use of chemical sprays or Mace. Level 3 is use of a taser. Level 4 is a striking technique using a hand or foot. Level 5 is a striking technique with an object such as a flashlight or baton. Level 6 is a canine bite. Level 7 is use of a "flash-bang, knee knockers." (Tr. 199.) Level 8 is deadly force.

bring appellant to the ground. (Tr. 176.) Once on the ground, both officers secured and checked the handcuffs.

{¶ 8} Per protocol for a combative prisoner, the officers called for a prisoner transportation vehicle ("PTV"), commonly known as a "paddy wagon." (Tr. 213.) While waiting for the PTV to arrive, the officers held appellant on the ground. A nearby PTV, staffed by police officers Tonya Allen and Ehryn McNamer, arrived approximately one to two minutes later. Upon their arrival, Allen saw Foulk and Wise struggling with appellant and trying to stand her up, but appellant was "dead-weight[ing]"—refusing to stand on her own—and dragging her feet. (Tr. 256.) Foulk and Wise passed appellant off to Allen and McNamer who assisted appellant into the PTV. According to Allen, appellant continued to dead-weight, screamed, and was disoriented. Both Allen and McNamer thought appellant smelled like alcohol.

{¶ 9} Per protocol, Foulk and Wise contacted a sergeant to report their use of "Level 1" force as well as to report appellant's allegation of sexual assault, which she apparently was shouting at the officers.[3] (Tr. 279.) Patrol Sergeant Jason Garner spoke to Foulk and Wise about the actions they took in handcuffing appellant and noted that the officers were authorized to use force up to Level 5 when appellant kicked an officer. Garner also spoke with appellant, who he believed "appeared [to be] under the influence of alcohol and/or drugs," had a strong odor of alcohol, and was acting belligerently. (Tr. 282.) Garner examined the injuries she claimed to have on her wrists and knee. When asked whether she needed to discuss anything else, appellant did not report any sexual assault or inappropriate touching. While at the scene, Garner also viewed the cruiser video. In Garner's opinion, no misconduct took place regarding the use of force or inappropriate touching, but he contacted sexual assault detectives and internal affairs personnel to follow up on the sexual assault allegation.

{¶ 10} Foulk charged appellant with resisting arrest under Columbus General Offenses Code 2321.33, operating a vehicle under the influence of drugs or alcohol under Columbus Traffic Code 2133.01(A)(1)(a) and (d), and open container under Columbus General Offenses Code 2325.62(B)(5). On June 9, 2014, the court held a motion hearing

[3] Appellant also told Allen and McNamer that Foulk and Wise had sexually assaulted her.

to consider defense counsel's motion to exclude testimony and dismiss charges based on a missing cruiser video[4] and to consider probable cause for the arrest. The court dismissed the OVI per se charge under Columbus Traffic Code 2133.01(A)(1)(d) and determined that the officers involved had probable cause to arrest appellant. The remaining OVI charge under Columbus Traffic Code 2133.01(A)(1)(a) and resisting arrest charge proceeded to a jury trial.

{¶ 11} After a three-day trial, the jury returned a verdict of not guilty of OVI and guilty of resisting arrest. On August 15, 2014, the trial court accepted the jury's finding and sentenced appellant to three days in jail plus court costs for resisting arrest. The court also found appellant guilty of the open container charge, for which it imposed and then suspended a $50 fine. Appellant filed a timely notice of appeal on September 12, 2014.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellant raises the following assignments of error for our review:

> I. Conviction for resisting arrest under [2321.33[5]] was improper due to statutory construction.
>
> II. Counsel was ineffective for failing to request a jury instruction on a lesser included offense since the offense set forth in Columbus City Code §2109.03 is a more accurate description of any violation of law under the acts and circumstances of this case.
>
> > A. Counsel was ineffective for failing to request dismissal of the resisting arrest under [2321.33[6]] and/or for prosecution under the more specific resisting arrest for a traffic offense a lower degree offense.
>
> III. A conviction for resisting arrest under §2109.03 was against the substantial weight of the evidence.

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[4] According to police staff, a systemic upload problem occurred with the police servers, causing the cruiser video at issue, as well as many others, to be deleted.

[5] Appellant's original assignment of error and brief argument refers to "2133.01(A)(1)(D)," the Columbus City Code section for "Operating a vehicle under the influence." As appellant was not convicted under the OVI statute, we will assume appellant's assignment of error and argument contest her conviction under the resisting arrest statute, Columbus General Offenses Code 2321.33.

[6] Appellant's original assignment of error states "2133.01(A)(a)(D)," an OVI code section. We will assume appellant is referring to Columbus General Offenses Code 2321.33, "Resisting an enforcing official."

III. DISCUSSION

A. First Assignment of Error

{¶ 13} Appellant's first assignment of error asserts that her conviction was improper because principles of statutory construction require the specific statutory provision that addresses resisting enforcing officials in traffic situations, City Traffic Code 2109.03, "prevail" over the general resisting arrest statute, City General Offenses Code 2321.33, because both sections provide different penalties for the same conduct in violation of *State v. Volpe*, 38 Ohio St.3d 191 (1988). (Appellant's Brief, 11, 14.)

{¶ 14} As a preliminary matter, appellant did not raise any issue regarding the charge as stated in the complaint prior to or during trial. "The general rule is that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Awan*, 22 Ohio St.3d 120, 122 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56 (1968), paragraph three of the syllabus. Crim.R. 12(C)(2) mandates that "[d]efenses and objections based on defects in the indictment, information, or complaint" must generally be raised "[p]rior to" trial, and the Supreme Court of Ohio has previously held that an appellant's " 'failure to timely object to the allegedly defective [charges] constitutes a waiver of the issues involved.' " *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, ¶ 73, quoting *State v. Biros*, 78 Ohio St.3d 426, 436 (1997); *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, paragraph three of the syllabus. However, an appellant cannot waive, "during the pendency of the proceeding," defects in the complaint that challenge the jurisdiction of the court or that amount to a failure to charge an offense. Crim.R. 12(C)(2).

{¶ 15} If an issue is waived, Crim.R. 52(B) affords an appellate court with discretion to review "[p]lain errors or defects affecting substantial rights" that were otherwise waived. *In re M.D.*, 38 Ohio St.3d 149 (1988). " 'The plain error rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice.' " *State v. Long*, 53 Ohio St.2d 91, 95 (1978), quoting *United States v. Rudinsky*, 439 F.2d 1074, 1076 (6th Cir.1971).

{¶ 16} In the interest of justice, we will construe appellant's argument as a challenge to the jurisdiction of the court and sufficiency of the charge. " 'A valid complaint is a necessary condition precedent for the trial court to obtain jurisdiction in a criminal matter.' " *State v. Ghaster*, 8th Dist. No. 90838, 2009-Ohio-2117, ¶ 21, quoting *State v. Hoerig*, 181 Ohio App.3d 86, 2009-Ohio-541 (3d Dist.). "Where it is clear that a special provision prevails over a general provision or the Criminal Code is silent or ambiguous on the matter, under R.C. 1.51, a prosecutor may charge only on the special provision." *State v. Chippendale*, 52 Ohio St.3d 118 (1990), paragraph three of the syllabus. Therefore, if traffic resisting is a special provision that must have been charged instead of general, forceful resisting, the complaint is invalid, and the trial court would have lacked subject-matter jurisdiction over the case.

{¶ 17} Appellant cites to *Volpe* for the rule that "[w]ell-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes." *Id.* at 193. In *Volpe*, a defendant who was charged and convicted under a felony possession of criminal tools statute argued on appeal that it was improper to convict him under the general statute where the General Assembly manifested an intent to charge his conduct under a specific misdemeanor statute covering possession of a gambling device. After noting the two criminal statutes conflicted and were irreconcilable in that they "provide for different penalties for the same conduct," the Supreme Court applied R.C. 1.51 and found the appellant's conviction to be in error. *Id.*

{¶ 18} Implicit in the *Volpe* analysis is that several prerequisites must be met prior to applying the conflicting statute rule. Under R.C. 1.51, a "general" statute must be compared against a "special or local" statute, the general and special or local statutes must "conflict," and the conflict must be "irreconcilable" in that the statutes cannot be construed "so that effect is given to both." R.C. 1.51. Lastly, the "legislature [must have] expressed its intent that a special provision prevail over a general one." *Chippendale* at 122, citing *Volpe* at 193; R.C. 1.51 (the general provision prevails where it "is the later adoption and the manifest intent is that the general provision prevail").

{¶ 19} Under *Volpe*, the state is not required to proceed against a defendant under a specific statute where the specific and general statute "each provides a different penalty for a different course of conduct" and are therefore reconcilable. *State v. Culwell*, 10th

Dist. No. 96APA04-504 (Nov. 26, 1996), citing *State v. Cooper*, 66 Ohio App.3d 551, 553 (4th Dist.1990) (finding general theft statute and specific falsification statute did not create irreconcilable conflict where acts committed under the specific statute did not always violate the general statute). *See also State v. Riggs*, 10th Dist. No. 92AP-1755 (Apr. 13, 1993) following *Chippendale* at 120 (incorporating former allied offenses element comparison test prior to applying R.C. 1.51).

{¶ 20} Further, "[w]here two statutes proscribe similar conduct, no rule of law requires the prosecution to proceed under the statute with a lower penalty." *Culwell*. *See also United States v. Batchelder*, 442 U.S. 114, 124 (1979) (recognizing that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants * * * [w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion").

{¶ 21} Here, appellant was charged and convicted under City General Offenses Code 2321.33, which states "(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest of himself or another. (B) Whoever violates this section is guilty of resisting arrest, a misdemeanor of the second degree."

{¶ 22} City Traffic Code 2109.03, which appellant believes she should have been charged with, states:

> (a) No person shall resist, hinder, obstruct or abuse any official while such official is attempting to arrest offenders under this Traffic Code. No person shall interfere with any person charged under such sections with the enforcement of the law relative to public streets or highways.
>
> (b) Whoever violates this section is guilty of a minor misdemeanor.

{¶ 23} We find the character of these two statutes, compared, do not fit the mold of "general" and "special or local" provisions and, therefore, do not trigger an analysis under R.C. 1.51. City General Offenses Code 2321.33 includes the element of reckless or forceful behavior and the element of lawful arrest, both which are unnecessary for conviction under City Traffic Code 2109.03. Even if categorized as a general and a specific statute, they are not "irreconcilable" and can be construed "so that effect is given to both." R.C.

1.51. Specifically, each statute provides a different penalty for a different course of conduct. As discussed, City General Offenses Code 2321.33 addresses resisting situations in any context where the person uses force or acts recklessly, while City Traffic Code 2109.03 addresses resisting situations in traffic contexts where the person does not use force or act recklessly. The slightly harsher penalty attached to City General Offenses Code 2321.33 reflects a higher degree of culpability attached to a person's use of force or reckless behavior.

{¶ 24} As such, the prosecutor was not required to proceed under City Traffic Code 2109.03, but, rather, had discretion to proceed under the City General Offenses Code 2321.33 in light of the ample evidence of appellant's forceful resistance in the record. Foulk and Wise testified that appellant physically resisted being handcuffed by refusing to turn her body, refusing to get out of the cruiser, pulling away from the officers, and kicking Foulk.

{¶ 25} Therefore, we find appellant's charge and conviction under City General Offenses Code 2321.33, rather than City Traffic Code 2109.03, was proper. Accordingly, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 26} In her second assignment of error, appellant asserts that she received ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced appellant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to show counsel's performance was deficient, appellant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The operative test evaluates whether "counsel's performance fell below an objective level of reasonable representation." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, appellant must establish that there is a "reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different." *Jackson* at ¶ 133.

{¶ 27} First, appellant argues that counsel was ineffective for failing to request a jury instruction on a lesser-included offense. However, the failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel. *State v. Albert*, 10th Dist. No. 14AP-30, 2015-Ohio-249, ¶ 41, citing *State v. Griffie*, 74 Ohio St.3d 332 (1996); *State v. Mitchell*, 10th Dist. No. 10AP-756, 2011-Ohio-3818, ¶ 52.

{¶ 28} Moreover, under *State v. Evans*, 122 Ohio St.3d 381 (2009), paragraph two of the syllabus:

> In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed.

" 'If the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense, then the judge should instruct the jury on the lesser included offense.' " *Id.* at ¶ 13, quoting *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, ¶ 11, citing *State v. Shane*, 63 Ohio St.3d 630, 632-33 (1992).

{¶ 29} Comparing the two statutes at issue, City General Offenses Code 2321.33 can be committed without City Traffic Code 2109.03 also being committed anytime a person resists with force in a non-traffic situation. As a result, the third prong of *Evans* fails, and City Traffic Code 2109.03 is not a lesser-included offense of City General Offenses Code 2321.33. Therefore, appellant's trial counsel was not ineffective for failing to request a jury instruction on a lesser-included offense.

{¶ 30} Second, appellant argues that his trial counsel's failure to request dismissal of the resisting arrest charge and request prosecution under the resisting an enforcing official in the traffic code amounts to ineffective assistance of counsel. However, as discussed in the first assignment of error, the city was within its discretion to charge appellant only with City General Offenses Code 2321.33 because the statutes at issue here do not trigger R.C. 1.51, and the record contained ample evidence of forceful resistance.

As such, trial counsel's performance was not deficient, and appellant's argument that her trial counsel was ineffective for not requesting prosecution under the traffic code fails.

{¶ 31} For all these reasons, appellant has not demonstrated ineffective assistance of counsel. Accordingly, we overrule appellant's second assignment of error.

C. Third Assignment of Error

{¶ 32} Appellant's third assignment of error challenges the sufficiency[7] of the evidence to support her conviction for resisting arrest. Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. *Id.* In determining whether the evidence is legally sufficient to support a conviction, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 33} In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed, but whether, if believed, the evidence supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime"). Further, "the testimony of one witness, if believed by the jury, is enough to support a conviction." *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶ 42.

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[7] Although the assignment of error uses the word "weight," appellant's argument is entirely devoted to sufficiency of the evidence. Therefore, we will construe the assignment of error as a sufficiency challenge.

{¶ 34} On appeal, appellant does not challenge whether her conduct was reckless or forceful, whether her conduct constituted interference or resistance, or whether the arrest was unlawful due to a lack of probable cause. Rather, appellant first challenges the element of "arrest," arguing that the time of arrest is unclear. Arrest involves four elements: "(1) [a]n intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person * * * (4) which is so understood by the person arrested." *State v. Darrah*, 64 Ohio St.2d 22, 26 (1980), citing *State v. Terry*, 5 Ohio App.2d 122, 128 (8th Dist.1966). "[A]n officer need not state, 'You are under arrest.' " *State v. Carroll*, 162 Ohio App.3d 672, 2005-Ohio-4048, ¶ 14 (--Dist.). Rather, arrest "signifies the apprehension of an individual or the restraint of a person's freedom in contemplation of the formal charging with a crime." *Darrah* at 26.

{¶ 35} The city presented the testimony of Foulk and Wise, stating they handcuffed and placed appellant into a police cruiser and then later re-handcuffed appellant and transported her to a PTV. Foulk and Wise were in uniform, driving a marked police cruiser, and operating under the authority of the city of Columbus in responding to a police dispatch. Viewing the above evidence in a light most favorable to the city, it is reasonable for a trier of fact to conclude beyond a reasonable doubt that the officers manifested an intent to arrest appellant under real authority, actually seized and detained her by use of the handcuffs and locked police cruiser, and that appellant understood she was arrested when uniformed officers restrained her freedom by using handcuffs and placing her in the back of a cruiser.

{¶ 36} Second, appellant asserts the officers' use of force was "unnecessary [and] unlawful." (Appellant's Brief, 19.) Specifically, appellant believes the officers "created the condition/environment that [police] classified as resisting" by removing her from a safely secured police vehicle in order to initiate a physical confrontation over the handcuffs. (Appellant's Brief, 20.) Appellant does not assert any alleged sexual assault contributed to an unlawful use of force.

{¶ 37} "The reasonableness of force is measured by the facts and circumstances of each particular case, including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether she is actively

resisting arrest or attempting to evade arrest by flight." *State v. Davis*, 10th Dist. No. 99AP-1428 (Sept. 28, 2000), citing *Graham v. Connor*, 490 U.S. 386, 396 (1989). *See also Columbus v. Purdie*, 10th Dist. No. 84AP-127 (Nov. 29, 1984) (finding officers' use of force by wrestling defendant to the ground and using mace to be warranted in response to defendant's attempt to flee and physical struggle after arrest).

{¶ 38} The city presented evidence to show why a passenger possessing loose handcuffs is a safety problem. Wise stated the handcuffs could be used as a weapon against the police, could be used by appellant to harm herself, and could be used to break the cruiser window. Additionally, Wise stated that, without handcuffs, a passenger could more readily access hidden weapons or destroy evidence.

{¶ 39} The city also presented evidence that appellant actively resisted arrest and attempted to evade arrest. As described previously, Foulk and Wise testified that appellant physically resisted being handcuffed by refusing to turn her body, refusing to get out of the cruiser, pulling away from the officers, and kicking Foulk.

{¶ 40} Furthermore, the city presented evidence that the officers acted in line with their training and that they utilized force in response to appellant's conduct. On the use of force continuum established by the police department, Foulk stated he used Level 0 force when he pulled appellant from the cruiser without locking her arm, and Wise stated he used Level 1 force in bringing appellant to the ground to secure the handcuffs. Garner reiterated that, when kicked by appellant, the officers were authorized to employ a higher degree of force than what the officers used to resolve the situation. Moreover, appellant's conduct in refusing to simply turn around while still in the cruiser to have her handcuffs re-secured prompted the officers' need to remove her from the police cruiser. In light of the above facts, the officers used a reasonable amount of force necessary to respond to appellant's resistance in order to secure her handcuffs.

{¶ 41} As a consequence, we reject appellant's arguments that the evidence was insufficient to support her conviction for resisting arrest. Accordingly, appellant's third assignment of error is overruled.

IV. CONCLUSION

{¶ 42} Having overruled appellant's three assignments of error, we hereby affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.
