

STATE V. SCHMITT

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHRISTOPHER SCHMITT,
Defendant-Appellant.**

NO. 35,936

COURT OF APPEALS OF NEW MEXICO

February 14, 2017

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY, Fernando R.
Macias, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate
Defender, Santa Fe, NM, for Appellant

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: JAMES J. WECHSLER, Judge,
JONATHAN B. SUTIN, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Defendant appeals from the district court's judgment and sentence, convicting him for resisting, evading or obstructing an officer and sentencing him to probation, following a jury trial. We were unpersuaded that Defendant's docketing statement

demonstrated error and issued a notice of proposed summary disposition, proposing to affirm. Defendant filed a response to our notice. We have considered Defendant's response and remain unpersuaded. We, therefore, affirm.

{2} Defendant initially pursued the appeal under the demands of *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982; and *State v. Boyer*, 1985-NMCA-029, ¶ 24, 103 N.M. 655, 712 P.2d 1, challenging the sufficiency of the evidence to support his conviction. [DS unnumbered 4] Our notice proposed to hold that the combined evidence of Defendant's belligerent and menacing behavior toward the officers and Defendant's actions showing his physical resistance against the officers attempting to arrest him, which forced the officers to carry him to the patrol car, was sufficient to support his conviction under NMSA 1978, Section 30-22-1(B) (1981). Our notice relied on *State v. Wilson*, 2007-NMCA-111, ¶ 43, 142 N.M. 737, 169 P.3d 1184, for its holding that the evidence was sufficient to convict the defendant for resisting or evading an officer under Section 30-22-1(B), where the defendant pulled away from the officer when the officer had handcuffed one of the defendant's hands, was attempting to secure the defendant's other hand, and had to forcibly apply the handcuffs onto the defendant.

{3} In response to our notice, Defendant contends that there was no evidence that he was "intentionally fleeing, attempting to evade or evading an officer[,]" as required by Section 30-22-1(B), and relies on dictionary definitions of the terms "flee" and "evade." [MIO 4] We note that definitions of "flee" and "evade" upon which Defendant relies are so similar as to be effectively redundant. [MIO 4] It is an axiomatic rule of statutory interpretation that we will not construe a statute to render any portion of it surplusage or superfluous. See *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1. We construe the Legislature's meaning of attempted evading in Subsection (B) to encompass more behavior than merely staying or slipping away, as Defendant asks us to define it. [MIO 4]

{4} Significantly, Defendant does not address our holding in *Wilson* regarding Section 30-22-1(B), nor does he attempt to distinguish that case. In *Wilson*, this Court broadly construed the offense of resisting, evading or obstructing an officer under Section 30-22-1(B) and held that the defendant's act of pulling his arm away from the officer trying to handcuff him, causing the officer to forcibly finish handcuffing the defendant, was a sufficient act of attempting to "resist or evade" the officer during an arrest. *Wilson*, 2007-NMCA-111, ¶ 43. We believe Defendant's act of "planting his feet [on] the ground to keep the officers from walking him" to the patrol car, and Defendant's act of continually dropping his weight, causing officers to forcibly carry him to the patrol car, [RP 13-14] are sufficiently akin to the defendant's act of pulling his arm away from the officer handcuffing the defendant in *Wilson* to support a similar finding of attempting to evade.

{5} For the reasons stated in our notice and in this opinion, we affirm the district court's judgment and sentence convicting Defendant of resisting, evading or obstructing an officer.

{6} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge