No. 46596-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Baron Dukes,

Appellant.

Clark County Superior Court Cause No. 14-1-00870-8

The Honorable Judge Gregory Gonzales

Appellant's Reply Brief

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I. THE PROSECUTOR ATTEMPTED TO SMEAR MR. DUKES FOR EXERCISING HIS CONSTITUTIONAL RIGHTS.

The government may not draw adverse inferences from the exercise of a constitutional right. *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). In his closing arguments, the prosecutor highlighted Mr. Dukes' assertion of his right to be free from unreasonable searches and seizures, his assertion of his right to privacy, his exercise of his right to free speech, and his choice to remain silent. RP 380, 414, 416.

The rule draws no distinctions between different kinds of adverse inferences. *Id.* A prosecutor may not draw any adverse inference from protected speech, or from an assertion of a person's rights to remain silent, to be free from unreasonable searches and seizures, or to privacy. *Id.* This includes a prosecutor's attempts to "impeach" a person by showing exercise of a constitutional right. *Id.*

Thus, the state's argument impugning Mr. Dukes' credibility was flagrant and ill-intentioned misconduct.[1] *Id.*; *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015) *cert. denied,* No. 14-1279, 2015 WL 1914367 (U.S. June 15, 2015).

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[1] It is also manifest error affecting Mr. Dukes's constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments as well as Wash. Const. art. I, § 7.

Without citation to authority, Respondent suggests that a prosecutor may argue credibility issues based on exercise of a constitutional right. Brief of Respondent, pp. 13-14. This court may assume that Respondent found no authority in support of this proposition after diligent search. *Woods View II, LLC v. Kitsap Cnty.*, No. 44404-6-II, 2015 WL 3608691, at *19 (Wash. Ct. App. June 9, 2015). Furthermore, the rule set forth in *Rupe* does not come with exceptions. *Rupe,* 101 Wn.2d at 705.

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Respondent argues, again without citation to authority, that any error could not have affected the outcome because Mr. Dukes was acquitted of obstructing.[2] However, if aimed at Mr. Dukes' credibility (as

[2] Again, this court can assume Respondent found no authority after diligent search. *Woods View II*, No. 44404-6-II, 2015 WL 3608691, at *19.

Respondent suggests),[3] the improper argument would infect all convictions, since Mr. Dukes testified and denied each offense.

Nor can Mr. Dukes' assertion of his constitutional rights be considered evidence of "flight." Brief of Respondent, p. 14. A person who asks "Am I being detained?" is not fleeing. RP 151. A person who exercises his right to remain silent is not fleeing. RP 151-158. A person who refuses to submit to an unlawful seizure is not fleeing. *See* Appellant's Opening Brief, pp. 5-7. Respondent's arguments regarding flight are misplaced.

The prosecutor argued that Mr. Dukes didn't behave like an innocent person. As evidence, the state cited Mr. Dukes' exercise of constitutional rights. The prosecutor's flagrant and ill-intentioned misconduct prejudiced Mr. Dukes. His conviction must be reversed and the case remanded for a new trial. *State v. Stearman*, -- Wn.App.--, ___, 348 P.3d 394, 400 (Wash. Ct. App. 2015).

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. DUKES OF RESISTING ARREST.

Mr. Dukes and Ms. Minjarez enjoy vehement debates on subjects about which they are passionate. RP 65-67, 70, 82-83, 258, 302. Officer

[3] Brief of Respondent, pp. 13-14.

Givens observed one such argument. RP 64, 73, 149, 170. He heard no threats and saw no physical contact or overt aggression. RP 170.

An argument does not create a reasonable suspicion of criminal activity. *See, e.g., Gattison v. State*, 309 Ga. App. 382, 384, 711 S.E.2d 25 (2011); *C.H.C. v. State*, 988 So. 2d 1145, 1147 (Fla. Dist. Ct. App. 2008). In the absence of reasonable suspicion, Mr. Dukes had the right of any citizen to ignore the officer and go on his way.[4] *State v. Gatewood*, 163 Wn.2d 534, 541, 182 P.3d 426 (2008). Givens had no basis to arrest him; thus, the state failed to prove the essential elements of resisting arrest. RCW 9A.76.040.

Respondent fails to cite the Washington case that most directly supports the state's position: *State v. Madrigal*, 65 Wn. App. 279, 827 P.2d 1105 (1992). In *Madrigal,* a divided panel upheld a *Terry* stop after an officer saw a couple arguing in public. *Id.* (citing *Terry v. Ohio,* 392 U.S. 1, 25–26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

This case differs from *Madrigal* in four important respects.[5] First, the couple in *Madrigal* could be heard from "more than half a block

[4] In fact, Mr. Dukes intended to move closer to his belongings, which he'd set down nearby.

[5] Furthermore, the continuing vitality of *Madrigal* is suspect, given the Supreme Court's opinion in *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011). The *Schultz* court rejected application of the community caretaking/emergency aid exception based on a loud argument. *Id.,* at 760-761.

away." *Id.,* at 280. Here, by contrast, Givens did not testify that he could hear the couple from a distance. RP 15-27, 146-249.

Second, in *Madrigal,* the defendant's "body language was overpowering" the woman he was arguing with. *Id.* Here, Givens testified that Mr. Dukes held his face close to Ms. Minjares, but did not suggest that his body language was overpowering. RP 15-27, 146-249.

Third, in *Madrigal,* the woman was crying. *Id.* Here, neither party was crying. RP 15-27, 146-249.

Fourth, in *Madrigal,* the couple continued yelling even after the officer parked nearby and approached them on foot. *Id.* Mr. Dukes and Ms. Minjares did not continue arguing with each other when the officer came and spoke to them. RP 15-27, 146-249.

Fifth, the woman in *Madrigal* was known to the officer. *Id.* Givens did not know Ms. Minjares; thus, he could not evaluate her body language and affect by comparing her behavior during the argument to her usual manner when she was not arguing. RP 15-27, 146-249.

Instead of relying on (or even citing) *Madrigal,* Respondent suggests that the "community caretaking" exception justifies the seizure here. Brief of Respondent, pp. 19-21. Respondent cites no authority suggesting that a verbal dispute permits a seizure as part of the community caretaking function. Brief of Respondent, pp. 19-21. This court can

assume Respondent found no such authority after diligent search. *Woods View II*, No. 44404-6-II, 2015 WL 3608691, at *19.

Furthermore, even if Officer Givens' concern for Ms. Minjares allowed him to detain and speak to her, it did not provide any basis to detain Mr. Dukes. Givens expressed no concern for Mr. Dukes' well-being. After separating the two, any further detention of Mr. Dukes could only be for the purpose of criminal investigation. As Respondent notes, criminal investigation is incompatible with the community caretaking doctrine:

> [T]he seizure "must be necessary and strictly relevant to performance of the noncriminal investigation"… Additionally, the "noncriminal investigation must end when reasons for initiating an encounter are fully dispelled."

Brief of Respondent, p. 20 (citations omitted) (quoting *State v. Moore,* 129 Wn. App. 870, 879, 120 P.3d 635 (2005)). If truly involved in "caretaking," Givens could have asked Ms. Minjares if she wanted a ride, or wished to be escorted away from Mr. Dukes. He had no need to detain Mr. Dukes—unless investigating.

Finally, the *Schultz* court's reasoning precludes application of community caretaking here. Police may no more seize a person for arguing than they may enter a home; such an intrusion into private affairs

without authority of law violates art. I, § 7. *Schultz,* 170 Wn.2d at 760-761.

Givens had no basis to detain Mr. Dukes. The arrest was unlawful, and the evidence insufficient to prove resisting. The conviction for resisting must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

III. THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY DIVERTED THE JURY'S ATTENTION AWAY FROM THE REASONABLENESS OF ANY DOUBT, AND ERRONEOUSLY FOCUSED IT ON WHETHER JURORS COULD PROVIDE A REASON FOR ANY DOUBTS.

A jury instruction misstating the reasonable doubt standard is structural error, "subject to automatic reversal without any showing of prejudice." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). RAP 2.5(a)(3) always allows review of structural error of this sort.[6]

[6] Structural error is "a special category of manifest error affecting a constitutional right." *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier,* 176 Wn.2d at 54 (Wiggins, J., dissenting) ("If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a 'manifest error affecting a constitutional right.'")

Contrary to Respondent's assertion,[7] Mr. Dukes' argument may be reviewed for the first time on appeal. RAP 2.5(a)(3).

Furthermore, the *Bennett* court (which exercised supervisory authority to approve WPIC 4.01 was not faced with a challenge to the language at issue in this case. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). *Bennett* does not control the issue raised here. Respondent's reliance on principles of *stare decisis* is misplaced. Brief of Respondent, pp. 24-25.

Finally, Respondent correctly points out that Division II has previously examined and upheld a reasonable doubt instruction similar to that used here. Brief of Respondent, p. 25 (citing *State v. Thompson,* 13 Wn. App. 1, 533 P.2d 395 (1975); *see also State v. Cosden*, 18 Wn. App. 213, 221, 568 P.2d 802 (1977) (citing *Thompson*). But *Thompson* predated *Sullivan,* and *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) *disapproved of on other grounds by Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). It also predated the *Bennett* court's criticism of the instruction at issue in that case. *Bennett*, 161 Wn.2d at 315-317.

Thompson should be revisited.

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[7] Brief of Respondent, pp. 22-23.

IV. RESPONSE TO "MOTION" TO STRIKE.

In its conclusion, Respondent asserts that Appellant's "entire conclusion section should be stricken" as irrelevant to the assignments of error. Brief of Respondent, p. 26. This "motion" is improper.

First, "[a] party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." RAP 10.4(d). Respondent's "motion" does not qualify under RAP 10.4(d). If counsel for Respondent has actual objections to appellate counsel's "diatriabe,"[8] he should file a proper motion under Title 17 RAP.

Second, Respondent's implication—that racial bias played no role here—ignores the reality facing people of color during encounters with police and the court system in our state. Brief of Respondent, p. 26.

Even before the death of Michael Brown in Ferguson, Missouri, a Washington task force examined the issue and concluded that "[t]he fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable." Research Working Group & Task Force on Race, the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 627 (2012); *see also* Mario L. Barnes & Robert S. Chang, *Analyzing Stops,*

[8] Brief of Respondent, p. 26.

Citations, and Searches in Washington and Beyond, 35 Seattle U. L. Rev. 673 (2012).

This reality is not altered by the fact that "there was no claim below that the actions of any state actors were based on racial bias." Brief of Respondent, p. 26. Defense counsel, representing an African-American man in a county that is only 0.8% African-American, [9] may well have decided that arguments about racial bias could prove unproductive.

Police use the crime of obstruction "disproportionately to arrest people of color." *State v. E.J.J.*, No. 88694-6, 2015 WL 3915760, at *6 (Wash. June 25, 2015) (Madsen, C.J., concurring). Against this backdrop, it is not inappropriate to mention the issue of racial bias, even if not raised by trial counsel in this case. This court has "an obligation to promote confidence in the courts and our justice system." *Id.,* at *7.

Appellate counsel's editorializing does not impact the legal arguments made in this case. However, it is important for all participants in the justice system—including prosecutors and defense attorneys—to think about questions of racial bias when they arise. *See* Michael Callahan, *"If Justice Is Not Equal for All, It Is Not Justice": Racial Bias, Prosecutorial Misconduct, and the Right to A Fair Trial in State v. Monday*, 35 Seattle U. L. Rev. 827 (2012); Krista L. Nelson & Jacob J.

[9] See http://quickfacts.census.gov/qfd/states/53/53015.html (Cowlitz County, Washington).

Stender, *"Like Wolves in Sheep's Clothing": Combating Racial Bias in Washington State's Criminal Justice System*, 35 Seattle U. L. Rev. 849, 853 (2012); *see also* Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 Seattle U. L. Rev. 755 (2012).

Respondent's "motion" should be denied.

CONCLUSION

Mr. Dukes' convictions must be reversed. The resisting charge must be dismissed with prejudice. The assault charge must be remanded for a new trial.

Respectfully submitted on July 1, 2015,

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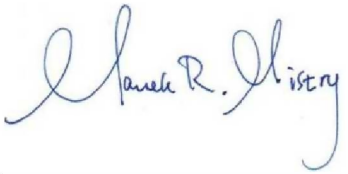

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 1, 2015.

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