NO. 98068-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KALEN WARREN DUNLAP, PETITIONER

RESPONDENT'S ANSWER TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington appears through the Kittitas County Prosecuting Attorney's Office.

II. COURT OF APPEALS DECISION

Appellant, Kalen Dunlap, petitions this court to review *State v. Kolb, and Dunlap*, No. 35723-6-III, 2019 Wash.App. LEXIS 3080, (Wn. Ct. App. filed December 10, 2019) (unpublished).[1] In that case, Division Three found that sufficient evidence supported the charge of resisting arrest as to Mr. Dunlap.[2] The State attaches a copy of that decision to this response.

III. ISSUE

Does Appellant/Petitioner satisfy the requirement of review under RAP 13.4(b) when his claim is essentially a sufficiency of the evidence argument?

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[1] *N.B.* Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding upon any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such precedential value as the court deems appropriate.

[2] Mr. Kolb also was convicted of resisting arrest, but did not appeal his conviction.

IV. STATEMENT OF THE CASE

Ellensburg police officer Derek Holmes[3] was on duty on September 23, 2016, at approximately 10:15 p.m. when he noticed a commotion outside the bar, Club 301. RP 244-246, 251. Officer Holmes could see the victim, Ben Miles, laying on the sidewalk just south of the Club 301 with two individuals standing over his body and kicking him. RP 244-245. Mr. Miles did not appear to be moving, and was in fact, unconscious. RP 245, 254. Officer Holmes observed the person to the left of Mr. Miles kicking Mr. Miles in the legs and torso. RP 245. He observed the person to the right of Mr. Miles (later identified as Kalen Dunlap), "soccer kick" Mr. Miles in the head. *Id.* According to Officer Holmes, when Mr. Dunlap kicked him, Mr. Miles' head "whipped back very violently and then back down on the pavement in the position it was in. He (Mr. Miles) didn't appear to be moving." RP 245-246. Officer Holmes activated his patrol car lights which in turn activated the car video recording system to backtrack some 30 to 60 seconds prior. RP 246. As Officer Holmes pulled up to the sidewalk where the events were occurring, the person on the left (Mr. Dunlap's

[3] Officer Holmes' first name was incorrectly stated as "Derrick" in the State's initial briefing, and as "Eric" in the initial decision of the Court of Appeals. It was subsequently corrected in the decision of the Court of Appeals, and is being correctly stated here.

cousin Rylon Kolb) ran away, while Mr. Dunlap kicked Mr. Miles one more time in the stomach and then joined Mr. Kolb in fleeing from the scene. *Id.* Officer Holmes testified that he yelled "hey" and then began to chase the two men. RP 253. Realizing that there were two of them, that he was unable to catch them, that he had left his running patrol car in front of the bar, and that there was an unconscious victim on the sidewalk to attend to, Officer Holmes relayed to dispatch that the two men were westbound on 4th, and returned to attend to Mr. Miles. RP 254.

Corporal Clayton of the Ellensburg Police Department was nearby when Officer Holmes' call was put out on the air. RP 225-226. Corporal Clayton went north on Main Street to try to locate the two suspects and observed them in the middle of the street on 4th Avenue next to the Palace Cafe. RP 226-227. The two men split up, and Corporal Clayton pursued the individual later identified as Kalen Dunlap. RP 227-228. Corporal Clayton, who was driving a patrol car, with its overhead lights activated, yelled at Mr. Dunlap, "[s]top, police, right there, stop." RP 227. In response, Mr. Dunlap continued to run from Corporal Clayton, who again yelled, "[s]top right there." RP 228. The audio of Corporal Clayton's patrol car can be heard as he continues the pursuit, and says, "he won't stop for

me." *Id.* Corporal Clayton then yelled, [s]top right there. Put your hands up. Get on the ground." *Id.* Finally, at the 300 block of North Water, an obviously winded Mr. Dunlap complied. *Id.* Ex. 11 at 22:16:08.

Corporal Clayton took Mr. Dunlap into custody at the 300 block of North Water. RP 256. Later, Officer Holmes was able to identify Mr. Dunlap as the person he had observed kicking Mr. Miles in the face and stomach outside the Club 301. RP 257.

V. ARGUMENT WHY THIS COURT SHOULD NOT ACCEPT REVIEW

THE DECISION IN PETITIONER'S CASE DOES NOT CONFLICT WITH A PUBLISHED DECISION IN ANOTHER DIVISION, AND AS SUCH, DOES NOT QUALIFY FOR DISCRETIONARY REVIEW UNDER RAP 13.4(b).

Contrary to Petitioner's assertion, the Court's ruling in this matter does not conflict with Division One's published decision in *State v. Calvin*, 176 Wn.App. 1, 13, 316 P.3d 496 (2013). In *Calvin,* the Court held that when the officer identified himself as "police," told the defendant to get on the ground and began to handcuff him, Calvin knew he was under arrest as he physically resisted the officer's efforts.

Calvin, however, does not stand for a general proposition that every defendant needs to be actively resisting being handcuffed by an identified law enforcement officer to be committing the crime of resisting. As the Court noted, force is not an element under 9A.76.040 (resisting arrest), *Calvin*, 176 Wn.App at 12. As Mr. Dunlap's own petition points out, there are no magic words, or singular situation which defines the arrest situation, but rather a totality of the assessed evidence in each case. For example, in *State v. Radka*, 120 Wn.App. 43, 50, 83 P.3d 1038 (2004), the totality of circumstances was not sufficient for a custodial arrest when the defendant was placed in a patrol car and told he was under arrest, subsequent search incident found invalid; *State v. Lyons*, 85 Wn.App. 268, 270-271, 932 P.2d 188 (1997), restraint of the defendant and stating "you're under arrest," did not turn an investigative detention into an arrest; and *State v. Gardner*, 28 Wn.App. 721, 724-725, 727-728, 626 P.2d 56 (1981), the physical apprehension and transportation of the defendant for an identification was not an arrest. None of these situations however involved the direct observation of a vicious physical assault, and an ensuing chase of the defendant. Similarly, there are no magic words to define the term as to what conduct constitutes resisting,

only the requirement that pursuant to a lawful arrest, the defendant intentionally prevents, or attempts to prevent, a peace officer from arresting him or her.

Washington Pattern Jury Instruction Criminal 120.06 reads as follows:

> To convict the defendant of the crime of resisting arrest, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about(date), the defendant prevented or attempted to prevent a peace officer from arresting [him] [her];
>
> (2) That the defendant acted intentionally;
>
> (3) That the arrest or attempt to arrest was lawful; and
>
> (4) That any of these acts occurred in the [State of Washington] [City of] [County of].
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

In Mr. Dunlap's case, the totality of the evidence allowed the jury to find beyond a reasonable doubt that he resisted arrest. Mr. Dunlap was observed kicking an unconscious Mr. Miles in the

head/face area by a law enforcement officer in a marked patrol car. As Officer Holmes pulled up within a few yards of the three men and activated his overhead lights, Mr. Dunlap again kicked Mr. Miles in the stomach while his cousin, Mr. Kolb immediately fled. Officer Holmes yelled at Mr. Dunlap and gave immediate foot chase, which was then taken up by Corporal Clayton in his patrol car also with activated overhead lights. After a chase which went on for several blocks with Corporal Clayton loudly commanding Mr. Dunlap to stop, and Mr. Dunlap changing his direction and path more than once, an obviously winded Mr. Dunlap appears to have come to the realization that he was not going to be able to outrun the patrol car. It was at this point that Mr. Dunlap complied with Corporal Clayton's command that he get on the ground. Being actively pursued by two different police officers after an observed assault, clearly objectively manifested an intent to arrest Mr. Dunlap.

Evidence is sufficient to support a verdict if the jury has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The evidence is viewed in the light

most favorable to the prosecution. *Green*, 94 Wn.2d at 221. Appellate courts defer to the trier-of-fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The totality of the circumstances in this case supported the jury's verdict, and are not at variance with published caselaw.

VI. CONCLUSION

Appellant/petitioner has not met the specific criteria for review under RAP 13.4(b). The fact that Mr. Dunlap was found guilty of resisting arrest premised upon a different fact pattern than that present in *Calvin* does not indicate a conflict between the two divisions. Every violation of an RCW, although identical in its required elements, is different in its commission. Mr. Dunlap's argument, though couched as being in conflict with a published decision in another division, is in reality, a second attempt to challenge the sufficiency of the evidence relied upon by the jury for their finding and his conviction. As this is not a valid ground for

discretionary review, the State respectfully asks that Mr. Dunlap's petition for discretionary review be denied

Respectfully submitted this 7th day of February, 2020.

Carole L. Highland

Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney

State v. Kolb

Court of Appeals of Washington, Division Three

December 10, 2019, Filed

No. 35723-6-III

Reporter
2019 Wash. App. LEXIS 3080 *; 2019 WL 6721138

THE STATE OF WASHINGTON, *Respondent*, v. RYLON KEASON KOLB, *Defendant*, ***KALEN*** WARREN ***DUNLAP***, *Appellant*.

Subsequent History: Reported at State v. Kolb, 2019 Wash. App. LEXIS 3133 (Wash. Ct. App., Dec. 10, 2019)

Prior History: **[*1]** Appeal from Kittitas Superior Court. Docket No: 16-1-00249-7. Judge signing: Honorable Scott R. Sparks. Judgment or order under review. Date filed: 12/04/2017.

Core Terms

arrest, resisting arrest, assault, fleeing, yelled, resisting, flight, financial obligation, trial court, intentionally, scene

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Judges: Authored by Kevin Korsmo. Concurring: Bradley Alan Maxa, Dissenting: Rebecca Pennell.

Opinion by: Kevin Korsmo

Opinion

¶1 KORSMO, J. — ***Kalen Dunlap*** appeals his convictions for fourth degree assault and resisting arrest, arguing that insufficient evidence supports the latter conviction. We affirm the convictions and remand.

FACTS

¶2 ***Dunlap***, a college student in Ellensburg, got into a confrontation with a drunken man inside a bar. The two men went outside and a fight ensued; ***Dunlap***'s cousin assisted him in the altercation. When the victim was knocked to the ground, a passing Ellensburg Police Department Officer, Derek Holmes, saw ***Dunlap*** kick the downed man in the face. Holmes turned on his lights, pulled his car up to the scene, got out of the vehicle, and called for assistance.

¶3 ***Dunlap*** **[*2]** kicked the man in the torso and ran after his cousin who had already fled. Holmes yelled "hey" and started running after them. Giving up after a short pursuit, Holmes returned to aid the victim and told

dispatch about the two fleeing suspects. Corporal Clifford Clayton soon spotted the two a short distance away and pursued ***Dunlap*** with his car when the two men split up. Clayton repeatedly told ***Dunlap*** to stop before ***Dunlap*** finally stopped running and was taken into custody.

¶4 ***Dunlap*** and his cousin were each charged with second degree assault and resisting arrest. Their cases proceeded to a joint jury trial. The prosecutor argued the resisting charge on a theory that ***Dunlap***'s flight constituted resisting arrest and that he was told repeatedly to stop. The jury convicted both men of resisting arrest, but did not reach a verdict on the assault charges. Mr. ***Dunlap*** waived his right to a jury trial and his retrial was to the bench. The court found Mr. ***Dunlap*** guilty of the inferior degree crime of fourth degree assault.

¶5 Counsel for Mr. ***Dunlap*** also moved to vacate the jury verdict, arguing that the flight from Officer Holmes was not flight from an "arrest." The trial court denied the motion. The **[*3]** court then imposed concurrent 30 day sentences for the two offenses and also required payment of a booking fee and the criminal filing fee.

¶6 Mr. ***Dunlap*** timely appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

¶7 Mr. ***Dunlap*** primarily argues that the evidence did not support the resisting arrest count; he also argues that the court erred in imposing the two noted financial obligations. We address the questions in the order presented.

Sufficiency of the Evidence

¶8 The focus of Mr. ***Dunlap***'s argument is a contention that there was no evidence as to what type of "restraint" he was fleeing from. Properly viewed, the evidence supported the jury's verdict.

¶9 Review of this contention is in accord with long settled standards. Evidence is sufficient to support a verdict if the trier-of-fact has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980)*. The evidence is viewed in the light most favorable to the prosecution. *Green, 94 Wn.2d at 221*. Appellate courts defer to the trier-of-fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)*.

¶10 A person commits the crime of resisting arrest if he "intentionally **[*4]** prevents or attempts to prevent a peace officer from lawfully arresting him." *RCW 9A.76.040(1)*. "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." *RCW 9A.08.010*. In Washington, a person is under arrest "when, by a show of authority, his freedom of movement is restrained." *State v. Holeman, 103 Wn.2d 426, 428, 693 P.2d 89 (1985)* (citing *United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)*). However, the failure of a person to submit to the show of authority does not factor into the *Mendenhall* test. *State v. Young, 135 Wn.2d 498,957 P.2d 681 (1998)*. Nor does there need to be a pronouncement that an arrest is being made. "A rational trier of fact could find that when a law enforcement officer identified himself as 'police,' told Calvin to get on the ground, and started to place handcuffs on him, Calvin knew he was under arrest." *State v. Calvin, 176 Wn. App. 1, 13, 316 P.3d 496 (2013)*.

¶11 This court once observed that a person "may resist arrest by various types of conduct." *State v. Williams, 29 Wn. App. 86, 92, 627 P.2d 581 (1981)*. The question presented here is whether fleeing from an officer who observed the defendant commit a felony is resisting an arrest. We believe the evidence permitted the jury to conclude that the defendant resisted the officer's attempt to arrest him by fleeing.

¶12 We have no cases squarely on point.[1] Flight is frequently associated with the offense of obstructing a public **[*5]** servant. *E.g.*, *State v. Little, 116 Wn.2d 488, 496, 806 P.2d 749 (1991)* (plurality opinion); *State v. Hudson, 56 Wn. App. 490, 497, 784 P.2d 533 (1990)*. Nonetheless, flight is not evidence solely of that crime.

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[1] In a somewhat analogous circumstance, the court once held there was insufficient evidence to support a conviction for knowingly resisting an officer due to lack of knowledge of the undercover officer's identity. *State v. Bandy, 164 Wash. 216, 219, 2 P.2d 748 (1931)*. This offense appears to be a forerunner of the obstructing a public servant law rather than resisting arrest. *Bandy* identified the elements as "knowingly resist by force or violence any executive or administrative officer in the performance of his duty." *Id.* (citing REM. COMP. STAT.§ 2331).

As a matter of common sense, offenders flee from a crime to avoid both detection and arrest. Still, one cannot intentionally resist an arrest unless the officer is on scene attempting to effectuate an arrest.

¶13 We believe that the facts of this case allowed the jury to make that determination. Officer Holmes was passing by when he observed the assault and took immediate action to intervene-turning on his siren and lights, driving his car to the scene, and exiting the car. Upon seeing the officer's intervention, ***Dunlap*** took off and Holmes briefly chased him on foot before turning his attention to the victim. The evidence allowed the jury to conclude that ***Dunlap*** intentionally fled the officer. The question then becomes whether he was fleeing an arrest. Viewing the evidence in a light most favorable to the State, we believe the jury could properly reach that conclusion.

¶14 ***Dunlap*** committed the assault in the officer's presence, provoking an immediate response from Holmes. ***Dunlap*** did not begin fleeing until aware of the officer's intervention. Rather than provide immediate **[*6]** aid to the victim, Holmes initially pursued ***Dunlap*** before attending to the victim. A reasonable person in ***Dunlap***'s shoes would understand that the officer's initial foray was designed to apprehend him rather than ascertain the victim's condition and investigate the attack. If there was any question, the ensuing pursuit by Corporal Clayton, accompanied by his repeated commands to stop, left no doubt that police were attempting to arrest ***Dunlap***.[2]

¶15 On this evidence, we believe the jury could find that the police were attempting to arrest ***Dunlap*** and that he fled to avoid the arrest. Officer Holmes had probable cause to arrest ***Dunlap*** for assault after seeing the man deliver two kicks to the body of the victim; he moved immediately to seize ***Dunlap*** and then sought assistance from his fellow officers to achieve that end. Mr. ***Dunlap*** knew that he had assaulted a man in front of an officer and that the officer's first action was to attempt to apprehend him. From these facts, a jury could conclude that Mr. ***Dunlap*** was intentionally avoiding police efforts to arrest him.

¶16 On different facts, such as Mr. ***Dunlap*** fleeing the scene before the officer had observed the attack, a jury might not have been able **[*7]** to conclude he was motivated by the desire to avoid arrest. But here, that was a permissible conclusion. Accordingly, the jury's verdict was supported by sufficient evidence.

¶17 The conviction for resisting arrest is affirmed.

Financial Obligations

¶18 Mr. ***Dunlap*** also argues that the trial court erred by imposing the two discretionary financial obligations without first conducting a proper inquiry into his ability to pay them. The State concedes the error and requests that we strike the obligations.

¶19 We accept the concession in light of *State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)*. There the Washington Supreme Court discussed the adequacy of the inquiry that trial courts must make before imposing discretionary financial obligations. The court also ruled that statutory amendments[3] concerning the ability of trial courts to impose financial obligations were retroactive and applied to all sentencings that were not final on the effective date of the new legislation, June 7, 2018.

¶20 We direct the trial court to strike the filing fee and the sheriffs service fee. The judgment otherwise is affirmed.

¶21 Remanded.

¶22 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for **[*8]** public record pursuant to *RCW 2.06.040*.

MAXA, J., concurs.[4]

Dissent by: PENNELL

Dissent

[2] Although Mr. ***Dunlap*** attempts to confine the flight evidence to Holmes' testimony, citing to a motion response filed by a second prosecutor prior to sentencing, the trial prosecutor argued the flight and Corporal Clayton's commands to stop to the jury as part of the basis for the resisting charge. Report of Proceedings at 411.

[3] *See* LAWS OF 2018, ch. 269.

[4] Judge Bradley Maxa is a Division II judge serving with the Court of Appeals, Division III, under *CAR 21(a)*.

¶23 PENNELL, A.C.J. (dissenting) — Deference to a jury's guilty verdict is appropriate only when the State's evidence is sufficient to support a conviction. Here, it is not.

¶24 The facts are largely undisputed. After Officer Derek Holmes of the Ellensburg Police Department saw ***Kalen Dunlap*** engaged in a fight he turned on his patrol car's lights and siren. As Mr. ***Dunlap*** began running away Officer Holmes yelled "'hey'" and began a foot pursuit. Clerk's Papers at 76. The chase was then taken up by Corporal Clifford Clayton. Corporal Clayton also had his lights and siren running. His patrol car recorded his interactions with Mr. ***Dunlap***.

¶25 According to the video recording, when Corporal Clayton spotted Mr. ***Dunlap*** he yelled, "Stop, police, right there, stop!" Ex. 11, at 2 min, 11 sec. Mr. ***Dunlap*** continued to run for 20 seconds. Corporal Clayton then yelled, "Stop right there!" *Id. at 2* min., 30 sec. Mr. ***Dunlap*** continued to run, this time for another 20 seconds. Finally, Corporal Clayton yelled, "Stop right there! Put your hands up, get on the ground!" *Id. at 2* min., 51 sec. At this point, Mr. ***Dunlap*** complied and was taken into custody without any indication of resistance in **[*9]** the video or from the officers over the radio. Mr. ***Dunlap*** complied with the officers' subsequent commands and was responsive to their questioning.

¶26 Given these facts, the question is whether Mr. ***Dunlap*** was subject to an attempted arrest prior to Corporal Clayton's final demand that resulted in Mr. ***Dunlap***'s compliance. There was unquestionably an attempted seizure, but that is not enough. "[T]he resisting arrest statute does not even purport to address detentions or other seizures short of an arrest." *State v. D.E.D., 200 Wn. App. 484, 496, 402 P.3d 851 (2017)*. To gain a conviction for resisting arrest under *RCW 9A.76.040(1)*, the State must prove Mr. ***Dunlap*** knew the police were attempting an arrest, not just an investigative detention or *Terry*[5] stop. *See State v. Bandy, 164 Wash. 216, 219, 2 P.2d 748 (1931)*; *State v. Calvin, 176 Wn. App. 1, 13, 316 P.3d 496 (2013)*.

¶27 An arrest occurs when an officer does or says something that can be objectively understood as manifesting an intent to arrest. *State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009)*. The officer's subjective intent is not relevant. *State v. O'Neill, 148 Wn.2d 564, 575, 62 P.3d 489 (2003)*. Nor is the line between a stop and arrest drawn by probable cause. *State v. Lorenz, 152 Wn.2d 22, 37, 93 P.3d 133 (2004)*. Instead, an arrest turns on what a reasonable person in the position of the defendant would have understood about the nature of the police contact. *See id.* ("[A] reasonable person in [the defendant's] position would have to believe that [they were] in police custody **[*10]** with the loss of freedom associated with a formal arrest."); *see also State v. Rivard, 131 Wn.2d 63, 75, 929 P.2d 413 (1997)*.

¶28 Here, Mr. ***Dunlap***'s noncompliance was preceded by a law enforcement pursuit and instructions to stop, accompanied by lights and siren. These circumstances were certainly sufficient to communicate an intent to detain Mr. ***Dunlap*** for purposes of a *Terry* stop. But our case law does not support interpreting the officer's words and actions as communicating an intent to curtail Mr. ***Dunlap***'s liberty to the extent of an arrest. *See, e.g., Rivard, 131 Wn.2d at 76* (reading of *Miranda*[6] rights insufficient); *State v. Radka, 120 Wn. App. 43, 50, 83 P.3d 1038 (2004)* (totality of circumstances not indicative of custodial arrest even though defendant was told he was under arrest and placed in a patrol car); *State v. Lyons, 85 Wn. App. 268, 270-71, 932 P.2d 188 (1997)* (physical restraint and statement, "'You're under arrest'" insufficient to transform an investigative detention into an arrest); *State v. Gardner, 28 Wn. App. 721, 724-25, 727-28, 626 P.2d 56 (1981)* (physical apprehension and transport to crime scene insufficient to transform an investigative stop into an arrest). In fact, had Mr. ***Dunlap*** complied with the initial instructions to stop and then been questioned without *Miranda* we would likely uphold the use of his statements at trial on the basis that they were part of an investigative detention, not an arrest. *See, e.g., State v. Ferguson, 76 Wn. App. 560, 566-68, 886 P.2d 1164 (1995)*; **[*11]** *State v. Walton, 67 Wn. App. 127, 129-31, 834 P.2d 624 (1992)*; *State v. Wilkinson, 56 Wn. App. 812, 819-20, 785 P.2d 1139 (1990)*; *State v. Marshall, 47 Wn. App. 322, 324-26, 737 P.2d 265 (1987)*.

¶29 Our prior decision in *Calvin* provides a helpful contrast to Mr. ***Dunlap***'s circumstances. The interaction between Donald Calvin and a law enforcement officer

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[5] *Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)*.

[6] *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.

began as a consensual encounter. *Calvin, 176 Wn. App. at 8*. But things escalated when Mr. Calvin became belligerent and refused instructions to stand back. Mr. Calvin repeatedly approached the officer in an aggressive manner, even after the officer deployed pepper spray and yelled at Mr. Calvin to get back and go to the ground. *Id.* Eventually, the officer struck Mr. Calvin with his baton and Mr. Calvin began to walk away. *Id.* At this point, the officer decided to initiate an arrest for assault and yelled, "'Police, get on the ground.'" *Id.* The officer then grabbed Mr. Calvin's left arm and took him to the ground. *Id.* But Mr. Calvin still was not compliant and would not yield his right arm to handcuffs. *Id. at 8-9*. The officer told Mr. Calvin to quit resisting, but Mr. Calvin struggled for approximately a minute before he was fully secured. *Id.* Mr. Calvin was then arrested and charged with resisting. *Id.*

¶30 Division One of our court upheld Mr. Calvin's resisting conviction against a sufficiency challenge. Although Mr. Calvin had not been told he was under arrest, **[*12]** we held the law enforcement officer sufficiently manifested intent to arrest by identifying himself as police, telling Mr. Calvin to get to the ground, and initiating the process of handcuffing. *Id. at 12-13*. Notably, *Calvin* did not hold that there was an arrest when the law enforcement officer merely told Mr. Calvin to stand back or when the officer deployed pepper spray and a police baton. *Id.* Instead, the show of force against Mr. Calvin that rose to the level of an arrest occurred when Mr. Calvin was taken to the ground and the officer attempted to place Mr. Calvin in handcuffs. *Id.*

¶31 Unlike Mr. Calvin, Mr. ***Dunlap*** was never subjected to physical force prior to noncompliance. He failed to stop when told to do so; but once Corporal Clayton made apparent that he was escalating the nature of the encounter by ordering Mr. ***Dunlap*** to put his hands up and to get on the ground, Mr. ***Dunlap*** complied. Mr. ***Dunlap***'s initial failure to comply with instructions was a quintessential example of obstruction. *See State v. Little, 116 Wn.2d 488, 496, 806 P.2d 749 (1991)* (The defendant's "flight from the police constituted obstruction of a police officer in the exercise of [their] official duties."). But it did not qualify as resisting arrest. I therefore dissent.

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Transmittal Information

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