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SUPREME COURT NO. 98068-3

NO. 35723-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KALEN DUNLAP,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Scott R. Sparks, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Kalen Dunlap, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished split decision in State v. Dunlap, ___ Wn. App. ___, ___ P.3d ___, 2019 WL 6721138 (No. 35723-6-III, filed December 10, 2019).¹

B. ISSUE PRESENTED FOR REVIEW

Where Dunlap was never subjected to physical force, never told he was under arrest, and stopped running and complied when police finally demanded he get on the ground and put his hands up, is the evidence insufficient to prove that Dunlap resisted arrest, versus some other form of detention, as required by RCW 9A.76.040?

C. STATEMENT OF THE CASE

In the fall of 2016 Dunlap was enrolled as a full time student at Central Washington University. On the evening of September 21, Dunlap and his cousin, Rylon Kolb, decided to go out to Ellensburg area bars to celebrate a friend's 21st birthday. RP 653-54, 686.

The group of friends began the night by meeting at a friend's apartment. Dunlap did not have anything to drink at the apartment. The group then moved to a bar where Dunlap also did not have anything to drink. RP 654-55. Dunlap had one shot of Fireball whiskey at the second

¹ A copy of the opinion is attached as an appendix.

bar stop. RP 656. At the third bar stop Dunlap had one glass of beer from the pitcher his friend received for his birthday. RP 656-57.

The fourth and final stop of the night was a bar called Club 301. RP 657. Dunlap was the first of the group to get inside Club 301 because of the security line. Once inside, Dunlap headed to the bar to get a drink. RP 658.

At the bar Dunlap ran into Ben Miles. RP 558-59, 577-79. At the time Miles was incredibly intoxicated, having a blood alcohol content (BAC) of .308. RP 557, 562, 594, 663. Miles had also smoked marijuana and taken non-prescribed Adderall earlier in the day. RP 557-58, 562-63, 576, 590, 609-10. Miles had been kicked out of at least one bar earlier that same evening. RP 575, 589.

Dunlap had never met or talked with Miles. But Dunlap knew Miles was a friend of his cousin's friend so he said hello. RP 577-79, 659-61. Miles responded rudely and asked who Dunlap was. RP 557, 662-63. Dunlap explained that Miles then started an argument prompting the bar owner to approach them and ask them to leave. RP 663-64, 683-84. Dunlap denied putting his hands on Miles inside the bar. RP

Dunlap exited the bar first, followed by Miles. RP 664, 689-90. At least one witness confirmed Dunlap exited the bar first. RP 631. When Dunlap turned around after exiting the bar, Miles punched him the face.

RP 582, 596, 665, 691. Dunlap fell to his knees and tried to grab Miles. RP 666, 668-69. Dunlap had recently had pins removed to treat his broken hand and could not form a fist with his hand. RP 666-68.

Kolb tried to pull Miles off Dunlap but was unsuccessful because Miles grabbed Dunlap's sweatshirt at the same time, causing the sweatshirt to rip. RP 669-71, 692-93. The bar owner also tried to separate Miles and Dunlap. RP 669-70.

Several people outside the bar witnessed the incident which lasted no more than one minute. 635, 641. Dunlap kicked Miles in the head to get free. RP 671-72, 677-79, 694. Miles was unconscious after the kick. RP 632-33, 637-38, 644-45. Some witnesses testified that Miles continued to be kicked after losing consciousness. RP 645. After Miles went limp, Kolb and Dunlap took off running because they were scared. RP 671-73, 677-79, 694, 698.

Ellensburg police officer, Eric Holmes happened to be driving by Club 301 at the time of the incident. RP 489. Holmes saw Miles lying on the ground and two people kicking him in the torso and head. RP 489-92. Holmes testified that Kolb kicked Miles in the torso two or three times. Miles head whipped backwards when he saw Dunlap kick him in the face. RP 492, 503, 505, 508, 512. Holmes did not witness the beginning of the incident and could not say what caused it. RP 502-03, 508.

When Holmes activated the lights of his patrol car Kolb and Dunlap ran away. RP 246. Holmes “yelled ‘hey’, and chased after Mr. Dunlap and Mr. Kolb.” RP 253; Exs. 4, 11. Holmes chased them for a short distance but eventually gave up and relayed their position over the radio. RP 254.

Ellensburg police officer Clifford Clayton heard Holmes radio dispatch and tried to locate Dunlap and Kolb. RP 225-27. Clayton found Dunlap and Kolb running in the middle of the street. RP 226-27. When they saw Clayton's patrol car they split up. RP 230.

According to the video recording, when Clayton spotted Dunlap he yelled, “Stop, police, right there, stop!” Ex. 11, at 2 min, 11 sec. Dunlap continued to run for 20 seconds. Clayton then yelled, “Stop right there!” Id. at 2 min., 30 sec. Dunlap continued to run, this time for another 20 seconds. Finally, Clayton yelled, “Stop right there! Put your hands up, get on the ground!” Id. at 2 min., 51 sec. At this point, Dunlap complied and was taken into custody without any indication of resistance in the video or from the officers over the radio. Dunlap complied with the officers’ subsequent commands and was responsive to their questioning. RP 230-31. Kolb was later contacted by Ellensburg police officer Brett Koss. RP 158-62, 197.

Based on this evidence, Dunlap was charged in part with resisting arrest. A jury found Dunlap guilty. CP 62; RP 449-51.

On appeal, Dunlap argued the evidence was insufficient to sustain his conviction for resisting arrest because even when viewed in the light most favorable to the prosecution, the State failed to prove that Dunlap was subject to an attempted arrest before Clayton's final demand that resulted in Dunlap's compliance.

In an unpublished decision signed by two judges, the Court of Appeals properly recognized that "one cannot intentionally resist arrest unless the officer is on scene attempting to effectuate an arrest." Op. at 5. The majority nonetheless rejected Dunlap's argument, reasoning that Clayton's pursuit accompanied by his repeated demands to stop, should have caused Dunlap to realize that police were attempting to arrest him. Op. at 5-6. The majority concluded it was a "permissible conclusion" that police were attempting to arrest Dunlap and that he fled to avoid the arrest. Op. at 7.

In a dissenting opinion, Judge Pennell pointed out the fallacy of the majority opinion's logic: "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." Op. at dissent 1 (Pennell, A.C.J., dissenting). The dissent noted that Dunlap was not subjected to physical force prior to

noncompliance. Although Dunlap failed to stop when told to do so, he complied once Clayton made it apparent that he was escalating the nature of the encounter by ordering Dunlap to get on the ground and place his hands on his head. Judge Pennell noted that while Dunlap's actions were a "quintessential example of obstruction," it did not qualify as resisting arrest. Op. at dissent 5.

Dunlap now asks this Court to accept review, reverse the Court of Appeals, and dismiss his conviction for resisting arrest for insufficient evidence.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(2), (b)(3), and (b)(4) BECAUSE A CONVICTION BASED ON INSUFFICIENT EVIDENCE IS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION AND THE OPINION IN DUNLAP'S CASE CONFLICTS WITH DIVISION ONE'S OPINION IN *STATE V. CALVIN*.

"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." Op. at dissent 1 (Pennell, A.C.J., dissenting); accord State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The single question presented here is whether the State failed to prove that Dunlap resisted arrest, versus some other form of detention by the police officers. This is important because “the resisting arrest statute does not . . . 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) (reversing obstruction conviction for insufficient evidence). As the dissent aptly notes, “Dunlap’s initial failure to comply with instructions was a quintessential example of obstruction. But it did not qualify as resisting arrest.” Op. at dissent 5 (Pennell, A.C.J., dissenting).

RCW 9A.76.040 provides that “[a] person is guilty of resisting arrest if he or she intentionally^[2] prevents or attempts to prevent a peace officer from lawfully arresting him or her.” Accord CP 55 (Instruction 26, to-convict instruction corresponding to resisting arrest charge); 11A WASH. PRAC.: PATTERN JURY INSTR: CRIM. (WPIC) 120.06 (4th Ed.). In this respect, the State failed to meet its burden in this case.

“One may resist arrest by various types of conduct.” State v. Williams, 29 Wn. App. 86, 92, 627 P.2d 581 (1981). Force, for example, is not required. State v. Calvin, 176 Wn. App. 1, 13, 316 P.3d 496 (2013), review granted in part on other grounds, cause remanded, 183 Wn.2d

² “A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); see CP 45 (Instruction 14).

1013, 353 P.3d 640 (2015). But, to intentionally resist an arrest, the arrested person must know he is under arrest. Id.

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 an 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 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).

The State failed to prove Dunlap intentionally resisted arrest rather than some lesser form of detention. Here, there was no question that Dunlap knew Holmes and Clayton were police officers. Dunlap's noncompliance was preceded by a police pursuit and instructions to stop, accompanied by lights and siren. These circumstances were sufficient to

communicate an intent to detain Dunlap for purposes of a *Terry*³ stop. But case law does not support interpreting the officer's words and actions as communicating an intent to curtail Dunlap's liberty to the extent of an arrest. See, e.g., Rivard, 131 Wn.2d at 76 (reading of *Miranda*⁴ 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 (physical apprehension and transport to crime scene insufficient to transform an investigative stop into an arrest), review denied, 95 Wn.2d 1027 (1981).

Under RCW 9A.76.040 it is essential that Dunlap understood that he was being arrested rather than simply detained. Calvin, is instructive in this regard and demonstrates why the majority opinion here is in conflict with Division One's analysis. Calvin challenged his conviction for resisting arrest by a park ranger, in part based on the argument that there was insufficient evidence that Calvin knew he was being arrested. 176

³ Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Wn. App. at 12. Calvin argued, in part, that the ranger never advised him that he was under arrest. Id. at 13.

There, the park ranger sought to arrest Calvin for assault. The ranger yelled, “Police, get on the ground,” grabbed Calvin’s left arm and took him to the ground. He was able to cuff Calvin’s left wrist, but Calvin struggled for about one minute before the ranger was able to get the second cuff on. Id. at 8-9.

Division One acknowledged that in other cases, defendants were explicitly told they were under arrest. Id. (citing State v. Ware, 111 Wn. App. 738, 740-41, 46 P.3d 280 (2002) (“Officer Ferguson approached Ms. Ware and told her she was under arrest for obstructing”); State v. Simmons, 35 Wn. App. 421, 422, 667 P.2d 133 (1983) (defendant was told he was under arrest pursuant to warrant)).

But, rejecting Calvin’s argument that such a warning was *required*, this Court observed that “[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.” Calvin, 176 Wn. App. at 13. Thus, Calvin stands for the proposition that while an officer need not formally tell a person that he is under arrest, there nonetheless must be sufficient evidence that the arrested person knew he was under arrest. Id.

As properly recognized in Judge Pennell's dissent, "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." Op. at dissent 5 (Pennell, A.C.J., dissenting). Rather, "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.

Here in contrast, Holmes only yelled "hey" at Dunlap as he started running. RP 253; Exs. 4, 11. Dunlap was never told he was being detained, much less arrested, when Holmes yelled "hey". Similarly, when spotted by Clayton who was following Dunlap in his car, he was told only "Stop, police, right there, stop!" Ex. 11, at 2 min, 11 sec. Dunlap continued to run for 20 seconds. Clayton then yelled, "Stop right there!" Id. at 2 min., 30 sec. There was no warning to Dunlap that he was under arrest at that point. Clayton finally yelled, "Stop right there! Put your hands up, get on the ground!" Id. at 2 min., 51 sec. At this point, Dunlap cooperated fully with Clayton's demands to get on the ground, and willfully acquiesced to being handcuffed.

Under Calvin, it was only at the point at which Dunlap was ordered to the ground and handcuffed that he would have known he was under arrest. Unlike Calvin however, by the point Dunlap was

handcuffed, the activity which led to the State filing resisting arrest charges had already ceased. See RP 277, 411 (State acknowledgment that the resisting arrest charge was based on Dunlap's running away from the scene and that "there wasn't anything physical."). As Calvin demonstrates, in the absence of some explicit warning that he was under arrest, there was insufficient evidence that Dunlap knew or should have known, that he was being arrested at the point of being told "hey" or to "stop right there" versus subject to some lesser form of detention.

Significantly, the majority opinion undertakes no analysis of Calvin and fails to reason how in the absence of any physical force, statement that he was under arrest, or other show of force, Dunlap would have reasonably known that he was under arrest. In the absence of any factual or legal distinction, the majority's analysis in Dunlap's case conflicts with Division One's analysis in Calvin.

Even when viewed in the light most favorable to the prosecution, the State failed to prove that Dunlap intentionally resisted arrest rather than some lesser form of detention. Because the evidence is insufficient to sustain Dunlap's conviction for resisting arrest, and Division Three's contrary conclusion conflicts with Division One's opinion in Calvin, this Court should grant review under RAP 13.4(b)(2), (b)(3) and (b)(4).

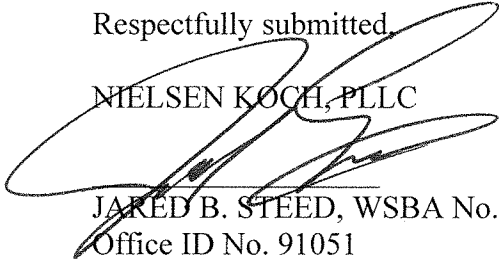
E. CONCLUSION

Because Dunlap satisfies the criteria under RAP 13.4(b)(2), (b)(3), and (b)(4), he respectfully asks that this Court grant review, reverse the court of Appeals, and dismiss his conviction for resisting arrest for insufficient evidence.

DATED this 9th day of January, 2020.

Respectfully submitted,

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APPENDIX

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 35723-6-III |
| Respondent, |) | |
| |) | |
| v. |) | |
| |) | |
| RYLON KEASON KOLB, |) | UNPUBLISHED OPINION |
| |) | |
| Defendant, |) | |
| |) | |
| KALEN WARREN DUNLAP, |) | |
| |) | |
| Appellant. |) | |

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

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, Eric 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.

Dunlap 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.

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.

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 court then imposed concurrent 30 day sentences for the two offenses and also required payment of a booking fee and the criminal filing fee.

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

ANALYSIS

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

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.

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).

A person commits the crime of resisting arrest if he “intentionally 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).

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.

We have no cases squarely on point.¹ Flight is frequently associated with the offense of obstructing a public 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. 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.

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.

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).

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 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

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.

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.

On different facts, such as Mr. Dunlap fleeing the scene before the officer had observed the attack, a jury might not have been able 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.

The conviction for resisting arrest is affirmed.

Financial Obligations

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.

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 amendments³ 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.

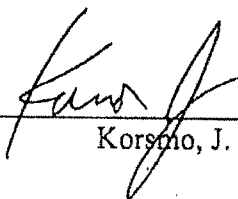
We direct the trial court to strike the filing fee and the sheriff's service fee. The judgment otherwise is affirmed.

³ See LAWS OF 2018, ch. 269.

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Remanded.

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



Korschio, J.

I CONCUR:



Maxa, J.⁴

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

No. 35723-6-III

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.

The facts are largely undisputed. After Officer Eric 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.

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 the video or from the officers over the radio. Mr. Dunlap complied with the officers' subsequent commands and was responsive to their questioning.

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*¹ 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).

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 with the loss of freedom

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

associated with a formal arrest.”); *see also State v. Rivard*, 131 Wn.2d 63, 75, 929 P.2d 413 (1997).

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*² 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

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

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1164 (1995); *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).


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

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, 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

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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.*

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.


Pennell, A.C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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