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 Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Dukes of his Fourteenth Amendment due process right to a fair trial.
2. The prosecutor committed misconduct by asking the jury to penalize Mr. Dukes for asserting his constitutional rights.
3. The prosecutor's argument infringed Mr. Dukes' First Amendment right to free speech.
4. The prosecutor's argument infringed Mr. Dukes' Fourth Amendment right to be free from unreasonable searches and seizures.
5. The prosecutor's argument violated Mr. Dukes' right to privacy under Wash. Const. art. I, § 7.
6. The prosecutor's argument violated Mr. Dukes' privilege against self-incrimination.

   ISSUE 1: By telling jurors to distrust Mr. Dukes because he asked "Am I being detained?", did the prosecutor commit reversible misconduct?

   ISSUE 2: Did the prosecutor commit reversible misconduct by asking jurors "If [Mr. Dukes] did nothing wrong, why not just let the officer confirm that?"

   ISSUE 3: Did the prosecutor commit reversible misconduct by asking jurors "If [Mr. Dukes] felt he did nothing wrong, why didn't he stay there?"

   ISSUE 4: Did the cumulative effect of the prosecutor's misconduct violate Mr. Dukes' due process right to a fair trial?

7. Mr. Dukes's conviction for resisting arrest violated his Fourteenth Amendment right to due process.
8. The state introduced insufficient evidence to prove beyond a reasonable doubt that Mr. Dukes resisted a lawful arrest.

   ISSUE 5: Was the arrest Mr. Dukes allegedly resisted unlawful because Officer Givens lacked a reasonable suspicion of criminal activity when he told Mr. Dukes not to leave?

9. The trial court erred by giving Instruction No. 3.
10. The trial court's reasonable doubt instruction violated Mr. Dukes' Fourteenth Amendment right to due process.
11. The trial court's reasonable doubt instruction violated Mr. Dukes' Sixth and Fourteenth Amendment right to a jury trial.
12. The trial court's reasonable doubt instruction violated Mr. Dukes' right to a jury trial under Wash. Const. art. I, §§ 21 and 22.
13. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.

ISSUE 6: By defining a "reasonable doubt" as a doubt "for which a reason exists," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Dukes' constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Baron Dukes and his girlfriend Ona Minjarez were homeless in the spring of 2014. RP 69, 254. Because of the inherent challenges of being homeless, they lost contact for a couple weeks in April, and reunited on April 28, 2014. RP 255-256.

They talked and walked down a street in Vancouver, carrying the majority of their possessions. RP 63-64, 69, 107. Mr. Dukes walked his bike as they talked. RP 73, 107, 261-263.

They were animated. Minjarez said that they enjoy vehement arguments on topics like religion. RP 65-67, 70, 258, 302. They set down their property and stood nearby, continuing their discussion. RP 263. A man working nearby perceived them as having a very serious dispute. He later testified that he did not see any physical contact between the couple, and that he watched them but did not see fit to call 911. RP 93-96, 106.

Detective Robert Givens saw the couple and stopped to talk to them. RP 64, 73, 149. He asked if everything was ok, and both Mr. Dukes and Minjarez both told him that they were fine. RP 78, 151, 167, 259.

Givens spoke separately with Minjarez and asked if they were arguing. RP 65, 73. Minjarez said they were not arguing. RP 65. Givens

responded that as a married man, he knew what an argument looked like. RP 66.

He told Mr. Dukes to wait while he talked with Minjarez. RP 64-67, 78, 151. Mr. Dukes asked if he was under arrest, and Givens responded that he was not but that he was not free to leave. RP 79, 151, 273-274. Mr. Dukes asked if he was being detained, and Givens again told him to stay there and wait. RP 152, 273-274.

Givens was in uniform and held his hands on his "gear," possibly on his holstered gun. RP 196-198. Mr. Dukes is African-American, and Detective Givens is white. CP 2; See also Ex. 6, 9.

Mr. Dukes got onto his bike. RP 152, 276. He later explained that he meant to go wait by his and Minjarez's property. RP 276-278, 288, 301. But Givens, apparently believing that Mr. Dukes meant to leave the area, grabbed him from behind and pulled him off the bike and to the ground. RP 79, 101, 151-152, 278. Givens told Mr. Dukes that now he was detained, and tried to cuff him. RP 137-139, 154.

Another officer arrived and joined the struggle, and then another officer came and did the same. RP 104, 110-111, 119-120, 156-157.

By the time Mr. Dukes was cuffed, at least seven officers had arrived to assist. RP 85, 311-312. Mr. Dukes had injuries from being pressed onto the curb, and Givens had scrapes on his knee and elbow. RP

123-125, 142-144, 162, 281-287. Mr. Dukes' scars remained visible three months later. RP 285-286.

The state charged Mr. Dukes with assault three, obstructing, resisting arrest, and assault four. CP 1.

At trial, Givens said that he did not see Mr. Dukes touch or threaten Minjarez at all. RP 170. The man who'd been working nearby testified that at one point he saw Mr. Dukes touch Minjarez's shoulder to turn her to face him. RP 97-98, 112. Givens was not aware of the worker's claim (that he'd seen some physical contact between the couple) until later at the police station. RP 208-210.

Minjarez testified that she and Mr. Dukes were having a friendly disagreement and that she was not afraid of him. RP 82-83. She said that there was no time when Mr. Dukes grabbed her shoulder to spin her to face him when she tried to walk away. RP 83, 251. She testified that Mr. Dukes did not fight back when the officer took him to the ground. RP 80. She said that she heard no verbal threats from Mr. Dukes. RP 80. She also told the jury that Mr. Dukes was yelling that he had nothing in his hands and that he wanted a witness. RP 81.

The court's reasonable doubt instruction included the following language: "A reasonable doubt is one for which a reason exists…" CP 21.

During the state's closing, the prosecutor argued:

> And is that consistent? This, "Oh, I'm cooperative, and I just want to hang out and -- and -- and help with this investigation," is that consistent with him asking several times, "Am I being detained? Am I being detained?" Well, why ask that if you're just going to hang out there with your stuff? No, that's not consistent, Ladies and Gentlemen. What happened is he did not like the answer that Detective Givens was giving him, and he was out of there.
> RP 380.

In rebuttal, the state came back to the same theme:

> If he did nothing wrong, why not just let the officer confirm that?
> RP 414.
>
> And if Mr. Dukes felt he did nothing wrong, why didn't he stay there?
> RP 416.

The jury found Mr. Dukes Not Guilty of assaulting Ms. Minjarez and Not Guilty of obstructing a law enforcement officer.[1] CP 42, 44. The jury convicted Mr. Dukes of assault three and resisting arrest. CP 41, 43.

After sentencing, Mr. Dukes timely appealed. CP 66.

[1] Mr. Dukes had moved to dismiss the resisting arrest charge on double jeopardy grounds, arguing it constituted the same conduct as either the obstructing or the felony assault charges. RP 349-352. The court denied the motion. RP 353-354.

ARGUMENT

I. THE PROSECUTOR TOLD JURORS TO DRAW NEGATIVE INFERENCES FROM MR. DUKES' EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

A. Mr. Dukes did nothing more than exercise his constitutional rights during his initial encounter with Officer Givens.

When first confronted by Officer Givens, Mr. Dukes did not more than ask "Am I being detained?" RP 151. He chose not to speak, and instead walked away from the encounter. Givens did not have reasonable suspicion that Mr. Dukes had engaged in criminal activity, but ordered him to remain, and then forcibly pulled him from his bicycle. RP 151-158.

In closing, the prosecutor told jurors to draw negative inferences from Mr. Dukes' exercise of his constitutional rights. RP 380. This misconduct can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126 (2013); *State v. Terry*, 181 Wn. App. 880, 890-894, 328 P.3d 932 (2014).

1. Mr. Dukes exercised his right to free speech.

The First Amendment's free speech protection extends to questions about police action.[2] U.S. Const. Amend. I; *City of Houston, Tex. v. Hill*,

[2] Wash. Const. art. I, § 5 provides even broader protection. *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 8 n. 6, 891 P.2d 720 (1995).

482 U.S. 451, 462, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). Mr. Dukes' question—"Am I being detained?"—falls within this core class of protected speech. *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973).

2. Mr. Dukes invoked the protections of the Fourth Amendment and art. I, § 7.

A person may "invoke with impunity" the protection of the Fourth Amendment and art. I, § 7. *Gauthier*, 174 Wn. App. at 267. These provisions protect the right to ignore an officer's questions and walk away from any social encounter: in such circumstances, a person "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *see also State v. Gatewood*, 163 Wn.2d 534, 541, 182 P.3d 426 (2008).

In this case, Mr. Dukes sought to ascertain whether or not he was free to leave. RP 151. His question—"Am I being detained?" was an effort to determine his rights under the Fourth Amendment and art. I, § 7. It was a prerequisite to asserting those rights, and thus a necessary part of invoking the protections of those provisions.

3. Mr. Dukes exercised his Fifth Amendment right to remain silent and his constitutional right to walk away from a police encounter unsupported by reasonable suspicion.

Every person has the right to remain silent and has no obligation to provide information to police. U.S. Const. Amends. V, XIV; *Missouri v. Seibert*, 542 U.S. 600, 607, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).[3] Here, Mr. Dukes exercised his Fifth Amendment right to remain silent by refusing to speak with Officer Givens.

In addition, an officer may not detain a person for investigation absent a "reasonable suspicion" of criminal activity. U.S. Const. Amend. IV, XIV; art. I, § 7; *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Officer Givens had no basis to detain Mr. Dukes: he witnessed nothing more than finger-pointing during an argument. RP 185-187.

In the absence of a reasonable suspicion, Officer Givens had no power to do more than initiate a social contact. *See Gatewood*, 163 Wn.2d at 541. Mr. Dukes was well within his state and federal constitutional rights when he ignored Officer Givens and walked away from this social contact. *Id.; Royer*, 460 U.S. at 497-98.

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[3] *See also, e.g., Kentucky v. King*, --- U.S. ---, ___, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011).

B. The prosecutor impermissibly asked jurors to draw adverse inferences from Mr. Dukes' exercise of 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). Here, the prosecutor told jurors to draw adverse inferences from Mr. Dukes' exercise of his rights.[4]RP 380, 414, 416.

The prosecutor implied that Mr. Dukes' question – "Am I being detained?" – showed that he was uncooperative. RP 380. The prosecutor also argued that Mr. Dukes' question, his refusal to help Givens "confirm" what had happened, and his decision to "go on his way"[5] refuted any claim of innocence:

> If he did nothing wrong, why not just let the officer confirm that?... And if Mr. Dukes felt he did nothing wrong, why didn't he stay there?
> RP 414, 416.

The prosecutor's arguments suggested that an innocent person wouldn't ask "Am I being detained?", wouldn't walk away from a social contact, and would help "confirm" his innocence. RP 380, 414, 416. But the constitution protects the right of citizens to ask questions, to walk away

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[4] Although Mr. Dukes did not object in the trial court, the misconduct may be reviewed because it is flagrant and ill-intentioned, and because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Gauthier*, 174 Wn. App. at 267; *Terry*, 181 Wn. App. at 890-894; *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

[5] *Royer*, 460 U.S. at 491, 497-98.

when approached by police who lack reasonable suspicion of criminal activity, and to remain silent in the face of police questioning.

The prosecutor committed misconduct by arguing otherwise. *Rupe,* 101 Wn.2d at 705.

C. The prosecutor's misconduct prejudiced Mr. Dukes and requires reversal of his two convictions.

To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect.[6] *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). In this case, the prosecutor committed prejudicial misconduct by asking jurors to penalize Mr. Dukes for asserting his constitutional rights. RP 380, 414, 416.

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, art. I, § 22. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Here, the record shows a substantial likelihood that the misconduct affected the jury's verdict. The two charges of which Mr. Dukes was convicted—resisting arrest and assaulting an officer—related to his degree

[6]The cumulative effect of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

of cooperation with Officer Givens. The prosecutor's misconduct directly impacted this issue.

By arguing that Mr. Dukes was uncooperative (and that he didn't behave like an innocent person), the prosecutor improperly influenced the jury. Prosecutorial misconduct during argument can be particularly prejudicial. *Glasmann*, 175 Wn.2d at 706.

By seeking to penalize Mr. Dukes for asserting his constitutional rights, the prosecutor committed misconduct that was flagrant and ill-intentioned. *Pierce*, 169 Wn. App. at 552. Whether considered separately or in the aggregate, the prosecutor's misconduct deprived Mr. Dukes of a fair trial. *Walker*, 164 Wn. App. at 737; *Glasmann*, 175 Wn.2d at 703-04. The convictions must be reversed and the case remanded for a new trial. *Glasmann*, 175 Wn.2d at 703-04.

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

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

B. The evidence was insufficient because Mr. Dukes was not lawfully arrested.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice.[7] *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

A conviction for resisting arrest requires proof of a lawful arrest.[8] RCW 9A.76.040. In this case, Officer Givens lacked a basis to lawfully arrest Mr. Dukes.

An arrest must be based on probable cause.[9] At the time of the arrest, Officer Givens did not have probable cause to arrest Mr. Dukes for obstructing.

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[7] To be sufficient, evidence must be more than substantial. *Vasquez,* 178 Wn.2d at 6. On review, inferences drawn in favor of the prosecution may not rest on evidence that is "patently equivocal." *Id.,* at 8. To establish even a *prima facie* case, the prosecution must present evidence that is consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006) (addressing the *corpus delicti* rule).

[8] An illegal arrest is equivalent to an assault. *State v. Hornaday*, 105 Wn.2d 120, 131, 713 P.2d 71 (1986). A person being unlawfully arrested may use reasonable force to resist the arrest. *State v. McCrorey*, 70 Wn. App. 103, 115, 851 P.2d 1234 (1993) *abrogated on other grounds by State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998).

[9] Probable cause exists when an officer has reasonably trustworthy information of facts and circumstances "'sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed". *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

Obstructing occurs when a person "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020. By definition, an unlawful detention is "not part of lawful police duties." *State v. Barnes*, 96 Wn. App. 217, 225, 978 P.2d 1131 (1999).

Givens' directive not to leave was not "part of lawful police duties"[10] because Givens lacked a "reasonable suspicion" that Mr. Dukes was engaged in criminal activity. *Brown*, 443 U.S. at 51. Officer Givens had no basis to detain Mr. Dukes—his only suspicion was that Mr. Dukes was involved in an argument. RP 185-186. Participating in an argument is not a crime. *See* RCW, *generally*; U.S. Const. Amends. I, XIV.

Because the evidence was insufficient to prove that Mr. Dukes resisted a lawful arrest, his conviction must be reversed. *Vasquez*, 178 Wn.2d at 6. The charge must be dismissed with prejudice. *Id.*

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. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash.

[10] *Barnes*, 96 Wn. App. at 225.

Const. art. I, § 3; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends.VI; XIV; *Sullivan*, 508 U.S.at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty "vitiates *all* the jury's findings." *Sullivan,* 508 U.S.at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is "inappropriate" because it "subtly shifts the burden to the defense." *Emery*, 174 Wn.2d at 759-60.[11]

Requiring articulation "skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions

[11] *See also Walker*, 164 Wn. App. at 731-32; *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) *review denied,* 171 Wn.2d 1013, 249 P.3d 1029 (2011).

in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit…" *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc,* 138 F.3d 552 (5th Cir. 1998).[12] An instruction imposing an articulation requirement "creates a lower standard of proof than due process requires." *Id.,* at 534.[13]

B. The trial court erroneously told jurors to convict unless they had a doubt "for which a reason exists."

The trial court instructed jurors that "A reasonable doubt is one for which a reason exists." CP 21. This suggested to the jury that it could not acquit unless it could find a doubt "for which a reason exists." CP 21. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

A "reasonable doubt" is not the same as a reason to doubt. "Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason… Rational." *Webster's Third New Int'l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds

[12] The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA's strict procedural limitations to avoid the issue. *See, e.g., Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

[13] In *Humphrey,* the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as "a serious doubt, for which you can give a good reason." *Humphrey,* 120 F.3d at 530.

of reason, and does not conflict with reason. *Accord Jackson v. Virginia,* 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); *Johnson v. Louisiana,* 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The "a" before "reason" in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. CP 21. "[A] reason" is "an expression or statement offered as an explanation of a belief or assertion or as a justification." *Webster's Third New Int'l Dictionary.* The phrase "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.") Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining why

their doubt is reasonable.[14]For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3. CP 21.

As a matter of law, the jury is "firmly presumed" to have followed the court's reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). Jurors had no choice but to deliberate with the understanding that acquittal required a reason for any doubt.

The instruction "subtly shift[ed] the burden to the defense." *Emery*, 174 Wn.2d at 759-60. It also "create[d] a lower standard of proof than due process requires…" *Humphrey,* 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court's instruction violated Mr. Dukes' right to due process and his right to a jury trial. *Id.; Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

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[14]See Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

CONCLUSION

The United States has a long and tragic history involving police assaults on unarmed people of color. *See, e.g.,* "Witnesses and Autopsy Report Rebut Police Version Of Negro's Slaying During Chattanooga Disorders," *New York Times*, May 29, 1971; "Rochester Police Killing of a Black Stirs an Outcry," *New York Times,* May 27 1988; "Tangled Aftermath of a Killing by Police," *New York Times,* August 17, 1997; "Four Officers Indicted for Murder in Killing of Diallo, Lawyer Says," *New York Times,* March 26, 1999; "Angered by Shooting, 200 March in Irvington,"*New York Times,* May 6, 2001; "Mayor Says Shooting Was Excessive," November 27, 2006.

In just the last twelve months, police have shot and killed unarmed black children in Missouri and Ohio. "Grief and Protests Follow Shooting of a Teenager," *New York Times,* August 10, 2014; "12-Year-Old Boy Dies After Police in Cleveland Shoot Him," *New York Times,* November 23, 2014.

Washington State is not immune from the problem of police violence against people of color. *See* "Police Fired 17 Times at Mexican Farm Worker in Washington State," *New York Times,* February 25, 2015. Even in our state's most liberal cities, police demonstrate prejudice against

African American men. *See* "Video shows Seattle cop arresting elderly black man using golf club as cane," *Washington Post*, January 29, 2015.

Although Mr. Dukes' race was not raised at his trial, his case makes up a part of this history. Givens detained Mr. Dukes after witnessing no more than an argument. When Mr. Dukes moved away, Givens dragged him off his bicycle. RP 152-155. When Mr. Dukes struggled, other officers piled on. RP84-85, 156-157. Mr. Dukes' head was forced to the ground, and an officer pressed his knee into his back, pinning him down. RP 123-125, 140-144. Mr. Dukes sustained injuries that were still visible more than three months after the encounter. RP 285-286.

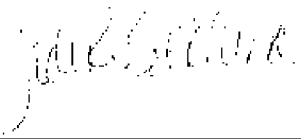
The arrest was unlawful, because Givens lacked probable cause. Because of this, the resisting conviction must be reversed, and the charge dismissed with prejudice.

Even if the resisting charge is not dismissed with prejudice, both convictions must be reversed and the case remanded for a new trial because the prosecutor committed misconduct during closing argument. Instead of allowing the evidence to speak for itself, the prosecutor invited jurors to convict based on Mr. Dukes' exercise of his constitutional rights. This misconduct was flagrant and ill-intentioned. It violated Mr. Dukes' constitutional rights, prejudiced him, and denied him a fair trial.

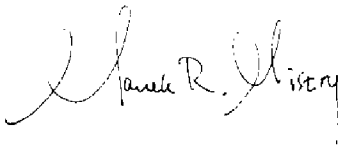
Finally, a new trial must be ordered because the trial court's reasonable doubt instruction imposed an articulation requirement that shifted the burden of proof and undermined the presumption of innocence. Upon retrial, the court must instruct jurors in a manner consistent with the constitution.

Respectfully submitted on March 6, 2015,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Baron Dukes
8415 NE Hazel Dell Ave #8
Vancouver, WA 98665

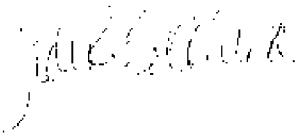
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening 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 March 6, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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