NO. 46596-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

BARON ADAM DUKES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00870-8

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Baron Dukes was charged by information with Assault in the Third Degree, Obstructing a Law Enforcement Officer, Resisting Arrest, and Assault in the Fourth Degree (Domestic Violence) for an evolving incident on or about April 28, 2014. CP 1-2. The case proceeded to trial before The Honorable Gregory Gonzales, which commenced on July 28, 2014, and concluded on July 30, 2014, with the jury's verdict. RP 15-434.

The jury found Mr. Dukes guilty as charged of the Assault in the Third Degree and Resisting Arrest, but acquitted him of the Obstructing a Law Enforcement Officer and Assault in the Fourth Degree (Domestic Violence). CP 41-44; RP 432-34. The trial court sentenced Mr. Dukes to a standard range sentence of 90 days in jail. CP 45-54, 57-60; RP 444. Mr. Dukes filed a timely notice of appeal. CP 66.

II. STATEMENT OF FACTS

On or about the afternoon of April 28, 2014, Baron Dukes and his significant other, Ona Minjarez, were walking down a street in downtown Vancouver. RP 63-64, 149, 254. The behavior of the couple caught the attention of Jesus Gonzalez, a citizen located across the street who was working that day and of Detective Robert Givens, who was driving by in his unmarked police vehicle. RP 93-94, 105-07, 149.

Mr. Gonzalez, despite wearing ear plugs at the time, heard loud voices and looked up and saw Mr. Dukes and Ms. Minjarez arguing. RP 94-96, 100, 105-07. According to Mr. Gonzalez, Mr. Dukes appeared irate, his voice was loud as if screaming, and he was pointing his finger at Ms. Minjarez all while just inches from her person. RP 94-96, 114. Ms. Minjarez was cowering as Mr. Dukes yelled at her and tried to leave, but Mr. Dukes grabbed her shoulder and turned her back around to face him. RP 95, 97-98, 112. Mr. Gonzalez was able to hear Ms. Minjarez say "stop" a couple times and also observed her cover her eyes or face in a manner that suggested she was crying or protecting her face. RP 99, 112-14, 128. As he was watching Mr. Dukes and Ms. Minjarez, Mr. Gonzalez saw Detective Givens arrive at the scene. RP 100, 105.

On the day in question, Detective Givens, who works for the Digital Evidence Cybercrime Unit, was out in the field making sex

offender contacts. RP 146-47. As he was driving down the street, he noticed Mr. Dukes and Ms. Minjarez arguing. RP 149, 201. More specifically, Detective Givens saw:

> Mr. Dukes standing in front of the female. He was leaning into her, and it looked like he was yelling, and his face was contorted, looked angry, and I could see him pointing at her. And I could see her kind of retreating slightly. His face was at about -- I'd estimate about 6 inches from her face.

RP 150, 166, 203-05. Because of his observations and concern that there was an ongoing domestic disturbance, Detective Givens did a U-turn in order to return to the scene. RP 151, 202, 205. Detective Givens then pulled up on the curb, just short of Mr. Dukes and Ms. Minjarez, and exited his vehicle. RP 150-51.

Upon exciting his vehicle, Detective Givens greeted the couple with a general hello and asked if everything was okay. RP 78, 151, 167, 196, 260. Both Mr. Dukes and Ms. Minjarez responded by indicating everything was fine. RP 78, 151, 167, 172-73, 260. Despite Mr. Dukes reporting that everything was fine, Detective Givens felt that Mr. Dukes was glaring at him, seemed angry, and utilized a confrontational and defiant tone. RP 172-73, 205-06, 234. Moreover, Detective Givens relayed that in his experience he has "had people say that everything's fine, and then when we separate them and investigate, we find out that, in fact, the opposite is true, everything is not fine." RP 205. Next, Detective Givens

asked Ms. Minjarez if he could speak with her and she assented. RP 67, 73, 78, 151, 260, 262.

Immediately after moving a short distance away with Ms. Minjarez, and before he could confirm that everything truly was okay, Mr. Dukes asked Detective Givens if he was being detained. RP 67, 151, 206-08, 273. Detective Givens responded by telling Mr. Dukes that he was not under arrest but that he was not free to leave. RP 79, 151, 194, 206-08. Mr. Dukes in short succession asked twice more if he was being detained and each time Detective Givens responded with the same answer: "You are not under arrest, but you are not free to leave." RP 79, 152, 194, 207-08, 273-74.

Despite Detective Givens informing Mr. Dukes that he was not free to leave, Mr. Dukes hopped onto his bicycle and attempted to pedal away. RP 101, 109, 152-53, 211, 215. Meanwhile, Detective Givens had still not spoken with Ms. Minjarez. RP 78-79, 153. As a result of Mr. Dukes's attempt to flee, Detective Givens yelled stop and moved to grab Mr. Dukes off the bike. RP 100, 108-09, 152-53, 211-12. According to Mr. Gonzalez and Detective Givens, Mr. Dukes only got about five feet away before Detective Givens was able to grab him. RP 109, 233. After separating Mr. Dukes from his bike, Detective Givens and Mr. Dukes struggled as Detective Givens attempted to get Mr. Dukes to the ground.

RP 103, 109-111, 211-12. As Detective Givens explained, he was attempting, physically and verbally, to get Mr. Dukes to sit down on the curb, but Mr. Dukes refused. RP 153-54, 216-17.

When Detective Givens finally got Mr. Dukes to sit down on the curb, he attempted to pull Mr. Dukes's hands behind his back in order to handcuff him; but Mr. Dukes continued to resist by pulling his hands apart. RP 154, 218-19, 222-23. Mr. Dukes continued to struggle, including getting one of his hands free. As a result, Detective Givens ordered him onto his stomach so that he would be in a better position to control Mr. Dukes and apply the handcuffs. RP 154-55. Mr. Dukes did not comply, called Detective Givens a "mother fucker," turned to his side, and continued to move around. RP 155-56.

At this point, Detective Givens felt Mr. Dukes deliver no less than four leg or knee strikes to his right side to include his hip and thigh. RP 156-57, 163, 224-230, 236. While the strikes did not hurt at the time, Detective Givens testified that once his adrenaline had worn off his right side and fifth finger were really sore. RP 156, 227, 231. Because Detective Givens was "losing," he dropped the handcuffs in an attempt to gain control of Mr. Dukes. RP 138, 157. Mr. Dukes then began tucking his left arm and hand underneath himself. RP 157.

Contemporaneous to this period in the struggle, Officer Scott Smith arrived. RP 120, 157, 223. Officer Smith observed Detective Givens and Mr. Dukes on the ground struggling, with Detective Givens trying to control Mr. Dukes's arms and Mr. Dukes twisting and kicking. RP 120, 145. Officer Smith immediately ran to help Detective Givens by putting his knee into Mr. Dukes's back and his hand on Mr. Dukes's head and attempted to push him down into the ground, but the struggle to get Mr. Dukes handcuffed continued. RP 120-21, 124-25, 138, 141. Despite multiple requests for Mr. Dukes to "[r]elax, [c]alm down, [s]top, [l]et go," and to show his hands, Mr. Dukes did not relent and prevented the officers from getting control of his hands by keeping them underneath himself and grabbing on to his belt line. RP 81, 121-22, 140-41, 230, 283. Eventually, each officer was able to gain control of one of Mr. Dukes's arms and pull them behind his back and Mr. Dukes was handcuffed. RP 159. Both Detective Givens and Mr. Dukes ended up with a number of scratches and abrasions as a result of the struggle. RP 123-26, 143-44, 159-163, 230-31, 310, 320. Throughout the whole struggle, neither officer utilized their firearm, Taser, mace, baton, or weapon of any kind, nor did either officer punch or kick Mr. Dukes. RP 84-85, 310.

Mr. Dukes testified at trial. RP 253-319.[1] He explained that though he and Ms. Minjarez were arguing or debating and he was close to her face, he was not angry, not yelling, and did not grab her. RP 257-58. Mr. Dukes further explained that when Detective Givens arrived on the scene that he (Detective Givens) was aggressive when he asked if everything was okay. RP 260. Additionally, Mr. Dukes testified that he did not glare angrily at Detective Givens, rather the sun in his eyes was causing him to glare. RP 260.

After asking if he was being detained and told he was not free to leave by Detective Givens, Mr. Dukes testified the he hopped on his bike and started pedaling, not to flee, but to move closer to his personal property, which was located close by near a tree. RP 276-78, 288-89, 305-06. Mr. Dukes also expressed that the thought biking away "would help" Detective Givens because he "didn't want to obstruct him in his duty," that is, he "didn't want to . . . interrupt the – his investigation more or less." RP 276-77, 279, 288, 291, 305-06.

Furthermore, Mr. Dukes asserted that when Detective Givens attempted to arrest him that he did not all struggle with the officer. RP

[1] Ms. Minjarez also testified and denied that Mr. Dukes assaulted her or was yelling at her just prior to Detective Givens's arrival. RP 64-70. Instead, she stated that the two were engaged in a passionate debate about religion and/or the illuminati. RP 64-70. But, on the day in question, Ms. Minjarez told Detective Givens that they were in engaged in an argument with Mr. Dukes four inches from her face, and when she tried to walk away from him that he grabbed and hugged her. RP 188-89.

278, 306-07. Instead, Detective Givens had difficulty handcuffing him for several minutes even with the help of another officer because, according to Mr. Dukes, his (Mr. Dukes's) "arm was trapped between the step of the curb and the street." RP 281-82, 307-09. Thus, the "struggle" was just get Mr. Dukes's "arm free from the curb. . . ." RP 283. In fact, Mr. Dukes acknowledged that the struggle stopped as soon as the officers were able to get handcuffs on him. RP3 313. Additionally, Mr. Dukes denied using knee strikes against Detective Givens. RP 293.

C. ARGUMENT

I. THE STATE DID NOT ENGAGE IN FLAGRANT AND ILL-INTENTIONED MISCONDUCT DURING ITS CLOSING ARGUMENT AND EVEN ASSUMING IT DID SUCH MISCONDUCT COULD HAVE BEEN CURED BY A LIMITING INSTRUCTION AND DID NOT HAVE A SUBSTANIAL LIKELIHOOD OF AFFECTING THE JURY VERDICT

At trial, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions."

State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of the two standards of review: "[i]f the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citations omitted).

Accordingly, a defendant must first establish a prosecutor engaged in misconduct and then, when failing to object at trial, that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Id.* at 760-61 (citation omitted); *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Under the

heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Here, Mr. Dukes did not object a single time during the State's closing to the arguments that he now asserts are misconduct. Consequently, Mr. Dukes must first establish the State engaged in misconduct and then that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." He cannot meet his burden.

Mr. Dukes complains about three arguments or statements made by the trial prosecutor during closing argument. They follow within the context in which they were made:

> Mr. Gonzales tells us that the defendant began to ride off. Mr. Dukes would have us believe that he just kind of

wanted to walk over to his stuff and hang out over there so the officer could do his job and he wanted to separate himself so Ms. Minjarez wouldn't hear -- or that he wouldn't hear. He was helping the officer with his -- with his investigation. Absolutely not, Ladies and Gentlemen. That's not what Jesus Gonzales says. That's not what the officer says. That's not what Detective Givens says.

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

And if Mr. Dukes felt he did nothing wrong, why didn't he stay there? Because he, per his own self-admission, said he went over at least towards this -- this tree. You know, why didn't -- Mr. Kurtz had you believe that he stuck around. Well, recall. Detective Givens said he didn't even have time to talk to Ms. Minjarez before he had to deal with Mr. Dukes trying to bolt. So those questions are coming right after another. He told us it was very quick. He didn't even have a chance to ask any questions other than, you know, "Is everything okay here," or something to that effect, to Ms. Minjarez. So he did bolt immediately. To say he didn't, not correct.

RP 414-15

But if Mr. Dukes is saying nothing even happened, then why is that important? In other words, which is it? Was it an accident or was it an intentional act? Well, Mr. Dukes says it didn't even happen.

If he did nothing wrong, why not just let the officer confirm that? Mr. Dukes is not the one that gets to make these determinations whether or not it was a lawful investigation or a lawful arrest. Mr. Gonzales tells us what happened prior to that. So it just happens to be the officer's experience was correct in this case. Mr. Dukes -- you'll see nowhere in there does it say the defendant gets to decide if this was an unlawful arrest. No.

> And, again, how many little inconsistencies does it take before his credibility is shot? They all go to that credibility.

RP 416.

Mr. Dukes was acquitted of the Obstructing a Law Enforcement Officer charge. The above arguments by the State, about which Mr. Dukes now complains, referenced his behavior and statements related to that charge and were not related to the offenses for which he was convicted except to the extent that his credibility was impacted as the result of contrasts between his testimony and Detective Givens's. Simply put, Mr. Dukes's queries about his detention status and his attempt to leave the scene were barely, if at all, probative of whether he resisted arrest or assaulted Detective Givens during the arrest. Consequently, even if the State's comments were improper, a curative instruction would have obviated any prejudice; and, regardless, those comments could not have resulted in a prejudice that had a substantial likelihood of affecting the jury verdict. Mr. Dukes waived the error by not objecting at trial.

That said, the State's arguments were not misconduct. In the context of the entire argument and the evidence elicited at trial, the State was arguing that Mr. Dukes's behavior was inconsistent with his statements and trial testimony, and that his continuous questioning of the officer, and subsequent attempt to flee, obstructed the officer's

investigation. Because the credibility of the witnesses, and Mr. Dukes in particular, was of utmost importance in this case, the State's arguments calling Mr. Dukes's credibility into question were necessary and not misconduct. RP 379-381.

Moreover, the State's comments were also permissible and relevant to the Obstructing charge because a person's (1) flight is probative of guilt and (2) flight from a lawful detention or *Terry Stop* when that person has been told that they are not free to leave, by law, constitutes the crime of obstruction. *State v. Wilson*, 26 Wn.2d 468, 482, 174 P.2d 553 (1946) (holding evidence of flight is admissible because "flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution."); *State v. Little*, 116 Wn.2d 488, 496, 806 P.2d 749 (1991) (holding that when an officer has a reasonable suspicion to conduct a *Terry* stop of a person "flight from the police constituted obstruction of a police officer in the exercise of his official duties."). Therefore, in the context in which they were made the State's arguments were not improper.

II. THERE WAS SUFFICIENT EVIDENCE OF RESISTING ARREST BECAUSE MR. DUKES WAS LAWFULLY ARRESTED.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact

to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers 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); *State v. W*alton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, "specifics regarding date, time, place, and circumstance are factors regarding credibility. . . ." *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996) *review denied* 130 Wn.2d 1013 (1996). In order to determine whether the necessary quantum of proof exists, the reviewing court "need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case." *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Here, Mr. Dukes challenges the sufficiency of the evidence underlying his resisting arrest conviction, arguing that the State failed to prove "a lawful arrest" of Mr. Dukes because Detective Givens "did not

have probable cause to arrest Mr. Dukes for obstructing." Br. of App. at 11. This argument is without merit.

Officers engage in their official duties in many ways that result in the brief, lawful detentions of citizens such as when they make *Terry* stops and when they exercise their community caretaking functions. Moreover, and critically, when an officer has grounds to seize someone and that person refuses to halt or flees, than he or she is guilty of Obstructing a Law Enforcement Officer. RCW 9A.76.020; *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999) (overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007)); *Little*, 116 Wn.2d at 496-98 (holding "that the investigating officers had reasonable suspicion to conduct a *Terry* stop of the appellants. Appellants' flight from the police constituted obstruction of a police officer in the exercise of his official duties.")

In determining whether the grounds for which an officer decided to stop someone were well-founded, courts must look at "the totality of circumstances known to the officer at the inception of the stop." *State v. Lee*, 147 Wn.App. 912, 917, 199 P.3d 445 (2008) (quotation omitted) ("the whole picture [] must be taken into account when evaluating whether there is reasonable suspicion."). Thus, the focus is on "what the officer

knew at the time of the stop." *State v. Z.U.E.*, 178 Wn.App. 769, 780, 315 P.3d 1158 (2014) (citing *Lee*, 147 Wn.App. at 917).

Additionally, the Fourth Amendment "does not proscribe inaccurate searches only unreasonable ones." *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981); *State v. Anderson*, 51 Wn.App. 775, 780, 755 P.2d 191 (1988) (holding that "police officers must be permitted to act before their reasonable belief is verified") (citation omitted). Consequently, that an officer's reasonable suspicion may turn out to be mistaken does invalidate the initial search or seizure. *See State v. Snapp,* 174 Wn.2d 177, 275 P.3d 289 (2012); *State v. Creed*, 179 Wn.App. 534, 319 P.3d 80 (2014) ("An officer's suspicion, even if mistaken, must still be reasonable in light of the objective reality with which he or she is presented."); *Seagull*, 95 Wn.2d at 907-908.

"Officers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct." *Id.* at 895. "[R]easonableness is measured not by exactitudes, but by probabilities." *State v. Samsel*, 39 Wn.App. 564, 571, 694 P.2d 670 (1985). Moreover, while an "'inchoate hunch' is not sufficient to justify a stop, experienced officers are not required to ignore arguably innocuous circumstances that arouse their suspicions." *State v. Santacruz*, 132 Wn.App. 615, 619–20, 133 P.3d 484 (2006). Courts reviewing the

reasonableness of a *Terry* stop "must evaluate the totality of circumstances presented to the investigating officer" while keeping in mind the "officer's training and experience." *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *State v. Mercer*, 45 Wn.App. 769, 774, 727 P.2d 676 (1986).

The development of reasonable, articulable suspicion entitles the officer to "maintain the status quo momentarily while obtaining more information." *State v. Williams*, 102 Wn.2d 733, 737, 689 P.2d 1065 (1984) (quotation omitted). In addition, the "detaining officer may ask a moderate number of questions . . . to confirm or dispel the officer's suspicions without rendering the suspect 'in custody.'" *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). "If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

But "[t]he scope of an investigatory stop . . . may be enlarged or prolonged as required by the circumstances if the stop confirms or arouses further suspicions." *State v. Guzman-Cuellar*, 47 Wn.App. 326, 332, 734 P.2d 966 (1987). This is unsurprising as The Supreme Court has acknowledged that "[i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than

the brief time period involved in *Terry*." *Michigan v. Summers*, 452 U.S. 692, 700, and n. 12, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

Furthermore, the state of the law makes sense as "[c]itizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens' questions, comments, and information citizens may offer." *State v. O'Neill*, 148. Wn.2d 564, 576, 62 P.3d 489 (2003). Similarly, "[m]any citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid." *Acrey*, 148 Wn.2d at 748 (internal quotations omitted). Accordingly, when acting in accordance to their community caretaking function, police may detain a person as part of a "routine check on health or safety." *Id.* at 749-50. As our courts have noted, when "an officer believes in good faith that someone's health or safety may be endangered ... public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer assistance while a warrant is obtained." *State v. Moore*, 129 Wn.App. 870, 880-81, 120 P.3d 635 (2005) (citations omitted) (alteration in original). On the contrary, "the officer could be considered

derelict by not acting promptly to ascertain if someone needed help." *Id.* at 881.

The standard governing whether a stop pursuant to the community caretaking function is lawful is whether the stop is reasonable after the "balancing of the competing interests involved in light of all the surrounding facts and circumstances." *Acrey*, 148 Wn.2d at 749. These competing interests are the individual's interest in freedom from police interference and the public's interest in having the police perform a community caretaking function. *Moore*, 129 Wn.App. at 880 (citations omitted). The scope of a stop of a person as part of a routine check on health or safety is not open ended, however, the seizure "must be necessary and strictly relevant to performance of the noncriminal investigation." *Id.* at 879 (citation omitted). Additionally, the "noncriminal investigation must end when reasons for initiating an encounter are fully dispelled." *Id.* (citation omitted). Finally, courts must apply the community caretaking exception cautiously, mindful of the risk of abuse. *Id.*

Here, Detective Givens was concerned about the safety of Ms. Minjarez after witnessing Mr. Dukes, with an angry look on his face and six inches from Ms. Minjarez, leaning into her and yelling while she retreated slightly. RP 149-50, 152, 164. After stopping and exiting his

vehicle to check on Ms. Minjarez, Detective Givens noticed that though the two stopped talking immediately, they did not appear calm, and that Mr. Dukes glared at him and responded to his question with a confrontational and defiant tone. RP 167-69, 172-73, 205-06, 234. Detective Givens testified he had training and experience in the arena of domestic violence and that verbal disturbances can be indicative of the fact that crimes have occurred, are occurring or will occur, and that often people will initially tell police that everything is fine and once separated from the other individual will tell the police the opposite is true. RP 150, 164, 187, 202, 205.

When viewed in the light most favorable to the State, whether Detective Givens's extremely brief seizure of Mr. Dukes is construed as a *Terry* stop or a stop pursuant to a check on health or safety under the community caretaking exception, his actions were reasonable given the totality of the circumstances. Because the stop was lawful, Mr. Dukes's immediate interrupting of Detective Givens's questioning of Ms. Minjarez and his subsequent attempt to flee despite being told he was not free to leave gave rise to probable cause for Detective Givens to arrest him for Obstructing a Law Enforcement Officer. *Little*, 116 Wn.2d at 496-98. Consequently, the State presented sufficient evidence of a lawful arrest, and therefore, of the crime of resisting arrest.

III. THE JURY WAS PROPERLY INSTRUCTED BY THE TRIAL COURT WHEN IT GAVE THE REASONABLE DOUBT INSTRUCTION BECAUSE THE REASONABLE DOUBT INSTRUCTION, WPIC 4.01, WHICH PROVIDES THAT "[A] REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS AND MAY ARISE FROM THE EVIDENCE OR LACK OF EVIDENCE" IS A CORRECT STATEMENT OF THE LAW.

Mr. Dukes advances no argument as to why he can raise this instructional issue for the first time on appeal. Br. of App. at 12-16; RAP 2.5(a)(3). In fact, he explicitly did not object to the instruction at the trial level. RP 336.[2] The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This "rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

The rule has additional force when applied to criminal cases in which claimed errors in jury instructions are raised for the first time on appeal because "CrR 6.15(c) *requires* that timely and well stated

[2] THE COURT: Number 3, 4.01, "The defendant has entered a plea of not guilty." [MR. DUKES]: No objection.

objections be made to instructions given or refused 'in order that the trial court may have the opportunity to correct any error.'" *Id.* at 685-86 (emphasis added) (quoting *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). Accordingly, our Supreme Court has "with almost monotonous continuity, recognized this procedural requirement and adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exceptions were taken." *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing cases). Thus, it is unsurprising that "[c]iting this rule or the principles it embodies" our Supreme Court "on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial." *Scott*, 110 Wn.2d at 686 (citing cases).

Because Mr. Dukes advances no argument as to why he should be able to raise this issue for the first time on appeal this court should decline to consider it.

If this court decides to reach the merits of the issue, Mr. Dukes's argument still fails. Mr. Dukes asserts that the trial court instructed the jury on an incorrect definition of reasonable doubt. Br. of App. at 12-16. He claims that WPIC 4.01, the pattern instruction used in this case, misstates the burden of proof by defining a reasonable doubt as "one for

which *a* reason exists." WPIC 4.01 (emphasis added); CP 21 (Instruction 3) ("A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."). This, he claims, improperly requires the jury to articulate a reason for its doubt.

The Washington Supreme Court, however, has expressly approved this instruction. *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). There, the court noted that the instruction was adopted from well-established language in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959), in which the court, nearly sixty years prior, observed that "[t]his instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without merit." *Bennett*, 161 Wn.2d at 308 (quoting *Tanzymore*, 54 Wn.2d at 291 (alterations original as quoted)). Indeed, the court in *Bennett* approved so strongly of WPIC 4.01 that it exercised its inherent supervisory authority to require trial courts in this state to issue WPIC 4.01—and *only* WPIC 4.01—in defining reasonable doubt. *Bennett,* 161 Wn.2d at 318.

Mr. Dukes has provided this court with no convincing basis upon which to depart from the holding of *Bennett*. *See State v. Watkins*, 136 Wn.App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court).

Even if this court were inclined to entertain such a challenge, Mr. Dukes bears the burden of making a "clear showing" that WPIC 4.01 is "incorrect and harmful." *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not met his burden.

Moreover, Mr. Dukes's argument has also been raised and rejected in the Court of Appeals. In *State v. Thompson*, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975), the defendant argued that the phrase, "'a doubt for which a reason exists[,]'. . . misleads the jury because it requires them to assign a reason for their doubt, in order to acquit[.]" *Thompson* rejected this argument because "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign *a reason* for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Id. at 5 (emphasis added).

Because the jury was properly instructed this court should affirm Mr. Dukes's convictions.

D. CONCLUSION

For the reasons argued above, Mr. Dukes's convictions should be affirmed.

It is unfortunate that in the conclusion section, Mr. Dukes's attorneys include a multi-paragraph diatribe in which they inject race into this case, even though there was no claim below that the actions of any state actors were based on racial bias. In so doing, Mr. Dukes's attorneys seek to capitalize on the legitimate debate, occurring among serious people, about race relations and excessive use of force by some police departments in this nation. Mr. Dukes's attorneys cheapen that debate by comparing Mr. Dukes to actual victims of police brutality, such as Tamir Rice and Amadou Diallo. The entire conclusion section is irrelevant, as are the citations to news publications which do not in any way support the assignments of error. Mr. Dukes's entire conclusion section should be stricken.

DATED this 4th day of June, 2015.

Respectfully submitted:

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CLARK COUNTY PROSECUTOR

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