92895-9

Supreme Court No. (to be set)
Court of Appeals No. 46596-5-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Baron Dukes
Appellant/Petitioner

Clark County Superior Court Cause No. 14-1-00870-8
The Honorable Judge Gregory Gonzales

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Baron Dukes, the appellant below, asks the court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Baron Dukes seeks review of the Court of Appeals opinion entered on February 17, 2016. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the prosecutor commit reversible misconduct by asking jurors to draw negative inferences from Mr. Dukes's exercise of constitutional rights?

ISSUE 2: Was Mr. Dukes improperly convicted of resisting an unlawful arrest, where the officer lacked a reasonable suspicion of criminal activity when he detained Mr. Dukes?

IV. SUMMARY OF THE ARGUMENT

An encounter with a white police officer (and six of his colleagues) left Baron Dukes, an unarmed homeless black man, with scars that remained visible three months later. It also left him with convictions for felony assault and resisting arrest. RP 85, 110-111, 119-120, 156-157, 285-286, 311-312; CP 2, 41, 43; Ex. 6, 9.

The police lacked a reasonable suspicion of criminal activity, and thus should not even have detained Mr. Dukes in the first place. Furthermore, the prosecutor committed misconduct at Mr. Dukes's trial by penalizing his exercise of constitutional rights.

This case raises significant constitutional issues that are of substantial public interest. The importance of this case stems in part from the legal arguments involved and in part from the historical context in which they arise. Mr. Dukes was detained, injured, and then tried and convicted during an era characterized by heightened awareness of police violence against unarmed citizens, especially people of color. *See, e.g.,* "Protest over fatal police shooting blocks downtown Seattle streets," *Seattle Post-Intelligencer,* February 25, 2016.[1]

The Supreme Court should accept review under RAP 13.4(b)(3) and (4).

V. STATEMENT OF FACTS

While they were both homeless, Baron Dukes and his girlfriend Ona Minjarez lost contact with each other for a few weeks. RP 69, 254-256. When they reunited on a Vancouver street, they walked together,

[1] Available at http://www.seattlepi.com/local/komo/article/Protest-over-fatal-police-shooting-blocks-6854352.php (accessed 3/2/16).

talking. They carried most of their possessions, and Mr. Dukes walked his bike. RP 63-64, 69, 73, 107, 255-256, 261-263.

According to Ms. Minjarez, the couple often enjoys vehement discussions about religion and other topics. RP 65-67, 70, 258, 302. They had an animated discussion on this occasion. During the discussion, they stopped walking and set down their property. RP 263.

Detective Robert Givens saw the couple and stopped to talk to them. RP 64, 73, 149. Givens did not see Mr. Dukes touch or threaten Ms. Minjarez at all. RP 170.[2] He asked if everything was ok, and both Mr. Dukes and Ms. Minjarez told him that they were fine. RP 78, 151, 167, 259.

Givens spoke separately with Ms. Minjarez and asked if they were arguing. RP 65, 73. She said they were not. RP 65. Givens responded that as a married man, he knew what an argument looked like. RP 66.

Givens told Mr. Dukes to wait while he talked with Ms. 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.

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[2] A bystander also saw no physical violence, and did not call 911. RP 93-98, 106, 112.

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 move his bike near the rest of his property, piled on the ground next to Ms. 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 onto the ground. RP 79, 101, 151-152, 278. Givens told Mr. Dukes that now he was detained, and tried to handcuff 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 handcuffed, 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 third-degree assault and resisting arrest. CP 1.[3]

At trial, Ms. Minjarez testified that she and Mr. Dukes were having a friendly disagreement and that she was not afraid of him. RP 82-83. She denied any violence between the two of them. 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.

During closing, the prosecutor asked jurors to draw negative inferences from Mr. Dukes's question about being detained:

> 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?

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[3] He was also charged with obstructing and with assaulting Ms. Minjarez. The jury acquitted him of those counts. CP 1, 42, 44.

RP 416.

Jurors convicted Mr. Dukes of assault three and resisting arrest. CP 41, 43. After sentencing, Mr. Dukes appealed, and the Court of Appeals affirmed. CP 66; Appendix.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the prosecutor committed misconduct by asking jurors to penalize Mr. Dukes for exercising his constitutional rights. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The government may not penalize or 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 state did just that.

The prosecutor implied that Mr. Dukes' question – "Am I being detained?" – proved that he was uncooperative. RP 380. The prosecutor also argued that this question, his refusal to help Givens confirm what had happened, and his decision to "go on his way",[4] 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.

[4]*See Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

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 of police,[5] to walk away when approached by officers who lack reasonable suspicion,[6] and to remain silent in the face of police questioning. U.S. Const. Amends. V, XIV; *Missouri v. Seibert*, 542 U.S. 600, 607, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

The prosecutor committed misconduct by seeking to penalize Mr. Dukes for exercising his constitutional rights. RP 380, 414, 416. The misconduct requires reversal because there is a "substantial likelihood that the misconduct affected the jury verdict." *In re Restraint of Glasmann*, 175 Wn.2d 696, 704, 206 P.3d 673 (2012). Furthermore, the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Id.*

In affirming the convictions, the Court of Appeals erroneously held that the prosecutor did not commit misconduct. Appendix, p. 8. According

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[5] U.S. Const. Amend. I; *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973); Wash. Const. art. I, § 5; *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 8 n. 6, 891 P.2d 720 (1995).

to the Court of Appeals, the prosecutor "was not focusing on the mere fact that Dukes exercised his right[s]." Appendix, p. 7.

The record shows otherwise. The prosecutor implied that Mr. Dukes was guilty because of his questions ("Am I being detained?"), because he walked away from a social encounter with police, and because he didn't voluntarily confirm his innocence by speaking with police. RP 380, 414, 416. The prosecutor's arguments did not merely touch upon Mr. Dukes's exercise of his constitutional rights. Instead, the state argued that Mr. Dukes did not behave like an innocent person.

This case raises significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4). The Supreme Court should accept review and reverse for prosecutorial misconduct. The case must be remanded for a new trial.

B. The Supreme Court should accept review and hold that insufficient evidence supported the conviction for resisting arrest. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

According to the Court of Appeals, the officer had a reasonable suspicion that the couple was "involved in a domestic dispute," which involved finger-pointing (at close range), anger, and yelling. Appendix, p.

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[6] U.S. Const. Amends. IV, XIV; *Royer*, 460 U.S. at 497-98; Wash. Const. art. I, §7; *State v. Gatewood*, 163 Wn.2d 534, 541, 182 P.3d 426 (2008); *see also Brown v. Texas*, 443 U.S. 47,

5. This, according to the Court of Appeals, supported the *Terry* stop that developed into an arrest for obstructing. Appendix, pp. 4-5 (citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

But *Terry* requires a reasonable suspicion of *criminal* conduct. *State v. Acrey,* 148 Wn.2d 738, 747, 64 P.3d 594 (2003). A domestic dispute is not a crime, even when it involves finger-pointing, anger, and yelling. *Cf. State v. Schultz*, 170 Wn.2d 746, 760-62, 248 P.3d 484 (2011) (insufficient evidence of domestic violence to justify warrantless entry under emergency aid exception).

The officer was permitted to intervene by initiating a social contact; however, he did not have a reasonable suspicion of criminal activity, and thus lacked authority to order Mr. Dukes to remain present. *Id.*

The Supreme Court should accept review under RAP 13.4(b)(3) and (4). The conviction for resisting arrest must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

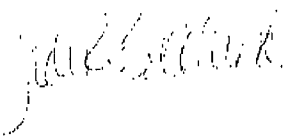
51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

VII. CONCLUSION

For the foregoing reasons, the Supreme Court should accept review and reverse Mr. Dukes's convictions. The resisting charge must be dismissed with prejudice. The assault charge must be remanded to the trial court for a new trial.

Respectfully submitted March 4, 2016.

BACKLUND AND MISTRY



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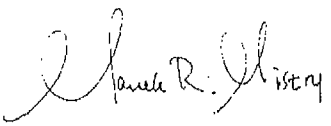

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Baron Dukes
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and I sent an electronic copy to

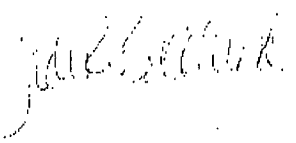
Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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 4, 2016.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

February 17, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BARON ADAM DUKES, Appellant.	No. 46596-5-II UNPUBLISHED OPINION

MAXA, J. – Baron Dukes appeals his convictions for resisting arrest and third degree assault. We hold that (1) the State presented sufficient evidence that the arrest Dukes resisted was lawful, and (2) the prosecutor did not commit misconduct by drawing adverse inferences from Dukes asking the officer whether he was being detained and attempting to leave. And we decline to address Dukes' challenge to the trial court's jury instruction defining reasonable doubt, because he did not object at trial. Accordingly, we affirm Dukes' convictions.

FACTS

On April 28, 2014, Dukes was walking down the street in Vancouver with his girlfriend, Ona Minjarez. As they walked down the street, Dukes walked his bike along his side.

The couple stopped and began having an animated conversation. The loudness of the conversation drew the attention of Jesus Gonzalez, who was working 40 to 50 feet away and wearing earplugs. Gonzalez could not hear what they were saying, but he saw Dukes standing about ten inches from Minjarez and pointing his finger at her. He saw Dukes touch Minjarez on the shoulder to turn her towards him, but did not see any other contact.

The conversation also drew the attention of Detective Robert Givens, who happened to drive by in his police car. Givens saw the couple and thought they might be involved in some type of domestic disturbance. He saw Dukes standing in front of Minjarez and leaning in with his face about six inches from hers. Givens also observed that Dukes had a contorted face, appeared angry, and looked as if he was yelling. But Givens could not hear anything from inside his car.

Givens parked near the couple and approached them. Givens said hello and asked the couple if everything was okay. They both told him that they were fine. Givens then asked Minjarez to talk with him apart from Dukes and she agreed. Givens stated that in his experience, sometimes officers learn that everything is not fine when couples are separated.

Before Givens was able to ask Minjarez anything, Dukes asked Givens, "Am I being detained?" Report of Proceedings (RP) at 151. Givens told him that he was not under arrest, but he was not free to leave. Dukes asked the same question two more times and Givens repeated the same response. Dukes then tried to put his feet on his bike pedals and started to ride his bike. Dukes went about five feet before Givens grabbed Dukes from behind and pulled him off of the bike.

After Givens pulled Dukes off the bike, the two began to scuffle as Givens tried to get Dukes to sit down. Dukes asked if he was being detained and Givens told him he was under arrest for obstructing a police officer. Givens tried to handcuff Dukes, but Dukes pulled his hands away. Vancouver Police Officer Scott Smith arrived and saw Givens struggling with Dukes, who was twisting and kicking. Smith helped Givens try to gain control of Dukes in order to handcuff him. The two attempted to get both of Dukes' hands behind his back as Dukes pulled his hands away, kept his arm under his body, and then refused to bend his arms, but

eventually Smith and Givens were able to handcuff Dukes. As a result of the struggle to handcuff Dukes, Givens sustained scrapes to his hand, knee, and forearm.

The State charged Dukes with fourth degree assault of Minjarez, obstructing a police officer, resisting arrest, and third degree assault of Givens.

At trial, the trial court gave a reasonable doubt jury instruction that was identical to WPIC 4.01. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). Dukes did not object to this instruction. During closing argument, the prosecutor commented on the fact that Dukes asked whether he was being detained and the fact that Dukes attempted to leave the area after Givens said he was not free to leave. Dukes did not object to these comments.

The jury found Dukes not guilty of fourth degree assault and obstructing a police officer, but guilty of resisting arrest and third degree assault of Givens. Dukes appeals his convictions.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Dukes argues that the State presented insufficient evidence to convict him of false arrest because the State failed to show that Dukes was resisting a *lawful* arrest. He argues that his arrest was unlawful because Givens lacked probable cause to arrest him for obstructing a law enforcement officer. We disagree.

1. Standard of Review

When evaluating the sufficiency of evidence for a conviction, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). This court will assume the truth of the State's evidence and all

reasonable inferences drawn from that evidence when evaluating whether sufficient evidence exists. *Id.* at 106.

2. Lawful Arrest

A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him. RCW 9A.76.040. An arrest without a warrant is lawful if the officer had probable cause to believe that a person is committing or has committed a misdemeanor or gross misdemeanor in the presence of the officer. RCW 10.31.100[1]. "Probable cause requires a showing that 'the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.' " *State v. Barron*, 170 Wn. App. 742, 750, 285 P.3d 231 (2012) (quoting *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)).

Givens attempted to arrest Dukes for obstruction of a law enforcement officer, a gross misdemeanor. RCW 9A.76.020(3). A person obstructs a law enforcement officer if he or she "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1). When an officer makes a lawful *Terry*[2] stop, flight from the officer constitutes an obstruction of a law enforcement officer. *State v. Little*, 116 Wn.2d 488, 498, 806 P.2d 749 (1991). Therefore, the issue here is whether Givens' detention of Dukes constituted a lawful *Terry* stop.

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[1] RCW 10.31.100 was amended in 2014, but the amendments do not relate to the language referenced here.

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

A police officer may conduct a *Terry* stop – a warrantless investigative stop – based upon less evidence than is needed to establish probable cause to make an arrest. *State v. Acrey,* 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). But the officer must have "a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." *Id.* at 747. "A reasonable, articulable suspicion means that there 'is a substantial possibility that criminal conduct has occurred or is about to occur.' " *State v. Snapp,* 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012) (quoting *State v. Kennedy,* 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). A mere hunch not supported by articulable facts that the person has committed a crime is not enough to justify a stop. *State v. Doughty,* 170 Wn.2d 57, 63, 239 P.3d 573 (2010).

We determine the propriety of an investigative stop – the reasonableness of the officer's suspicion – based on the "totality of the circumstances." *Snapp*, 174 Wn.2d at 198. The focus is on what the officer knew at the time of the stop. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008). We base our evaluation of reasonable suspicion on " 'commonsense judgments and inferences about human behavior.' " *Id.* at 917 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

Here, Givens testified that he stopped to speak with Dukes and Minjarez because he suspected that they were involved in some type of domestic disturbance. His suspicion was based on the facts that he saw Dukes pointing at Minjarez with his face about six inches from hers, and it looked like Dukes was angry and yelling. Givens' testimony established that he had specific and articulable facts to support his suspicion that Dukes and Minjarez were involved in a domestic dispute. Accordingly, the State presented sufficient evidence to show that the warrantless investigative stop conducted by Givens was lawful.

Because Givens' initial investigative stop was lawful, when Dukes attempted to leave he was obstructing Givens' investigation. *Little*, 116 Wn.2d at 498. Therefore, Givens had probable cause to arrest Dukes for obstruction of a law enforcement officer. Accordingly, we hold that the State presented sufficient evidence to show that Dukes resisted a lawful arrest.

B. PROSECUTORIAL MISCONDUCT

Dukes argues that the prosecutor made impermissible adverse inferences from Dukes asking Givens if he was being detained and attempting to leave the area, which Dukes claims are protected constitutional rights. We disagree that the prosecutor's comments were improper.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). We analyze the prosecutor's conduct and whether prejudice resulted therefrom based on the full trial context including the evidence presented, the issues in the case, the prosecutor's total argument, and the instructions given to the jury. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

2. Improper Argument

During closing argument, the prosecutor asked the jury a number of rhetorical questions to challenge Dukes' credibility. The prosecutor first recounted Dukes' testimony that he meant to be cooperative by moving away from Givens and Minjarez to wait by his bags. Then the prosecutor asked whether that testimony was "consistent with [Dukes] 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?" RP at 380. Later, the prosecutor asked, "[I]f Mr. Dukes felt he did nothing wrong, why didn't he stay there?" and "If [Dukes] did nothing wrong, why not just let the officer confirm that?" RP at 414, 416.

Dukes argues that because the First Amendment to the United States Constitution protects questions about police action, his question – "Am I being detained?" – was an exercise of his constitutional right. Dukes also argues that his question was asked in an effort to determine his rights under the Fourth Amendment, which permits an individual to walk away from a social encounter with law enforcement. He cites the general rule that the State 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).

However, "not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights." *State v. Gregory,* 158 Wn.2d 759, 806, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.,* 181 Wn.2d 757, 336 P.3d 1134 (2014). Where the focus of a prosecutor's comment is not on the right itself, it does not violate the defendant's constitutional right at issue. *Id.* at 807.

Here, the prosecutor was not focusing on the mere fact that Dukes exercised his right to question Givens, but instead was highlighting that the specific question Dukes asked belied his testimony that he intended to stay in the area and wait by his bags. Dukes cites no authority supporting his claim that this type of argument is improper. Further, it is well established that speech protected by the First Amendment can be used to establish the elements of a crime or prove motive or intent, subject to the rules of evidence. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489, 113 S. Ct. 2194, 2201, 124 L. Ed. 2d 436 (1993).

In addition, Dukes cites no authority for the proposition that a person has a constitutional right to walk away from a lawful *Terry* detention. As discussed above, attempting to leave such a detention is evidence of interference with a law enforcement officer.

We hold that the prosecutor's arguments were not improper, and therefore the prosecutor did not commit misconduct.

C. REASONABLE DOUBT INSTRUCTION

Dukes argues that the trial court erred by giving a reasonable doubt instruction identical to WPIC 4.01, which states "[a] reasonable doubt is one for which a reason exists," because the instruction erroneously suggests that the jury must be able to articulate a reason for its doubt before it can acquit. We decline to address this issue because Dukes did not object to this instruction in the trial court.

A party generally waives the right to appeal an error unless there is an objection in the trial court. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception is for "manifest error affecting a constitutional right." RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. To determine whether we should consider an unpreserved error under RAP 2.5(a)(3), we inquire whether (1) the error is truly of a constitutional magnitude, and (2) the error is manifest. *Kalebaugh*, 183 Wn.2d at 583. An error is manifest when the appellant shows actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The asserted error must have practical and identifiable consequences in the trial court. *Id.* The focus of the actual prejudice inquiry is whether it is obvious from the record that the error warrants appellate review. *Id.* at 99-100.

Here, Dukes makes a claim of constitutional magnitude – instructions that misstate the reasonable doubt standard are constitutional errors. *Kalebaugh*, 183 Wn.2d at 584. However, Dukes cannot show an obvious error. The trial court's reasonable doubt jury instruction was

identical to WPIC 4.01. In *State v. Bennett*, the Supreme Court directed trial courts to exclusively use WPIC 4.01 to instruct juries on the burden of proof and the definition of reasonable doubt. 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In *Kalebaugh*, the Supreme Court recently reaffirmed that WPIC 4.01 was the "proper" instruction and "the correct legal instruction on reasonable doubt." 183 Wn.2d at 582, 585-586. The court distinguished between the proper language of WPIC 4.01 ("a doubt for which a reason *exists*") and the trial court's improper additional instruction in that case ("a doubt for which a reason *can be given*"). *Id.* at 585. Similarly, the Supreme Court in *Emery* stated that the prosecutor in closing argument "properly" described reasonable doubt as a doubt for which a reason exists. 174 Wn.2d at 760.

Dukes cannot show that the trial court's reasonable doubt instruction constituted a manifest error. Accordingly, we will not consider his unpreserved challenge to this instruction.

We affirm Dukes' convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, J.

JOHANSON, C.J.

BACKLUND & MISTRY

March 04, 2016 - 10:14 AM

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