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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PEDRO L. TOMAS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

JESSICA L. BLYE, WSBA No. 43759
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Did the State present sufficient evidence to sustain Tomas's conviction for Assault in the Third Degree?
- B. Can Tomas raise, for the first time on appeal, the argument that Officer Smerer lacked reasonable suspicion to detain Tomas for investigatory purposes?

II. STATEMENT OF THE CASE

On August 6, 2016, Centralia Police Officer Mike Smerer was dispatched to a report of a Hispanic male waving around a Buck knife in the middle of the street. RP 10; CP 12. In the area, Officer Smerer encountered Pedro Lopez Tomas, who matched the description given. RP 11-12; CP 13. Tomas appeared to be under the influence of some type of drug. RP 13; CP 13. Officer Smerer asked Tomas if he lived in the house he had come out of and Tomas responded, "No." RP 12; CP 13.

Officer Smerer handcuffed Tomas, and Tomas's behavior became more erratic. RP 13-14; CP 13. Tomas would not remain still – attempting numerous times to stand up and lying down a few times. RP 14. CP 13. While handcuffed, Tomas sat up in a kneeling position, went to one knee, and jumped up in Officer Smerer's direction, striking Officer Smerer square in the chest. RP 15; CP 13. After being struck in the chest, Officer Smerer immediately pushed Tomas aside. RP 15; CP 13.

Tomas fell to the ground and hit his head. RP 17. Tomas then rolled onto the grass, tensed up all of his muscles, and began screaming. RP 17. After an aid car arrived, Tomas wormed his way over to a sidewalk and started hitting his head repeatedly against the concrete. RP 17. Officer Smerer placed Tomas under arrest and had him transported to the hospital. CP 13.

On January 10, 2017, Tomas was arrested and booked for assaulting Officer Smerer. CP 14. Tomas indicated to the arresting officer that he remembered the incident and said he was an alcoholic and did stupid things when he was drunk. CP 14.

Ultimately, Tomas was charged with Assault in the Third Degree. CP 7. Tomas proceeded to a bench trial, where he argued his voluntary intoxication prevented him from being able to form intent. RP 45-46. Tomas also argued the State failed to prove his contact with Officer Smerer was harmful or offensive because Officer Smerer never explicitly testified that he was harmed or found the contact offensive. RP 44-45. Tomas at no point argued that his detention or arrest were unlawful nor did he file any pretrial motions raising the issue. RP 44-46.

The trial court found Tomas guilty of Assault in the Third Degree. RP 48; CP 14-15. The trial court found Tomas's intoxication

did not rise to level of preventing him from being able to form intent. RP 48. The trial court found Tomas's contact with Officer Smerer was intentional based on the fact that Tomas appeared to be understanding the situation, responding to questions, and responding to directives. RP 48-49. The trial court found that when Tomas lunged at Officer Smerer, the act was volitional and not inadvertent or accidental. RP 49.

The trial court also found the contact was offensive because it was uninvited. RP 48. The trial court found Officer Smerer implied he found the contact offensive. RP 48. This implication came from Officer Smerer's testimony that the contact was uninvited and that Officer Smerer responded to the contact by arresting Tomas for assault. RP 48.

On May 3, 2017, the trial court entered written findings of fact and conclusions of law after listening to objections and arguments by the parties and making alterations to the State's proposed findings and conclusions. RP 55-64; CP 12-15. Tomas then proceeded to sentencing. RP 64. CP 26-35. This appeal follows. CP 36.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND TOMAS GUILTY OF ASSAULT IN THE THIRD DEGREE.

Tomas argues the State did not present sufficient evidence to sustain the trial court's guilty verdict. Brief of Appellant 8-11. The State presented sufficient evidence to sustain the trial court's guilty verdict.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational trier of fact could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

A trial court's decision following a bench trial is reviewed for whether substantial evidence supports any challenged findings of fact and whether the findings of fact support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318, *review denied*, 166 Wn.2d 1020 (2009). The reviewing court does not decide if it believes the evidence establishes guilt beyond a reasonable doubt, but rather if any rational trier of fact could find guilt. *State v. Kilburn*, 151 Wn.2d 36, 57, 84 P.3d 1215 (2004).

Findings of fact not assigned error are considered verities on appeal. *State v. Kaiser*, 161 Wn. App. 705, 724, 254 P.3d 850 (2011). A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *Kaiser*, 161 Wn. App. at 724; *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

In the present case Tomas does not assign error to any of the findings of fact, and they are therefore verities on appeal. Tomas also fails to assign error to the conclusions of law. Given Tomas's arguments on appeal, the State will assume this was an oversight.

2. The State Proved Each Element Beyond A Reasonable Doubt, As Required, And Therefore Presented Sufficient Evidence To Sustain The Trial Court's Guilty Verdict.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the

sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the finder of fact's by reweighing the credibility or importance of the evidence. *Green*, 94 Wn.2d at 221. The determination of the credibility of a witness or evidence is solely within the scope of the finder of fact and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

a. The evidence in the light most favorable to the State establishes that Tomas intentionally made physical contact with Officer Smerer.

To convict Tomas of Assault in the Third Degree the State was required to prove, beyond a reasonable doubt, that on or about August 6, 2016, Tomas assaulted a law enforcement officer who was performing his official duties at the time of the assault. RCW 9A.36.031(1)(g). Assault is defined as "an intentional touching of

another person that is harmful or offensive.” WPIC 35.50. *See State v. Madarash*, 116 Wn.App. 500, 513, 66 P.3d 682 (2003). Evidence of intoxication “may be considered in determining whether the defendant acted with intent.” WPIC 18.10; *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987).

Tomas argues the evidence shows that he was too intoxicated to form intent. Brief of Appellant 10-11. However, this argument fails as it is not based on viewing the evidence in the “light most favorable to the State” or drawing all reasonable inferences in the State’s favor.

The State presented evidence that Tomas appeared to understand the situation, responded to questions, and responded to Officer Smerer’s directives. RP 12-15, 20. Officer Smerer testified the contact Tomas made was forceful enough to move him backward. RP 16. Officer Smerer believed that, based on their positions and spacing, Tomas would not have made contact with him had Tomas merely stumbled and fallen.

Tomas’s argument, that he had no memory of the incident, was highly intoxicated during the incident, was hospitalized for days due to the alcohol in his system, requires viewing evidence and making inferences in his favor, which is not the proper standard of

review.¹ Although there was conflicting testimony regarding Tomas's lucidity, the trial court did consider evidence of intoxication when rendering its verdict. RP 48-49. The trial court was permitted to find the State's evidence more persuasive, which it did when it found that the evidence showed Tomas's level of intoxication did not preclude him from forming intent. RP 48-49. This was a decision a rational trier of fact could make in light of the evidence.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Tomas's contact with Officer Smerer was intentional, and this Court should affirm his conviction.

b. The evidence in the light most favorable to the State establishes that Tomas's contact with Officer Smerer was offensive.

In addition to arguing the contact was not intentional, Tomas also argues the evidence was not sufficient to find the contact with Officer Smerer was offensive. A touching is considered offensive "if it would offend an ordinary person who is not unduly sensitive." See WPIC 35.50.

¹ This also requires consideration of evidence that sustained a hearsay objection. RP 37-38. The trial court did not have evidence of whether it was Tomas's intoxication level that kept him at the hospital, the fact that he hit his head against a concrete sidewalk multiple times, or some combination of factors.

As Tomas himself notes, Officer Smerer testified that Tomas “threw his body up towards [Officer Smerer] with his head leading and went right into [Officer Smerer’s] upper chest with his head.” Officer Smerer testified that he then “smacked [Tomas’s] head away.” RP 15. Tomas presents this as evidence that Officer Smerer did not find the contact harmful or offensive, however, this again requires viewing evidence and making inferences in his favor, which is not the proper standard of review. This evidence is sufficient to infer that the contact with Officer Smerer would offend an ordinary person who is not unduly sensitive. The trial court was permitted to make this inference without Officer Smerer having to explicitly state he found the contact offensive. Tomas does not present any case law for the proposition that a trier of fact may not find a touching offensive without the assault victim using the word “offensive.”

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Tomas’s contact with Officer Smerer was offensive, and this Court should affirm his conviction.

B. TOMAS CANNOT RAISE THE ISSUE OF THE ALLEGED VIOLATION OF HIS RIGHT TO PRIVACY BECAUSE THE ERROR IS NOT MANIFEST.

Tomas argues for the first time on appeal that Officer Smerer violated his right to privacy by detaining him without reasonable suspicion.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of

constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

While both the Washington State and federal constitutions protect citizens from unreasonable searches and seizures, “it is also true that, in order to preserve these rights, persons claiming benefits thereunder must seasonably object.” *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638, 643 (1966) (citing *Seguola v. United States*, 275 U.S. 106, 72 L. Ed. 186, 48 Sup. Ct. 77 (1927)).

Tomas fails to argue how any failure of the State to show a reasonable basis for detaining Tomas is a manifest constitutional error. Tomas has not articulated any actual prejudice or that this alleged error had an identifiable and practical consequence in the trial. In arguing that Officer Smerer unlawfully seized him, Tomas

argues that there was insufficient evidence presented to justify an investigatory stop. Brief of Appellant 16-19. This argument highlights that there is not “a sufficient record for the reviewing court to determine the merits of the alleged error.” *O’Hara* 167 Wn.2d at 99. The testimony presented at Tomas’s bench trial minimally addressed the basis for an investigatory stop because this was never raised as an issue at the bench trial or in a pretrial motion. “Because there was no motion to suppress, the State had no obligation or interest in developing the factual basis for the detention.” *State v. D.E.D.*, 200 Wn. App. 484, 490-91, 402 P.3d 851 (2017).

However, the limited record does show that at the time Officer Smerer handcuffed Tomas, there was at least reasonable suspicion Tomas was committing Criminal Trespass in the First Degree. RCW 9A.52.070. When Officer Smerer first encountered Tomas, Tomas was exiting a home. RP 11-12. Tomas told Officer Smerer that he did not live there and it was unclear to Officer Smerer whether or not Tomas knew the owners. RP 11-14. This gave Officer Smerer reasonable suspicion to believe Tomas was trespassing, allowing Officer Smerer to detain Tomas while he investigated further. See *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Tomas also argues his behavior more appropriately resembles resisting arrest and then asserts a defense to that unfiled charge. Brief of Appellant 18-19. Tomas cites *State v. D.E.D.*, 200 Wn. App. 484, 490-91, 402 P.3d 851, 854 (2017) for this proposition.

However, the court in *D.E.D.* noted “it long has been the rule that a defendant's criminal behavior in response to a police illegality is not subject to suppression.” *Id.* at 492. The court concluded there was no general obligation to cooperate with a police investigation and passive resistance to being handcuffed does not amount to obstructing a law enforcement officer. *Id.* at 494, 496. In making this conclusion, the court specifically stated “Other statutes impose different duties that may arise in this situation, such as the duty to not assault or threaten the officer.” *Id.* at 496 (citing RCW 9A.36.031 – Assault in the Third Degree). If an unlawful arrest threatens only a loss of freedom and does not pose an imminent threat of serious physical harm, use of force to resist the unlawful arrest is not reasonable. See *State v. Valentine*, 132 Wn.2d 1, 6, 935 P.2d 1294 (1997); *State v. Mierz*, 127 Wn.2d 460, 476, 901 P.2d 286 (1995) (citations omitted).

Here, *arguendo*, even if a court were to find Officer Smerer's detention of Tomas was unlawful, the record does not support

Tomas's use of force, as there was no indication of an imminent threat of serious physical harm when Officer Smerer handcuffed him.

This Court should not consider Tomas's argument as it was raised for the first time on appeal and the record is not sufficient for this Court to determine the merits of the alleged error, there is no prejudice, and the error is not manifest. If this Court does consider the merits of the alleged error, the evidence that is present in the record supports a finding that Officer Smerer had reasonable suspicion Tomas was at least committing criminal trespass and provided a basis for detaining Tomas to investigate. Regardless of whether the detention was lawful, there was no imminent threat of serious physical harm, and Tomas's use of force was unreasonable. This Court should therefore affirm Tomas's conviction.

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IV. CONCLUSION

The State presented sufficient evidence to sustain Tomas's conviction for Assault in the Third Degree, presenting sufficient evidence of intent and that the contact was offensive. This Court should not consider Tomas's argument, raised for the first time on appeal, that Officer Smerer did not have reasonable suspicion to detain him. Officer Smerer's detention of Tomas was lawful, and even an unlawful detention would not justify Tomas's use of force under the circumstances. Therefore, this Court should affirm Tomas's conviction.

RESPECTFULLY submitted this 14th day of December, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
JESSICA L. BLYE, WSBA 43759
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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