

FILED  
Court of Appeals  
Division II  
State of Washington  
10/8/2018 8:00 AM

NO. 51818-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT DAGNON,

Appellant.

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

The Honorable Joely A. O'Rourke, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict appellant of disorderly conduct.

2. Legal financial obligations for court appointed attorney costs, criminal filing fee, and DNA collection fee were improperly imposed and must be stricken.

Issues pertaining to assignments of error

1. Following a bench trial, the court found appellant guilty of disorderly conduct, concluding he used abusive language and intentionally created a risk of assault. Where there was no evidence that appellant's words to a Department of Corrections officer created an actual risk of assault, must the conviction be reversed and the charge dismissed?

2. Where appellant was indigent at the time of sentencing and has prior convictions for which the State has collected his DNA, must the legal financial obligations for court appointed attorney costs, criminal filing fee, and DNA collection fee be stricken?

B. STATEMENT OF THE CASE

Appellant Robert Dagnon was convicted following a bench trial of disorderly conduct relating to his encounter with a Department of Corrections officer on August 20, 2017. He was convicted of second

degree malicious mischief related to allegations that he damaged a patrol car later that evening. CP 23-27.

Dagnon's sister, Stacy Dagnon, was at the Pioneer Tavern with Cody Muller when she saw her brother walk in and approach the bar. 3RP<sup>1</sup> 51-52. After a short time Dagnon walked toward the back door, and as he passed their table he addressed comments to both Stacy and Muller. He told Stacy she did not hide very well, and he told Muller that if he was dating Stacy he better run. 3RP 87-88. Stacy did not respond to Dagnon's comments, but Muller asked him to leave, and he did. 3RP 88. Dagnon gestured to the door as he was leaving, which Muller considered an invitation to fight. 3RP 88-89. Muller did not go outside with Dagnon, but remained seated at the table. 3RP 89.

A few minutes later, while Stacy was in the restroom, Dagnon returned and sat at the table with Muller. 3RP 89. Muller told Dagnon he was a DOC officer and if Dagnon made any more threats he would be arrested for threatening a DOC employee. 3RP 90. Dagnon again left the tavern. 3RP 91.

Stacy returned from the restroom, had some words with Muller, and left alone as Muller was paying the bill. 3RP 56, 95. Around that time, Angela Middleton, another DOC officer and a friend of Stacy's

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<sup>1</sup> The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—1/18/18; 2RP—4/12/18; 3RP—4/17/18; 4RP—4/25/18.

came in the bar and had a brief conversation with Muller. 3RP 93, 122-23.

Muller walked outside through the back door. As he was crossing the street to his car, he noticed Dagnon approaching. 3RP 96. Muller testified that Dagnon started cussing at him, but he did not remember what Dagnon said, and no one else was around to hear it. 3RP 96. When Dagnon got within a foot of Muller, Muller put his arm out to keep Dagnon at a safe distance, and Dagnon walked into it. 3RP 96.

Dagnon told Muller that if he touched him again he would knock Muller out. Muller told Dagnon he needed to step back, and Dagnon did, saying they could talk like men. Muller testified that he was concerned for his safety because he believed Dagnon would knock him out, but when Dagnon offered to shake his hand, he declined. 3RP 97-98. He described the exchange as heated on Dagnon's part, but said he did not say anything other than telling Dagnon to step back. 3RP 108.

At that point, Middleton drove up, got out of her car, and exchanged some words with Dagnon. 3RP 99. Muller called 911 while they were talking. 3RP 99. Dagnon walked away without further comment to Muller. 3RP 99, 129.

Muller testified that he was concerned about the encounter with Dagnon, but he would not have punched Dagnon for using abusive

language, because that was contrary to his training and duties as a Department of Corrections officer. 3RP 109. He also testified that no one else was around to hear what Dagnon said. 3RP 96.

Officer Cole Courmyer contacted Dagnon at a friend's house and detained him based on information provided by Muller. 3RP 15, 17. Dagnon was placed in the back seat of a patrol car. 3RP 18. Courmyer testified that Dagnon used profane language as he was being arrested, and once he was in the patrol car he kicked the rear window, causing the door to bow outward. 3RP 18-20. According to Courmyer, there was a gap between the frame and the car, but the gap repaired itself sometime in the two weeks before the car was taken to a repair shop. 3RP 21, 35-37. Nonetheless, the service estimate writer at the repair shop testified he observed a small deformation in the window run on the rear passenger side. 3RP 65. He prepared a repair estimate for \$785.63. Photos admitted at trial did not show any damage to the vehicle, which had never been taken for repairs and was still in service. 3RP 32, 38-39.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH DISORDERLY CONDUCT, AND THAT CHARGE MUST BE DISMISSED.

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. *In re Winship*, 397 U.S. 358, 364,

90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Dagnon was convicted of disorderly conduct, which required the State to prove he used abusive language and thereby intentionally created a risk of assault. RCW 9A.84.030(1)(a); CP 27. Disorderly conduct statutes are constitutionally limited to “fighting words,” i.e. words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *State v. Yoakum*, 30 Wn. App. 874, 876, 638 P.2d 1264 (1982) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)). Because speech that does not constitute fighting words is afforded First Amendment protection, disorderly conduct requires some evidence that the words at issue actually inflicted some

injury, incited a breach of the peace, or created a risk of assault. *City of Kennewick v. Keller*, 11 Wn. App. 777, 787, 535 P.2d 267 (1974).

Words may or may not be fighting words depending on the circumstances of their utterance. The addressee's reaction or failure to react is a factor which must be considered in evaluating the situation in which the words were spoken. *City of Seattle v. Camby*, 104 Wn.2d 49, 54, 701 P.2d 499 (1985). The words may convey anger and frustration without provoking a violent reaction from the addressee, such as a properly trained officer who would be expected to exercise a higher degree of restraint than the average citizen. *Yoakum*, 30 Wn. App. at 877 (citing *Lewis v. New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 (1974)).

For example, in *Yoakum*, the defendant entered the county sheriff clerk's office demanding to know if his girlfriend was there. He was angry, loud, obnoxious, and intoxicated, and as he was shouting vulgar terms, he clenched his fists and hit one fist into the other. When the defendant was asked to leave, he told the deputy to step outside and threatened to beat him up and shoot him. The deputy was concerned that he would be assaulted and stood up to minimize his vulnerability, but he remained calm, and after an hour and a half the defendant left the office. *Yoakum*, 30 Wn. App. at 875-76.

The trial court concluded the defendant was guilty of disorderly conduct because his words, coupled with his aggressive actions, caused the deputy to assume a defensive stance to protect against possible assault. The Court of Appeals held that the evidence was insufficient to convict, however, because there was no indication the deputies were about to initiate an assault on the defendant. Instead, they remained calm throughout the hour and a half encounter, despite the defendant's abusive language, and eventually the defendant left without incident. *Yoakum*, 30 Wn. App. at 878.

This case involves a similar situation, although much less extreme than the one in *Yoakum*. There was evidence that Dagnon made offensive comments to Muller, a Department of Corrections officer, both in the tavern and outside by the car. As in *Yoakum*, Dagnon apparently asked the officer to step outside to settle their differences. 3RP 88-89. He also told Muller he would knock him out if he touched Dagnon again. Muller testified he was concerned Dagnon might do so. 3RP 97.

Muller also testified, however, that the encounter was heated on Dagnon's part but not on his. 3RP 91, 108. He was not about to initiate an assault on Dagnon. His training and duties as a DOC officer precluded that possibility. 3RP 109. Moreover, no one else was around to hear what

Dagnon said, so there was no danger of his words inciting an assault from anyone else. 3RP 96. Finally, as in *Yoakum*, Dagnon left the scene without incident. 3RP 129.

While the court found that Muller felt Dagnon's words and demeanor were threatening, and that he positioned himself by his car to avoid the risk of being assaulted, the court did not find that Dagnon created an actual risk that an assault would occur. CP 24-25. Because there was no evidence that Dagnon's words actually created a risk of assault, the State failed to prove beyond a reasonable doubt that Dagnon was guilty of disorderly conduct. His conviction must be reversed and the charge dismissed. *See Yoakum*, 30 Wn. App. at 879.

2. STATUTORY AMENDMENTS PROHIBITING IMPOSITION OF CERTAIN LEGAL FINANCIAL OBLIGATIONS APPLY TO DAGNON'S CASE, AND THOSE LFOS MUST BE STRICKEN.

Dagnon was represented by appointed counsel at trial and sentencing under a finding of indigency, and the court entered an order of indigency authorizing appellate review at public expense. CP 19-21. Despite his indigency, the court ordered Dagnon to pay \$1400 in fees for his court appointed attorney and the \$200 criminal filing fee. CP 13. In addition, although Dagnon's criminal history includes two prior felonies, the court imposed a \$100 DNA collection fee. CP 7-8, 10, 13.

In March 2018, the Legislature enacted Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018), modifying Washington’s system for imposing and collecting LFOs. Under this bill, statutory amendments prohibit the imposition of costs if the defendant is indigent at the time of sentencing,<sup>2</sup> prohibit imposition of the \$200 criminal filing fee on an indigent defendant,<sup>3</sup> and prohibit imposition of the \$100 DNA fee if the State has previously collected the offender’s DNA as a result of a prior conviction.<sup>4</sup> Laws of 2018, ch. 269 § § 6, 17, 18. These amendments went into effect on June 7, 2018. *Id.*

The Washington Supreme Court recently held that the statutory amendments enacted by House Bill 1783 apply to cases pending on direct appeal when the amendments went into effect. *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_ (No. 95249-3, Sept. 20, 2018), at 6. Because these amendments pertain to costs imposed upon conviction, and Dagnon’s case

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<sup>2</sup> “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

<sup>3</sup> “Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 36.18.202(2)(h).

<sup>4</sup> “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law....” RCW 43.43.7541.

was not yet final when the amendments were enacted, he is entitled to benefit from this statutory change. *Ramirez*, at 8.

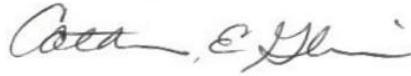
Dagnon was indigent at the time of sentencing. CP 19-21. Because the statutory amendments expressly prohibit courts from imposing discretionary costs and the criminal filing fee on indigent defendants, both the court appointed attorney costs and the filing fee must be stricken from his judgment and sentence. In addition, because Dagnon has prior convictions which resulted in the collection of his DNA, the court was prohibited from imposing a DNA collection fee. That fee must be stricken as well. *See Ramirez*, at 8 (remedy is to remand for trial court to strike improperly imposed LFOs).

D. CONCLUSION

The evidence was insufficient to establish disorderly conduct, and Dagnon's conviction on that offense must be reversed and the charge dismissed. In addition, improperly imposed LFOs must be stricken from the judgment and sentence.

DATED October 6, 2018.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in  
*State v. Robert Dagon*, Cause No. 51818-0-II as follows:

Robert Dagon  
378 E. State Street  
Mossyrock, WA 98554

I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Manchester, WA  
October 6, 2018

**GLINSKI LAW FIRM PLLC**

**October 06, 2018 - 1:10 PM**

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**Appellate Court Case Number:** 51818-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Robert Dagnon, Appellant  
**Superior Court Case Number:** 17-1-00614-3

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