

FILED  
DECEMBER 30, 2014  
Court of Appeals  
Division III  
State of Washington

No. 32558-0

COURT OF APPEALS IN THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON, Respondent

v.

ANGEL TAPIA, Appellant

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APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

THE HONORABLE CAMERON MITCHELL

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BRIEF OF APPELLANT

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I. Assignment of Errors

- A. The trial court erred in finding Mr. Tapia guilty of second degree criminal trespass where the evidence is insufficient to support the disposition.
- B. The trial court erred in making conclusion of law 2: "It is not required that any particular no trespass sign be present for a person to be guilty of criminal trespass."
- C. The trial court erred in making conclusion of law 4: "There was probable cause to arrest the respondent for the crime of obstruction."
- D. The trial court erred in making conclusion of law 5: "The Court finds beyond a reasonable doubt that the respondent is guilty of criminal trespass in the second degree and resisting arrest."

ISSUES RELATED TO ASSIGNMENT OF ERRORS

- 1. Was the evidence insufficient to sustain a conviction for criminal trespass second degree ?
- 2. Where Mr. Tapia attempted to make a phone call for help while the officer arrested someone else, was there probable cause to arrest him for obstruction?

2. Was the evidence insufficient to sustain a conviction for resisting arrest?

II. Statement of Facts

The juvenile court adjudicated Angel Tapia guilty of criminal trespass second degree and resisting arrest, based on events that occurred on February 9, 2014. (CP 16-23).

Around 10 p.m. on Sunday, February 9, 2014, sixteen year old Angel Tapia and a friend (Perez) were walking on the north side grounds of the Chief Joseph Middle School, about 15 feet away from the building. (RP 12-15; 52; CP 6). Officer Joe Brazeau of the Richard Police Department was dispatched after someone reported seeing the youths walking on the school grounds. (RP 13).

OFFICER BRAZEAU'S TESTIMONY

Officer Brazeau shined his spotlight and car lights on the teens as they walked. He testified that although he "commanded" them to stop, they continued to walk. However, once he identified himself as law enforcement, the youths walked back to him. (RP 16-17).

The officer asked a few questions and told the teens they were trespassing. (RP 26). When asked what gave cause to his

belief the teens were trespassing, the officer reported it was, “the hour of darkness” , the school was not in session, and the possibility that the teens might damage the school. (RP 34). The officer stated that to his knowledge there was no fencing around the school, nor any ‘no trespassing’ signs. (RP 28).

The officer testified he smelled alcohol on Perez. (RP 17). He said, “I could tell that [Perez], was acting defiant, not answering questions, bladed stance, clenched fists.” (RP 17-18). The officer told Perez he was under arrest and reported Perez said “F—k that” and threw off his backpack and “bladed his stance”<sup>1</sup>. (RP 18). The officer defined ‘bladed stance’ as “When you step back in a fighting-type stance. His hands weren’t raise but it’s a ...stance that is a pre-attack indicator, where somebody is bracing themselves, and getting a wide stance so they can either fight or run.” (RP 18). Mr. Perez’s hands were *not* raised in fists. (RP 18).

The officer drew his taser and commanded Perez to get on the ground. He complied, but yelled and swore as he got on the ground. (RP 19). The officer struggled with him, handcuffed and searched the teen, reportedly removing a knife. (RP 18). The

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officer threw the knife about 5 feet away, as he knelt on the teen.  
(RP 20).

He then observed Mr. Tapia using his cell phone. When asked if Mr. Tapia's use of the cell phone had an effect on his ability to arrest Mr. Perez the officer testified:

"It did. It stilled a ...the scene was still not controlled and I'm still getting resistance and non-compliance now from both parties." (RP 21).

The officer told him to put the phone down, which Mr. Tapia refused to do. (RP 21). The officer testified, "I knocked the phone out of his hand, and I told him he was under arrest." (RP 21).

He grabbed Mr. Tapia, who spun out of his jacket to get away from him. (RP 21). However, the officer grabbed his arm, did two knee strikes on him, and brought him to the ground. (RP 21). Mr. Tapia went to the ground, his face and body pushed into the snow, and was handcuffed. (RP 22;32-33;49).

The officer turned his attention back to Perez, who was kicking at him. Mr. Tapia stood up in an attempt to retrieve his phone from the snow. (RP 49). The officer again drew his taser and commanded Mr. Tapia to get back on the ground. (RP 23). He arrested Mr. Tapia for criminal trespass and resisting arrest. (CP 1-2).

### MR. TAPIA'S TESTIMONY

Mr. Tapia testified that he and Perez were on their way to meet some friends and walk to someone's house. (RP 43). They saw the car light, but did not know what it was. (RP 43). When he heard the officer say he was Richmond Police, he stopped and turned back to the officer. (RP 44). The officer told him that he was trespassing; Mr. Tapia said he had no idea that he was trespassing. (RP 44).

Mr. Tapia said the officer told Perez he was under arrest for drinking, however, Perez wanted a breathalyzer because he had not been drinking. (RP 46). As he watched the two struggle, Mr. Tapia pulled out his phone, because he was afraid and wanted to call an adult for help. (RP 46-47).

Mr. Tapia stated he had not seen any no trespassing signs or any signs that indicated school grounds were closed after hours. (RP 45). He also reported that in the past he had walked through school grounds on his way to places numerous times, all without incident. (RP 49).

### MOTION TO DISMISS

Mr. Tapia made a motion to dismiss, as there were no material facts to indicate a trespass had occurred; there was no

signage indicating the grounds were closed to the public. (RP 36).

The court denied the motion. (RP 38-39).

### COURT'S ORAL RULING ON GUILT

In its oral ruling, the court stated,

“I don't think it's required that there be any particular trespassing sign present for individual to be guilty of trespass. Nor do I believe that the individual has to necessarily individually know that they – their presence there is unlawful. If they knowingly went on that property, and I think at that point the court looks at the circumstances to determine whether or not a reasonable person would believe that they were legally or illegally on that particular property.

And I note there's testimony in the record from Mr. Tapia that he's seen people walk through there many times, and that he in fact himself has walked through that campus and other school campuses without incident previously. I don't think that negates the fact that under these circumstances, ten o'clock at night on a Sunday evening, after dark, no school events going on, with ten to 15 feet of the school building, remaining there—does not appear they were simply passing through the area, and a reasonable person would conclude that they were not lawfully remaining in that area.” (RP 68).

The court went on:

“...I think regardless of whether or not the state had proved the criminal trespass, ...when Perez was being arrested for the – being in possession or consumption of alcohol and became

combative, and the officer was controlling that situation, ..and instructed Mr. Tapia to back up and to not use his phone. There was a safety issue. I think that was a reasonable request from the officer. ... Mr. Tapia...does admit that he stated “Fuck that” and continued to use his phone, that he would call whoever he wanted to. At that point I think Mr. Tapia was obstructing the officer from making an arrest on Mr. Perez, and controlling the situation...” RP 69).

“Once he was told that he was under arrest, then he tried to -  
- then he spun out of the coat, and then later, after being directed to remain on the ground, that he did at a certain point get up and placed the officer in what he believed to be a (inaudible) position, and the officer had to at that point -- direct his taser towards Mr. Tapia, as Mr. Tapia was not following his verbal commands, at that point Mr. Tapia also was resisting the lawful attempt to place him under arrest. So the court is going to find Mr. Tapia guilty of the crime of criminal -- excuse me -- of resisting arrest as well.” (RP 69).

The court entered the following written findings of fact:

1. The court found that based on the testimony the events occurred in Richland, Washington.
2. The court found that the Respondent and co-Respondent were on Chief Joseph Middle School premises on February 9, 2014. The Respondent

was within ten to fifteen feet of the school building. The ninth of February was a Sunday; it was approximately 10 pm, dark outside, and there were no events taking place at the school.

3. The court found that Officer Brazeau of Richland police responded to a report of the Respondent and co-respondent being on Chief Joseph School property. Officer Brazeau made contact with the Respondent and co-Respondent.
4. The court found Officer Brazeau attempted to arrest the co-respondent, Mr. Perez, for MIP/C after observing signs of intoxication. Mr. Perez became combative with Officer Brazeau. The Respondent was given commands by Officer Brazeau to back up and not use his phone. The respondent continued to use his phone and did not listen to the reasonable requests of Officer Brazeau.
5. The court found the Respondent was told he was under arrest. Officer Brazeau attempted to place the respondent in handcuffs and the respondent spun out of his coat. The respondent stood up after he was directed to remain on the ground.

And the following Conclusion of Law:

1. The court takes judicial notice that the events occurring in Richland, Washington occurred in Benton County.

2. It is not required that any particular no-trespass signage be present for a person to be guilty of criminal trespass.
3. The respondent knowingly entered the premise of Chief Joseph Middle School.
4. There was probable cause to arrest the respondent for the crime of obstruction.
5. The court finds beyond a reasonable doubt that the respondent is guilty of criminal trespass in the 2<sup>nd</sup> degree and resisting arrest.

(CP 33-36). Mr. Tapia makes this timely appeal. (CP 24).

### III. Argument

#### A. THE EVIDENCE WAS INSUFFICIENT TO FIND MR. TAPIA GUILTY OF CRIMINAL TRESPASS SECOND DEGREE.

Due process under the Fourteenth Amendment to the United States Constitution requires the State to prove all necessary elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, in viewing it in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 618 P.2d 628 (1980). In such a challenge, the defendant admits the

truth of the State's evidence and all reasonable inferences that can reasonable be drawn from it. *State v. Colquitt*, 133 Wn.App. 789, 137 P.3d 892 (2006).

#### 1. Standard of Review

Substantial evidence must support the trial court's findings after an adjudication of guilt in a juvenile proceeding. *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). The court's findings must support the conclusions of law. *State v. Avila*, 102 Wn.App. 882, 895-96, 10 P.3d 486 (2000), *rev. denied*, 143 Wn.2d 1009 (2001). Conclusions of law are reviewed de novo. *State v. Martin*, 137 Wn.2d 774, 788, 975 P.2d 1020 (1999).

#### 2. The State's Evidence Was Insufficient To Sustain An Adjudication of Guilt For Criminal Trespass.

Where there is a statutory defense that negates an element of the crime, the State bears the constitutional burden to prove the absence of the defense beyond a reasonable doubt. *State v. R.H.*, 86 Wn.App. 807, 812, 939 P.2d 217 (1997).

Under RCW 9A.52.080(1), the State was required prove not only that Mr. Tapia knowingly entered or remained on the property, but that he was not licensed, invited, or privileged to enter or remain. *State v. R.H.*, at, 810; *State v. Kutch*, 90 Wn.App. 244,

246-47, 951 P.2d 1139 (1998). Here, the trial court applied the wrong legal standard: citing a late hour, the fact that the school was not hosting an event, and that the teens “were within close proximity” to the school building to conclude Mr. Tapia was trespassing. However, none of those facts support the legal conclusion.

RCW 9A.52.090(2), a statutory defense to criminal trespass, provides that it is a defense that the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to remaining on the premises. Here, the State did not, nor could it prove beyond a reasonable doubt that Mr. Tapia did something unlawful that would overcome the statutory defense. The property in question was the grounds of a public middle school. Mr. Tapia and his friend were literally walking through the grounds to get to another destination. The State did not overcome this statutory defense to criminal trespass.

Additionally, the court wrongly concluded both in its oral and written rulings that “It is not required that any particular no-trespass signage be present for a person to be guilty of criminal trespass.” (CP 35; RP 68.) Under RCW 9A.52.010(5) “A license or privilege to enter or remain on improved and apparently used land that **is**

**open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner.”** (Emphasis added).

Thus, it is required that signage be posted in a conspicuous manner detailing prohibited/allowed times of entry. The school grounds here were open to the public at particular times: the area was unfenced, and neither Mr. Tapia nor the police officer saw or knew of any signs prohibiting entry to the outside property of the school. Mr. Tapia’s presence on the school property was not unlawful.

Because Mr. Tapia complied with all lawful conditions for remaining on the property, the area was unfenced, and there was no signage prohibiting entry, the State did not prove the absence of the statutory defenses beyond a reasonable doubt. The State has not met its constitutional burden and this adjudication should be reversed and dismissed with prejudice. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

B. THE EVIDENCE WAS INSUFFICIENT TO FIND MR. TAPIA GUILTY OF RESISTING ARREST.

a. The Trial Court Erred When It Concluded There Was Probable Cause to Arrest Mr. Tapia for the Crime of Obstruction.

The court entered conclusion of law No. 4: “There was probable cause to arrest the respondent for the crime of obstruction. (CP 35). A person commits the crime of obstruction if he willfully hinders, delays, or obstructs a law enforcement officer in the discharge of the officer’s official powers or duties. RCW 9A.76.020. Willfully means to purposefully act with knowledge that his action will hinder or delay or obstruct the officer in the discharge of official duties. *State v. Ware*, 111 Wn.App. 738 743, 46 P.3d 280 (2002)(internal citations omitted). The essential elements require action or inaction that *in fact* hinders, delays or obstructs, the officer. *State v. Contreras*, 92 Wn.App. 307, 315-16, 966 P.2d 915 (1998). (emphasis added). Probable cause to arrest exists when an officer has reasonable grounds to believe a suspect has committed or is committing a crime due to the surrounding circumstances. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004).

Here, the facts were that Officer Brazeau was arresting Mr. Perez, for purportedly being a minor in possession/consumption of

alcohol. As the officer took Mr. Perez down, Mr. Tapia, fearful of what could happen to him, attempted to use his cell phone to call an adult for help.

In *Ware*, officers responded to a disturbance report at a residence. *Ware*, 111 Wn.App. at 739. Once there, they told the teens to leave the premises. One of her friends refused to leave. Officers attempted to arrest her due to her threats of assault on another. *Ware* charged at them and demanded release of her friend. She was ordered to step back, but then reapproached the officers. She was again ordered back several more times and continued to approach officers. *Ware*, 111 Wn.App. at 740. In concluding she obstructed officers, the reviewing Court stated “It is readily apparent Ms. Ware knew she was confronting officers discharging their official duties and that her intervention would hinder or delay them in carrying out those duties. *Id.* at 744.

By contrast, here the officer escalated what could have been a cordial encounter: he told Mr. Tapia, who was an arms length away, to not use the phone, knocked it out of his hand and told him he was under arrest. ( for obstruction). (RP 21). The officer’s belief that he was hindered from making the arrest hinged on the notion that the scene was not under his control. However,

the facts are that Mr. Tapia did not interfere with Perez's arrest. He did not touch or distract the officer, nor did he verbally or physically escalate the situation. See *State v. Lalonde*, 35 Wn.App. 54, 61, 665 P.2d 421 (1983). Mr. Tapia's act of using the cell phone to call an adult for help did hinder or delay the arrest that was occurring. Absent are the facts and circumstances that would lead a reasonable officer to believe a crime, obstruction, had been committed. The court's legal conclusion that there was probable cause to arrest for obstruction is not supported by the facts in this case. His arrest for obstruction was unlawful.

b. The Trial Court Erred When It Concluded that Mr. Tapia Was Guilty of Resisting Arrest.

A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him. The Courts have held that the use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable. *State v. Goree*, 36 Wn.App. 205, 209, 673 P.2d 194 (1983)(rev. denied, 101 Wn.2d 1003 (1984)). However, there is a distinction in law between resisting arrest and simply being recalcitrant. *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986)((*overruled on other grounds*)).

In *Hornaday*, a juvenile appealed his conviction for resisting arrest. The teen was arrested for illegal consumption of alcohol. He refused to enter the backseat of the police car and had to be forcibly placed there. *Id.* at 121. The Court concluded the juvenile's arrest was unlawful because the crime requires that the arrest itself be lawful. Moreover, the Court noted that there was no evidence the youth used any force to resist, but only that he was recalcitrant.

Here, without conceding that there was probable cause to arrest Mr. Tapia for obstruction, or that his arrest was lawful, his only "resistance" was passive: he spun out of his jacket. As he stood, the officer twice struck him on the outside of his thigh to bring him to his knees and push his face into the snow. Mr. Tapia did not retaliate with any use of force to resist. (RP 33).

In *McCrorey*, the Court found that although the defendant was uncooperative in allowing officers to handcuff him, he did not use force that was unreasonably aggressive or disproportionate. *State v. McCrorey*, 70 Wn.App. 103, 115, 851 P.2d 1234 (1993)(overruled on other grounds). Likewise, Mr. Tapia's reluctance to be arrested was not forceful, unreasonably

aggressive or disproportionate to the situation. This charge should be reversed and dismissed.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Tapia respectfully asks this Court to reverse all charges and dismiss with prejudice.

Respectfully submitted this 29<sup>th</sup> day of December 2014.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on DECEMBER 29, 2014, I served by USPS, first class, postage prepaid a true and correct copy of the Brief of Appellant to:

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