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NO. 35723-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

KALEN DUNLAP,

Appellant.

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

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's conviction for resisting arrest.

2. The \$200 court cost fee and \$100 booking fee should be stricken from the judgment and sentence.

Issues Pertaining to Assignments of Error

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. To prove the crime of resisting arrest, the State must prove beyond a reasonable doubt that the accused intentionally prevented or attempted to prevent a peace officer from lawfully arresting him. RCW 9A.76.040. As the State acknowledged, the charge was based on appellant fleeing the scene, not any physical confrontation with the arresting officer. Appellant was not informed he was under arrest at the point in which he was told to stop running. Is reversal required where the State presented insufficient evidence that the appellant intentionally resisted arrest, as distinguished from detention short of arrest?

2. Under the Supreme Court's recent decision in State v. Ramirez,¹ must the \$200 court cost fee and \$100 booking fee be stricken?

¹ State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714, 2018 WL 4499761 (September 20, 2018).

B. STATEMENT OF THE CASE

1. Procedural History.

The Kittitas County prosecutor charged appellant, Kalen Dunlap by information with one count each of second degree assault and resisting arrest for an incident alleged to have occurred on September 23, 2016. CP 1-2.

A jury found Dunlap guilty of resisting arrest. CP 62; RP² 449-51. A mistrial was declared as to the second degree assault charge after the jury was unable to reach a verdict on that count. CP 63; RP 448, 453-54.

After the mistrial, the State refiled the assault charges against Dunlap. Dunlap subsequently waived his right to a jury trial. CP 73. Dunlap was found guilty of fourth degree assault following a bench trial. The trial court found the State had failed to prove that Dunlap was guilty of second degree assault. CP 74-82; RP 739.

Dunlap was sentenced to 364 days in jail with 334 days suspended for the fourth degree assault conviction. He was sentenced to 90 days in jail with 60 day suspended for the resisting arrest conviction. 15 days of confinement was converted to 120 hours of community service. CP 83-87.

² This brief refers to the consecutively paginated verbatim report of proceedings from April 11, 12, 13, 14, 2017; November 7, 8; and December 4, 2017 as "RP".

Dunlap was also ordered to pay a \$200 court cost fee and \$100 booking fee. CP 84. Following entry of judgment and sentence, defense counsel moved for an order of indigency because Dunlap fell below the poverty guidelines under RCW 10.101.010 and federal law. CP 89-92. The trial court found Dunlap to be indigent and lacking sufficient funds to prosecute an appeal. CP 93-94.

Dunlap timely appeals. CP 95-110.

2. Trial Testimony.³

In the fall of 2016 Dunlap was enrolled as a full time student at Central Washington University. On the evening of September 21, Dunlap and his cousin, Rylon Kolb, decided to go out to Ellensburg area bars to help a celebrate a friend's 21st birthday. RP 653-54, 686.

The group of friends began the night by meeting at a friend's apartment. Dunlap did not have anything to drink at the apartment. The group then moved to a bar where Dunlap also did not have anything to drink. RP 654-55. Dunlap had one shot of Fireball whiskey at the second bar stop. RP 656. At the third bar stop Dunlap had one glass of beer from the pitcher that his friend received for free for his birthday. RP 656-57.

³ The facts set forth herein are taken from testimony presented at both trials. Facts relevant to the resisting arrest conviction are taken from the jury trial, whereas the facts relevant to the fourth degree assault conviction are taken from the bench trial.

The fourth and final stop of the night was a bar called Club 301. RP 657. Dunlap was the first of the group to get inside Club 301 because of the security line. Once inside, Dunlap headed to the bar to get a drink. RP 658.

At the bar Dunlap ran into Ben Miles. RP 558-59, 577-79. At the time Miles was incredibly intoxicated, having a blood alcohol content (BAC) of .308. RP 557, 562, 594, 663. Miles had also smoked marijuana and taken non-prescribed Adderall earlier in the day. RP 557-58, 562-63, 576, 590, 609-10. Miles had been kicked out of at least one bar earlier that same evening. RP 575, 589.

Dunlap had never met or talked with Miles. But Dunlap knew Miles was a friend of his cousin's friend so he said hello. RP 577-79, 659-61. Miles responded rudely and asked who Dunlap was. RP 557, 662-63. Dunlap explained that Miles then started an argument prompting the bar owner to approach them and ask them to leave. RP 663-64, 683-84. Dunlap denied putting his hands on Miles inside the bar. RP

Dunlap exited the bar first, followed by Miles. RP 664, 689-90. At least one witness confirmed Dunlap exited the bar first. RP 631. When Dunlap turned around after exiting the bar, Miles punched him the face. RP 582, 596, 665, 691. Dunlap fell to his knees and tried to grab Miles.

RP 666, 668-69. Dunlap had recently had pins removed to treat his broken hand and could not form a fist with his hand. RP 666-68.

Kolb tried to pull Miles off Dunlap but was unsuccessful because Miles grabbed Dunlap's sweatshirt at the same time, causing the sweatshirt to rip. RP 669-71, 692-93. The bar owner also tried to separate Miles and Dunlap. RP 669-70.

Several people outside the bar witnessed the incident which lasted no more than one minute. 635, 641. Dunlap kicked Miles in the head to get free. RP 671-72, 677-79, 694. Miles was unconscious after the kick. RP 632-33, 637-38, 644-45. Some witnesses testified that Miles continued to be kicked after losing consciousness. RP 645. After Miles went limp, Kolb and Dunlap took off running because they were scared. RP 671-73, 677-79, 694, 698.

Ellensburg police officer, Eric Holmes happened to be driving by Club 301 at the time of the incident. RP 489. Holmes saw Miles lying on the ground and two people kicking him in the torso and head. RP 489-92. Holmes testified that Kolb kicked Miles in the torso two or three times. Miles head whipped backwards when he saw Dunlap kick him in the face. RP 492, 503, 505, 508, 512. Holmes did not witness the beginning of the incident and could not say what caused it. RP 502-03, 508.

When Holmes activated the lights of his patrol car Kolb and Dunlap ran away. RP 246. Holmes "yelled 'hey', and chased after Mr. Dunlap and Mr. Kolb." RP 253; Exs. 4, 11. Holmes chased them for a short distance but eventually gave up and relayed their position over the radio. RP 254.

Ellensburg police officer Clifford Clayton heard Holmes radio dispatch and tried to locate Dunlap and Kolb. RP 225-27. Clayton found Dunlap and Kolb running in the middle of the street. RP 226-27. When they saw Clayton's patrol car they split up. RP 230. Clayton continued to follow Dunlap and told him to stop running. RP 228-30; Exs. 2, 4, 11. Dunlap eventually stopped and was cooperative with Holmes demands. RP 230-31. Kolb was contacted by Ellensburg police officer Brett Koss. RP 158-62, 197.

Miles was conscious and awake by the time he arrived at the hospital by ambulance. RP 495, 552, 585. Miles remained highly intoxicated and belligerent at the hospital and refused to provide police with a statement. 409, 496, 507, 511, 528, 557, 562, 588. Miles did tell police that he wanted to "fuck those guys up". RP 614.

Miles had facial bruising and abrasions on his back and torso. RP 553, 559. A CT scan showed fractures to Miles' right facial bone including his orbital socket. RP 555. There was no evidence of any visual

impairment as a result of the injury. RP 560. Miles was discharged from the hospital about four hours after his arrival. RP 567.

Miles testified that he had surgery to correct the injuries suffered during the incident, including the placement of three metal plates and 12 mental screws in his cheekbone. RP 586-87. Miles maintained that he still suffered from some sinus issues as a result of the injury. RP 586-87.

Miles account of the confrontation at the bar differed from Dunlap's. Miles testified that Dunlap approached him at the bar and threatened to beat him up for treating his ex-girlfriend poorly. RP 578-79. Miles responded that he had been at his ex-girlfriend's house a week prior, prompting Dunlap to shove him into the bar. RP 579-80, 618-21.

When Miles asked Dunlap if he was really going to beat him up in front of all the people inside the bar, Dunlap responded, "let's go outside". RP 580-81, 593. Miles agreed to accompany Dunlap outside because the bartender looked uncomfortable with the situation. Miles was shoved in the back after he exited the bar. RP 581. He assumed it was Dunlap who pushed him. RP 581, 594. In response, Miles punched Dunlap in the face. RP 582, 596.

Miles and Dunlap went "blow-for-blow a couple times each" before Miles was struck in the head by Kolb and fell to the ground. RP

582-84, 597, 601-04, 613. Miles was then kicked in the head and torso and eventually lost consciousness. RP 584-85, 601-02.

Dunlap never punched Miles but acknowledged that he told Clayton that he had because "at the time it sounded better than a kick." RP 523, 528-29, 672-74, 681.

3. Motion for Relief from Judgement.

At trial, the State acknowledged that the resisting arrest charge was based on Dunlap's running away from the scene and that "there wasn't anything physical." RP 277, 411.

Following the jury trial, Dunlap moved for relief from judgment of the resisting arrest conviction under CrR 7.8, arguing the State failed to present sufficient evidence that officers had probable cause to arrest him for assault. CP 64-71. Dunlap also argued that resisting arrest was not the correct criminal charge based on the facts of the case. Rather, Dunlap argued "[t]he State should have charged Obstructing a Law Enforcement Officer under RCW 9A.76.020." CP 67, 71.

In response, the State maintained that Dunlop committed the crime of resisting arrest when he ran from Holmes. The State argued that Clayton could rely on the information provided by Holmes to establish probable cause under the fellow officer rule. The State further contended that Dunlap could have been charged with a separate count of Obstructing a Law

Enforcement Officer for continuing to run from Clayton. Supp. CP ____ (sub no. 48, Amended Response to Motion for Relief from Judgement, filed 5/4/17).

The trial court denied Dunlap's motion to set aside the resisting arrest verdict. CP 88.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DUNLAP COMMITTED THE CRIME OF RESISTING ARREST.

Insufficient evidence supports the conviction for resisting arrest. The State failed to present evidence to support that Dunlap resisted arrest, versus some other form of detention by the police officers. The conviction must be reversed and dismissed with prejudice.

a. Due process requires the State to prove each element of the charged crime.

Due process under the state and federal constitutions requires that the State prove each element of a charged crime. “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); accord U.S. CONST. amend. XIV; CONST. art. I, § 3.

[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); accord State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Sufficiency of the evidence is a question of constitutional law reviewed de novo by this Court. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The critical inquiry in reviewing sufficiency of the evidence is to “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting Jackson, 443 U.S. at 318). This inquiry disturbs the discretion of the fact finder only “to the extent necessary to guarantee the fundamental protection of due process of law.” Jackson, 443 U.S. at 319. The inquiry focuses on “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. (emphasis in original).

This Court’s review of whether the evidence is adequate to allow “any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt” guards against a conviction where no rational

trier of fact could have found find guilt. Id. Where sufficient evidence does not support a conviction, such a conviction “cannot constitutionally stand.” Id. at 317-18.

If the evidence is insufficient to support a conviction, this Court reverses and remands for dismissal of the charge with prejudice. State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002).

- b. The State must prove an accused intentionally resisted arrest versus some other lesser form of detention.

To prove a charge of resisting arrest, the State must prove the accused person intentionally resisted arrest, versus intentionally resisted some other form of detention. In this respect, the State failed to meet its burden in this case.

RCW 9A.76.040 provides that “[a] person is guilty of resisting arrest if he or she intentionally⁴ prevents or attempts to prevent a peace officer from lawfully arresting him or her.” Accord CP 55 (Instruction 26, to-convict instruction corresponding to resisting arrest charge); 11A WASH. PRAC.: PATTERN JURY INSTR: CRIM. (WPIC) 120.06 (4th Ed.).

“An arrest is lawful if the arresting officer had probable cause to believe that the person arrested had committed” a felony. CP 53

⁴ “A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); see CP 45 (Instruction 14).

(Instruction 24); WPIC 120.07 (Lawful Arrest—Definition). "Probable cause"

means facts that would cause a reasonably cautious officer to believe that the person had committed that crime. In determining whether the facts known to the officer justified this belief, [the jury] may take into account the officer's experience and expertise.

CP 53 (Instruction 24); WPIC 120.07.

"One may resist arrest by various types of conduct." State v. Williams, 29 Wn. App. 86, 92, 627 P.2d 581 (1981). Force, for example, is not required. State v. Calvin, 176 Wn. App. 1, 13, 316 P.3d 496 (2013), review granted in part on other grounds, cause remanded, 183 Wn.2d 1013, 353 P.3d 640 (2015). But, to intentionally resist an arrest, the arrested person must know he is under arrest. Id.

Moreover, "the resisting arrest statute does not . . . purport to address detentions or other seizures short of an arrest." State v. D.E.D., 200 Wn. App. 484, 496, 402 P.3d 851 (2017) (reversing obstruction conviction for insufficient evidence). "Other statutes impose different duties that may arise in this situation such as the duty to not assault or threaten the officer." Id. (citing RCW 9A.36.031 (third degree assault); RCW 9A.36.041 (fourth degree assault); RCW 9A.46.020 (harassment)).

Title 9A RCW does not define the term "arrest." "Washington courts have held that 'a person is placed under arrest when he is deprived

of his liberty by an officer who intends to arrest him.” State v. Champion, 28 Wn. App. 281, 286, 622 P.2d 905, 908 (1981) (quoting State v. Sullivan, 65 Wn.2d 47, 51, 395 P.2d 745 (1964); Seattle v. Sage, 11 Wn. App. 481, 485, 523 P.2d 942 (1974)). A necessary first step in determining whether there has been an “arrest” is to ask whether individual was free to leave presence of police; the second step is likelihood that present confinement will be accompanied by future interference with individual’s freedom of movement. State v. Rupe, 101 Wn.2d 664, 683-84, 683 P.2d 571 (1984). In general, an arrest occurs when an officer manifests intent to detain a suspect in custody and seizes him or her in such a manner as to cause a reasonable person in the circumstances to believe he or she is “under a custodial arrest” and “not free to leave.” State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004).

It is well established that detention accompanied by “probable cause” to arrest, versus “actual custodial arrest,” are distinct concepts. See O’Neill, 148 Wn.2d at 585 (“[P]robable cause for a custodial arrest is not enough. There must be an actual custodial arrest to provide the ‘authority’ of law justifying a warrantless search incident to arrest under article I, section 7.”). “Something short of placing a person under arrest may constitute a seizure within the meaning of the Fourth Amendment.”

Lesnick, 84 Wn.2d at 942-43 (citing Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

Whether an arrest has occurred ““depends on all of the surrounding circumstances, including the extent that freedom of movement is curtailed and the degree and type of force or authority used to effectuate the stop.”” State v. Thornton, 41 Wn. App. 506, 514, 705 P.2d 271 (1985) (quoting United States v. Patterson, 648 F.2d 625, 632 (9th Cir.1981)).

Based on the foregoing, the State was required to prove that Dunlap intentionally prevented or attempted to prevent a police officer from *arresting* him. An intentional attempt to prevent a detention short of arrest, for example, does not fall under the plain language of the statute.

c. The State failed to prove Dunlap resisted arrest.

The State failed to prove Dunlap intentionally resisted arrest rather than detention. Two cases dealing with evidentiary sufficiency are instructive.

In State v. Bandy, 164 Wash. 216, 2 P.2d 748 (1931), Bandy was convicted of interfering with a public officer in the performance of his duties after she attempted to impede the arrest of her father. She appealed, and the Supreme Court found insufficient evidence to support the conviction. Id. at 217-19. As the Court noted, there was no evidence the arresting officers displayed badges. There was, moreover, no other reason

for anyone in the area to understand that Bandy's father was being arrested by federal prohibition agents, rather than manhandled by ruffians. The Court reversed the conviction. Id. at 219-21.

The Court noted that "it is essential that [the] accused have knowledge that the person obstructed is an officer" and "it is incumbent on an officer, seeking to make an arrest, to disclose his official character, if not known to the offender." Id. at 219.

Here, there was no question that Dunlap knew Holmes and Clayton were police officers. But Bandy nonetheless applies by analogy—here, it was no less essential that that officers disclose to Dunlap that he was being arrested, rather than simply detained. Under the Bandy's Court's rationale, Dunlap's conviction must be reversed for insufficient evidence.

The second case is Calvin, 176 Wn. App. 1. Calvin challenged his conviction for resisting arrest by a park ranger, in part based on the argument that there was insufficient evidence that Calvin knew he was being arrested. Id. at 12. Calvin argued, in part, that the ranger never advised him that he was under arrest. Id. at 13.

There, the park ranger sought to arrest Calvin for assault. The ranger yelled, "Police, get on the ground," grabbed Calvin's left arm and took him to the ground. He was able to cuff Calvin's left wrist, but Calvin

struggled for about one minute before the ranger was able to get the second cuff on. Id. at 8-9.

Division One acknowledged that in other cases, defendants were explicitly told they were under arrest. Id. (citing State v. Ware, 111 Wn. App. 738, 740-41, 46 P.3d 280 (2002) (“Officer Ferguson approached Ms. Ware and told her she was under arrest for obstructing”); State v. Simmons, 35 Wn. App. 421, 422, 667 P.2d 133 (1983) (defendant was told he was under arrest pursuant to warrant)).

But, rejecting Calvin’s argument that such a warning was *required*, this Court observed that “[a] rational trier of fact could find that when a law enforcement officer identified himself as ‘police,’ told Calvin to get on the ground, and started to place handcuffs on him, Calvin knew he was under arrest.” Calvin, 176 Wn. App. at 13. Thus, Calvin stands for the proposition that while an officer need not formally tell a person that he is under arrest, there nonetheless must be sufficient evidence that the arrested person knew he was under arrest. Id.

A cursory review of Calvin might suggest that this Court could find that Dunlap too should have known, that he was being arrested. Like the circumstances in Calvin, the police officers in this case had identified themselves as police and told Dunlap to stop. But a close reading of Calvin reveals it is distinguishable on its facts.

In Calvin, there was no indication that the behavior which gave rise to the resisting arrest charge occurred until after the ranger already had Calvin on the ground and was attempting to handcuff him. This allowed Division One to infer that Calvin would have known he was being placed under arrest. Here in contrast, Holmes only yelled "hey" at Dunlap as he started running. RP 253; Exs. 4, 11. Dunlap was never told he was being detained, much less arrested, when Holmes yelled "hey".

Similarly, Dunlap was only told to "stop" by Clayton who was following Dunlap in his car. RP 228-30; Exs. 2, 4, 11. There was likewise no warning to Dunlap that he was under arrest at that point. Once Dunlap did stop, he cooperated fully with Clayton's demands to get on the ground, and willfully acquiesced to being handcuffed. Under Calvin, it was only at the point at which Dunlap was ordered to the ground and handcuffed that he would have known he was under arrest. Unlike Calvin however, by the point Dunlap was handcuffed, the activity which led to the State filing resisting arrest charges had already ceased. RP 277, 411.

Unlike Calvin, in the absence of some explicit warning that he was under arrest, there was insufficient evidence that Dunlap knew or should have known, that he was being arrested at the point of being told "hey" or to "stop" versus subject to some lesser form of detention.

- d. Dismissal with prejudice is the required remedy in this case; policy considerations do not dictate a different result.

As stated, the State presented insufficient evidence that Dunlap intentionally resisted an arrest, rather than some lesser form of detention. Thus, his conviction for resisting arrest should be reversed and dismissed. Rodgers, 146 Wn.2d at 60.

As a final matter, the resisting arrest statute is not the only criminal statute that governs an individual's behavior when the individual and the police find themselves at loggerheads. Limiting the resisting arrest statute to actual arrests will not unleash a maelstrom of lawlessness. Compare D.E.D., 200 Wn. App. at 496 ("Other statutes impose different duties that may arise in this situation such as the duty to not assault or threaten the officer.") with State v. Little, 116 Wn.2d 488, 496-98, 806 P.2d 749 (1991) (recognizing that flight from the police constitutes obstruction of a public servant in the performance of duties under RCW 9A.76.020); State v. Hudson, 56 Wn. App. 490, 497, 784 P.2d 533 (1990) ("The established rule is that flight constitutes obstructing, hindering, or delaying[.]").

This Court should reject as contrary to the law any similar policy-type arguments on appeal. Reversal and dismissal are required.

2. THE \$200 COURT COST FEE AND \$100 BOOKING FEE MUST BE STRICKEN BASED ON INDIGENCY

The \$200 court costs fee and \$100 booking fee must be stricken from the judgment and sentence because Dunlap is indigent and the recently amended statutes, which prohibit imposition of discretionary costs against indigent defendants, apply to cases pending on appeal.

In State v. Ramirez, the Supreme Court held Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018, applies prospectively to cases currently on appeal. State v. Ramirez, ___ Wn.2d ___, ___ P.3d ___, 2018 WL 4499761 at *6-8 (slip op. filed Sept. 20, 2018). HB 1783 "amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c)." Id. at *6 (citing Laws of 2018, ch. 269, § 6(3)).⁵ Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health

⁵ See RCW 10.01.160(3) ("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)."); see also RCW 9.94A.760(1) (2018) ("The court may not order an offender to pay costs as described in RCW 10.01.160 if the court finds that the offender at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)."); RCW 10.64.015 (2018) ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).").

facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

HB 1783 amends RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. This amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, 2018 WL 4499761 at *8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Dunlap is indigent under RCW 10.101.010(3)(c). CP 126-33. Because HB 1783 applies prospectively to his case, the sentencing court lacked authority to impose the \$200 court cost fee.

The \$100 booking fee must also be stricken due to indigency. This fee has always been considered discretionary. See RCW 70.48.390 (A governing unit *may* require that each person who is booked at a city, county, or regional jail pay a fee based on the jail's actual booking costs or one hundred dollars[.]) (emphasis added). But the current statute amended as part of HB 1783 now outright prohibits imposition of discretionary costs based on indigency. RCW 10.01.160(3). The \$100 booking fee for is therefore unauthorized by statute.

When legal financial obligations are impermissibly imposed, the remedy is to strike them. Ramirez, 2018 WL 4499761 at *8. The court cost fee and booking fee must therefore be stricken from the judgment and sentence.

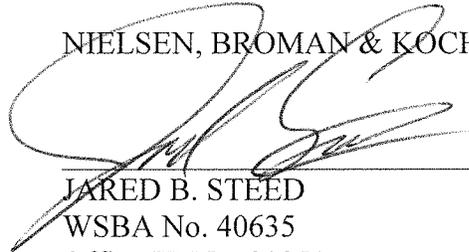
D. CONCLUSION

For the foregoing reasons, the State presented insufficient evidence supporting the conviction for resisting arrest. The remedy is reversal and dismissal with prejudice. The \$200 court cost and \$100 booking fees should also be stricken.

DATED this 31st day of October, 2018.

Respectfully submitted,

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