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Division III
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35723-6-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KALEN WARREN DUNLAP,

Defendant/Appellant

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page No.
I. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. ISSUES PRESENTED.....	1
A. Did the State prove each and every element of the crime of resisting arrest in Appellant Dunlap’s case? Answer: Yes.	
B. Given that the Court failed to make any inquiry about Mr. Dunlap’s ability to pay, may non-mandatory costs be recovered from an indigent defendant? Answer: No.	
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	3
A. The State proved each and every element of the crime of resisting arrest beyond a reasonable doubt.....	3
B. As there was no inquiry at the time of sentencing about Mr. Dunlap’s ability to pay costs, all non- discretionary costs should be stricken.....	6
V. CONCLUSION.....	6

TABLE OF AUTHORITIES

Page No.

Cases

State v. Calvin, 176 Wn.App. 1, 316 P.3d 496 (2013) review granted in part, cause remanded 183 Wn.2d 1013, 353 P.3d 640 (2015).....5

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....6

Other Authorities

RCW 10.76.040.....3

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Appellant Dunlap knew or reasonably should have known that he was going to be placed under arrest when he was observed in the commission of a crime by one officer, and pursued by two officers both of whom told him to stop.
- B. Recent changes in case law leaves the Respondent in a position unable to contest Appellant's second argument.

II. ISSUES PRESENTED

- A. Did the State prove each and every element of the crime of resisting arrest in Appellant Dunlap's case?
Answer: Yes.
- B. May non-mandatory costs be recovered from an indigent defendant, when the Court at sentencing makes no inquiry into an offender's ability to pay?
Answer: No.

III. STATEMENT OF THE CASE¹

Ellensburg police officer Derrick Holmes was on duty on September 23, 2016, at approximately 10:15 P.M. when he noticed a commotion outside the Club 301. RP 243, 251. Officer Holmes could see the victim, Ben Miles, laying on the sidewalk just south of the Club 301 with two individuals standing over him. RP 244, 245. Mr. Miles did not appear to be moving. RP 244. Officer Holmes

¹ As did Appellant, Respondent's brief will also refer to the consecutively paginated verbatim report of proceedings from April 11, 12, 13, 14, 2017, and November 7, 8, and December 4, 2017 as RP.

observed the person to the left of Mr. Miles kicking Mr. Miles in the legs and torso. RP 244, 245. He observed the person to the right of Mr. Miles (later identified as Mr. Dunlap), “soccer kick” Mr. Miles in the head. *Id.* According to Officer Holmes, when Mr. Dunlap kicked him, Mr. Miles’ head “whipped back very violently and then back down on the pavement in the position it was in. He (Mr. Miles) didn’t appear to be moving.” RP 246. Officer Holmes activated his patrol car lights which in turn activated the car video 30 seconds earlier. *Id.* As Officer Holmes pulled up to the sidewalk where the events were occurring, the person on the left ran away, while Mr. Dunlap kicked Mr. Miles one more time in the stomach and then joined the other man in fleeing from the scene. *Id.* Officer Holmes testified that he yelled “hey” and then began to chase the two men. RP 253. Realizing that there were two of them, that he was unable to catch them, that he had left his running patrol car, and that there was an unconscious victim on the sidewalk to attend to, Officer Holmes relayed that the two men were westbound on 4th to dispatch and returned to attend to Mr. Miles. RP 254.

Corporal Clayton of the Ellensburg Police Department was nearby when the Officer Holmes’s call was broadcast. RP 225, 226. Corporal Clayton went north on Main Street to try to locate the

two suspects and observed them in the middle of the street on 4th next to the Palace. RP 226, 227. The two men split up, and Corporal Clayton pursued the individual later identified as Kalen Dunlap. RP 227, 228. Corporal Clayton, who was driving a patrol car, with its siren activated, yelled at Mr. Dunlap, “Stop, police, right there, stop.” RP 227. Mr. Dunlap did not stop, and Corporal Clayton again yelled, “Stop right there.” The audio of Corporal Clayton’s patrol car can be heard as Corporal Clayton says “he won’t stop for me.” RP 228. Corporal Clayton then yelled, “Stop right there. Put your hands up. Get on the ground.” *Id.* Finally, at the 300 block of North Water, Mr. Dunlap complied. *Id.*

Corporal Clayton took Mr. Dunlap into custody at the 300 block of North Water. RP 256. Later, Officer Holmes was able to identify Mr. Dunlap as the person he had observed kicking Mr. Miles in the head and stomach outside the Club 301. RP 257.

IV. ARGUMENT

A. The State proved each and every element of the crime of resisting arrest beyond a reasonable doubt.

(1) A person is guilty of resisting arrest if he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her.

(2) Resisting arrest is a misdemeanor. RCW 9A.76.040

When Officer Holmes arrived at the Club 301, he saw Mr. Dunlap kick an apparently unconscious Ben Miles in the head. After he activated his patrol car lights, Mr. Dunlap again kicked Mr. Miles in the presence of the officer, this time in the stomach. Officer Holmes exited his patrol car and said “hey” as he began to give chase. In response, Mr. Dunlap and his co-defendant ran from the scene and then split up at 4th near the Palace as observed by Corporal Clayton. Corporal Clayton drove a patrol car after Mr. Dunlap and repeatedly told him to stop, a command Mr. Dunlap ignored more than once. Mr. Dunlap finally acceded to the officer’s commands, probably realizing that he could not outrun a patrol car.

Appellant downplays this series of events by representing that Corporal Clayton only told him to “stop.” BA 6, 17. Instead, as related above, Corporal Clayton who was driving a patrol car, with its siren activated, and following Mr. Dunlap yelled at him, “Stop, police, right there, stop.” RP 227. Mr. Dunlap did not stop, and Corporal Clayton again yelled, “Stop right there.” The audio of Corporal Clayton’s patrol car can be heard as Corporal Clayton says “he won’t stop for me.” RP 228. Corporal Clayton then yelled, “Stop right there. Put your hands up. Get on the ground.” It was only then that Mr. Dunlap complied.

There is no issue as to whether or not Mr. Dunlap knew that Officer Holmes and Corporal Clayton were law enforcement officers. Each approached him in a patrol vehicle with lights, and in the case of Corporal Clayton, an ongoing siren.

It was not necessary for either officer to explicitly inform Mr. Dunlap that he was under arrest before he prevented or attempted to prevent either officer from arresting him. *State v. Calvin*, 176 Wn.App. 1, 316 P.3d 496 (2013) *review granted in part, cause remanded* 183 Wn.2d 1013, 353 P.3d 640 (2015). An officer need not formally tell an individual that he is under arrest for that person to know that they are under arrest. At the time of this incident, Mr. Dunlap was a college student, who according to his own testimony had had only two to three drinks prior to his assault of Mr. Miles. RP 309, 311-314. The circumstances were such that Mr. Dunlap, as an individual engaged in higher education, and relatively uninfluenced by intoxicating liquor, should have reasonably known that it was both officers' intent to place him under arrest for having assaulted Mr. Miles by kicking him in the head and stomach.

Mr. Dunlap had committed an assault in the presence of the first officer, had run from the scene with his co-defendant, split up from that co-defendant, and then took affirmative steps to prevent Corporal Clayton from lawfully arresting him.

Evidence is sufficient to support a conviction if, after the evidence and all reasonable inferences from it is viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

By fleeing, and by refusing to obey either officer's commands, Mr. Dunlap took intentional, affirmative steps in an effort to prevent either Officer Holmes or Corporal Clayton from arresting him.

B. As there was no inquiry at the time of sentencing about Mr. Dunlap's ability to pay costs, all non-discretionary costs should be stricken.

V. CONCLUSION

A reasonable person in Mr. Dunlap's situation would have known that it was the intent of both Officer Holmes and Corporal Clayton to place him under arrest for his assault of Ben Miles. His fleeing from the scene of the assault and his continued refusal to

comply with the officers' commands are indicative of his intent to resist arrest. For the foregoing reasons, the State respectfully asks that this Court uphold Mr. Dunlap's conviction for resisting arrest, but remand for an adjustment of costs and fees.

Dated this 14th day of February, 2019.

/s/ Carole L. Highland, WSBA
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PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on 14th day of February, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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