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Division III
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NO. 36147-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

FREEDOM TJ MORGANFLASH,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to convict Freedom TJ Morganflash of third degree assault.

2. Instruction 5 fails to include all of the necessary language for the definition of assault. (CP 55; Appendix "A")

3. The trial court erroneously imposed discretionary legal financial obligations (LFOs) at sentencing.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the State establish each and every element of the offense of third degree assault beyond a reasonable doubt?

2. Does the second paragraph of Instruction 5, which omits the phrase "with unlawful force," violate the essential elements rule of Const. art. I, § 22?

3. Does *State v. Ramirez,* 191 Wn.2d 732 (2018), require the removal of all discretionary LFOs from the Judgment and Sentence?

STATEMENT OF THE CASE

Officer Adelsbach of the Asotin Police Department was on duty on February 5, 2018. He was acting as a school resource officer at that time. He heard a call over the radio of a suspicious person in the area. (RP 35, ll. 6-11; ll. 20-22; RP 36, ll. 14-17; RP 36, l. 22 to RP 37, l. 7)

Upon seeing a person who matched the description Officer Adelsbach radioed Deputy Carpenter. He went to assist Deputy Carpenter. He recognized Mr. Morganflash as the person who Deputy Carpenter was contacting. (RP 38, ll. 3-14; RP 39, ll. 5-18)

As Mr. Morganflash approached Officer Adelsbach the officer put up his arm to stop him from walking away. Mr. Morganflash grabbed the officer's shirt collar. Deputy Carpenter then assisted in taking Mr. Morganflash to the ground. (RP 40, l. 23 to RP 41, l. 7; RP 43, ll. 9-16; RP 90, ll. 1-5)

It took twenty (20) to thirty (30) seconds for the officers to handcuff Mr. Morganflash. Mr. Morganflash resisted entering the patrol car. (RP 45, ll. 9-16; RP 46, ll. 5-9; RP 46, l. 15 to RP 47, l. 13)

Mr. Morganflash claimed that he had tripped on a rock and that was the reason that he grabbed the officer's shirt. (RP 120, ll. 8-16)

An Information was filed on February 6, 2018 charging Mr. Morganflash with third degree assault and obstructing a law enforcement officer. (CP 11)

Mr. Morganflash was not arraigned until March 5, 2018. . The attorney initially appointed to represent him determined had a conflict of interest and withdrew on February 26, 2018. No trial date was set at the arraignment. (CP 13; CP 15; Supp. RP 17, ll. 9-25; Supp. RP 22, ll. 18-20)

A scheduling order was entered on March 19, 2018 setting a jury trial for May 3, 2018. Defense counsel did not object to either the late arraignment or the date of the trial setting. (CP 17; Supp. RP 25, ll. 14-19)

On April 16, 2018 the trial date was stricken by the Court. The Court determined another case had priority. (CP 18)

A new scheduling order entered on April 16, 2018 set the trial date for May 29, 2018. Mr. Morganflash did not challenge time-for-trial until May 21, 2018 by means of a *pro se* motion. (CP 19; CP 20; CP 21)

The trial court denied Mr. Morganflash's motion on May 22, 2018. The State filed an Amended Information adding a count of custodial assault. (CP 27; RP 12, l. 16 to RP 13, l. 2; RP 16, ll. 7-10)

A jury determined that Mr. Morganflash was guilty of third degree assault and obstructing a law enforcement officer. A not guilty verdict was entered on the custodial assault charge. (CP 67)

Judgment and Sentence was entered on June 4, 2018. The trial court imposed legal financial obligations totaling $2,590.00. Mr. Morganflash was sentenced to fifty-eight (58) months on the third degree assault and four (4) months, to run consecutively, on obstructing a law enforcement officer. Two (2) months of community custody was imposed. (CP 72)

Mr. Morganflash filed his Notice of Appeal on June 26, 2018. An order of indigency was entered the same date. (CP 82; CP 93)

SUMMARY OF ARGUMENT

The State failed to establish that the contact between Mr. Morganflash and Officer Adelsbach involved unlawful force and/or that it was harmful.

Instruction 5, defining assault, failed to include the phrase "with unlawful force" in the second paragraph. The absence of that language denied both Mr. Morganflash and the

jury of the constitutional requirement to be informed of all of the essential elements of an offense.

The discretionary LFOs imposed by the trial court must be removed from the Judgment and Sentence based upon *State v. Ramirez, supra.*

ARGUMENT

I. SUFFICIENCY OF THE EVIDENCE

When a convicted offender challenges the sufficiency of the evidence on appeal the appropriate inquiry is that set out in *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980):

> '… [T]he relevant question is 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.*' *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

Mr. Morganflash does not deny that he intentionally touched Officer Adelsbach. He grabbed the officer's shirt collar. The question is whether or not grabbing the shirt collar constitutes "unlawful force" and also whether it is "harmful or offensive."

As set out in WPIC 35.50 "a touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive."

> In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such not one unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

Restatement (Second) of Torts; § 19(a); COMMENT to WPIC 35.50

Since Mr. Morganflash is charged with third degree assault of a law enforcement officer, he contends that it would be an "ordinary law enforcement officer who is not unduly sensitive."

It is obvious from the record that no harm was occasioned to Officer Adelsbach.

In addition to the question of whether the touching was offensive, is whether it was done with unlawful force.

Neither Officer Adelsbach nor Deputy Carpenter indicated that Mr. Morganflash used any type of force other than the grabbing of the shirt collar.

II. INSTRUCTION NO. 5

The jury was provided Instruction No. 5 which only included the first two (2) paragraphs of WPIC 35.50. The second paragraph omitted the language "with unlawful force."

As the COMMENT to WPIC 35.50 states:

> The term "assault" is not defined in the criminal code. Courts use common law to define the term. *State v. Krup,* 36 Wn. App. 454, 457, 676 P.2d 507 (1984); *Peasley v. Puget Sound Tug & Barge Co.,* 13 Wn.2d 485, 504, 13 Wn.2d 485, 504, 125 P.2d 681 (1942). Three definitions of assault have been recognized by Washington courts: (1) an attempt, **with unlawful force,** to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm. [Citations omitted.]

The COMMENT continues and addresses the phrase "with unlawful force."

> The phrase "with unlawful force" has been bracketed in all three paragraphs. The definition of "assault" includes the requirement that it be committed with unlawful force. *See, e.g., State v. Hupe,* 50 Wn. App. 277, 748 P.2d 263 (1988), *disapproved on other grounds by State v. Smith,* 159 Wn.2d 778, 154 P.3d 873 (2007) ….

The omission of the phrase "with unlawful force" from the second paragraph of Instruction No. 5 failed to advise the jury of an essential element of the offense of third degree assault. Moreover, there was insufficient evidence presented that Mr. Morganflash intended to inflict any bodily injury upon Officer Adelsbach.

Const. art. I, § 22 provides, in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, … [and] to have a speedy public trial ….

The constitutional requirement carries over to jury instructions:

> Instructions to the jury are sufficient to satisfy the requirement of a fair trial when, taken as a whole, they are readily understood, not misleading to the ordinary mind, and property inform the jury of applicable law. *State v. Rehak,* 67 Wn. App. 157, 165, 834 P.2d 651 (1992).

State v. O'Donnell, 142 Wn. App. 314, 324, 174 P.3d 1205 (2007).

Just as an individual charged with a crime is entitled to know all of the essential elements of that offense, so is the jury in order for it to make an appropriate factual determination under a correct statement of the law.

III. LEGAL FINANCIAL OBLIGATIONS (LFO'S)

Mr. Morganflash recognizes that the trial court would not have known that a decision concerning the $200.00 filing fee and the $100.00 DNA fee entered on September 20, 2018 would declare that legislation prospective.

LAWS OF 2018, ch. 269, § 17 became effective June 7, 2018.

The new law amended RCW 36.18.020(2)(h) which provided for collection of a $200.00 filing fee. The amendment now precludes collecting that fee if a defendant is determined to be indigent. *State v. Ramirez, supra.*

The State failed to indicate whether or not a sample of Mr. Morganflash's DNA was previously collected. Mr. Morganflash has multiple felony offenses in the State of Washington consisting of possession of stolen property first degree (two (2) counts); attempting to elude a pursuing police vehicle (two (2) counts); first degree theft; second degree theft; controlled substance violations (two (2) counts); intimidating a public servant; and third degree assault. Any one of the offenses would have resulted in a DNA sample being taken. (CP 72)

CONCLUSION

The evidence presented at trial fails to establish, beyond a reasonable doubt, that Mr. Morganflash intended to assault Officer Adelsbach. The grabbing of the shirt collar was not done with unlawful force. It was neither harmful nor offensive.

The absence of the phrase "with unlawful force" in the second paragraph of Instruction No. 5 resulted in an incorrect statement of the law. It violated Const. art. I, § 22.

The *Ramirez* decision recognized that LAWS OF 2018, ch. 269, § 18 amended RCW 43.43.7541 which now prohibits collection of a DNA fee if it has previously been collected.

Due to the fact that the trial court determined that Mr. Morganflash was indigent, the $40.00 sheriff's fee; the $1,000.00 fine; and the $750.00 court-appointed attorneys fees should also be removed.

The designated LFOs should be removed from the Judgment and Sentence if his convictions are not reversed and the case dismissed.

DATED this 2nd day of January, 2019.

Respectfully submitted,

s/ Dennis W. Morgan_____

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APPENDIX “A”

INSTRUCTION NO. 5

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

NO. 36147-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. FREEDOM TJ MORGANFLASH, Defendant, Appellant.	)))))))))))))	ASOTIN COUNTY NO. 18 1 00024 8 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 2nd day of January, 2019, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

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