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Court of Appeals  
Division III  
State of Washington  
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No. 36147-1-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

FREEDOM T.J. MORGANFLASH, Appellant.

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**BRIEF OF RESPONDENT**

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**I. SUMMARY OF ISSUES**

1. DID THE STATE PRESENT SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF ASSAULT IN THE THIRD DEGREE?
2. DID THE COURT'S INSTRUCTION CONTAIN ALL THE NECESSARY ELEMENTS FOR ASSAULT IN THE THIRD DEGREE WHERE NO CLAIM OF LAWFUL FORCE WAS RAISED?
3. DID THE COURT ERR IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS?

**II. SUMMARY OF ARGUMENT**

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF ASSAULT IN THE THIRD DEGREE.
2. THE COURT'S INSTRUCTION CONTAINED ALL THE NECESSARY ELEMENTS FOR ASSAULT IN THE THIRD DEGREE WHERE NO CLAIM OF LAWFUL FORCE WAS RAISED.
3. CERTAIN DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN.

### III. STATEMENT OF THE CASE

On February 5, 2018, law enforcement received a call of a possible vehicle prowl and suspicious person in Asotin, Washington. Report of Proceedings (*hereinafter* RP) 36-7, 82. Officer Greg Adelsbach of the Asotin Police Department got into his patrol vehicle and drove around the area . RP 37. Officer Adelsbach was not able to locate the subject and returned to his duties as School Resource Officer for Asotin High School RP 36-7. As he was walking from his patrol car to the school, a citizen pulled up in a pickup and stated that a suspicious male was near the school playground area. RP 37. The citizen indicated a direction of travel and pointed to the area of Looking Glass Park, across the street from the high school. RP 37. Officer Adelsbach looked and could see a person matching the earlier descriptions walking in that area, and moving toward the parking lot and football field. RP 37-8. Officer Adelsbach used his police radio to notify other law enforcement of the location of the suspect. RP 38.

Depute Jesse Carpenter of the Asotin County Sheriff's Office was in the area and responded. RP 38, 83. Upon arrival, Deputy Carpenter located the suspect, whom he recognized as the Appellant, Freedom Morganflash, near the football field fence. RP 83-4. Deputy Carpenter contacted the Appellant and asked him to walk up to his patrol vehicle. RP 87-8. As the Appellant walked ahead of Deputy

Carpenter toward the patrol car, he looked back at Deputy Carpenter and then began to run. RP 88-9.

Officer Adelsbach had walked over to the area and when the Appellant began to run. RP 41, 89. The Appellant ran at Officer Adelsbach who extended his arm to signal him to stop. RP 41, 89-90. There was ample space for the Appellant to avoid Officer Adelsbach, but instead of avoiding him, the Appellant grabbed Officer Adelsbach by the collar and began struggling with the officer. RP 41, 90-1. Deputy Carpenter entered the fray and assisted Officer Adelsbach with subduing the Appellant. RP 44-6, 91-4. After approximately half a minute of struggling with the Appellant on the ground, the two law enforcement officers were finally able to place the Appellant in cuffs. RP 44-5, 94. Trooper Cody Mueller of the Washington State Patrol arrived to assist as well. RP 46, 94.

The Appellant continued to resist and struggle with officers. RP 45-6. The Appellant resisted being placed into the patrol car and two officers had to forcefully place him inside. RP 46-7, 94. He was then transported to the Asotin County Jail where he continued to resist and otherwise be noncompliant. RP 97-102.

The Appellant was ultimately charged with Assault in the Third Degree, Obstructing a Law Enforcement Officer, and Custodial Assault. Clerk's Papers (*hereinafter* CP) 33-35.

At trial, both Officer Adesbach and Deputy Carpenter explained to the jury why it is particularly dangerous for a suspect to get hold of an officer's neck or collar area. RP 42, 91. This is a point of leverage and gives the attacker control over the head and body of the officer during a fight, which could cause the officer to lose his balance. RP 42-3, 91. Once on the ground, an officer is highly vulnerable to physical attack or injury. RP 43. The head and neck area are also particularly vulnerable to injury during an attack by a suspect. RP 91. This close proximity also gives the attacker easy access to the officer's weapons, including his sidearm, increasing the risk of lethality. RP 42. Fortunately, Officer Adelsbach received only minor scrapes in the assault. RP 48.

The Appellant testified that as he was walking up the slope toward the deputy's car, he tripped on a rock and stumbled. RP 120. He grabbed for Officer Adelsbach's arm to catch himself but accidentally grabbed his collar instead. RP 120. The Appellant testified that he then fell to the ground and the officers jumped on top of him. RP 125. The Appellant affirmatively testified that he was not claiming self defense. RP 124.

The court instructed the jury on the law. CP 49-63. Included in these instructions was Instruction 5, which was taken from WPIC 35.50 and read as follows:

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.

CP 55. The Appellant neither objected to any of the State's proposed instructions nor did the defense submit any alternative instructions.<sup>1</sup> RP 114-5. No claim of self defense was made nor was any other form of lawful force instruction submitted or requested by the Defense. RP 114-5.

The jury did not believe the Appellant's claim of accident and, on the strength of the State's evidence, returned guilty verdicts on the charges of Assault in the Third Degree and Obstructing a Law Enforcement Officer. CP 67. The Appellant now appeals claiming insufficient evidence and instructional error.

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<sup>1</sup>It is the local custom in the Asotin County Superior Court that the State prepares and submits a master proposed set of instructions to the court. The defense is then required to object if they believe that an instruction should not be given, submit alternate instructions if they believe certain instructions are not properly worded, or submit instructions that were omitted from the State's set. Otherwise, it is presumed that the instructions submitted by the State are the same instructions that would have been submitted by the defense, had they been required to author a complete proposed set. Therefore, the State's proposed set of instructions is also defense proposed instructions unless otherwise noted. RP 115.

#### IV. DISCUSSION

The Appellant claims that the evidence was insufficient to support conviction and that an instructional error relieved the State of proving all the required elements of the assault charge. He further requests relief from certain legal financial obligations. Because the Defendant did not claim self defense or other justification, the State was not required to prove that the Appellant's force was otherwise unlawful. The State was only required to prove that the Appellant's act of grabbing the officer's collar was intentional and harmful or offensive. Because the evidence produced at trial compellingly demonstrates these required elements, the Appellant's claims should be rejected and his conviction affirmed. Any instructional error was invited by the Defense and was otherwise harmless beyond a reasonable doubt.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF ASSAULT IN THE THIRD DEGREE.

The Appellant first claims that there was insufficient evidence produced at trial to sustain his conviction for Assault in the Third Degree. Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational fact finder could have found the elements of the crime beyond a reasonable doubt. State v. Homan, 181 Wn.2d 102, 105, 330 P.3d

182 (2014). Circumstantial evidence is as reliable as direct evidence. State v. Arquette, 178 Wn. App. 273, 282, 314 P.3d 426 (Div. II, 2013) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). In claiming insufficient evidence, the Appellant necessarily admits the truth of the State's evidence and all reasonable inferences arising from that evidence. Homan, 181 Wn.2d at 106. The reviewing court should defer to the trier of fact's evaluation of the persuasiveness of the evidence. *Id.*

To sustain the conviction for Assault in the Third Degree, the State was required to produce evidence that demonstrates each of the following elements:

- (1) That on or about the 5<sup>th</sup> day of February 2018, the [Appellant] assaulted Greg Adelsbach;
- (2) That at the time of the assault Greg Adelsbach was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and
- (3) That any of these acts occurred in Asotin County, the State of Washington.

See RCW 9A.36.031(1)(g), WPIC 35.23.02, CP 54. The Appellant's sufficiency claim is limited solely to whether or not the evidence supports a finding that the Appellant committed an assault on Officer Adelsbach. Brief of Appellant, p. 4. Washington law defines an assault, in pertinent part, as follows:

[An assault is an intentional [touching] [or] [striking] [or] [cutting] [or] [shooting] 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] [or] [cutting] [or] [shooting] is offensive if the [touching] [or] [striking] [or] cutting] [or] [shooting] would offend an ordinary person who is not unduly sensitive.]]

[An assault is [also] an act[, with unlawful force,] 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.]

WPIC 35.50 (*third and fourth paragraphs omitted as inapplicable*).

The Appellant concedes, on appeal<sup>2</sup>, that he touched the officer intentionally when he grabbed his collar. His only claim herein is that his act of grabbing the officer by the collar was not “harmful or offensive.”

A touching is harmful or offensive if it “would offend an ordinary person who is not unduly sensitive.” WPIC 35.50, State v. Villaneuva–Gonzalez, 180 Wn.2d 975, 982, 329 P.3d 78 (2014) Without citation to legal authority, the Appellant modifies the standard to that of an “ordinary law enforcement officer.” Brief of Appellant, p. 5. This is not the legal standard, rather the standard is an ordinary person. WPIC 35.50, and State v. Villaneuva–Gonzalez, *supra*.

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<sup>2</sup>This concession on appeal stands in contrast to his trial testimony that he stumbled and accidentally grabbed Officer Adelsbach's collar.

However, under either standard, the evidence is clear that the Appellant's act of grabbing the officer's collar was objectively offensive, to a reasonable police officer.

Both Deputy Carpenter and Officer Adelsbach testified that an aggressive act like grabbing of their collar would constitute an imminent threat to them. Officer Adelsbach testified to receiving abrasion injuries from the attack. Beyond the obvious harm involving possible damage to the uniform or pain from abrasions, the act of grabbing the collar compromises the officer's balance and safety. It allows the attacker, in this case, the Appellant, to gain physical control of the officer. It also places the officer's duty pistol and other weapons well within arm's reach of the attacker. This is more than offensive, it would constitute a critical danger to the life and safety of the officer or anyone in the near proximity.

The Appellant's continued non-compliance and aggressive behavior demonstrates the intentionality of his attack on the law enforcement officer. It is circumstantial evidence of both the Appellant's intent and the reasonableness of the officer's perception of the Appellant's actions as an aggressive attack and not merely an clumsy stumble. Here there was ample evidence that the Appellant's act of grabbing Officer Adelsbach by the collar constituted a harmful

or offensive touching and the jury was entitled to so infer from the evidence.

Almost in passing, the Appellant argues that the State failed to prove that grabbing the officer's collar was unlawful. As discussed below, because the Appellant did not raise a defense of "lawful force," the State was not required to prove the absence of justified force. See State v. Brooks, 142 Wn. App. 842, 176 P.3d 549 (Div. III, 2008). Further, the Appellant's fleeting mention is insufficient to merit appellate review. See Christian v. Tohmeh, 191 Wn. App. 709, 728, 366 P.3d 16 (Div. III, 2015).

Regardless, it is clear from the evidence and testimony that no such lawful reason existed for the Appellant to use force against Officer Adesbach. The Appellant admitted in his own testimony that he was not claiming self defense or any other form of lawful force. In fact, even if he were so claiming, the Appellant would only be justified in using force if he were facing "imminent danger of serious injury or death." State v. Bradley, 141 Wn.2d 731, 737–38, 10 P.3d 358 (2000). Here, there was no such evidence of any physical peril prior to the Appellant's use of force against Officer Adelsbach.

2. THE COURT'S INSTRUCTION CONTAINED ALL THE NECESSARY ELEMENTS FOR ASSAULT IN THE THIRD DEGREE WHERE NO CLAIM OF LAWFUL FORCE WAS RAISED.

The Appellant next claims that the Court’s Jury Instruction #5 failed to include a “necessary” element of “unlawful force.” There is a wholly fatal flaw in the Appellant’s argument. He didn’t raise the issue of lawful force at trial. The Appellant did not claim that he was defending against an unlawful attack by the officer or otherwise raise self defense. The Appellant did not claim that he was otherwise licenced or justified in grabbing the officer by his collar. The issue of “lawful force” must be raised by a defendant at trial with sufficient evidence thereof before the State is required to affirmatively disprove it beyond a reasonable doubt. See State v. Brooks, 142 Wn. App. 842, 176 P.3d 549 (Div. III, 2008). In Brooks, this Court stated:

The State must prove facts necessary to support each element of the crime charged. And the State has the burden to prove beyond a reasonable doubt the absence of a defense (such as self-defense) if (1) it is an element of the crime and (2) there is some evidence of the defense. Here, Mr. Brooks neither alleged nor tried to show self-defense. And unlawful force would only have been an element of the crime charged if self-defense were an issue. The instruction did not, then, relieve the State of its burden to show the essential elements of the crime here. And the trial court's statement to the jury that unlawful force applied only when self-defense is presented was correct.

*Id.* at 847–48, (*internal citations omitted*). Therefore, the Court was not required to instruct the jury on “unlawful force,” nor was the State required to prove the absence thereof. See State v. Cardenas-Flores, 194 Wn.App. 496, 514, 374 P.3d 1217 (Div. II, 2016), *aff’d*, 189

Wn.2d 243, 401 P.3d 19 (2017). The Trial Court is only required to “[i]nclude the phrase ‘with unlawful force’ if there is a claim of self defense or other lawful use of force.” *Id.* (Quoting the comment to *WPIC 35.50*). “The term ‘unlawful force’ is necessary in the definition of assault only when there is a specific argument from the defense that the use of force was somehow lawful.” *State v. Calvin*, 176 Wn. App. 1, 20, 316 P.3d 496, 505 (Div. I, 2013), *as amended on reconsideration* (Oct. 22, 2013), *review granted in part, cause remanded*, 183 Wn.2d 1013, 353 P.3d 640 (2015). The Court should not have included the phrase “with unlawful force” in the first paragraph, but that unnecessary inclusion doesn’t mandate inclusion in the second paragraph. In fact, had the jury raised a question regarding the meaning of “unlawful force”, it would have been proper for the trial court to replace Instruction #5 with an instruction that omits the term entirely where there was no claim of lawful use of force. See *Calvin*, at 23. The superfluous inclusion of the phrase “with unlawful force” in the first paragraph did not require that the phrase unnecessarily appear in the second paragraph of Instruction #5.

Of note, there is actually a sound legal reason for the trial court’s instruction to omit the “with unlawful force” phrase from the second paragraph. If the jury accepted the argument that the

Appellant's actions were not merely an intentional and unwanted touching, but rather that he actually intended to cause bodily injury, then the lawfulness of his force would still not have been available as a defense at trial. Under the law, the Appellant would only be justified in using force with intent to injure the officer if he were facing "imminent danger of serious injury or death." See Bradley, *supra*, at 737–38. There was absolutely no evidence produced at trial of any threat to the Appellant's life or risk of serious injury from the officers prior to his attack on the officer. He acknowledged this in his testimony. Therefore, it was wholly appropriate for the trial court to omit that language from the second paragraph, regardless of whether the phrase appeared in the first paragraph of the jury instruction.

To the extent that it's inclusion in the first paragraph was error, it was invited error and harmless beyond any reasonable doubt. The Appellant did not object to Instruction #5, nor did he submit an alternative instruction with the phrase appearing in both paragraphs, or omitted entirely. As such, Instruction #5 was effectively a defense proposed instruction, and therefore, invited error. See State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request.

*Id.* The inclusion of the additional phrase “with unlawful force” in the first paragraph of Instruction #5 or its omission in the second paragraph, if error at all, was invited error. The Appellant cannot now be heard to complain about an instruction that he agreed to at trial.

Further, any error was clearly harmless beyond any doubt. A jury instruction that omits an essential element is harmless if it appears beyond a reasonable doubt the error did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The omitted element must be supported by uncontroverted evidence, and the reviewing court must be able to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Id.* (*Internal citations and quotations omitted*).

The Appellant not only failed to raise a claim of “lawful force” or self defense, but directly eschewed the opportunity in his trial testimony. When he was asked directly by State’s counsel whether he was claiming self defense, he explicitly said he was not and denied he was threatened with any kind of harm by the officers prior to grabbing Officer Adelsbach. The Appellant did not claim that he was exercising his right to use lawful force. He denied that he had any intent to make physical contact at all, claiming he stumbled and simply grabbed onto the nearest thing he could. The jury was instructed, in Instruction #5, that to be an assault, the touching must

be intentional and not accidental. The jury was properly instructed on the definition of an assault, based upon the evidence and claims of the witnesses, including the Appellant. The jury simply didn't believe his claim of accidental contact in light of the other evidence, including his immediate response and continued aggressive behavior toward officers. Any instructional error was harmless beyond any doubt.

3. CERTAIN DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN.

Finally, the Appellant asks this Court to strike all discretionary legal financial obligations (LFOs). It should be noted that the Appellant only submitted legal briefing as to the filing fee and the DNA fee.<sup>3</sup> While these LFOs were properly imposed at the time of sentencing, subsequent amendment of the statute and recent caselaw dictate that these fees should be stricken. See State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018). As such and with regard to these specific fees, the State would concede, and would ask this Court to remand for entry of an order striking the filing fee and the DNA fee.

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<sup>3</sup>The State has confirmed that the Appellant has previously had his DNA collected and typed.

Without briefing and only in the “Conclusion” section of his brief, the Appellant asks for all other discretionary LFOs to be stricken as well. The Appellant has failed to properly raise and brief any issues regarding these LFOs. This Court should refrain from completing the Appellant’s work for him. The State would ask this Court to decline review of imposition of these assessments as not properly raised. See Holland v. City of Tacoma, 90 Wn.App. 533, 538, 954 P.2d 290 (Div. II, 1998)(“*Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.*”).

#### **V. CONCLUSION**

The evidence of the Appellant’s guilt on the charge of Assault in the Third Degree was overwhelming and more than sufficient to sustain the charge. Further, where the Appellant did not claim that his force was justified, and rather asserted that his actions were accidental, the State was not required to prove the absence of “lawful force” as a necessary element of the charge of Assault in the Third Degree. Any instructional error concerning the inclusion of the phrase was invited error and in any event, harmless beyond a reasonable doubt. The State concedes that the DNA assessment and the filing fee should be stricken. The convictions should be affirmed but the matter should be remanded for entry of an order

striking the DNA assessment and the filing fee. The State respectfully requests this Court enter a decision affirming the jury's verdict.

Dated this 8<sup>th</sup> day of February, 2019.

Respectfully submitted,



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THE STATE OF WASHINGTON,

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Court of Appeals No: 36147-1-III

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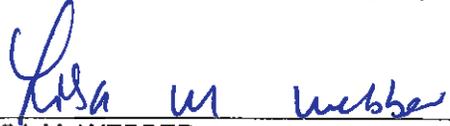
DECLARATION

On February 11, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

DENNIS W. MORGAN  
NODBLSPK@RCABLETV.COM

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on February 11, 2019.

  
\_\_\_\_\_  
LISA M. WEBBER  
Office Manager

**ASOTIN COUNTY PROSECUTOR'S OFFICE**

**February 11, 2019 - 11:13 AM**

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