

66634-7

66634-7

NO. 66634-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAMON SMITH,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES

1. Smith was charged with assault in the third degree, resisting arrest, obstructing a law enforcement officer and driving under the influence. The trial court permitted the State to elicit testimony that Smith made rude gestures and comments to police officers without indicating what the gestures or comments were. Did the trial court abuse its discretion by permitting testimony relevant to the crimes charged?

2. The Fifth Amendment to the United States Constitution provides that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” Smith was convicted of assault in the third degree for attempting to punch a state trooper, and was convicted of resisting arrest for also refusing to comply with commands of police, physically resisting being placed in handcuffs, and fleeing the troopers. Do Smith's convictions for assault in the third degree and resisting arrest violate double jeopardy?

3. The evidence showed that Smith led the police on a car chase, was ordered to get on the ground at gunpoint, and resisted when officers tried to handcuff him. Was the evidence sufficient to prove Smith intentionally resisted arrest?

4. Resisting arrest is a misdemeanor with a maximum penalty of 90 days confinement. Smith was sentenced to 120 days in jail for resisting arrest. Did the trial court sentence exceed its authority?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Damon Smith, was charged with attempting to elude a police vehicle, assault in the third degree, and driving while under the influence. CP 1-2. The State alleged that Smith was intoxicated and led police on a chase through North Seattle, physically resisted arrest, and attempted to punch a state trooper on May 28, 2010. CP 4-9. The State amended the information to add charges of obstructing a law enforcement officer and resisting arrest on December 8, 2010. CP 11-13. The jury found Smith guilty of attempting to elude, assault in the third degree, and resisting arrest. CP 21, 22, 25. The jury acquitted Smith of driving while under the influence and obstructing. CP 24, 23. The court imposed a standard range sentence of four months of confinement for attempting to elude and assault in the third degree. CP 62-69. The court imposed a one-year suspended sentence with four

months of confinement for resisting arrest. CP 59-61. All terms of confinement were to be served concurrently. CP 59-69. Smith was sentenced on January 7, 2011. Id.

2. SUBSTANTIVE FACTS

On May 28, 2010, Trooper Michael Stracke was on patrol on Interstate 5 in North Seattle. 1RP 92.¹ Stracke was in a marked State Patrol car and in full uniform. 1RP 9, 90-92. At approximately 11:00 p.m., Stracke was attempting to make a traffic stop when he noticed Smith's car. 1RP 92-93. Smith was speeding and nearly collided with a tanker truck. 1RP 93. Smith was changing lanes quickly and nearly hit the truck a second time. 1RP 93. Trooper Stracke abandoned the stop he was conducting and pursued Smith. 1RP 93. Stracke drove at up to 90 miles per hour to catch up to Smith. 1RP 96.

Stracke pulled within two car lengths of Smith and activated his overhead lights. 1RP 96. Smith was exiting on Northgate Way and showed no signs of stopping. 1RP 96. Smith continued to

¹ The verbatim report of proceedings consists of two volumes, which will be referred to in this brief as follows: 1RP (December 15 and 16, 2010), and 2RP (December 20 and 22, 2010, and January 7, 2011).

drive and pulled into the parking lot of Northgate Mall. 1RP 101. Smith slowed down but did not stop. 1RP 101. Trooper Stracke could see Smith looking in his rearview mirror and making suspicious movements. 1RP 102. Stracke called for backup and Trooper Dominic Ledesma responded to help. 1RP 124.

Stracke continued to pursue Smith with his siren on. 1RP 107. Stracke used his loudspeaker to address Smith and ordered him to pull over. 1RP 104-05. Smith did not stop, but instead ran through a stop sign, then left the mall parking lot. 1RP 105.

Smith drove down 103rd Avenue and stopped briefly when there was another car in the roadway. 1RP 105-06. Smith drove around the stopped car, cut in front of it and turned on 1st Avenue. 1RP 106. Smith accelerated to 40-50 miles per hour in a 35 mile per hour zone. 1RP 106. Smith ran through another stop sign then tried to drive through a roundabout at high speed and nearly lost control of his car. 1RP 109-10. His car went into a ditch, and then came out of the ditch with all four tires off the ground. 1RP 109-10. Smith's car fishtailed, nearly striking a telephone pole. 1RP 109-10. By this time, Trooper Ledesma caught up and saw the sparks fly from Smith's car as he jumped out of the ditch. 1RP 134. Trooper

Stracke continued to pursue Smith with his lights and siren on.

1RP 107.

Smith ran through yet another stop sign and turned southbound on Meridian. 1RP 110. Smith came to a stop on Meridian. Troopers learned later that Smith did not stop the car willingly; rather, he ran out of gas. 1RP 110-11.

Troopers Ledesma and Stracke got out of their cars and drew their guns. 1RP 111. Smith also got out of his car and immediately put his hands up. 1RP 112, 127. Smith nonchalantly asked what was wrong, and the troopers ordered him to get on the ground. 1RP 112. Smith did not comply. 1RP 112, 127. Stracke did not see any indications that Smith had a weapon so he holstered his own gun, and approached Smith while Ledesma continued to cover them. 1RP 112, 128.

Stracke attempted a "control tactic" by grabbing Smith's arm and trying to lock the arm. 1RP 113. Smith physically resisted by pulling away and slipping out of his jacket to free himself from Stracke's grasp. 1RP 113, 128. Smith faced Stracke, and then pushed him in the face. 1RP 113-14, 128. Smith raised his right fist to strike Stracke. 1RP 114, 128. Stracke disengaged as Smith

swung and the blow missed. 1RP 114, 128. Smith turned and ran down the street. 1RP 129.

Smith ran approximately twenty feet before turning to face the troopers again. 1RP 114-15, 130. Both troopers used their tasers to subdue him. 1RP 115. Trooper Ledesma placed Smith in handcuffs. 1RP 116. During the attempts to subdue Smith, the troopers did not specifically tell him he was under arrest. 1RP 135-36.

Trooper Stracke advised Smith of his rights and removed the taser darts. 1RP 116-17. Smith continued to try to kick at Stracke as he attempted to remove the taser darts. 2RP 35. Smith told Stracke "I did not swing at you." 1RP 142. Trooper Stracke also attempted to advise Smith of his implied consent warnings, but Smith refused to acknowledge them. 1RP 121. Stracke observed signs that Smith was intoxicated. 1RP 118. Smith had bloodshot and watery eyes, there was an odor of alcohol on him, and Smith's speech was thick and slurred. 1RP 118. Stracke opined that Smith was under the influence of alcohol. 1RP 119.

Stracke called for paramedics to evaluate Smith since he had been tased, but Smith refused to speak to the paramedics. 2RP 10-11. Smith was taken to jail. 2RP 11. During the intake

process Smith was asked if he had any medical conditions, and Smith claimed to have a heart problem. 2RP 12. Smith was taken to Harborview to be evaluated, but Smith refused to answer any questions about his condition when speaking to the doctors and nurses at the hospital. 2RP 12. The medical staff ran tests on Smith and cleared him to go back to the jail. 2RP 12-13. Trooper Stracke had to remain with Smith during the hour his alleged heart condition was checked. 2RP 12-13.

Stracke took Smith back to the jail and placed him in a holding cell. Stracke sat at a desk across from the cell to write his report. 2RP 14. Smith told a fellow inmate that he intentionally swung at the trooper. 2RP 15. Smith was "giggling and laughing" and "putting on a show" for the others in his cell. 2RP 16. In addition, Smith made obscene gestures towards the trooper and made obscene comments to the police and hospital staff.² 2RP 13.

² During pretrial motions the gestures were described as "simulating masturbation" and calling jail staff "sweetie." 1RP 71. The court granted Smith's motion in limine, but it was unclear if the court excluded any reference to the comments and gestures, or merely excluded what the gestures and comments were. 1RP 73. Smith objected when Stracke testified that he made obscene gestures and comments, and there was a sidebar that was not placed on the record. 2RP 13. There was no motion to strike, no motion for a mistrial, and no further objection when Stracke referenced the gestures and comments again later in his testimony. 2RP 16, 53-54.

The trooper described Smith as "making statements and gestures towards me trying to aggravate me." 2RP 16.

The jury found Smith guilty of attempting to elude, assault in the third degree, and resisting arrest. CP 21, 22, 25. The jury acquitted Smith of driving while under the influence and obstructing. CP 24, 23.

C. ARGUMENT

1. THE COURT PROPERLY PERMITTED THE STATE TO ADMIT EVIDENCE SMITH MADE OBSCENE GESTURES AND COMMENTS.

Smith contends that the trial court erred by admitting evidence that he made obscene gestures and comments to jail and hospital personnel, and to Trooper Stracke. Smith is incorrect. The evidence was relevant to the crimes charged, Smith failed to preserve any error, and any error was harmless in light of the fact that the police did not reveal what the gestures or comments were.

a. Smith Failed To Make A Record For This Court To Review.

Smith initially objected to testimony that he made rude gestures and comments and he requested a sidebar. 2RP 13.

However, Smith's attorney did not summarize the sidebar on the record. 2RP 13. This Court cannot review a ruling if there is no record of what the ruling was.

The Court cannot review a ruling in the absence of a record. See State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10 (1991), overruled on other grounds in In re Personal Restraint of Address, 147 Wn.2d 602, 56 P.3d 981 (2002) (stating that review is limited to matters included in the record). The Supreme Court has recognized the danger of sidebar conferences. State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), overruled on other grounds, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989). "Failure to record the resulting ruling may preclude review." Koloske, 100 Wn.2d at 896; see also Mayekawa Manufacturing Co., Ltd. v. Sasaki, 76 Wn. App. 791, 796 n.6, 888 P.2d 183 (1995) (refusing to review issue where trial court noted objection but made no specific ruling).

Smith's attorney objected and asked for a sidebar. 2RP 13. Smith did not summarize the sidebar on the record. 2RP 13. The record does not reflect the trial court's ruling or Smith's arguments. Smith has failed to create a sufficient record for the Court to review.

b. Smith Waived Any Challenge By Failing
To Object To Subsequent References
To His Rude Gestures And Comments.

There is no specific ruling on the record for Smith's objection. In addition, Smith did not object when the testimony was repeated on direct examination and again on cross examination. 2RP 16, 53-54. Smith did not request that the testimony be stricken or move for a mistrial. As a general rule, "[t]he failure to make a timely objection to the admission of evidence at trial precludes appellate review." State v. O'Neil, 91 Wn. App. 978, 993, 967 P.2d 985 (1998). While manifest error affecting a constitutional right may be raised for the first time on appeal under RAP 2.5(a), "[w]ithout an objection, an evidentiary error is not preserved for appeal." State v. Davis, 141 Wn.2d 798, 850, 10 P.3d 977 (2000). Smith failed to object when the trooper repeated that Smith made obscene gestures and comments during direct and cross examination.

c. The Court Did Not Err By Permitting
Testimony That Smith Made Rude
Gestures And Comments To The Police.

In the absence of a record, Smith argues the trial court overruled the objection and ruled the testimony was admissible. Brief of Appellant at 16. Assuming Smith's contention is correct, the trial court did not err. Evidence about Smith's interactions with the police were relevant to his intent and state of intoxication.

To be admissible, evidence must be relevant. ER 402. Evidence is relevant when it has any tendency to make the existence of any consequential fact more probable or less probable than it would be without the evidence. ER 401. Facts that tend to establish a party's theory or disprove an opponent's evidence are relevant. Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976). The court must also determine if the probative value is substantially outweighed by the likelihood that it will mislead the jury or contribute to a confusion of the issues. ER 403. The trial court has wide discretion in determining whether evidence will mislead the jury. State v. Luvene, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion. State v. Powell, 126

Wn.2d 244, 258, 893 P.2d 215 (1995); State v. Smith, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). Discretion is abused if the trial court's decision is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

Smith's behavior at the jail and at the hospital was directly relevant to several of the charges against him. Smith's attempts to annoy and distract the trooper were relevant to his intent to obstruct. His animosity towards law enforcement was relevant to his intent to assault Trooper Stracke. His uninhibited behavior was relevant to the charge of driving under the influence. The evidence was relevant and probative of the crimes charged. Furthermore, by permitting only testimony about obscene gestures and comments, without detail about what the gestures and comments were, the trial court limited any undue prejudice. The trial court properly permitted the testimony.

Smith analyzes the admission of the evidence under ER 404(b). Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove character and show action in conformity therewith. Powell, 126 Wn.2d at 258; ER 404(b). Such evidence is admissible, however, for other purposes, "such as proof

of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The list of other purposes for which evidence of a defendant's prior misconduct may be introduced is not exclusive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Such evidence is admissible if its probative value outweighs its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion. Powell, 126 Wn.2d at 258; State v. Smith, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). Even analyzed under ER 404(b), evidence that Smith was antagonizing the jail and hospital staff was admissible to prove his intent and state of intoxication.

d. Any Error Was Harmless.

Any error in the admission of Stracke's testimony about Smith's gestures and comments was harmless because Stracke never told the jury what the gestures or comments were. 2RP 13, 16, 53-54. Erroneous admission of evidence under ER 404(b) is reviewed under the non-constitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991).

Reversal is not required unless there is a reasonable probability that the outcome of the trial was materially affected by the error. Id.

The jury properly heard about more significant misconduct by Smith during the chase and arrest. Viewed in the context of all the evidence, the fact that Smith was rude was not particularly prejudicial. Furthermore, the jury acquitted Smith of obstructing and driving under the influence. CP 23, 24. The jury's analysis of the evidence was clearly not overcome by hearing that Smith made rude gestures and comments. Even if the trial court erred by allowing Stracke's testimony, any error was harmless and does not warrant a new trial.

2. SMITH'S CONVICTIONS FOR ASSAULT IN THE THIRD DEGREE AND RESISTING ARREST DO NOT VIOLATE DOUBLE JEOPARDY.

Smith contends that his conviction for assault in the third degree and resisting arrest cannot be punished separately. Smith is incorrect. The subsection of assault in the third degree that Smith was charged with is different in law and in fact from resisting arrest.

Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment.

State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases a defendant's single act may violate more than one criminal statute. When this occurs, without question, a defendant can permissibly receive punishment for each statute violated. Id. at 776-82 (finding no double jeopardy violation for a single act of intercourse that violated the rape statute and the incest statute). Double jeopardy is implicated only when the court exceeds the authority designated to it by the legislature and imposes multiple punishments where multiple punishments have not been authorized. Id. at 776. Therefore, a reviewing court's role "is limited to determining what punishments the legislative branch has authorized," and determining whether the sentencing court has properly complied with this authorization. Id.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, 125 Wn.2d at 776. Should this step not result in a definitive answer, the court turns to another rule of statutory construction, the two-part "same evidence" or

"Blockburger" test.³ This test asks whether the offenses are the same "in law" and "in fact." Id. at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, which can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Calle, at 778-80.

Neither the assault in the third degree nor resisting arrest expressly allows or disallows multiple punishments for a single act. Thus, the Court must turn to the "same evidence" test. See RCW 9A.36.031, RCW 9A.76.040.

The "same evidence" or "Blockburger" test asks whether the offenses are the same "in law" and "in fact." Calle, 125 Wn.2d at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Id. at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Id. at 777.

³ Referring to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Here, the convictions are not the same "in law."

A comparison of resisting arrest and assault in the third degree under RCW 9A.36.031(1)(g) demonstrates that each require proof of different elements. Resisting arrest under RCW 9A.76.040(1) required the following:

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

Smith was charged with assault in the third degree under RCW 9A.36.031(1)(g). A person is guilty of assault in the third degree if under circumstances not amounting to assault in the first or second degree a person:

Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

RCW 9A.36.031(1)(g). Third degree assault under the statute does not require the State to prove that the defendant acted with a specific intent to prevent arrest. Therefore, resisting arrest requires proof independent of that required for third degree assault under RCW 9A.36.031(1)(g). Conversely, resisting arrest does not require proof of an assault, as required for assault in the third degree. Thus, resisting arrest is not a lesser-included offense, nor

is it the same "in law" for purposes of double jeopardy, as assault under RCW 9A.36.031(1)(g).

Smith cites State v. Godsey, 131 Wn.2d 278, 127 P.3d 11 (2006), to argue the elements are the same because resisting arrest is a lesser-included offense of assault in the third degree. Brief of Appellant at 12. However, Godsey compared a different provision of assault in the third degree to resisting arrest. Id. at 290. The court compared resisting arrest with assault in the third degree under RCW 9A.36.031(1)(a). Id. Third degree assault required the State to prove [the defendant], "[w]ith intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assault[ed] another." However, Smith was not charged under subsection (1)(a). Smith was charged with assault in the third degree under RCW 9A.36.031(1)(g). Godsey's holding that resisting arrest is a lesser offense of subsection (1)(a) is not applicable.

With each charged crime having an element not contained in the other, and no requirement that one commit another crime to be convicted of either offense, the two offenses fail the same "in law" prong of the "same evidence" test. It makes no difference if they

are the same "in fact." Because the offenses are not the same "in law," this Court must find that the defendant's convictions should have been punished separately unless "there is a clear indication of contrary legislative intent." Calle, 125 Wn.2d at 780.

Smith's only argument to the contrary is his assertion that the same acts proved both crimes and thus, he claims, the same evidence test is satisfied. Smith's argument is both legally and factually incorrect. Smith's argument addresses only the factual part of the "same evidence" test. It ignores the elements-based part of the "same evidence" test. Further, this limited fact-based analysis has been rejected by both the United States Supreme Court and the Washington State Supreme Court.⁴ The Supreme Court has stated many times that a reviewing court must determine "whether each provision requires proof of a fact which the other

⁴ Calle represented a rejection of the fact-based analysis that was being conducted by some courts prior to the early 90's (and what the defendant tries to argue here). In 1993, the United States Supreme Court rejected the "same conduct" fact-based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington State Supreme Court did the same, recognizing that a purely factual analysis had been rejected by the United States Supreme Court and that the state double jeopardy clause did not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based double jeopardy/merger analysis makes sense when considering the question is one of legislative intent, of which the facts of a particular case tell us nothing. See State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996) (recognizing rejection of the "same conduct" rule in finding no double jeopardy for kidnap and rape).

does not." In re Orange, 152 Wn.2d 795, 817-18, 100 P.3d 291 (2004) (emphasis added); State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

Furthermore, the evidence used to prove each crime was factually different. In Godsey, Division Three found resisting arrest was a lesser included offense of subsection (1)(a) of assault in the third degree. However, the court still found that double jeopardy was not violated because proof of different acts established each of the crimes. Godsey, 131 Wn. App. at 289. The facts of Godsey are similar to Smith's case. Officers tried to arrest Godsey for an outstanding warrant and Godsey fled on foot. Id. at 283. He turned to face the officer, put up his fists and told the officers "Come on." Id. Godsey physically wrestled and resisted being cuffed. Id. In Godsey "[t]he State recognized the overlap between the two offenses but did not rely on the same conduct to establish the [third degree] assault charge as used to prove the resisting arrest charge." Id. at 290. In other words, two crimes were not the same "in fact." Id.

Similarly, in the present case, the State did not rely solely on Smith's attempt to punch Stracke to convict him of resisting arrest. The State relied upon additional evidence other than the attempt to

punch Trooper Stracke to support the resisting arrest charge. The prosecutor argued the following evidence to support the resisting arrest charge:

That the defendant prevented or attempted to prevent a peace officer from arresting him.

What do we have in this case? We have a defendant getting out of his vehicle knowing that the troopers are there. The troopers have their guns arrested [sic] and they're telling him to get on the ground. He's not complying so Trooper Stracke goes over and he describes what is called a strong-arm. When he does that the defendant doesn't comply. Instead he pushes, tries to take a swing at Trooper Stracke and Trooper Ledesma. . . He took off running.

2RP 75. As in Godsey, there was some "overlap" in the evidence because Smith's attempt to punch the trooper was part of his larger efforts to escape. However, that does not preclude punishment for Smith's assault on the officer and his additional efforts to resist arrest.

Because the offenses are not the same "in law" or "in fact," this Court must find that the defendant can be punished for each statute he violated unless "there is a clear indication of contrary legislative intent." Calle, 125 Wn.2d at 780. The "strong presumption" created by the "same evidence" test can be overcome only by the defendant showing clear evidence that the

Legislature intended only one punishment. Id. at 780. Smith provides no such evidence here.

A double jeopardy determination is a three-step process, any one of which is dispositive. Here, Smith's argument fails at every step of the analysis, and the trial court properly punished Smith for assault in the third degree and resisting arrest.

3. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD CONCLUDE SMITH INTENTIONALLY RESISTED ARREST.

Smith contends that the evidence was not sufficient to find that he intentionally resisted arrest. He argues that since the troopers did not announce that he was under arrest, the State failed to prove that he intended to resist arrest. Brief of Appellant at 7. However, there was ample evidence that Smith knew he was being arrested when the police pointed their weapons at him and ordered him to the ground.

The standard of review for determining the sufficiency of the evidence to sustain a criminal conviction 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." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), citing Jackson v. Virginia, 443 U.S. 307, 316-20, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1970). In State v. Gerber, 28 Wn. App. 214, 622 P.2d 888 (1981), this court noted:

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. The evidence is interpreted most strongly against the defendant and in a light most favorable to the State...When there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.

Gerber, 28 Wn. App. at 217, (citing State v. Theroff, 25 Wn. App. 592, 593, 608 P.2d 1254 (1980)).

It is not necessary that the reviewing court itself be convinced of the defendant's guilt beyond a reasonable doubt. Gerber, 28 Wn. App. at 221. Appellate courts must defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. Jackson, 443 U.S. at 319; Gerber, 28 Wn. App. at 622.

Smith was charged with resisting arrest. Resisting arrest requires proof that a person "intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her."

RCW 9A.76.040(a). Knowledge that one is resisting an officer is an essential element of crime. State v. Bandy, 164 Wash. 216, 2 P.2d 748 (1931). The State was required to prove that Smith intentionally prevented or attempted to prevent a peace officer from lawfully arresting him. The facts in this case, taken in the light most favorable to the State, are sufficient to convince a rational trier of fact that Smith knew he was under arrest and intended to resist.

The evidence established that Smith intentionally fled from the police. The trooper was in a fully marked police car. 1RP 90-92. He activated his lights and siren. 1RP 96, 107. The trooper addressed Smith on his loudspeaker instructing him to pull over. 1RP 104-05. Trooper Stracke saw Smith look up at him through Smith's rearview mirror. 1RP 102. Smith fled at a high speed through a residential neighborhood, running through stop signs and nearly losing control of his car. 1RP 105-10. By the time Smith's car ran out of gas, forcing him to stop, he knew the police were attempting to arrest him and this was no mere traffic stop.

When Smith got out of his car he immediately put his hands in the air. 1RP 112, 127. The troopers were in uniform and they drew their guns. 1RP 111. They pointed their weapons at Smith and ordered him to get on the ground. 1RP 112, 127. Trooper

Stracke then attempted to physically gain control of Smith and he resisted and ran away. 1RP 113. The facts support the reasonable inference that Smith knew he was being arrested and intentionally resisted.

Smith seems to suggest the only way a defendant can know he is being arrested is by the officer making a specific announcement. Brief of Appellant at 7-8. There is no authority for Smith's argument.⁵ The statute requires the defendant to act with intent; it does not require the officer, who may be in the midst of a struggle to speak the words "you are under arrest." Jurors are permitted to draw inferences from circumstantial evidence.

WPIC 5.01. Jurors were permitted to infer Smith acted intentionally without requiring Smith to announce his intention. The jurors could also infer, based on the circumstantial evidence, that Smith was aware he was being arrested even if the officers did not utter the words "you are under arrest." In this case, when two state troopers had Smith at gunpoint and ordered him to the ground, it was clear that Smith was under arrest. Smith's behavior showed that he

⁵ Smith anecdotally cites two cases in which officers announced a defendant was under arrest. Brief of Appellant at 8-9. However, this fails to establish that such an announcement is required to sufficiently show a suspect intentionally resisted arrest.

knew he was under arrest; he got out of his car with his hands in the air. 1RP 112, 127.

The jury had ample evidence to conclude that Smith intentionally resisted arrest. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that when Smith was held at gunpoint and ordered to the ground after leading the police on a chase that he was under arrest. Smith's sufficiency of the evidence argument must be rejected.

4. THE STATE CONCEDES SMITH WAS IMPROPERLY SENTENCED TO FOUR MONTHS OF CONFINEMENT FOR A SIMPLE MISDEMEANOR.

Smith argues that the trial court improperly ordered four months of confinement for his conviction for resisting arrest. Smith is correct. Resisting arrest is a simple misdemeanor. RCW 9A.76.040(2). A misdemeanor is punishable by a maximum of 90 days in jail. RCW 9A.20.021(3). The trial court imposed four months (120 days) of confinement.⁶ The court's sentence exceeded the maximum penalty authorized by the legislature.

⁶ The trial court properly imposed four months confinement on Smith's remaining charges to be served concurrently.

The State agrees that the trial court imposed a term of confinement beyond its authority and that remand for resentencing on the charge of resisting arrest is appropriate.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Smith's conviction for attempting to elude a police officer, assault in the third degree, and resisting arrest. This Court should remand the case to the trial court to re-sentence Smith on the charge of resisting arrest.

DATED this 14th day of October, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAMON R. SMITH, Cause No. 66634-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

10/12/11
Date 10/12/11