

NO. 38095-1

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONALD H. KEAL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 07-1-02733-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Can defendant raise an issue for the first time on appeal?

In the alternative, did the deputy properly enter defendant's wife's apartment when defendant had already been placed under arrest, actively resisted the arrest and instead fled into his wife's apartment?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Ronald Keal, on May 22, 2007, with one count of assault in the third degree, one count of resisting arrest, and one count of criminal trespass in the second degree. CP 1-2.

Defendant's motion to dismiss for lack of probable cause was heard on October 11, 2007, in front of the Honorable Kitty-Ann van Doorninck. 2RP 4¹, CP 181-188. The court denied the defendant's motion to dismiss finding that Deputy Fries had probable cause to arrest defendant for trespassing. 3RP 6-7.

¹ The State will adopt the appellant's method of citing to the record found on page 1 of Appellant's Opening Brief.

The case was called for trial on October 17, 2007 in front of the Honorable Frank Cuthbertson. 4RP 2. Defendant brought a motion to dismiss at half time arguing that defendant was permitted to be on the property. 6RP 255. The court agreed and dismissed the criminal trespass count finding that a reasonable jury could not find that he was violating an order since Ms. Offner testified that defendant could visit anyone on the property. 6RP 262-3. The court allowed the resisting arrest and assault in the third degree charges to go to the jury finding that Deputy Fries had told defendant something different than Ms. Offner, and so it was up to the jury if they believed he had probable cause. 6RP 264.

The jury found defendant guilty as charged on both of the remaining counts. 8RP 405, CP 105-6.

The court allowed trial counsel to withdraw on December 21, 2007. 9RP 11. Defendant's new counsel brought a motion for a new trial which was heard on May 2, 2008. 11RP 2. The motion was brought on the basis of ineffective assistance of counsel for defendant's trial counsel allegedly not speaking to witnesses. 11RP 12. The court denied the motion for a new trial. 11RP 14.

Sentencing was held on July 18, 2008. 12RP 2, CP 145-160. Defendant's offender score was determined to be a six. 12RP 7, CP145-155. Defendant's sentencing range was 22-29 months on the assault in the third degree charge, and the resisting arrest charge was a misdemeanor. 12RP 7, CP 145-160. The court sentenced defendant to no jail time on the

resisting arrest and gave the defendant an exceptional sentence downward to zero days in jail on the assault in the third degree. 12RP 20, CP 145-160.

Defendant filed this timely appeal. CP 161-168.

2. Facts

Deborah Keal was a resident in apartment A-9 at the Woodmark Apartments in 2007. 2RP 12, 5RP 60. Her son, Isaac, was the only other named person on her lease. 2RP 13. Defendant, Ronald Keal, came to the attention of the management as an illegal occupant of the apartment in February 2007. 2RP 13-14, 5RP 45, 58, 65. Defendant was observed around the apartments and was often seen violating the rules. 2RP 15, 5RP 59-61. Defendant was working on vehicles, congregating, and smoking in the stairwells which are all violations of the apartment complex rules. 2RP 15, 5RP 61. The management sent Mrs. Keal a letter that gave her 10 days to comply or vacate the apartment. 2RP 15, 5RP 63. Defendant applied to be added to Mrs. Keal's lease. 2RP 17. The lease application was denied on April 23, 2007. 2RP 22, 5RP 65, 71.

Deputy Fries is a Pierce County Sheriff's Deputy who is also employed as a security officer for the Woodmark Apartments during his off-duty hours. 2RP 17-18, 45, 5RP 66, 68, 125-6. Deputy Fries knew defendant was not a resident at the Woodmark Apartments and that he was a problem. 2RP 47, 5RP 129-33. Defendant was often seen in the parking lot flagging down cars, hanging out of windows, standing in the stairwells

at night and drinking beer in the parking lot. 2RP 47, 50-51. Deputy Fries had confronted defendant in the past to tell him he was not a resident and to tell him what he could and could not do on property. 5RP 134. Defendant told the deputy to, "Fuck off." 5RP 134.

Deputy Fries gave defendant a no trespass notice on March 31, 2007. 2RP 19, 21, 5RP 69, 70, 139. Defendant was working on a car in the parking lot. 5RP 136. Defendant refused to sign the trespass notification. 2RP 49, 5RP 69, 137, 139. Defendant was not allowed to be on the property except to visit Mrs. Keal, and was to only be in her apartment. 2RP 25, 51, 5RP 140. Mrs. Keal was the only person defendant was allowed to visit. 2RP 31, 51, 5RP 107, 140. Defendant could only enter the property to go straight to Mrs. Keal's apartment, and was to exit the same way. 2RP 51, 5RP 107, 140.

Defendant was still seen on the property despite the trespass. 5RP 74. Defendant was still seen violating apartment rules, and assistant business manager Kathie Offner would approach him and tell him to stop. 5RP 75. Defendant was difficult to speak with. 5RP 76.

On May 17, 2007, Ms. Offner was doing a ride along around the complex with Deputy Fries. 2RP 11, 23, 54, 5RP 77, 142. Earlier that day, Ms. Offner had given Mr. and Mrs. Keal a verbal warning for smoking in the stairwell. 2RP 24. The ride along lasted for about two hours and during that time, Ms. Offner and Deputy Fries observed defendant outside on the grounds several times. 2RP 25, 55, 5RP 77-8,

142-3. Defendant was then observed by B building. 2RP 25, 28, 55, 5RP 79, 144-5. Building B would not have been an area defendant needed to access in order to get from the entrance to Mrs. Keal's apartment in building A. 2RP 41, 5RP 95, 114-5, 144-5. Defendant was talking to a female who was not Mrs. Keal. 2RP 56, 5RP 147, 210.

Deputy Fries got out and asked defendant what he was doing. 2RP 26, 56, 5RP 80, 147. Defendant said he was going to his apartment. 2RP 56, 5RP 147. The deputy told defendant he had been trespassed and defendant replied that he hadn't. 2RP 56. Defendant said that he was talking to people. 2RP 56, 5RP 147, 6RP 213. When the Deputy told him he wasn't supposed to be doing that, defendant told the deputy, "don't fuck with me" and pointed his hand toward the deputy. 2RP 56, 5RP 148. At that time, the deputy informed defendant that he was under arrest for trespass. 2RP 56, 5RP 148, 6RP 214-5.

Defendant refused to be arrested and told the deputy that he wasn't under arrest. 2RP 57, 59, 5RP 148. Mrs. Keal stepped in between the deputy and defendant. 2RP 57, 59, 5RP 149. Deputy Fries called for backup. 2RP 57. Defendant walked backwards into his wife's apartment. 2RP 26, 57, 5RP 149. Defendant slammed the door to the apartment on the deputy's foot and then pushed on the door so the deputy could not get his foot out. 2RP 57-58, 5RP 150. The deputy continued to tell defendant that he was under arrest and defendant said he wasn't under arrest. 2RP 59, 5RP 150. Deputy Fries told defendant he was resisting

and defendant said he wasn't. 2RP 59, 5RP 150. Deputy Fries told him then to come out to be handcuffed and defendant said no. 5RP 150.

Defendant was eventually arrested but not until backup arrived and a taser had to be deployed. 2RP 60. Deputy Wylie saw defendant pushing on the door. 6RP 236-7. Once the door was pushed open, defendant got into a Karate fighting stance. 5RP 153, 6RP 237. Deputy Fries repeated that defendant was under arrest. 6RP 238. After the first application of the taser, defendant punched Deputy Fries in the chest and the jaw and caused the deputy to fall over a chair. 2RP 61, 5RP 153, 6RP 204, 240. Defendant continued to resist and had to be tasered again, and then pepper sprayed. 5RP 154-5, 6RP 239.

Mrs. Keal claimed that defendant never touched Deputy Fries. 6RP 312. Mrs. Keal also testified that defendant only stayed at her place six nights a week and was just a visitor. 6RP 319. Mrs. Keal also claimed she was the one pushing on the door. 6RP 325.

Once defendant was detained in the police vehicle, he told Ms. Offner, "You're going to get yours." 5RP 84.

C. ARGUMENT.

1. DEFENDANT CANNOT RAISE AN ISSUE FOR THE FIRST TIME ON APPEAL. IN THE ALTERNATIVE, DEFENDANT WAS PLACED UNDER ARREST, ACTIVELY RESISTED THE ARREST, AND FLED INTO HIS WIFE'S APARTMENT NECESSITATING THE DEPUTY ENTERING HIS WIFE'S APARTMENT.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). RAP 2.5(a) permits a party to raise for the first time on appeal a 'manifest error affecting a constitutional right.' An appellant must show actual prejudice in order to establish that the error is "manifest." *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992); *State v. Contreras*, 92 Wn. App. 307, 311, 966 P.2d 915 (1998). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)(citing *Riley*, 121 Wn.2d at 31).

Under the Fourth Amendment to the U.S. Constitution, and article 1, section 7 of the Washington Constitution, a warrantless arrest must be supported by probable cause. *State v. Bonds*, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982). The evidence required for probable cause is less than that required for conviction, but more than a bare suspicion. *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949);

State v. Cord, 103 Wn.2d 361, 365, 693 P.2d 81 (1985). An officer has probable cause to arrest a person when the facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe a crime has been committed. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996).

A seizure is reasonable and lawful when it is based on an officer's objectively reasonable suspicion that an individual has engaged in criminal activity. *State v. Armenta* 134 Wn.2d 1, 10, 948 P.2d 1280 (2004). Probable cause for a warrantless arrest exists when the totality of facts and circumstances within the officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. *Bokor v. Dept. of Licensing*, 74 Wn. App. 523, 527, 874 P.2d 168 (1994); *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993), *review denied*, 123 Wn.2d 1004 (1994). "The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer." *State v. Knighten*, 109 Wn.2d 896, 899, 748 P.2d 1118 (1988).

Warrant requirements must yield when exigent circumstances demand that police act immediately. *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127 (2002). The court uses eleven factors as a guide in determining whether exigent circumstances justify a warrantless entry and search:

(1) the gravity or the violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; (6) the entry is made peaceably; (7) the police are in hot pursuit; (8) the suspect is fleeing; (9) the arresting officer or the public are in danger; (10) the suspect has access to a vehicle; and (11) there is a risk that the police will lose evidence.

State v. Wolters, 133 Wn. App. 297, 303, 135 P.3d 562 (2006), *see also State v. Le*, 103 Wn. App. 354, 12 P.3d 653 (2000), *Cardenas* at 406, citing *State v. Terranova*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). It is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers needed to act quickly. *Cardenas* at 408, citing *State v Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10 (1989) (no one factor is conclusive; weight varies with circumstances).

Defendant raises the issue of an unlawful arrest for the first time on appeal. Defendant made two motions to dismiss at the trial level. 2RP 4, 6RP 255, CP 181-188. In his pre-trial motion to dismiss, defendant moved to dismiss the charges against him due to a lack of probable cause to arrest. 2RP 4, 3RP 6, CP 181-188. The court found that probable cause existed and allowed the case to proceed. 3RP 6-7. At half time, defendant

moved again to dismiss the charges based on the State not being able to prove a prima facie case as to the criminal trespass charge. 6RP 255. The court found that the State had not presented a prima facie case on the criminal trespass charge but allowed the assault in the third degree charge and the resisting arrest charge to go to the jury. 6RP 262-3. Defendant does not assign error to the court's ruling that the officer had probable cause to arrest defendant for criminal trespass. Because defendant did not raise this issue below, this court cannot consider it now for the first time on appeal.

However, if the court decides to consider the issue, defendant's claim fails because he cannot show his constitutional rights were violated. Defendant's claim misconstrues the facts of the case. Officer Fries placed defendant under arrest while defendant was standing outside of his apartment on the common grounds of the complex. 2RP 25, 28, 55, 56, 5RP 79, 144-5, 148, 6RP 214-5. Defendant told the Deputy that he was not under arrest and began to back up toward his wife's apartment. 2RP 26, 57, 59, 5RP 148, 149. The Deputy continued to tell defendant he was under arrest for trespassing while the defendant continued to argue with the Deputy and continued to walk away from him. 2RP 59, 5RP 150. Defendant's wife also got in the way as the Deputy attempted to arrest her husband. 2RP 57, 59, 5RP 149. The Deputy continued to deal with both defendant and his wife and called for backup to help him as defendant was resisting arrest. 2RP 57. Defendant walked into his wife's apartment and

attempted to close the door but the Deputy wedged his foot in the door as defendant continued to push on it. 2RP 57-58, 5RP 150. When the Deputy again told him he was under arrest and that he was resisting, defendant replied that he was not resisting. 2RP 59, 5RP 150. However, defendant refused to come back out and surrender to the Deputy. 5RP 150

In the instant case, the deputy did not enter defendant's wife's apartment to place defendant under arrest. The deputy had already placed defendant under arrest for a crime that he had personally observed. The trial court found that the Deputy had probable cause to arrest defendant and this finding is unchallenged on appeal. Defendant actively resisted being arrested and instead retreated to his wife's apartment. The Deputy was in pursuit of the defendant as at that point he had been placed under arrest and was actively fleeing and resisting. The Deputy could lawfully pursue defendant into his wife's house without violating his fourth amendment rights. See *United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L.Ed.2d 300 (1976); *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L.Ed.2d 782 (1967); see also *Washington v. Chrisman*, 455 U.S. 1, 102 S. Ct. 812, 70 L.Ed.2d 1087 (1982) (warrantless entry to maintain control over resident arrested outside his dormitory room for minor offense; entry held lawful).

Defendant's argument would lead to absurd consequences. Under defendant's theory, a defendant could simply tell an officer that they were not under arrest, flee to any residence in which they were a guest, and

claim sanctuary once they were in the door. This is contrary to the law. Defendant was placed under arrest well before he entered his wife's apartment. Defendant was actively committing the crime of resisting arrest as he walked to his wife's apartment. Further, nothing gives defendant license to assault the deputy. The deputy did not error in pursuing a fleeing suspect who he had already placed under arrest and who was actively trying thwart a valid arrest.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the conviction and sentence below.

DATED: February 9, 2010

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BY  DISPUTY

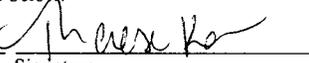
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date 2-9-10 Signature