

No. NO. 39570-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

BOW STAR HALL,

Appellant.

FILED
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STATE OF WASHINGTON
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LEWIS COUNTY

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

I. WHEN VIEWED IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE AT TRIAL PERMITTED A RATIONAL JURY TO FIND Mr. HALL GUILTY OF RESISTING ARREST AND CUSTODIAL ASSAULT BEYOND A REASONABLE DOUBT.

A. Legal Standards.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The state is not required to convince the reviewing court that the defendant was guilty beyond a reasonable doubt – just that a rational trier of fact could so conclude. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wn.2d 1011 (1992). Circumstantial evidence is given equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). As further explained below, sufficient evidence was presented in this case to support both convictions.

B. Custodial Assault.

Regarding the crime of custodial assault, Mr. Hall specifically challenges whether the state presented sufficient evidence of his intent to assault a corrections officer. To support his claim, he relies upon his testimony that the officer's arm obstructed his airway and joins this with his assertion that the state failed to present evidence of intent. His argument fails for lack of support of both claims. Although Mr. Hall testified that the officer's arm was an obstruction, he presented no evidence at trial that his biting of the officer was an involuntary reaction. At most, his testimony infers that he acted out of self defense. But he makes no such argument on appeal. While his trial attorney sought a self-defense instruction at trial, he does not now challenge the trial judge's ruling that the instruction was unsupported by the evidence. RP 112-13.

In addition, the state provided sufficient evidence of intent for the jury to have found that Mr. Hall acted purposefully when he bit the officer. Officer Curtright testified that from the beginning of his encounter with Mr. Hall on the day of the crime, Mr. Hall told the officers that he was not going to jail with them. Mr. Hall elaborated later, according to officer Curtright, that if they attempted to force him he would "smash our fucking faces in." RP 37-38.

The officer's testimony described Mr. Hall making good on that threat. Officer Curtright testified that once he felt a need to physically restrain Mr. Hall, the officer used a physical control technique to subdue Mr. Hall. He testified that in doing so he placed his forearm across Mr. Hall's cheekbone, not his mouth, in an effort to force Mr. Hall to expose his hands. RP 45. He then described Mr. Hall moving his head to get his mouth into position to bite the officer:

"I started to loosen my left arm from his face so I can grab that arm, and when I did that is when I could feel and watch what he was doing, he sunk his chin and turned into my arm... when he did that, obviously, at that point I knew he was probably going to bite me...

Did he bite you?

He did."

RP 46.



This evidence establishes that the bite was not involuntary. Officer Curtright testified that it was purposeful. RP 53. He also explained that Mr. Hall maneuvered his head into a position to bite him. He recounted that it was only when he loosened his grip on Mr. Hall's head in order to grab Mr. Hall's arm that the defendant took the opportunity to bite the officer. *Id.* The bite was not a protective response by Mr. Halls as the officer did not shove his forearm into Mr. Hall's mouth during his efforts to restrain him. RP 54.

Mr. Hall's testimony conflicted with the officer's statements. Mr. Hall testified that the officer's arm obstructed his airway. RP 97. He testified that the arm was obstructing his whole face. RP 96. At the same time, he did not state that he bit the officer because he was unable to breathe or that it was a reflex action. . . . Regardless, this court may disregard this evidence as it was within the jury's purview to dismiss the testimony as unreliable. The dependability of evidence is determined by the trier of fact at trial. Walton, 64 Wn.App. at 415-16. Thus, the state's evidence, when viewed in the light most favorable to the state, supports the jury's verdict finding Mr. Hall guilty of custodial assault.

C. Resisting Arrest.

The evidence similarly is sufficient for the jury to have found Mr. Hall guilty of resisting arrest. On appeal, Mr. Hall does not specify in what respect he believes the state's evidence was inadequate. He merely asserts that the "facts do not support a finding beyond a reasonable doubt of the essential element of the crime... in instruction No. 10 that Mr. Hall intentionally resisted arrest." Appl. Br. at 6-7. This assertion is incorrect. The state's evidence substantially supports each of the elements necessary to prove the defendant guilty of resisting arrest.

The essential elements of resisting arrest are that (1) the defendant prevented or attempted to prevent a peace officer from arresting him; (2) that the defendant acted intentionally; (3) that the arrest or attempt to arrest was lawful; and (4) that these acts occurred in Washington. See 11A WPIC 120.06. The state presented sufficient evidence in support of each element. The evidence presented established that the arrest of Mr. Hall was lawful. Both officers testified that the arrest was based upon probable cause that Mr. Hall had violated the terms of this community supervision. RP 37, 73-75.

Next, the evidence established that Mr. Hall resisted arrest. The state's testimony showed that after the officers told Mr. Hall that he was under arrest, Mr. Hall refused to submit to them, he threatened them, he attempted to prevent them from handcuffing him, and he finally bite Officer Curtright. RP 37-38, 46, 57, 79-80. In addition, the evidence proved that these officers were peace officers at the time of the arrest. RP 32, 63.

Next, the evidence established that Mr. Hall acted purposefully when he attempted to avoid arrest. At trial he admitted he knew why the officers were at his house. RP 100. The officers testified that they informed him that he was under arrest shortly after entering the residence. RP 55. Rather than submitting to them, the officers testified that he stated he would not let the officers take him to jail; that he would smash their faces if they attempted to restrain him. RP 37-38, 76. When they did, his response, he admitted at trial, was to bite Officer Curtright. RP 100. The evidence supports a conclusion that his resistance was intentional beyond a reasonable doubt.

Finally, the state's evidence proved that Mr. Hall resisted arrest in Lewis County, Washington. RP 34. When added to the state's other evidence and if viewed in a light most favorable to the

State, this proof permitted a rational jury to find Mr. Hall guilty of resisting arrest and custodial assault beyond a reasonable doubt.

For all of these reasons, Mr. Hall's arguments regarding the sufficiency of the evidence fail.

II. MR. HALL'S CONVICTIONS FOR RESISTING ARREST AND CUSTODIAL ASSAULT DO NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY

Mr. Hall next argues that the entry of convictions for both resisting arrest and custodial assault placed him in double jeopardy. The state disagrees.

Double jeopardy questions are reviewed de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). The test for unconstitutional double jeopardy is whether two offenses are identical in both law and fact. *State v. Roybal*, 82 Wn.2d 577, 512 P.2d 718 (1973). In determining whether charged offenses are identical in law and fact, this court applies the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *State v. Vermillion*, 112 Wn.App. 844, 51 P.3d 188 (2002). Under the *Blockburger* test, crimes are not identical if “each provision requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304. In other words, double jeopardy

attaches if the evidence to prove one crime would also completely prove a second crime. In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). Or, offenses are identical "both in fact and law" if one is a lesser included offense of the other.

Roybal, 82 Wn.2d at 582, 512 P.2d 718. A lesser included offense is one whose elements are necessary elements of the greater offense. Roybal, 82 Wn.2d at 583.

Mr. Hall claims that the test for double jeopardy is satisfied in his case because "resisting arrest requires no proof independent of that also required for an assault charge under RCW 9A.36.100(1)(c)(i)" (custodial assault). This claim is incorrect. Under RCW 9A.76.040(1), "a person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." The charge of custodial assault in comparison requires proof of an "assault of a full or part-time community correction officer while the officer is performing official duties..." RCW 9A.36.100(c)(i). Unlike resisting arrest, custodial assault does not require the State to prove that the defendant acted with a specific intent to prevent arrest. In other words, resisting arrest requires proof independent of that required for custodial assault under RCW 9A.36.100(c)(i).

The requirements for the crime of resisting arrest also differ from the elements of the crime of custodial assault in that "the Legislature expressly included lawfulness of the arrest as a statutory element." See 11 WPIC 120.06. This same requirement is not found in RCW 9A.36.100. Thus, in this respect too resisting arrest is not legally identical to custodial assault and the crimes pass the *Blockburger* test.

The same conclusion is true when one looks at the crimes in reverse. Proof of resisting arrest does not necessarily establish the crime of custodial assault. The provisions of custodial assault require proof of facts that resisting arrest does not. To establish custodial assault, RCW 9A.36.100(c)(i) requires that a person commit an assault. In contrast, resisting arrest only requires that the defendant "prevents or attempts to prevent" his arrest. This may or may not involve an assault. A defendant might prevent arrest through the use of non-threatening and non-violent means.

This reasoning is not refuted by Mr. Hall's argument. Mr. Hall does not argue that the two crimes are legally identical. Instead, he concentrates his argument on highlighting the overlap of the factual proof required to establish guilt for each crime. This argument, however, is not sufficient to satisfy the *Blockburger* test.

The state's reliance on identical facts to prove two crimes does not establish a violation of double jeopardy. The State may bring multiple charges arising from the same criminal conduct in a single proceeding. State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." State v. Reiff, 14 Wash. 664, 667-668, 45 P. 318, 319 (1896) (quoting Morey v. Commonwealth, 108 Mass. 433, 1871 WL 5339 (1871)). Under the *Blockburger* test, two crimes must be identical in fact *and* law. State v. Calle, 125 Wn.2d 769, 778, 888 P.2d 155, 159 (1995) ("Although the offenses charged may be identical in fact - i.e., both occurred when the Defendant had sexual intercourse - they are not identical in law. Incest requires proof of relationship; rape requires proof of force. Therefore, the two offenses are not the same under either the "same evidence" test or *Blockburger*). Even "where a crime is elevated to a higher degree by proof of another crime... both convictions will be allowed to stand where the legislative purpose for criminalizing the conduct or the harm associated with each crime is unique, that is, where the statutes in question address two separate evils." Vermillion, 112 Wn.App. at 861. Here, resisting

arrest and custodial assault have different purposes. The former punishes a person's efforts to defy the authority of the state to legally detain the person for committing a crime. The latter crime addresses violent behavior by a person against a law enforcement officer. This difference in purpose is supported by the different location of each criminal provision in the criminal code. The two crimes are located in different chapters, 9A.76 and 9.46, of the code. See Calle, 125 Wn.2d at 780; In re Percer, 150 Wn.2d 41, 52, 75 P.3d 488 (2003). Thus, while Mr. Hall's single act of biting may constitute proof of both crimes, it is clear that the crimes are separate offenses under the double jeopardy clause. *Id.*

Accordingly, jeopardy did not attach during the superior court proceedings and this court should reject Mr. Hall's double jeopardy claim.

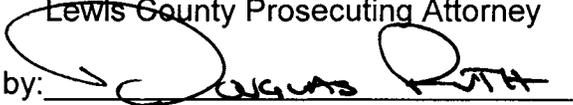
CONCLUSION

For the foregoing reasons, this court should affirm Mr. Hall's conviction.

RESPECTFULLY submitted this 7 day of May, 2010.

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by:


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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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_____)
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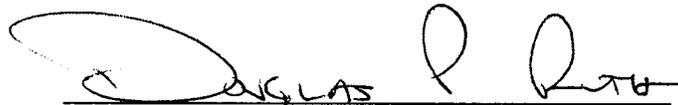
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ATTORNEY

Mr. Doug Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 7, 2010, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 7 day of May 2010, at Chehalis, Washington.



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