

NO. 48071-9-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

KELLEN M. LINNELL,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Erik D. Price, Judge  
Cause No. 11-1-01848-6

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count III, bail jumping, from the jury for lack of sufficient evidence.
02. The trial court erred in not taking count II, obstructing a law enforcement officer, from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Linnell failed to appear for a required court appearance with knowledge of the requirement to do so?  
[Assignment of Error No. 1].
02. Whether there was sufficient evidence that Linnell willfully hindered, delayed, or obstructed Lieutenant Mark Arras?  
[Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Kellen M. Linnell was charged by first amended information filed in Thurston County Superior Court May 20, 2015, with assault in the third degree, count I, obstructing a law enforcement officer, count II, and bail jumping, count III, contrary to RCWs 9A.36.031(1)(g), 9A.76.020, and 9A.76.170, respectively. [CP 49].

Linnell's pretrial statements were ruled admissible following a CrR 3.5 hearing. [RP 06/22/15 37-44;<sup>1</sup> CP 72-75]. Trial to a jury commenced August 17, the Honorable Erik D. Price presiding. Linnell was acquitted of assault but found guilty of the remaining charges, sentenced within his standard range, and timely notice of this appeal followed. [CP 122-134].

02. Trial<sup>2</sup>

02.1 Obstructing Lieutenant Mark Arras

On November 28, 2011, on the Capitol Campus in Olympia, demonstrators were protesting in support of the "Occupy Olympia" campaign. [RP 15, 26, 128]. Around six that evening, when a surge of demonstrators on the outside of the southeast entrance to the Legislative Building ("dome building") attempted to enter, they were successfully pushed back by employees of the Department of Enterprise Services and several members of the Washington State Patrol. [RP 33-37, 46-47]. During this encounter, Sergeant Theodore Dehart was bitten by one of the protestors. [RP 34, 48, 53]. After the doors were secured [RP 50], Dehart went outside to apprehend the person who had injured him:

I went back through the doors and grabbed him and said he was under arrest and started to pull him back towards the interior of the Legislative Building.

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<sup>1</sup> Unless otherwise indicated, as here, all references to the Report of Proceedings are to the transcripts entitled Jury Trial, Volumes I-II.

<sup>2</sup> The facts are limited to the offenses of obstruction and bail jumping for which Linnell was found guilty.

RP 51].

As the demonstrator resisted Dehart's efforts to arrest him, Dehart "felt somebody's weight on top of (him)." [RP 62]. "On top of my shoulder blades and my back." [RP 62]. "I was limited movement at that point in time." [RP 63].

When Lieutenant Mark Arras, who was in full uniform, observed Linnell run and jump on the back of Dehart in an apparent effort to prevent the arrest of the demonstrator, he went to assist Dehart by pulling Linnell off of his back. [RP 104, 111]. "I was able to grasp him by the shoulder and the collar and pull him away." [RP 111].

He was immediately flailing his arms. He was struggling. He was yelling. He was - - he was very loud. He was very animated. And the movement continued. I took him right to the ground, and ended up on his back at that point.

....

I was behind him so he didn't have a - - an opportunity to direct anything towards me, but his arms were flailing. He was trying to move every time, and I was - - I was controlling his activity so he couldn't move at that point.

[RP 113]. "It was pretty quick. We're talking about - - we're going through this sequence by sequence, but this is a matter of seconds." [RP 113-14].

He was on his - - he was laying facedown (sic) on the ground, and at that point I was on his back - - on his back. He flailed at one point. I slipped and landed on my elbow, and then - - so then I ended up with my arm directly under his face ....

[RP 114].

And then I felt his hand - - I felt my gun move. I felt my gun move, and my gun belt move, and I began moving to try to control it and move his arms and - - and basically stop the activity.

....

He kept yelling. He was yelling loud. And at that point I continued. I applied the pressure in a standard carotid restraint. His voice inflexion changed, and then he immediately stopped and started tapping both hands on the ground.

[RP 116].

Arras then handed Linnell off to Sergeant Elmore. [RP 118]. When Linnell overheard Elmore inform Dehart that Linnell had been arrested for jumping on his back, Linnell said, “I didn’t know you were a police officer. I didn’t know you were a cop.” [RP 67]. Later, during the on-site booking process, Linnell spontaneously addressed Dehart:

He pleaded with me, “Sir, sir, please let me go. Please let me go. I didn’t know you were a police officer. I was just helping out a friend.”

[RP 69].

At trial, Linnell explained that after being forced out of the southeast entrance to the Legislative Building, he walked about 30 feet to where an arrest was taking place “with the intention of being a witness just to stand by and witness this person being arrested ... see that people are treated fairly, you know.” [RP 223]. He came within a couple of steps of where the arrest was taking place. [RP 223]. “I had my hands out to my side and - - just thinking peace, you know, like praying kind of like.” [RP 223].

And I was struck. This is - - I was struck in the back of the head and it - - and it gave me, like, a flash of light, like - - like knocked the daylights, you know. And it was like a minor concussion or something. And it got me. And I was slammed to the ground, and the wind was totally knocked out of me ....  
....

There’s a strangle on me, and so I can’t inhale any air. And I try to scream, and I couldn’t make any sound ... So I tapped the ground like this, and I’m tapping, tapping, tapping. And I’m just afraid, you know. And I hear - - I hear, “That’s right. You better tap out.”

[RP 224].

After he was arrested and put in handcuffs, he heard,

“What’s the charge? What’s the charge on this one?  
And the response is “Assault on all three of them.”  
And I say assault - - “I assaulted no one. And this is on the audio recording I gave you.

[RP 226].

I felt like I was so violated and so dominated at that point. It was like I - - all I could really say was like pleading. It was like I was violated, and I felt victimized and I felt helpless, and I was just, like pleading with these troopers, you know, to please - - to listen to what I'm saying, that I did not assault anyone.

[RP 226-27].

Linnell denied ever saying he didn't know someone was a cop.

"But I heard - - and I absolutely heard that being said by other individuals." [RP 227].

#### 02.2 Bail Jumping

Through elected Thurston County Clerk Linda Enlow, the State introduced the following certified documents relating to the bail jumping charge: 11/2/11 Conditions of Release, requiring Linnell to appear before the court within "three (3) days notice" [State's Exhibit 5; RP 150], 12/01/11 Information charging Linnell with assault in the third degree [State's Exhibit 7; RP 151-52], 12/11/11 Bail Bond [State's Exhibit 6; RP 153-54], 12/13/11 Clerk's Minutes for arraignment [State's Exhibit 8; RP 156-57], 12/13/11 Order and Notice Setting Trial Date or Other Hearings, requiring defendant to be present at all required hearings and that failure to do so will result in warrant for his arrest [State's Exhibit 9; RP 159], 07/02/12 Agreed Order of Trial Continuance, setting forth, among other dates, a status conference hearing

for November 7, 2012 and notice that failure to appear for a scheduled hearing “MAY RESULT IN ISSUANCE OF AN ARREST WARRANT, FORFEITURE OF BAIL, AND CRIMINAL PROSECUTION FOR BAIL JUMPING” [State’s Exhibit 11; RP 165], 11/07/12 Clerk’s Minutes indicating defendant not present [State’s Exhibit 12; RP 168], 11/07/12 Order for Bench Warrant after Failure to Appear issued for Linnell [State’s Exhibit 13; RP 169-170], 11/09/12 Bench Warrant [State’s Exhibit 14; RP 171].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT LINNELL FAILED TO APPEAR FOR A REQUIRED COURT APPEARANCE WITH KNOWLEDGE OF THE REQUIREMENT TO DO SO.

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in 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). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.

Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

To prove the charge of bail jumping, the State had to prove that Linnell failed to appear for a required appearance before the court with knowledge of the requirement to do so, which, in this case, translated to proof that he was the same person who had signed the July 2, 2012 Agreed Order of Trial Continuance, which listed the subsequently missed status conference hearing for the following November 7. [State’s Exhibit 11].

[W]hen criminal liability depends on the accused’s being the person to whom a document pertains(,) ... the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt “that the person named therein is the same person on trial.”

State v. Hubner, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (emphasis added) (footnotes omitted). The State is required to present some corroborating evidence, such as “booking photographs, booking fingerprints, eyewitness identification, or ... distinctive personal information.” Id. 129 Wn. App. at 503. If the State presents only

documents bearing an identical name, the State produces insufficient evidence to support a criminal conviction beyond a reasonable doubt. State v. Hunter, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981). Nor does the State satisfy its burden simply because the defense presents no evidence refuting the claim of identity. State v. Huber, 129 Wn. App. at 503.

In Huber, where the defendant was charged with bail jumping, the State, as here, presented only documentary evidence (information, order, clerk's minutes) referencing Huber, which this court, in reversing, held was insufficient to establish that Huber was the person named in the documents. Similarly, here the State produced nearly identical documentary evidence: information, orders and clerk's minutes. The State did not call any witnesses who had attended any of the hearings or anyone who was familiar with Linnell's signature. In fact, when the Thurston County Clerk, who was the State's sole witness on the bailing jumping charge, was asked if she was familiar with Linnell's signature, she said "No." [RP 177].

Under these facts, given the State failed to carry its burden of proving that Linnell was the same person named in and who signed the order requiring his appearance for the November 7, 2012 hearing, his conviction for bail jumping must be reversed and dismissed.

02. THERE WAS INSUFFICIENT EVIDENCE THAT LINNELL WILLFULLY HINDERED, DELAYED, OR OBSTRUCTED LIEUTENANT MARK ARRAS.<sup>3</sup>

To establish obstruction of a law enforcement officer, the State had to prove that Linnell willfully hindered, delayed, or obstructed Lieutenant Mark Arras in the discharge of his powers or duties. RCW 9A.76.020(1). Willfully means to purposefully act with knowledge that one's actions will hinder or delay or obstruct a law enforcement officer in the discharge of his official duties. State v. Ware, 111 Wn. App. 738, 743, 46 P.3d 280 (2002) (internal citations omitted. [Court's Instruction 11; CP 116].

The evidence here falls short of this burden. Lieutenant Arras testified that he approached Linnell from behind and took him "right to the ground and ended up on his (Linnell's) back at that point." [RP 111]. Linnell was "laying facedown" (sic) and Arras was on his back. [RP 114]. When Linnell "flailed at one point," Arras wound up with "his arm directly under (Linnell's) face." [RP 114]. Linnell "immediately stopped and started tapping both hands on the ground" once Arras's applied the carotid restraint. [RP 116]. According to Arras, this didn't take long:

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<sup>3</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for sufficiency of the evidence presented earlier herein is hereby incorporated by reference.

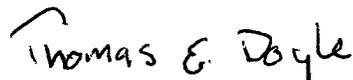
“We’re talking about - - we’re going through this sequence by sequence, but this is a matter of seconds.” [RP 113-14].

Under these facts it is difficult to assert that Linnell was purposefully acting to hinder the person who had struck him from behind. He was hit on the back of his head, immediately taken face down to the ground and strangled as his arms flailed about. And in this context, whether his hands touched Arras’s belt or gun is of little consequence, given that it cannot be established that he was acting with this purpose. He was trying to breathe and reacting in a manner consistent with the circumstances. He was not willfully hindering, delaying, or obstructing Lieutenant Mark Arras, with the result that his conviction for obstruction should be reversed.

E. CONCLUSION

Based on the above, Linnell respectfully requests this court to reverse his convictions for bail jumping and obstruction consistent with the arguments presented herein.

DATED this 3<sup>rd</sup> day of May 2016.



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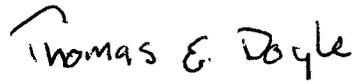
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne  
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DATED this 3<sup>rd</sup> day of May 2016.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE  
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**DOYLE LAW OFFICE**

**May 03, 2016 - 3:58 PM**

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