

NO. 53552-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MARCUS CHURCH,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable J. Andrew Toynebee, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The state failed to prove beyond a reasonable doubt that Mr. Church assaulted McKnight with intent to resist arrest.

Issue Presented on Appeal

Could the state prove beyond a reasonable doubt that Mr. Church assaulted McKnight with intent to resist arrest, when Mr. Church did not know that he was resisting arrest, but rather believed he was being attacked by a stranger posing as a plain clothed officer?

B. STATEMENT OF THE CASE

Marcus Church was charged and convicted by jury of failure to make contact with his DOC CCO under RCW 72.09.310 and third degree assault under RCW 9A.36.031(1)(a). CP 24.

Lewis County Deputy Scott Robb responded to an incident on March 30, 2019. RP 70. The incident did not involve Mr. Church. RP 72-73. Robb first saw Church as he was walking near the residence at 11:00am close to the residence Robb responded to, but Robb never saw Church inside that residence. RP 73-74. Robb made contact with Church outside the residence. RP 79. Church was wearing a hoodie with his hood on so that his face was not

visible to Robb. RP 79-80.

After the conversation Church entered the house and Robb spoke to the other occupants. RP 80. Robb believed that Church looked familiar but did not recognize him on his own. RP 81. Robb called Sergeant McKnight who lived across the street and was inside his house, to ask if he recognized Church. RP 80, 114.

McKnight went to his window to see Church, but he was already inside. RP 115. McKnight had seen a photograph of Church in the past, but had never met him. RP 115. According to McKnight, he saw Church jogging east bound from the back of the residence – hopping fences. RP 116-117. Robb tried to contact dispatch to run Church's name for warrants. RP 83. McKnight, in plain clothes, decided to follow Church by jogging parallel to Church to keep Church in sight. RP 117-18, 126.

McKnight testified that he knew that Church had a DOC escape warrant, but Robb never testified that he told McKnight that Church had a warrant and Church's CCO never communicated to either Robb or McKnight that Church had a warrant. RP 70 118. Robb testified that he learned Church had an active warrant. RP 87.

During the jog, McKnight yelled for Church to stop and said he was a police officer. RP 118. Church responded by saying “seriously?” RP 119, 127. Church stopped and stood in a defensive boxing posture to try to strike McKnight, who ducked. RP 120-21. The strike landed on the back of McKnight’s head causing no more than ‘offense’. RP 124. McKnight assumed that Church was running from Robb to avoid arrest. RP 125.

McKnight followed Church to “assist Deputy Robb in any way I could”. RP 128. McKnight did not intend to detain Church until Robb arrived because McKnight “didn't have all the tools that Deputy Robb had.... so I was just going to keep him in sight.” RP 128. McKnight testified that he was not trying to apprehend Church, but if Church just submitted, he would have apprehended him. RP 128-29. In redirect, McKnight answered “yes” when asked, “I think you had a little difficulty answering, just given the question, but was your intent in pursuing Mr. Church to assist Deputy Robb in arresting him?” RP 131. McKnight slammed Church to the ground in one move, but never told Church he was under arrest. RP 129-31.

Jury instruction 15 provided:

No. 15

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 25. This timely appeal follows. Notice of Appeal, Supp. CP.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF ASSAULT IN THE THIRD DEGREE UNDER RCW 9A.36.031(1)(a)

The state failed to prove all of the essential elements of assault as charged in this case. Specifically, that Church assaulted McKnight with intent to resist a lawful apprehension. In a criminal prosecution, due process requires the state to prove every element of the charged crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); *In re Winship*, 397 U.S. 358, 361–64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

To commit assault in the third degree under RCW 9A.36.031

(1)(a), the state must prove beyond a reasonable doubt that:

With 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, herself, or another person, assaults another

RCW 9A.36.031(1)(a) thus makes it a crime to assault any individual who is in the process of lawfully detaining, apprehending or executing lawful process, regardless of whether the person assaulted is a private citizen or a law enforcement officer. *Id.*

Mr. Church was charged under this subsection because officer McKnight was not on duty and not in a uniform. This subsection (1)(a) overlaps somewhat with subsection (1)(g), which addresses assaults on law enforcement officers engaged in official duties. *State v. Mierz*, 127 Wn.2d 460, 478, 901 P.2d 286 (1965) (*citing, State v. Belleman*, 70 Wn. App. 778, 784, 856 P.2d 403 (1993)).

Under this subsection (1)(a), the state has the burden of establishing that the arrest was in fact, lawful. *Belleman*, 70 Wn. App. at 778. The state is not required to establish that the defendant subjectively knew that the arrest was lawful. *State v. Goree*, 36 Wn. App. 205, 209, 673 P.2d 194 (1983).



The Court noted that the “primary purpose of the statute is “to *prohibit* assaultive behavior which interferes with the custodian’s lawful obligations to insure a peaceful and orderly custody.” *Goree*, 36 Wn. App. at 209 (*citing, State v. Jury*, 19 Wn. App. 256, 269, 576 P.2d 1302 (1978) (*Italics added by Goree.*)) This goal is meant to ensure that force is not used to prevent even an unlawful arrest. *Goree*, 36 Wn. App. at 209 (*citing, State v. Rousseau*, 40 Wn. App. 92, 241 P.2d 447 (1952)); *State v. Westlund*, 13 Wn. App. 460, 536 P.2d 20 (1975).

First, Mr. Church does not challenge the lawfulness of his arrest or the state’s burden to prove that the arrest was lawful. Rather he argues that because he did not know he was being arrested or apprehended, he could not intend to commit an assault while being arrested or apprehended. RP 65. This is different than establishing a lawful arrest or apprehension. A person cannot assault a person with the intent to resist arrest or apprehension, if the person believes he is being attacked rather than arrested or lawfully detained.

The approach in *Goree*,, permitting the state to prove the intent to assault under this subsection without establishing the

defendant knew he was being lawfully arrested or detained made sense 35, 50, or 70 years ago as indicated in these cases, but today, the relationship between the community and the police is different. Here, the issue here is not whether Church knew the detention was lawful, but rather he did not know he believed he was being attacked, not apprehended or arrested. When McKnight, jogged parallel to Mr. Church and yelled at Mr. Church indicating he was the police, Mr. Church did not believe him because McKnight was in plain clothes. RP 117-19, 126.

When Mr. Church struck McKnight, McKnight had not told Mr. Church that he was under arrest for a DOC warrant, or for any warrant, he just told Mr. Church to stop because he was a police officer. RP 119. The facts show Mr. Church reacted to being confronted by a person he did not believe to be an officer. This scenario should not suffice to establish assault in the third degree, even under *Goree*, because it defies logic to permit the state to establish an assault in the third degree when the defendant reasonably believes he is defending himself against an unlawful attack. *Goree*, 36 Wn. App. at 209.

Second, there is scant evidence that McKnight was trying to

apprehend Church. The majority of McKnight's testimony consisted of McKnight indicating he was merely keeping an eye on Church until Robb arrived, but that McKnight did not intend to apprehend or detain Church, despite testifying that he was willing to apprehend Church if Church complied with verbal commands. RP 117-18, 126, 128-29, 31. Assisting and keeping an eye on Church versus apprehending may seem insignificant, but the statute requires the state prove that Church assaulted McKnight who was 'lawfully apprehending' him. RCW 9A.36.031(1)(a).

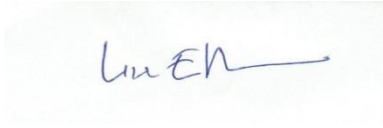
The facts support that McKnight was keeping an eye on Mr. Church while he jogged parallel to him and communicated his whereabouts to Robb. The facts also support that McKnight told Mr. Church to stop and that he was the police. These facts do not however, establish beyond a reasonable doubt that McKnight was apprehending Mr. Church, rather than just assisting Robb by keeping Church in sight. RP 119, 126, 131. This is insufficient to establish assault under RCW 9A.36.031(1)(a).

#### D. CONCLUSION

For the reasons discussed herein, Mr. Church respectfully requests this Court reverse and remand for dismissal with prejudice.

DATED this 27<sup>th</sup> day of November 2019.

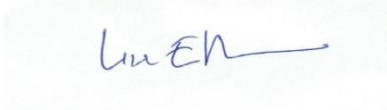
Respectfully submitted,

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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov) and [sara.beigh@lewiscountywa.gov](mailto:sara.beigh@lewiscountywa.gov) and Marcus Church/DOC#351208, Coyote Ridge Corrections Center, PO Box 769. Connell, WA 99326a true copy of the document to which this certificate is affixed on November 27, 2019. Service was made by electronically to the prosecutor and Marcus Church by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is centered within a light green rectangular box.

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Signature