Supreme Court No. 100782-5
No. 82112-1-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

NATHAN LEONARD YAFFEE,

Petitioner.

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washapp.org

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Nathan Yaffee asks this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued an opinion affirming Mr. Yaffee's convictions for attempted arson and attempting to elude a pursuing police vehicle on March 7, 2022. Appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether a prosecutor commits misconduct by making an emotional appeal outside the evidence by speaking about recent attacks upon law enforcement and the current political climate against the police in the wake of George Floyd's murder?

2. Whether an instruction stating that "malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another," is a judicial comment on the evidence?

3. In order for a charging document to both fairly inform the defendant of the facts underlying the charge and enable the defendant to plead double jeopardy as a bar in a future prosecution for the same offense, must the charging document allege specific facts making up the charged offenses?

C. STATEMENT OF THE CASE

Patrick Gunn testified that on April 19, 2020, between about 9:00 to 10:00 p.m., he was driving to a Fred Meyer. RP 294. On his way, he drove by the Lynnwood Police Department. RP 295-96. He saw a man and a dark vehicle parked on the side of the road near the parking lot of the Police Department. RP 296-98. He saw a fire near or under a truck in the parking lot; he speculated that the person must be trying to set the vehicle on fire. RP 299, 303, 309. When Mr. Gunn arrived at Fred Meyer, he claimed he told someone about it and to call the police, but testified the person he told could not be bothered. RP 298.

Mr. Gunn completed his shopping, which took about 10 minutes. RP 298. On his way back, he saw the man and the dark colored car in the same area. RP 299, 308. He could not recall if there was still a fire. RP 303. When he got home, he called 911. RP 299.

Law enforcement responded. Sergeant Joshua Kelsey approached the dark colored car and activated his lights and sirens. RP 329-30. Ending a pursuit that lasted about a minute and half, Sergeant Kelsey forced the car off the road using a "PIT"[1] maneuver. RP 338, 345, 350. Sergeant Kelsey and other officers approached the car, with their guns pointed toward the

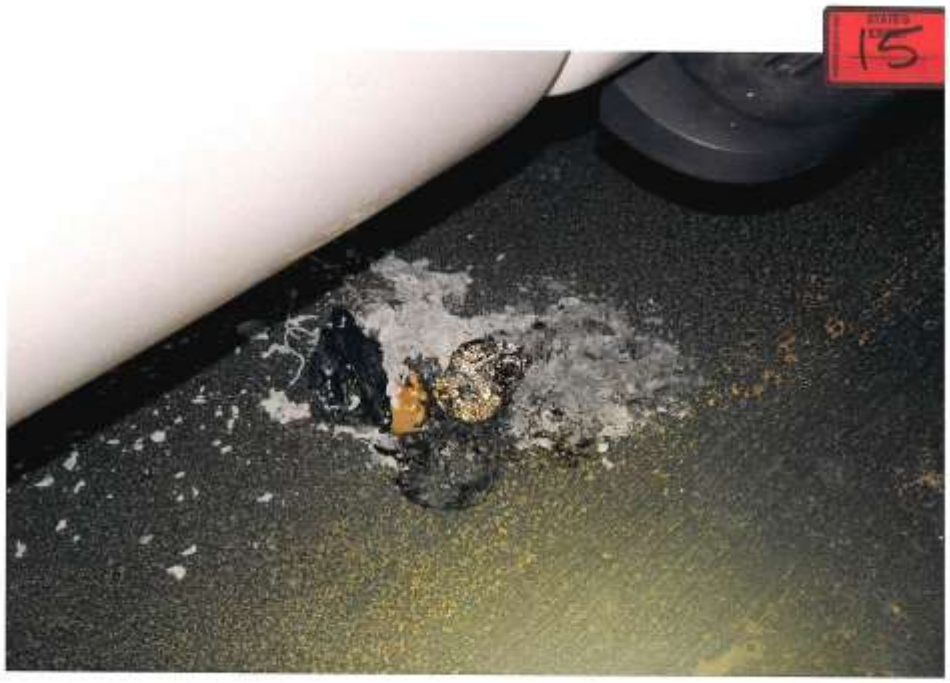
[1] "Pursuit Intervention Technique" or "Pursuit Immobilization Technique." RP 338. PIT maneuvers, a form of deadly force, have come under scrutiny recently because of misuse and the risk of death or serious injury. Ewan Palmer, Newsweek, *What Is a PIT Maneuver? Nicole Harper Incident Throws Spotlight on Police Tactic*, June 10, 2021, available at: https://www.newsweek.com/pit-maneuver-police-arkansas-nicole-harper-rodney-dunn-1599300; Shaun Raviv and John Sullivan, The Washington Post, *Deadly force behind the Wheel*, August 24, 2020, available at https://www.washingtonpost.com/graphics/2020/investigations/pit-maneuver-police-deaths/.

driver. RP 363, 451, 571-72. The driver, Nathan Yaffee, already had his hands raised in the air through the driver's side window. RP 348, 364, 416, 573. Likely in response to the guns being pointed at him and not wanting to be shot and killed, Mr. Yaffee said "just tase me." RP 348. Mr. Yaffee was compliant with police commands. RP 351, 391, 548. Shortly after being detained, Mr. Yaffee said he was going through a rough time and had done something stupid. RP 395-397.

Officer Alec Dyngen, who responded to the scene where police arrested Mr. Yaffee, was the first to arrive back at the Lynnwood Police Department and investigate the report of a fire. RP 516-17, 524. On the ground near the right middle side of a truck was a small smoldering object. RP 519. Because there appeared to be a braided fabric cord protruding from the object, which could be a fuse, other officers decided to call in a bomb squad to investigate. RP 519, 524-25.

Using a robot, the bomb technician picked up and squeezed the small object. RP 592-93. The technician did not

see smoke coming from the object. RP 596. The object was a bag with a burrito inside wrapped in foil. RP 593. The robot placed the remnants back on the ground about in the spot where it had been. RP 593. The corded material sticking out from the object was part of the handle of the bag. RP 372, 463-65, 472-73. Pictures of the debris and truck were admitted at trial, including the following:



Exs. 14-15.

The prosecution charged Mr. Yaffee with attempted second degree arson and attempting to elude a pursuing police vehicle, both felonies. CP 80-81, 135-36. The charging document was abstract and did not allege specific facts in support of the charges. CP 80-81, 135-36.

The trial focused on the issue of whether Mr. Yaffee acted with malice, necessary to find Mr. Yaffee guilty of attempted second degree arson. See RP 5/26/20 RP 20-44

(closing arguments). Mr. Yaffee contended the prosecution failed to prove malice. Over Mr. Yaffee's objection, the court instructed the jury that "[m]alice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another." CP 53 (instruction #14).

The prosecutor framed the prosecution as addressing an "attack on law enforcement," and that the police response was not disproportionate, particularly given the recent "political climate" against law enforcement. RP 135-36; 5/26/20 RP 24. Following the prosecutor's politically charged and misleading arguments, the jury convicted Mr. Yaffee of attempted second degree arson and attempting to elude. RP 49.

The Court of Appeals rejected Mr. Yaffee's challenges to the convictions, but granted him sentencing relief.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted to decide whether a prosecutor commits reversible misconduct by invoking the current "political climate" against law enforcement in the wake of George Floyd's murder, an irrelevant matter outside the evidence that occurred *after* the charged incident.

When a prosecutor makes improper arguments, this misconduct may deprive defendants of a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). The right to a fair trial is a fundamental liberty secured by the state and federal constitutions. Id. at 703-04; U.S. Const. amend. XIV; Const. art. I, § 3.

For this reason, prosecutorial "advocacy has its limits." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). A "prosecutor's duty is to ensure a verdict free of prejudice and based on reason." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A "prosecutor has a duty to act impartially in the interest only of justice." State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). To ensure defendants receive a fair trial,

prosecutors must "subdue courtroom zeal," not increase it. State v. Loughbom, 196 Wn.2d 64, 69, 470 P.3d 499 (2020) (internal quotation omitted). Convictions must be "based on specific evidence in an individual case and not on rhetoric." Id. at 69-70. Thus, a prosecutor commits misconduct by making arguments outside the admitted evidence or by appealing to the passions and prejudices of the jury. Glasmann, 175 Wn.2d at 705-07; State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).

Citing matters outside the evidence and through rhetoric, the prosecutor politicized the trial, which occurred in late October 2020. During jury selection, the prosecutor alluded to events in the recent months, asserting that "we're in a different political climate than we used to be in regards to law enforcement." RP 131-32. Referring to protests against law enforcement in the wake of the police murder of George Floyd, an unarmed Black man, the prosecutor spoke about "attacks on

law enforcement in the last six months to a year" and rhetorically asked, "whether we should be taking attacks on law enforcement seriously," and "how seriously should we be taking them?" RP 135-36.

During trial, the prosecutor elicited testimony from law enforcement officers that they had never had a fire lit near one of their vehicles on government property and were concerned about being "attacked" at their home base. RP 444-45, 530.

Citing this testimony, the prosecutor argued to the jury that the reaction by the police was justified, particularly '[i]n this political climate" and "where we are today":

> You have heard the testimony. You have heard from officers who have been working for as long as 22 years. I've never seen anything like this happen.
>
> Officer Dyngen pulled over a reckless driver, cut him loose because he thought the building was under attack.
>
> Now, counsel when he opened his case, what did he say? 'A bag, a burrito, and the bomb squad. The difference between prudence and overreaction.'

> In this political climate, given the fact that no officers could remember a single incident like this, given where we are today, we talked about it in voir dire, the bag that's unattended in the airport. This was not an overreaction. We've never seen this before.

10/29/20 RP 23-24 (emphases added).

Voir dire was not evidence. There was no evidence presented about the "political climate." The community protests and demonstrations against abusive actions by law enforcement in the summer of 2020 were not relevant to the events at issue. Nor could they be. The date in question was **April 19, 2020**. The murder of George Floyd by police was on **May 25, 2020**.[2] The "political climate" the prosecutor spoke of arose afterward. The prosecutor committed misconduct by citing matters outside the evidence and injecting politics into the case.

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to

[2] https://www.nytimes.com/article/george-floyd.html.

consider." Belgarde, 110 Wn.2d at 508. In Belgarde, the prosecutor committed misconduct by testifying about the "American Indian Movement" during closing argument. The defendant had testified he was associated with the group. The prosecutor commented that this was "deadly group of madmen" and compared members of the group to terrorists. This Court held this argument was misconduct because it was outside the evidence and inflammatory. The arguments encouraged the jury to render a verdict based on the defendant's associations rather than the admitted evidence. 110 Wn.2d at 507-09.

More recently, this Court held it was misconduct to frame a prosecution as representative of the "war on drugs." Loughbom, 196 Wn.2d at 75. This sort of political argument or "send a message" type argument is improper because it seeks to convict based on matters outside the evidence and is inflammatory. As this Court explained:

> Justice can be secured only when a conviction is based on specific evidence in an individual case and not on rhetoric. We do not convict to make an

> example of the accused, we do not convict by appeal to a popular cause, and we do not convict by tying a prosecution to a global campaign against illegal drugs.

Id. at 69-70.

Likewise, the prosecutor committed misconduct by citing matters outside the evidence and injecting politics into the trial. After speaking of recent attacks on law enforcement during voir dire, he framed the incident as being one of these attacks on law enforcement. He justified the actions of the police based on the "political climate." His argument was designed to inflame the passions and prejudices of the jury by focusing them on irrelevant matters outside the evidence. It invited the jury to "side" with police and against Mr. Yaffee through a guilty verdict, rather than whether the evidence proved the elements of the offenses.

The Court of Appeals "acknowledge[d] that the prosecutor's statement was outside the record and risked appealing to the passions of the jury." Slip op. at 8. The Court

of Appeals, however, ruled Mr. Yaffee was not entitled to relief because the remarks were not so prejudicial that a curative instruction would have been ineffective. The court unfairly minimized the misconduct by reasoning that it was merely a response "to defense counsel's questioning of the use of resources to investigate the smolder, and not [Mr.] Yaffee's guilt." Slip. op at 8.

This reasoning is flawed. It ignores that it was the prosecution that introduced the "political climate" as an issue, not the defense. It further ignores that prosecution was inappropriately asserting that Mr. Yaffee's purported act of burning a burrito near a police truck was a *malicious* act against law enforcement *in response to the police's murder of George Floyd, an unarmed Black man*. But the events at issue occurred *before* the police murder and the resulting protests. And the issue was not whether the police reaction was proportionate or disproportionate; it was whether the prosecution could prove the elements of the charged crimes beyond reasonable doubt.

The prosecution unfairly and misleadingly used evidence outside the record to imply that Mr. Yaffee's burning of a burrito was a malicious act of protest against law enforcement.

The Court of Appeals' decision conflicts with precedent where similarly outrageous misconduct by prosecutors warranted reversal because no instruction would have cured the resulting prejudice. Loughbom, 196 Wn.2d at 75; Belgarde, 110 Wn.2d at 507-510. Prosecutors cannot be permitted to secure convictions based on this type of foul play. This is especially true where the misconduct implicates racial bias or animus. See State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). While the prosecutor did not explicitly appeal to racial bias, the "political climate" it referred to concerned protests about systemic racial injustices perpetrated by police, particularly the murder of unarmed Black men. Although Mr. Yaffee does not appear to be a person of color, the prosecutor's argument singled him out as a type of dangerous person; a person whom the police were warranted in reacting with overwhelming and

lethal force. This was misconduct. State v. Salas, 1 Wn. App. 2d 931, 946, 408 P.3d 383 (2018) (misconduct to misuse evidence "'in order to show action in conformity therewith,' improper under ER 404(b)."

This cannot be permitted. Review is warranted so that this Court may continue to stamp out this kind of misconduct and reiterate it meant what it has said in its precedents. RAP 13.4(b)(1), (2) . Otherwise, these plainly improper arguments will continue, which will be used by prosecutors to secure convictions against minorities and other disadvantaged persons. This cannot be tolerated. Review is further warranted as a matter of substantial public interest. RAP 13.4(b)(4).

2. The Court should grant review to decide whether an instruction telling the jury on the circumstances it may infer malice constitutes a judicial comment on the evidence.

Over Mr. Yaffee's objection, the trial court instructed the jury that "[m]alice may be, but is not required to be, inferred

from an act done in willful disregard of the rights of another." CP 53 (instruction #14).

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. Through this provision, "the framers of the constitution could not have more explicitly stated their determination to prevent the judge from influencing the judgment of the jury on what the testimony proved or failed to prove." Bardwell v. Ziegler, 3 Wash. 34, 42, 28 P. 360 (1891). "It is the exclusive province of the jury to determine from the evidence what fact is proven conclusively or otherwise, and to analyze the testimony, and to determine for themselves whether there is any dispute in relation to all or any of the facts concerning which testimony is offered." Id. at 42-43. Thus, "any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Whether there is a comment on the evidence "depends upon the facts and circumstances of each case." State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980). Here, the instruction told the jury that the trial judge believed malice may be inferred simply based on a willful disregard of another's rights. Viewed in the context of this case, this had the potential effect of suggesting to the jury that it could find malice based solely on Mr. Yaffee's willful disregard of the property rights of the Lynnwood Police Department. See id. at 713 (instruction that great bodily harm means an injury of a more serious nature than an ordinary striking with the hands or fist was a comment on the evidence because it indicated that the evidence at trial was insufficient to support self-defense).

Indeed, this is why the prosecution wanted the instruction. In support of the instruction, the prosecution argued to the court, "By Mr. Yaffee's actions, he is showing a disregard for the rights of the police department to the enjoyment of their property in quiet enjoyment. So I think it's

appropriate, and the inference is appropriate and can be made." 5/12/20 11-12. But the jury, not the court, is charged with deciding what inferences to draw from the evidence. The instruction improperly suggested that the jury should find malice merely on Mr. Yaffee's willful disregard of the property rights of the police department. See State v. Sinrud, 200 Wn. App. 643, 650-51, 403 P.3d 96 (2017) (instruction commented on evidence by implying that a single corroborating factor was sufficient to find the intent element of possession with intent to deliver).

The Court of Appeals disagreed, reasoning simply "that the instruction is not a judicial comment on the evidence because it did no more than accurately state the law pertaining to the issue of malice." Slip op. at 6 (citing RCW 9A.04.110(12)).

This reasoning does not withstand scrutiny. To be sure, the instruction is based on a statute. But the legislature cannot legislate away the due process requirement that the jury find the

facts of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477-78, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Similarly, the legislature may not legislate away the prohibition on courts commenting on the evidence. See State v. Villela, 194 Wn.2d 451, 459, 450 P.3d 170 (2019). Moreover, "[m]any correct statements of the law are not appropriate to give as instructions." State v. Chenoweth, 188 Wn. App. 521, 538, 354 P.3d 13 (2015) (Becker J., concurring); see, e.g., Painter, 27 Wn. App. at 714 (despite previously being deemed a correct statement of law, instruction commented on the evidence).

The instruction on malice is frequently given in cases where malice is an element of the offense, such as arson. The issue will recur. There is also tension in the precedent on whether a statement of law can constitute a comment on the evidence. This is an issue of substantial public interest warranting review. RAP 13.4(b)(4). It is also an important issue of state constitutional law meriting review. RAP 13.4(b)(3).

3. The charging document was constitutionally deficient because it was generic and failed to allege specific facts in support. Review should be granted to decide whether this is impermissible.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV. "The 'essential elements' rule requires that a charging document *allege facts supporting every element of the offense,* in addition to adequately identifying the crime charged." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Thus, more is required than simply stating every element of the charged crime. Id. The rule "requires that the defendant be apprised of the elements of the crime charged *and the conduct of the defendant which is alleged to have constituted that crime*." Kjorsvik, 117 Wn.2d at 98 (emphasis added). In other words, "[t]he information is constitutionally adequate only if it sets forth all essential elements of the crime,

statutory or otherwise, and the particular facts supporting them." State v. Hugdahl, 195 Wn.2d 319, 324, 458 P.3d 760 (2020) (emphases added).[3] "The State bears this burden and failure to set forth the required elements and facts renders the information deficient in charging the crime." Id. (emphasis added).

The constitutional rule serves two fundamental purposes. First, by notifying the defendant of the facts alleged to constitute the charged crime, it helps ensure that defendants can prepare a defense. Kjorsvik, 117 Wn.2d at 101. Second, it protects the double jeopardy rights of defendants by allowing them to plead the first judgment as a bar to a future prosecution

[3] As stated long ago by the United States Supreme Court, "[a] crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." United States v. Cruikshank, 92 U.S. 542, 544, 23 L. Ed. 588 (1875). Consistent with the constitutional rule, the court rule provides: "The indictment or the information shall be a plain, concise and *definite written statement of the essential facts* constituting the offense charged." CrR 2.1(a)(1) (emphasis added).

for the same offense. Leach, 113 Wn.2d at 688; State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965); State v. Carey, 4 Wash. 424, 432-33, 30 P. 729 (1892). Thus, to be constitutionally sufficient, a charging document must both fairly inform the defendant of the charge and enable the defendant to plead double jeopardy in a future prosecution. United States v. Resendiz-Ponce, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007).

The charging document in this case does not comply with these constitutional demands. Although the charging document sets out the elements of the charged offenses, it is generic and bare-boned:

> Comes now ADAM CORNELL, Prosecuting Attorney for the County of Snohomish, State of Washington, and charges the above-named defendant(s) with the following crime(s) committed in the State of Washington.
>
> Count 1: SECOND DEGREE ARSON ATTEMPTED, committed as follows:
>
> That the defendant, on or about the 19th day of April, 2020, with intent to commit second degree

> arson, to-wit: did knowingly and maliciously cause a fire or explosion that damages any motor vehicle, did do an act which was a substantial step towards the commission of that crime; proscribed by RCW 9A.28.020 and RCW 9A.48.030, a felony.
>
> Count 2: ATTEMPTING TO ELUDE A PURSING POLICE VEHICLE, committed as follows:
>
> That the defendant, on or about the 19th day of April, 2020, as a driver of a motor vehicle, did willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a reckless manner while attempting to elude a pursing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice, emergency light, or siren by a uniformed police officer whose vehicle was equipped with lights and siren; proscribed by RCW 46.61.024(1), a felony.

CP 80.[4].

[4] The amended information changed language in count one in the "to-wit" section from "which damaged a vehicle" to "that damages any motor vehicle." CP 80, 135. The prosecution filed the amended information after the trial court informed the prosecution that the proposed jury instructions used the language "any motor vehicle" rather than the language "a vehicle." RP 553-54, 564.

This information fails to state the actual facts making up the charged offenses. By itself, the charging document did not notify Mr. Yaffee of the conduct alleged to constitute the crimes. And if Mr. Yaffee had pleaded guilty to the charges, the charging document would not have been sufficient to enable Mr. Yaffee to plea double jeopardy as a bar in a future prosecution for the same offenses. State v. Carey, 4 Wash. 424, 432-33, 30 P. 729 (1892) (failure to state specific facts in charging document meant that defendant's double jeopardy rights would not be protected); cf. Resendiz-Ponce, 549 U.S. at 108 ("the time-and-date specification in respondent's indictment provided ample protection against the risk of multiple prosecutions for the same crime" of illegally reentering the United States).

Here, the charging document contained the dates of the alleged offenses and that the attempted arson charge concerned "any motor vehicle." Contrary to the Court of Appeals' decision, these additional facts are inadequate to satisfy the

double jeopardy rationale of the essential elements rule. They also do not provide Mr. Yaffee meaningful notice about what conduct he is charged with committing. Because the charging document did not set out the necessary facts to provide notice and enable a plea that would protect Mr. Yaffee's double jeopardy rights, the charging document was constitutionally defective.

This is an important constitutional issue that this Court should review. RAP 13.4(b)(3). How much factual detail is required in a charging document is also an issue of substantial public interest meriting review because the issue implicates nearly every criminal prosecution in this state. RAP 13.4(b)(4). Review should be granted.

E. CONCLUSION

For the foregoing reasons, Mr. Yaffee respectfully asks this Court to grant review.

This document contains 4,195 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 31st day of March, 2022.

Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Petitioner

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NATHAN LEONARD YAFFEE, Appellant.	)	No. 82112-1-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Nathan Yaffee appeals the trial court's judgment and sentence finding him guilty of attempted second degree arson and attempting to elude a pursuing police vehicle. Yaffee argues: (1) that there was insufficient evidence to convict him of second degree arson, (2) that the instruction allowing jurors to permissively infer malice relieved the State of its burden of proof and was a judicial comment on the evidence, (3) that prosecutorial misconduct denied him a fair trial, and (4) that the information was inadequate to advise him of the charges that he was facing. We disagree and affirm.

Yaffee also raises issues related to his sentencing. We agree with several of his arguments and remand to the trial court to correct the sentence consistent with this opinion.

FACTS

On April 19, 2020, around 10:00 p.m., Patrick Gunn was driving past the Lynwood Police Department parking lot on his way to purchase groceries. Gunn observed a man shoving a large piece of paper or cardboard with waist-high flames underneath a police vehicle. Gunn searched for his cell phone, but he had left it at home.

After about 10 minutes of shopping, Gunn drove back home past the police station where he observed the same individual starting to go towards his car. Gunn went home and called the police to tell them that someone in the police parking lot was trying to set one of their vehicles on fire.

Sergeant Joshua Kelsey was the patrol sergeant when the call came in. Kelsey drove through the department parking lot and observed a vehicle parked at an angle in the opposite lane near the lot's exit. The vehicle was parked next to a fully marked transit Ford police pickup truck. Meanwhile, Officer Kris Munoz approached the parked vehicle in the opposite direction. As Kelsey tried to initiate a stop, the vehicle left, drove around Munoz, and then accelerated rapidly.

Kelsey activated his emergency lights and siren and pursued the vehicle. The vehicle exceeded speed limits, ran stop lights, swerved through traffic, and entered oncoming lanes. Several other police units joined in the pursuit. Kelsey ultimately disabled the vehicle using a Pursuit Intervention Technique (PIT) maneuver. Officer Arthur Burke approached Yaffee, removed him from the vehicle, and handcuffed him. After reading Yaffee his Miranda[1] rights, Burke asked Yaffee about the fire at the

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Lynwood Police Department parking lot. Burke testified that Yaffee replied, "I did something stupid . . . my life [is] . . . my life [is] pretty bad and, you know, I just did something stupid."

Police searched Yaffee's car and found lighter fluid, zip ties, newspapers, paper towels, matches, lighters, and foil. Police brought Gunn to the scene of the arrest and later to the police station to identify the vehicle as the one Gunn saw beside the man shoving flaming materials under the police pickup. Gunn identified the vehicle in both instances.

Police discovered a smoldering debris pile underneath the police pickup's gas tank with aluminum foil and what they believed was a fuse. Police called in the bomb squad to investigate, which deployed a bomb robot. The robot manipulated the aluminum object to reveal that it was a partially eaten Chipotle burrito.

The State charged Yaffee with attempted second degree arson and attempting to elude a pursuing police vehicle, both felonies. A jury convicted Yaffee as charged.

Yaffee appeals.

ANALYSIS

A. Sufficiency of the Evidence

Yaffee argues that there was insufficient evidence to convict him of attempted second degree arson. We disagree.

"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). We draw all reasonable inferences from the evidence in favor of the

State and interpret them most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 907-07, 567 P.2d 1136 (1977). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

A person is guilty of second degree arson if "he or she knowingly[2] and maliciously[3] causes a fire or explosion which damages [an] . . . automobile." RCW 9A.48.030(1). "A person is guilty of an attempt to commit a crime if, with intent[4] to commit a specific crime, he or she does any act which is a substantial step[5] toward the commission of that crime. RCW 9A.28.020(1).

Sufficient evidence supports Yaffee's conviction for attempted second degree arson. Yaffee parked in the westbound lane adjacent the police pickup. He then spent 10 to 15 minutes—enough time for Gunn to complete a quick grocery trip—attempting to light a fire beneath the gas tank of a police pickup. When police arrived, Yaffee left the scene and tried to evade pursuing police. After being detained and read his Miranda rights, Yaffee told the police that he "did something stupid." Accelerants,

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[2] A person knows or acts knowingly or with knowledge when:
(i) He or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
(ii) He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.
RCW 9A.08.010.

[3] "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.
RCW 9A.04.110(12).

[4] "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

[5] A substantial step is conduct that strongly indicates a criminal purpose; it is more than mere preparation. State v. Oakley, 158 Wn. App. 544, 550, 242 P.3d 886 (2010).

flammable materials, and the shopping bag associated with the burrito found in the smolder were in Yaffee's vehicle. When viewing this evidence in the light most favorable to the State, any rational trier of fact could have found that Yaffee took a substantial step toward knowingly and maliciously causing a fire or explosion which would have damaged the police pickup. RCW 9A.28.020(1); 9A.48.030(1).

B. Jury Instruction

Yaffee argues that the instruction allowing jurors to permissively infer malice relieved the State of its burden of proof and was a judicial comment on the evidence. We disagree.

Jury instruction 14 stated:

> Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.
>
> Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

1. Burden of Proof

Yaffee first asserts that the permissive inference instruction relieved the State of its burden of proof and thereby violated his due process rights. We review due process challenges to jury instructions de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). A permissive inference cannot relieve the State of its burden to prove each element of a crime without violating due process. State v. Randhawa, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). We evaluate the constitutional propriety of these instructions based on the particular facts of each case and specifically the State's evidence supporting the inference. Randhawa, 133 Wn.2d at 76.

"A permissive interference is valid when there is a 'rational connection' between the proven fact and the inferred fact, and the inferred fact flows 'more likely than not' from the proven fact." State v. Ratliff, 46 Wn. App. 325, 330-31, 730 P.2d 716 (1986) (citing County Court of Ulster County v. Allen, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)). Here, there was a rational connection between the proven fact and the inference of malice. Yaffee arrived at the Lynwood Police Department with combustible materials and accelerants. For at least the duration of Gunn's shopping trip, Yaffee placed burning materials underneath the police pickup. Yaffee placed these materials beneath the gas tank of the pickup, leading to the possibility that the fire could scorch or even blow up the vehicle. Given these facts, the inference of malice flows more likely than not from Yaffee's conduct.

2. Judicial Comment on the Evidence

Yaffee next contends that this instruction was a judicial comment on the evidence. We review jury instructions de novo to determine whether the trial court improperly commented on the evidence. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. "A jury instruction that does no more than accurately state the law pertaining to an issue . . . does not constitute an impermissible comment on the evidence." State v. Woods, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001).

Here, the instruction is not a judicial comment on the evidence because it did no more than accurately state the law pertaining to the issue of malice. RCW 9A.04.110(12). The instruction did not, as Yaffee asserts, convey the court's opinion

that malice may be inferred from an act done in willful disregard to the rights of another. This is not the court's opinion; this is the law as provided by statute.

C. Prosecutorial Misconduct

Yaffee argues that prosecutorial misconduct warrants a new trial. We disagree.

To prevail on a claim of prosecutorial misconduct, Yaffee must establish "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). The burden to establish prejudice requires Yaffee to prove that "there is substantial likelihood [that] the instances of misconduct affect the jury's verdict." Magers, 164 Wn.2d at 191 (alteration in original). Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that no instruction could cure the resulting prejudice. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). "A conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." Russell, 125 Wn.2d at 86.

Yaffee raises two instances of alleged prosecutorial misconduct on appeal. Yaffee's counsel did not object to these instances at trial. Thus, we review each to determine whether the remarks were so flagrant and ill intentioned that no instruction could have cured them. Russell, 125 Wn.2d at 86.

First, Yaffee asserts that the prosecutor's statements involving the political climate were outside the record and overly inflammatory. During defense counsel's opening statement he said, "a bag, a burrito, and a bomb squad. This case is about perceptions and about prudent reactions, versus overreactions." During voir dire, he

asked jurors about excessive spending by law enforcement, whether it was reasonable to call the fire department when the fire was extinguished, and whether at times an officer overreacts.

During closing arguments, the prosecutor stated:

> Now, counsel when he opened his case, what did he say? 'A bag, a burrito, and the bomb squad. The difference between prudence and overreaction.'
>
> In this political climate, given the fact that no officers could remember a single incident like this, given where we are today, we talked about it in voir dire, the bag that's unattended at the airport. This was not an overreaction. We've never seen this before.

Yaffee fails to establish prejudice. While we acknowledge that the prosecutor's statement was outside the record and risked appealing to the passions of the jury, viewed in context the statement responded to defense counsel's questioning of the use of resources to investigate the smolder, and not Yaffee's guilt. Any deficiency could have been addressed by a curative jury instruction.

Second, Yaffee contends that the prosecutor misstated the law when he argued:

> Reckless burning is starting a fire and then something goes awry. Reckless burning is putting one too many pallets on top of your campfire and then the paint on your next-door neighbor's house starts to get hot and melts. Reckless burning is disregarding the fact that there's a risk.

The prosecutor then gave additional examples of reckless burning.

Here, Yaffee fails to demonstrate that the remarks were flagrant or ill intentioned. Moreover, any misstatement of the law could have been cured with a curative instruction.

D. Adequacy of the Information

Yaffee argues for the first time on appeal that the information was inadequate to inform him of the charges of attempted second degree arson and attempting to elude a pursuing police vehicle. We disagree.

The Constitution of the State of Washington requires that "all essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "It is sufficient to charge in the language of the statute if the statute defines the offense with certainty." Kjorsvik, 117 Wn.2d at 99; Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974) ("It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."). When a charging document is first challenged on appeal, "it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." Hagner v. United States, 285 U.S. 427, 433, 52 S. Ct. 417, 420, 76 L.Ed. 861 (1932).

Yaffee asserts that the information was constitutionally deficient because it failed to allege specific facts. The information stated:

> Count I: SECOND DEGREE ARSON ATTEMPTED, committed as follows: That the defendant, on or about the 19th day of April, 2020, with intent to commit second degree arson, to-wit: did knowingly and maliciously cause a fire or explosion that damages any motor vehicle, did do an act which was a substantial step towards the commission of that crime; proscribed by RCW 9A.28.020 and RCW 9A.48.030, a felony.

> Count II: ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE, committed as follows: That the defendant, on or about the 19th day of April, 2020, as a driver of a motor vehicle, did willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice, emergency light, or siren by a uniformed police officer whose vehicle was equipped with lights and siren; proscribed by RCW 46.61.024(1), a felony.

The information in Yaffee's charging document is not constitutionally inadequate. The information contained more than the elements of both attempted second degree arson and attempting to elude a pursuing police vehicle.[6] The information also contains the dates in which the alleged crimes occurred, and that the attempted arson involved a motor vehicle. Combined, the information afforded notice to Yaffee of the nature and cause of the accusation against him.

E. Sentencing

Yaffee raises four issues related to his sentencing. We address each in turn.

1. Supervision Fees

Yaffee argued that the trial court erred by imposing supervision fees. We agree. Discretionary legal financial obligations, may not be imposed on a person who is indigent at the time of sentencing RCW 10.01.160(3). Supervision fees are discretionary legal financial obligations. State v. Dillon, 12 Wn. App. 2d. 133, 152, 456 P.3d 1199 (2020); State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021). Yaffee was found to be indigent, and the trial court declined to impose otherwise mandatory

[6] Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.
RCW 46.61.024(1).

fees due to his indigency. Because of Yaffee's indigency, we remand to the trial court to strike the supervision fees from the sentence and judgment.

2. Social Security Benefits

Yaffee argues that this court should remand to amend the judgment and sentence to state that legal financial obligations may not be satisfied out of Yaffee's Supplemental Security Income (SSI). We agree.

In State v. Catling, 193 Wn.2d 252, 438 P.3d 1174 (2019), the court held that Social Security benefits could not be used for debt retirement. Although Yaffee was not a recipient of SSI at the time of sentencing because he was incarcerated, he previously received SSI benefits. On remand, the trial court should amend the judgment and sentence to indicate that the imposed fees may not be satisfied out of any funds subject to 42 U.S.C. § 407(a).

3. Prohibition of Contact with the Lynwood Police Department

Yaffee argues that this court should remand to modify his community custody condition over contact with the Lynwood Police Department. We agree.

Yaffee asserts that the community custody condition stating that he "have no contact with the Lynwood Police Department" should be modified to state that he may contact the police department in its official capacity. The State counters that Yaffee may use other police resources, such as the Sheriff's Office or State Patrol, should he need assistance. The State's argument is unconvincing. If Yaffee needs to contact the Lynwood Police Department or be contacted by them in an official capacity he should be able to do so without violating his community custody. We remand to the trial court

to modify the community custody condition to state that "the defendant shall have no contact with Lynwood Police Department except in its official capacity."

4. DNA Fee

Yaffee argues that the trial court erred by imposing a $100 DNA fee. We agree.

A DNA fee may not be imposed on a person who suffers from a mental health condition and lacks the ability to pay. RCW 9.94A.777.[7] The trial court stated at sentencing that "it seemed pretty clear . . . that [Yaffee] had some mental health issues." The record demonstrates that Yaffee was on public assistance through SSI, but the basis for SSI was not stated. Because of Yaffee's perceived mental health issues, we remand to the trial court to determine whether Yaffee has a mental health issue under RCW 9.94A.777(2) and, if so, whether he has the means to pay the $100 DNA fee.

Affirmed and remanded for proceedings consistent with this opinion.

Mann, C.J.

WE CONCUR:

Brennan, J.

Coburn, J.

[7] (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under terms of this section, has the means to pay such additional sums.

(2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82112-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Matthew Pittman
[matthew.pittman@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: March 31, 2022

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