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67627-0

No. 67627-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD L. CALVIN,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Donald Calvin committed the crime of assault in the third degree.

2. The State did not prove beyond a reasonable doubt that Mr. Calvin committed the crime of resisting arrest.

3. Mr. Calvin did not receive the effective assistance of counsel because his attorney did not propose a self-defense instruction.

4. The trial court erred by replacing Instruction 5 with a substitute instruction during jury deliberations.

5. The prosecutor committed misconduct in closing argument by disparaging defense counsel and offering his opinion that Mr. Calvin was lying.

6. The trial court's finding that Mr. Calvin had the ability to pay the ordered financial obligations is not supported by the record. Judgment and Sentence Finding of Fact 2.5.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Donald Calvin was convicted of third degree assault of a law enforcement officer performing his official duties by attempting to

place the officer in fear of imminent bodily injury. A state park ranger testified he was afraid because Mr. Calvin walked towards him during a conversation, raised his hand when the ranger shined a flashlight in his face, and had his fists by his head after the ranger sprayed him in the face with pepper spray. Mr. Calvin testified he did not intend to frighten the park ranger, but was merely trying to hear his remarks, shield his eyes from the flashlight, and protect his face in reaction to the pepper spray. Viewing the evidence in the light most favorable to the State, must Mr. Calvin's conviction for assault in the third degree be dismissed in the absence of proof beyond a reasonable doubt that (1) the ranger's fear of imminent bodily injury was reasonable and (2) Mr. Calvin intended to place the armed ranger in fear of imminent bodily injury?

2. In order to convict Mr. Calvin of resisting arrest, the State was required to prove beyond a reasonable doubt that he intentionally attempted to prevent a peace officer from lawfully arresting him. RCW 9A.76.040(1). The state park ranger did not immediately identify himself as a police officer and never informed Mr. Calvin that he was under arrest. Viewing the evidence in the light most favorable to the State, must Mr. Calvin's conviction for resisting arrest be dismissed?

3. The accused has the constitutional right to effective assistance of counsel at trial, and counsel is responsible for investigating and pursuing viable defenses. Mr. Calvin was charged with assault in the third degree and resisting arrest, and he testified that he was frightened and confused by the park ranger's use of force upon him and reacted to protect himself. Where Mr. Calvin had the right to act in self-defense if he believed he was in danger of being injured by the officer, was Mr. Calvin's constitutional right to effective counsel violated when defense counsel did not propose a self-defense instruction?

4. A trial court may provide the jury with substitute instructions during deliberations if the original instruction is not a correct statement of the law. Instruction 5 correctly defined assault as charged in Mr. Calvin's case. When the jury asked the court to define the phrase "unlawful force," the trial court told the jury Instruction 5 was incorrect and replaced it with a substitute instruction defining assault.

a. Where the original instruction was proposed by the State and the replacement instruction relieved the State of its burden of proving that Mr. Calvin did not act with lawful force, did

the substitution of the instruction defining assault violate the law of the case doctrine?

b. Where the trial court told the jury that Instruction 5 was incorrect in response to a jury question and then provided a substitute instruction, did the trial court comment on the evidence in violation of article IV, section 16 of the Washington Constitution?

c. Where the original instruction was proposed by the State, the State did not propose the replacement instruction, and the replacement instruction relieved the State of its burden of proving that Mr. Calvin did not act with lawful force, did the substitution of the instruction defining assault violate the appearance of fairness doctrine?

5. The prosecutor is a representative of the State, and prosecutorial misconduct may deny the defendant a fair trial. Defense counsel plays an important role in a criminal trial, and it is misconduct for the prosecutor to argue in a manner that denigrates defense counsel or his role. It is also misconduct for the prosecutor to express a personal opinion as to the veracity of any of the witnesses, including the defendant.

a. Did the prosecutor commit misconduct by arguing that defense counsel was lying, his argument was untrustworthy, he

was unfairly calling the State's witness a liar, and unfairly blaming the victim? Where the case hinged on the jury's evaluation of the credibility of the State's key witness and Mr. Calvin, is there a substantial likelihood the misconduct affected the jury verdict?

b. Did the prosecutor commit misconduct by telling the jury that Mr. Calvin was "trying to pull the wool" over their eyes? Where the case hinged on the jury's evaluation of the credibility of the State's key witness and Mr. Calvin, is there a substantial likelihood the misconduct affected the jury verdict?

6. The trial court did not inquire as to Mr. Calvin's financial condition or his present or future ability to pay his legal financial obligations but entered a written finding that Mr. Calvin had the present or future ability to pay them. Must the trial court's factual finding be stricken in the absence of any supporting evidence in the record?

C. STATEMENT OF THE CASE

Donald Calvin was living in an old mobile home near Lynden that lacked running water. RP 112.[1] On the evening of April 10, he drove to Larrabee State Park to use the shower, arriving between

[1] RP refers to the verbatim report of the jury trial on July 25-26, 2011, that is found in a single volume. The pretrial motions and jury selection are in separate volumes and are not referenced here. Other volumes of the verbatim report of proceedings are referred to by date.

8:45 and 9:15 PM. RP 16, 113. The park closes 30 minutes after sunset, but overnight campers may enter until 10 PM. RP 15-16, 19-20. The gate was closed when Mr. Calvin arrived, and he parked his car in order to enter on foot. RP 114.

State Park Ranger Alexander Moularas stopped his car when he saw Mr. Calvin and called out to him, informing him that the park was closed. RP 17-19, 35, 114. Mr. Calvin was unable to hear Ranger Moularas due to hearing loss, so he walked closer to the ranger's vehicle and explained that he just wanted to use the shower. RP 115. The ranger told Mr. Calvin he had to leave unless he paid $14 to camp. RP 19-20, 36, 115.

Mr. Calvin then walked towards his car, but realized the park ranger was shining a flashlight on him and his vehicle. RP 116-17. Ranger Moularas told Mr. Calvin to get out of his car, asked if there was anything in it that the ranger needed to know about, and shined his flashlight in Mr. Calvin's face. RP 118. Mr. Calvin raised his hand to shield his eyes, as he suffers from migraine headaches, and he told the ranger to get the light out of his eyes. RP 118.

Ranger Moularas instantly "maced" Mr. Calvin with pepper spray, which was both painful and blinding. RP 118. The ranger then struck Mr. Calvin several times with a baton. RP 119. Mr.

Calvin did not understand why Ranger Moularas was attacking him; he was afraid and tried to get away. RP 120. The park ranger then wrestled Mr. Calvin to the ground and forced handcuffs on him. RP 120. Mr. Calvin screamed in pain and confusion, begging for mercy. RP 120-21. When Ranger Moularas's supervisor, Amber Forrest arrived ten minutes later, Mr. Calvin was still afraid and in pain. RP 66, 68, 69, 71. She confirmed that pepper spray is painful and frightening. RP 70, 71-72.

As a result of the incident, the Whatcom County Prosecutor charged Mr. Calvin with assault in the third degree by assaulting a law enforcement officer performing his official duties, RCW 9A.36.031(1)(g), and resisting arrest, RCW 9A.76.040. CP 93-94. At a jury trial before the Honorable Steven J. Mura, Ranger Moularas admitted that Mr. Calvin never hit him, but testified that he utilized the pepper spray and struck Mr. Calvin with his baton because he believed Mr. Calvin was about to injure him. RP 26, 30.

Ranger Moularas testified that he had been a park ranger for about two years and had recently been assigned to Larrabee State Park. RP 10-11. He had been trained to use various kinds of force, from lethal force to "strikes" and kicks. RP 12-13. He was armed with a firearm, a collapsible baton made of steel and plastic,

oleoresin capsicum (OC or pepper spray), and a flashlight. RP 13-14, 48-49.

Ranger Moularas testified that after he got out of his car, Mr. Calvin asked him his name and said "Well, at least you know you're your damn name," when the ranger provided it. RP 21. Concerned that Mr. Calvin might be under the influence of alcohol or "unbalanced," he pointed his flashlight at Mr. Calvin's body and asked him if he had had anything to drink.[2] RP 22-23. Mr. Calvin yelled no, asked if the showers were locked, put his hand up, and told the ranger to "get that f-ing thing out of my face." RP 23, 45. The two were about five feet apart. RP 23. Ranger Moularas said he immediately sprayed Mr. Calvin two times with oleoresin capsicum (pepper spray) because Mr. Calvin's hand was moving forward and Mr. Calvin was moving in his direction. RP 13, 24.

According to Ranger Moularas, Mr. Calvin continued to move forward as the ranger backed to Chuckanut Drive. RP 24. Ranger Moularas commanded Mr. Calvin to get on the ground and get back. RP 25. The ranger believed Mr. Calvin's fists were near Mr. Calvin's face, so he struck Mr. Calvin six times with his baton. RP 25. Mr. Calvin responded by walking away on Chuckanut Drive, so Ranger

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[2] Mr. Calvin had not been drinking. RP 43-33, 62.

Moularas ordered him to get on the ground, for the first time using the word "police." RP 53-54. Ranger Moularas then grabbed Mr. Calvin's arm, forced him to the ground, and placed him in handcuffs. RP 26. He added that Mr. Calvin's arms were tensed and it was difficult to place his wrists in the handcuffs. RP 26-27.

Medics, Ranger Moularas's supervisor, and Whatcom County Sherriff's deputies responded to Ranger Moularas's call for help. RP 27-28, 76-77. A deputy sheriff took Mr. Calvin into custody after he was treated by the medics. RP 77, 79-80. Mr. Calvin told the deputy that he had not tried to assault anyone. RP 81.

Mr. Calvin was convicted as charged, and he appeals to this Court. CP 5-13, 49.

D. ARGUMENT

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. CALVIN ASSAULTED THE PARK RANGER

a. The State was required to prove every element of third degree assault beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the government prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The

inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

Mr. Calvin was charged with assault in the third degree under the prong that he assaulted a law enforcement officer performing his official duties. CP 93. The statute reads:

> A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: . . .
>
> (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

RCW 9A.36.031(1)(g).

Assault is not defined in the criminal code. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Under its common law definition assault may be committed in three different ways: (1) a unwanted touching (actual battery), (2) an attempt with unlawful force to inflict bodily injury on another that is not accomplished (attempted battery), or (3) putting another person in fear of harm which creates a reasonable apprehension of harm. Id. at 215-16.

An assault requires an intentional act. In order to commit assault, a person must have either the intent to cause bodily harm or to create an apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

Here, the State did not prosecute Mr. Calvin for touching or attempting to touch Ranger Moularas (battery or attempted battery). Instead, the State proceeded on the theory that Mr. Calvin attempted to frighten the armed park ranger. RP 139, 166-67; CP 77. The elements of the crime were thus that (1) on April 10, 2010, Mr. Calvin intentionally placed Ranger Moularas in apprehension and fear of bodily injury by his actions, (2) the park ranger's apprehension and imminent fear of bodily injury were reasonable, (3) the ranger was a law enforcement officer who was performing his official duties, and (4) the acts occurred in Washington. State v. Brown, 140 Wn.2d 456, 470, 998 P.2d 321 (2000); CP 58-59.

b. The State did not prove beyond a reasonable doubt that Mr. Calvin intended to place Ranger Moularas in fear of imminent bodily injury or that the ranger's fear of imminent bodily harm was reasonable. Park Ranger Moularas testified that he approached Mr. Calvin because he was standing near the gate to Larrabee State Park after the park was closed to day visitors. RP 16-17. After the ranger

informed Mr. Calvin that the park was closed, they discussed whether he could use the park bathroom; the ranger related he would have to pay about $14 for a camp site. RP 35. During the conversation, Mr. Calvin walked towards the ranger's truck and appeared "aggravated" by the information. RP 20-21, 37. When Mr. Calvin reached the ranger's state truck, Ranger Moularas got out of his vehicle because "of the stare I was receiving from Mr. Calvin and his distance to me." RP 39. The ranger explained he had been taught "you're not suppose [sic] to be approached by subjects." RP 20.

Instead of asking Mr. Calvin to back up, the ranger shined a powerful flashlight at Mr. Calvin, who was about five feet away. RP 21, 23. As the intense light hit his face, Mr. Calvin simultaneously raised one of his arms and asked the ranger to "Get that F-ing light out of my face." RP 22-23, 45. The ranger interpreted these actions as an assault and sprayed Mr. Calvin's face twice with pepper spray. RP 24. When Mr. Calvin continued to move forward with his hands near his face instead of complying with the ranger's order, Ranger Moularas struck Mr. Calvin several times with his steel and plastic baton. RP 25 .

i. *The State did not prove that Ranger Moularas was placed in reasonable fear of bodily harm*. Ranger Moularas testified that he believed he was assaulted by Mr. Calvin, but was unable to articulate a reasonable basis for his fear. The ranger testified he was afraid for his safety because Mr. Calvin (1) used a "strained" or "sarcastic" tone of voice, (2) walked towards him, and (3) raised one arm when the ranger shown his flashlight at him. These claims, even construed in the light most favorable to the State, do not establish the required element of reasonable fear.

First, it is logical and socially appropriate to approach a person with whom you are having a conversation. Ranger Moularas was in a park truck and the conversation occurred outside at night in an area with poor lighting. Moreover, Mr. Calvin testified he had difficulty hearing the ranger. RP 114-15. Thus, advancing to Ranger Moularas's truck was not an aggressive act.

Second, Mr. Calvin put his arm up when the ranger shined a powerful flashlight on his body. Although the ranger stated he aimed the flashlight at Mr. Calvin's chest, not his face, he admitted that the bright light could be disorienting and even momentarily blinding. RP 23, 43 . Ranger Moularas never described how Mr. Calvin's arm was raised in order to justify his fear. Instead, the

ranger's fear appeared to be based more upon the diminishing distance between him and Mr. Calvin.

Ranger Moularas also testified he remembered Mr. Calvin's "fists being up towards his face" after the ranger had attacked Mr. Calvin with pepper spray. RP 24-25. Ranger Moularas's supervisor, however, testified that being sprayed with pepper spray is both painful and frightening. RP 70, 71-72. She also observed that Mr. Calvin was crying, distraught and complaining of pain over ten minutes after Ranger Moularas sprayed him with the pepper spray. RP 67-69. It was thus not reasonable for the ranger to assume Mr. Calvin intended to injure him when Mr. Calvin put his hands to his face after being sprayed in the face with oleoresin capsicum.

Mr. Calvin also did not verbally threaten Ranger Moularas with bodily harm. The only conversation the park ranger testified to concerned whether Mr. Calvin could use the park shower and how much that would cost. RP 19, 20, 21. Mr. Calvin asked the ranger his name and asked him to get the flashlight out of his face. RP 21, 23. There were no verbal threats or "fighting words." See State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) ("true threat" is statement which, in context, a reasonable listener would perceive as a serious expression of an intent to inflict bodily harm or death);

City of Seattle v. Camby, 104 Wn.2d 49, 50, 54, 701 P.2d 499 (1985) ("fighting words" are words that necessarily inflict injury or incite immediate breach of peace; invitation to "come outside so I can kick your fucking ass" was not "fighting words" in context in which it was spoken). Instead, the park ranger said he was frightened by Mr. Calvin's tone of voice, which he described first as "straining" and then as "hushed sarcastic." RP 20.

In the absence of a true threat to harm the ranger, the use of a strained or sarcastic tone of voice does not create a reasonable fear of assault. Nor did Mr. Calvin's mild use of profanity. In fact, citizens like Mr. Calvin are permitted to protest or criticize law enforcement officers when they are performing their official duties. City of Houston v. Hill, 482 U.S. 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 393 (1987). "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Id. Mr. Calvin's sarcastic tone and mild use of profanity does not support a reasonable belief that he was going into injure Ranger Moularas.

The Washington Supreme Court addressed a conviction for third degree assault under RCW 9A.36.031(1)(g) where the assault was based upon an act that created reasonable fear of bodily injury rather than an actual battery. Brown, 140 Wn.2d at 463, 468. In

Brown an undercover police officer purchased drugs from the defendant and remained in the area to assist fellow officers in the arrest. Id. at 459-61. The defendant spun around to face the undercover officer, unzipped his jacket, and removed a cigarette lighter that looked like a handgun. When the undercover officer identified himself as a police officer, the defendant pointed the apparent weapon directly at the officer . Id. at 461-62. In contrast with this case, the law enforcement officer's fear that he might be injured when faced with an apparent firearm was reasonable.

Similarly, a defendant who took a fighting stance with raised fists, invited the officer to "come on," and took a step forward put the police officer in reasonable apprehension of imminent bodily harm and was thus guilty of third degree assault. State v. Godsey, 131 Wn.App. 278, 288, 127 P.3d 11, rev. denied, 158 Wn.2d 1022 (2006).

The same is not true in Mr. Calvin's case. His actions and conversation with Ranger Moularas did not demonstrate that he intended to attack the park ranger and cause bodily harm. A reasonable person in Ranger Moularas's position would not believe Mr. Calvin intended to inflict bodily harm.

ii. *The State did not prove beyond a reasonable doubt that Mr. Calvin intended to place the park ranger in fear of bodily injury*. Because an assault is an intentional act, an element of third degree assault as charged in this case is that the defendant intended to place the law enforcement officer in fear of bodily injury. State v. Toscano, ___ Wn.App. ___, 261 P.3d 912, 914 (2012); CP 59, 61. The State did not prove this element of the crime beyond a reasonable doubt.

Mr. Calvin approached a park ranger to discuss whether or not he could enter the park to take a shower. He walked forward to talk to the ranger and was blinded by a flashlight and assaulted with pepper spray when he put up a hand to shield his eyes. Disoriented by the pepper spray, he did not immediately get to the ground as ordered by the ranger, but instead tried to walk away. Mr. Calvin did not say anything to imply he wanted to hurt the ranger. Mr. Calvin's actions do not indicate that he intended to assault Ranger Moularas by putting him in fear of imminent bodily harm. When questioned by Deputy Osborn after his arrest, Mr. Calvin explained that he was not trying to assault anyone and did not know why the ranger had attacked him with the pepper spray and baton. RP 81-82, 102.

This is a far cry from Toscano, where the defendant drove her car at the vehicle of a law enforcement officer who was attempting to stop her nephew for traffic infraction and refused to yield. Later the defendant darted into traffic as if she was going to hit the police car and directed her high beams so the officer could not see. Toscano, 271 P.3d at 913-14. The court concluded that these actions, viewed in the light most favorable to the State, were sufficient to create a reasonable inference of specific intent to create the apprehension of harm. Id. at 914-15. Mr. Calvin's conduct does not similarly demonstrate such an intent.

Moreover, Mr. Calvin's testimony affirmatively showed that he lacked such intent. He explained that he approached Ranger Moularas because he could not hear the ranger due to hearing loss. RP 114-15. He explained that he was particularly bothered by the bright flashlight because he gets migraine headaches and the light was shining in his eyes. RP 118, 127. As he put his hand up to shield his eyes, the ranger immediately used the pepper spray, which caused Mr. Calvin's eyes to swell shut, and he moved away to protect himself. RP 118-19, 124, 129. The ranger then struck Mr. Calvin several times with his baton, and Mr. Calvin twisted to get away. RP 120. Mr. Calvin's testimony proved that he was afraid of Ranger

Moularas and in pain due to the ranger's actions. Mr. Calvin did not attempt to assault the ranger and did not have the intent to place him in fear of bodily harm.

c. Mr. Calvin's conviction for assault in the third degree must be dismissed. The State did not prove that Ranger Moularas was in reasonable fear that Mr. Calvin was going to inflict bodily injury on him or that Mr. Calvin intended to assault the ranger or place him in fear of assault. As a result, Mr. Calvin's conviction for assault in the third degree must be reversed and dismissed. Smith, 155 Wn.2d at 505-06.

2. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. CALVIN RESISTED ARREST

In addition to third degree assault on a law enforcement officer, Mr. Calvin was convicted of resisting arrest, RCW 9A.76.040, for trying to prevent Ranger Moularas from handcuffing him. RP 142; CP 49. A person is guilty of resisting arrest if he "intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." RCW 9A.76.040(1). A conviction must be based upon more than passive resistance. State v. Hornaday, 105 Wn.2d 120, 131, 713 P.2d 71 (1986). A person acts intentionally if "he acts with the objective or purpose to accomplish a result which

constitutes a crime." RCW 9A.08.010(1)(a). Proof that a person acted intentionally also establishes that he acted with knowledge. RCW 9A.08.010(2). Mr. Calvin's conviction for resisting arrest cannot stand because the State did not prove that Mr. Calvin intentionally resisted arrest.

Ranger Moularas testified that he identified himself as a park ranger when he drove up to the state park gate and stopped about 15 feet away from Mr. Calvin.[3] RP 17, 33-34. When Mr. Calvin asked for his name, however, Ranger Moularas said his first and last names without mentioning he was a park ranger. RP 41. When the ranger felt Mr. Calvin was too close to him, he yelled, "Get back," and used his pepper spray without mentioning he was a law enforcement officer. RP 24. The first time the ranger used the word "police" was when he shouted at Mr. Calvin to get on the ground and hit him with a baton. RP 24, 54. At no time did Ranger Moularas tell Mr. Calvin that he was under arrest, even when he was attempting to handcuff Mr. Calvin. RP 26-27. Mr. Calvin could not intentionally resist arrest -- act with intent to commit the crime -- if

[3] He was in a park ranger uniform and driving a state park vehicle, but it was evening and the area was poorly lit. RP 18-19, 21, 34.

he was unaware that he was under arrest.[4] RCW 9A.08.010(1)(a); RCW 9A.76.040(1).

In appellate cases affirming resisting arrest convictions, the courts are confronted with situations where it is clear that the defendant was informed by the arresting officer that he or she was under arrest. Therefore, a juvenile was guilty of resisting arrest when, after being told she was under arrest for obstructing officers' arrest of her companion, the juvenile said "your [sic] not going to take me" and ran. State v. Ware, 111 Wn.App. 738, 740, 745, 46 P.3d 280 (2002). Similarly, a resisting arrest conviction was affirmed where police officers arrested the defendant, informed him of a warrant for his arrest, and told the defendant that he could see the warrant when he got to the police station. The defendant then turned away to leave and got into a scuffle with the officers. State v. Simmons, 35 Wn.App. 421, 422, 667 P.2d 133, rev. denied, 100 Wn.2d 1025 (1983).

In 1931, the Washington Supreme Court made the obvious point that, in order to obstruct a police officer, "it is essential that

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[4] By way of comparison, the crime of obstructing a police officer in the performance of his official duties similarly requires a finding that the defendant knew the police officer was acting in an official capacity. RCW 9A.76.020(1); State v. C.L.R., 40 Wn.App. 839, 841-42, 700 P.2d 1195 (1985); accord Lassiter v. Bremerton, 556 F.3d 1049, 1053 (9th Cir. 2009).

accused have knowledge that the person obstructed is an officer; consequently it is incumbent upon an officer, seeking to make an arrest, to disclose his official character, if not known to the offender." State v. Bandy, 164 Wash. 216, 219, 2 P.2d 748 (1931). Here, Ranger Moularas never informed Mr. Calvin that he was under arrest, and did not identify himself as a police officer until he had already struck and pepper sprayed him. Because the State did not prove Mr. Calvin knew he was under arrest, it failed to prove he intentionally resisted arrest.

Additionally, a conviction for resisting arrest requires that the defendant use force. Hornaday, 105 Wn.2d 131. The Hornaday Court reversed a resisting arrest conviction where there was no evidence "that the defendant used force to resist, but only that he was recalcitrant." Id. In this case, Ranger Moularas complained that Mr. Calvin did not get on the ground when ordered and that it was difficult to handcuff Mr. Calvin because his wrists were tense. RP 26-27, 53-54. As in Hornaday, Mr. Calvin did not use force, but was simply recalcitrant, and his resisting arrest conviction must be reversed and dismissed. Smith, 155 Wn.2d at 505-06.

3. MR. CALVIN DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

Mr. Calvin was convicted of assault in the third degree and resisting arrest for an incident in which Park Ranger Moularas sprayed Mr. Calvin with pepper spray, hit him on the back and shoulders with a baton, forced him to the ground, and handcuffed him. Mr. Calvin testified he was confused and frightened by the ranger's actions, that he was blinded by the pepper spray, and that the handcuffing caused him great pain due to his arthritis. RP 119-121. Although Mr. Calvin was reacting in panic and fear that the park ranger might seriously injure him, Mr. Calvin's attorney did not request that the jury be instructed on Mr. Calvin's right to act in self-defense. Mr. Calvin's convictions must be reversed because his counsel did not provide the effective assistance of counsel guaranteed by the federal and state constitutions.

a. Mr. Calvin had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v.

Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronic, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

While an attorney's tactical decisions are treated with deference, a decision is not tactical if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms" (quoting Strickland, 466 U.S. at 688)); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (no tactical reason not to bring meritorious suppression motion); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (no tactical reason to propose jury instructions that could lead to conviction under a statute not in effect during charging period). An attorney's failure to pursue a defense may constitute deficient performance. Thomas, 109 Wn.2d at 226-27 (failure to request diminished capacity instruction); State v. Powell, 150 Wn.App. 139, 155, 206 P.3d 703 (2009) (failure to request reasonable belief instruction); State v. Maurice, 79 Wn.App. 544, 552, 903 P.2d 514 (1995) (attorney ineffective for failing to adequately investigate defenses).

b. Defense counsel was ineffective for failing to propose a self-defense instruction. Due process requires the State prove every element of a charged crime beyond a reasonable doubt. U.S. Const.

amends. VI, XIV; Const. art. I, §§ 3, 22; Apprendi, 530 U.S. at 476-77. When a defendant raises self-defense, the State must prove the absence of self-defense beyond a reasonable doubt. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). If there is some credible evidence that the accused person acted in self-defense, it "creates an additional fact the State must disprove beyond a reasonable doubt," and the jury must be accurately and completely instructed on this element of the offense. O'Hara, 167 Wn.2d at 105.

Self-defense is assessed from the standpoint of a reasonable person in the defendant's shoes. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The right to defend oneself during an encounter with a law enforcement officer, however, is limited. A person has the right to use "reasonable and proportional force" to resist an attempt to inflict injury upon him in the course of an arrest. State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997); Washington Supreme Court Committee on Jury Instructions, 11 Washington Practice: Pattern Jury Instructions Criminal, WPIC 17.02.01 (2011). The defendant must face a situation of actual, imminent danger, not just apparent, imminent danger. State v. Bradley, 141 Wn.2d 731, 738, 10 P.3d 358 (2000).

The defendant in a criminal case has the right to have the jury instructed on a defense that is supported by evidence. Thomas, 109 Wn.2d at 228; Powell, 150 Wn.App. at 154. To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. Powell, 150 Wn.App. at 154-58.

i. *A self-defense instruction would have been given if offered*. The defendant need only produce "some evidence" to justify the giving of a self-defense instruction. Janes, 121 Wn.2d at 237; State v. George, 161 Wn.App. 86, 249 P.3d 202, rev. denied, 172 Wn.2d 1007 (2011); State v. Arth, 121 Wn.App. 205, 213, 87 P.3d 1206 (2004). The trial court must review the evidence in the light that most favors the defendant, and the court must not weigh the credibility of the witnesses. George, 161 Wn.App. at 95-96. "Only when the record contains no credible supporting evidence will the trial court be justified in denying a request for a jury instruction." Arth, 121 Wn.App. at 213 (addressing self-defense instruction).

Mr. Calvin testified that he was confused and frightened when Ranger Moularas sprayed his face with painful pepper spray and then forcefully struck his body with a baton. RP 119-21. The trial court would have given the jury a self-defense instruction such as WPIC 17.02.10 if it had been proposed by defense counsel.

ii. *There was no tactical reason for Mr. Calvin's attorney not to offer a self-defense instruction*. Defense counsel must, "at a minimum, conduct a reasonable investigation" in order to make informed decisions about how to best represent her client. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis deleted) (quoting In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 142 P.3d 601 (2001)). "This includes investigating all reasonable lines of defense," including the relevant law. Davis, 152 Wn.2d at 721 (citing Morrison, 477 U.S. at 384); accord Strickland, 466 U.S. at 690-91; State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3rd ed. 1993).

Defense counsel is ineffective if he fails to propose an instruction that assists the jury in understanding a critical component of the defense. Powell, 150 Wn.App. at 155; In re

Personal Restraint of Hubert, 138 Wn.App. 924, 926, 158 P.3d 1282 (2007). For example, where the defendant's intent was the focus of the defense in a prosecution for assaulting a police officer, it was ineffective assistance to fail to propose a diminished capacity instruction. State v. Kruger, 116 Wn.App. 685, 693-94, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003). Although the issue of the defendant's intoxication was before the jury in Kruger, the jury was not apprised of the law and thus the defense was "impotent." Id. at 695.

Similarly, where defense counsel raised a diminished capacity defense based upon intoxication in a prosecution for felony flight, it was ineffective to fail to propose an instruction that explained the subjective elements of that offense. Thomas, 109 Wn.2d at 226-27. The Thomas Court reasoned the defendant was entitled to jury instructions that correctly state the law and "a reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him or her to propose an instruction based on pertinent cases." Id. at 229.

Here, defense counsel argued that Mr. Calvin was not guilty of resisting arrest but was merely trying to protect himself from the ranger's attacks. RP 160. Counsel, however, made that argued

concerning the assault charge or offer a self-defense instruction was not a reasonable tactic. Mr. Calvin, however, testified he was afraid of the ranger. A reasonably competent attorney would have been sufficiently aware of Valentine and the defendant's right to use self-defense when faced with imminent bodily injury by a police officer. Reasonably effective counsel would have proposed a self-defense instruction, and counsel's failure to do was not a reasonable trial tactic.

iii. *Mr. Calvin was prejudiced by the failure of his attorney to propose a self-defense instruction*. A suspect may resist a police officer in order to protect himself from actual bodily injury, but the jury was not so instructed in Mr. Calvin's case. Although defense counsel argued Mr. Calvin did not assault Ranger Moularas, the jury did not have an instruction that allowed them to find Mr. Calvin's actions were justified in light of the fear generated by the ranger's use of pepper spray and a baton. Thus, the jury lacked a key instruction needed to render its decision, and Mr. Calvin was prejudiced by his lawyer's failure to request a self-defense instruction. Mr. Calvin was thus prejudiced by his attorney's error. See Kruger, 116 Wn.App. at 695.

c. Mr. Calvin's conviction must be reversed. Mr. Calvin's attorney's performance was deficient because he did not propose a self-defense instruction. Without a self-defense instruction, the jury had no reason to determine if Mr. Calvin believed he was in danger of serious injury and therefore not guilty of assault. The evidence in this case is not so strong that this Court can conclude the lack of a self-defense instruction did not prejudice the outcome. See Arguments 1 and 2 above. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Powell, 150 Wn.App. at 157-58.

4. THE TRIAL COURT'S SUBSTITUTION OF THE INSTRUCTION DEFINING ASSAULT WITH A NEW INSTRUCTION DURING JURY DELIBERATION VIOLATED THE LAW OF THE CASE DOCTRINE, THE APPERANCE OF FAIRNESS DOCTRINE, AND THE CONSTITUTIONAL PROHIBITION AGAINST JUDGES COMMENTING ON THE EVIDENCE

While it was deliberating, the jury asked a question about a phrase in the instruction defining assault. Although the instruction was a correct statement of the law, the trial court responded by replacing the instruction with a new version of the assault definition and telling the jury it had been provided an incorrect instruction. Mr. Calvin's convictions must be reversed because the provision of a unnecessary substitute instruction defining assault relieved the State

of its burden of proving Mr. Calvin's force was unlawful in violation of "law of the case" doctrine, violated the appearance of fairness doctrine, and constituted an unconstitutional comment on the evidence.

a. Over Mr. Calvin's objection, the trial court provided a substitute instruction defining assault during jury deliberations and told the jury it had been incorrectly instructed. The trial court correctly instructed the jury that an assault was an act designed to place another person in fear of bodily injury. CP 58. The instruction was proposed by the State and modeled after a Washington pattern jury instruction. CP ; RP 134; 11 Washington Pattern Jury Instructions Criminal, WPCI 35.50 (2008). It correctly informed the jury of the form of assault alleged by the State. Instruction 5 read:

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily harm, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury.
>
> An act is not an assault, if done with the consent of the person alleged to be assaulted.

CP 58.

During its second day of deliberation, the jury asked the court, "How does the law define 'unlawful force?'" CP 50. In

response to the jury question, the court informed the jury that it had "misinstructed you on the definition of assault in this case." RP 178. The court withdrew Instruction 5, replaced it with a substitute instruction, and read the new Instruction 5 to the jury. RP 178-79; CP 59. The jury returned a verdict less than an hour later. SuppCP ___ (Clerk's Minutes, sub. no. 54A), pages 4-5.

The substitute instruction omitted the language "with unlawful force" from the initial instruction and also omitted a sentence informing the jury that an assault cannot be consensual. CP 58-59. The new Instruction 5 read:

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 59.

Mr. Calvin's attorney objected to the substitute instruction, arguing the existing instruction and language concerning unlawful force was the law of the case and a new instruction would unduly emphasize the assault definition above other jury instructions. RP 171-74, 176-77. He moved for a mistrial and later for a new trial on this basis, but both motions were denied. RP 177-78;8/16/11RP 12-19, 20-21; CP 22-30. The court opined that it was obligated to give

the jury correct instructions and Mr. Calvin was receiving a fair trial.[5] RP 173; 8/16/10RP 13-14, 21.

b. The court's statement that it had "misinstructed" the jury and the unreasonable replacement of a correct instruction defining assault relieved the State of its burden of proof, constituted an unconstitutional comment on the evidence, and violated the appearance of fairness doctrine. The trial court has the discretion to provide the jury with further instructions after deliberation has begun. State v. Aguirre, 168 Wn.2d 350, 364, 229 P.3d 669 (2010); State v. Ransom, 56 Wn.App. 712, 785 P.2d 469 (1990); CrR 6.15(f)(1). The supplemental instruction, however, must not emphasize certain evidence or address an area of the law not addressed by the parties. Id; Harris v. Groth, 31 Wn.App. 876, 881, 645 P.2d 1104 (1982), aff'd, 99 Wn.2d 438 (1983). Additionally, no supplemental instruction is required if the original instructions properly state the law. Harris, 31 Wn.App. at 881.

Here, the court originally gave the jury a correct definition of assault. CP 58. The court thus misled the jury when, instead of answering the jury's question, it informed the jury that it had been

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[5] The court added it did not "worry about appeals" or "what the Court of Appeals says because "oftentimes, when I'm reversed, they're wrong. So I'm very comfortable getting reversed if I have to be." 8/16/11RP 20.

"misinstructed." RP 178. The error was compounded when the court replaced Instruction 5 with an instruction that omitted the language the jury questioned as well as another paragraph, thus confusing the jury and relieving the State of its obligation to prove Mr. Calvin used unlawful force.

The original Instruction 5 was a correct statement of Washington law defining assault. As a result, there was no need for the trial court to provide a substitute instruction. Harris, 31 Wn.App. at 881. Moreover, the court told the jury that it had "misinstructed" them. RP 178. A reasonable juror would thus believe that the first instruction defining assault was incorrect, when it was not. This incorrect information would thus improperly impact the jury deliberations.

i. *The State was obligated under the law of the case doctrine to prove Mr. Calvin's force was unlawful, and the substitute instruction improperly relieved the State of its burden of proof.* Instruction 5 was proposed by the State, and the State thus undertook the obligation to prove Mr. Calvin committed an assault as defined in the instruction. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); State v. Lee, 128 Wn.2d 151, 159, 904 P.2d

1143 (1995) ("Added elements become the law of the case . . . when they are included in instruction to the jury.").

In Hobbs, the trial court amended the "to convict" instruction during jury deliberations to omit the requirement that the crime occur in King County and substitute the requirement that it occur in the State of Washington. State v. Hobbs, 71 Wn.App. 419, 421, 859 P.2d 73 (1993). Although venue is not an element of the crime, this Court agreed with the defense that the State had undertaken to prove venue by including it in the information and its proposed "to convict" instruction. Id. at 422-23. "[W]here the trial court, 'at the request of the State's attorney, proceeds to incorporate the unnecessary element in the instructional language . . . ', then the State assumes the burden of proving that element." Id. at 423 (quoting State v. Worland, 20 Wn.App. 559, 566, 582 P.2d 539 (1978)).

This Court therefore reversed the conviction because of the improper supplemental instruction. Hobbs, 71 Wn.App. at 424-25. While the trial court had permitted the parties to reargue the case after altering the instruction, defense counsel lacked the ability to "re-think its cross-examination strategy, which had been based upon the State's error." Id. at 425. "We believe the trial court had two

permissible remedies here: (1) to hold the State to its own election or (2) to declare a mistrial." Id.

The logic of Hobbs controls the result in Mr. Calvin's case. The instruction that was altered in this case was a critical instruction. It is the assault definition that informs the jury of two elements of the crime: that the defendant intends to create apprehension or fear of bodily injury and that the defendant in fact creates a reasonably apprehension and imminent fear of bodily injury. CP 58. Thus, by proposing an instruction defining assault that included the "unlawful force" language, the State undertook to prove that Mr. Calvin used unlawful force. Hickman, 135 Wn.2d at 101-02. While defense counsel was given the opportunity to reargue the case, he determined re-argument would unduly emphasize one instruction over the others.[6] RP 174. The opportunity to re-argue does not provide a real remedy to the defendant, who cannot amend trial strategy after both sides have rested. Hobbs, 71 Wn.App. at 425.

Moreover, once the State proposed and agreed to an instruction informing the jury that an assault is an act done with

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[6] Defense counsel may also have been wary of further prosecutorial misconduct if the parties engaged in further closing argument. See Argument 4, infra.

lawful force, it undertook the burden of proving that to the jury beyond a reasonable doubt. Hickman, 135 Wn.2d at 105. The jury, however, never made this determination. Furthermore, the evidence does not establish beyond a reasonable doubt that Mr. Calvin acted unlawfully in walking towards the park ranger, discussing whether he could use the shower, and reacting to protect himself. Mr. Calvin's conviction for third degree assault must therefore be reversed and dismissed. Id. at 106.

ii. *The substitute instruction and the court's comment that the jury had been incorrectly instructed were an unconstitutional comment on the evidence*. In addition to violating the law of the case doctrine, amending the assault definition during deliberations was a comment on the evidence. The Washington Constitution forbids judges from commenting on the evidence. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). By including this provision, "the framers of the constitution could not have more explicitly stated their determination to prevent the judges from influencing the judgment of the jury on what testimony proved or failed to prove." Bardwell v. Ziegler, 3 Wash. 34, 42, 28 Pac. 360 (1891). Washington courts have long recognized that jurors

are very interested in the court's opinion and the words of the trial judge are extremely influential. Washington thus employ a "rigorous standard" when reviewing alleged violations of article IV, section 16. State v. Lang, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

The jury in Mr. Calvin's case could have believed from the court's substitution of one definition of assault for another that the judge was signaling his belief that the evidence showed Mr. Calvin had committed an assault. Or the jury could have deduced that the court felt the jury's question and its deliberation process was off-base. The jury would similarly have been confused by the court's statement that it had "misinstructed" the jury. The jury could interpret the judge's comment as a hint as to how to view the evidence.

iii. *The substitute instruction and court's comment violated the appearance of fairness doctrine*. The constitutional right to a due process requires that the trial court judge be fair and impartial. Const. art. I, §§ 3, 22; State v. Madry, 8 Wn.App. 61, 68-69, 504 P.2d 1156 (1972). In Washington, the judge must not only be fair, he must also appear to be fair. "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973

(2010) (quoting Madry, 8 Wn.App. at 70). Under the appearance of fairness doctrine, a judicial proceeding is valid only if a disinterested observer would conclude that the parties received a fair, impartial and neutral hearing. Id.

After the jury asked for the definition of "unlawful force," the trial court declined to answer their question, but instead prepared and provided the jury with a substitute definitional instruction. The substitute instruction eliminated the phrase "unlawful force," thus eliminating the State's obligation to prove that Mr. Calvin's use of force was unlawful, a task that would not be easy as Mr. Calvin did not use any force. The court also told the jury that the definition it initially provided was incorrect. The substitute instruction was unnecessary, as the original instruction was correct, and the giving of the replacement instruction favored the State and disadvantaged Mr. Calvin. A disinterested observer thus would not conclude that Mr. Calvin and the State both received a fair trial before an impartial and neutral judge.

c. Mr. Calvin's convictions must be reversed and remanded for a new trial. In response to a jury question, the trial court replaced a correct instruction that correctly defined assault with one that signaled to the jury that they did not have to answer the

question to convict. This action favored the State by eliminating the requirement that it prove Mr. Calvin's use of force was not lawful in violation of the law of the case doctrine. The substitute instructions and the judge's comment that the original instruction was wrong were prohibited comments on the evidence. Further, a disinterested observed would believe Mr. Calvin had not received a trial by a neutral judge, thus violating the appearance of fairness doctrine. Mr. Calvin's convictions must be reversed and remanded for a new trial. Hobbs, 71 Wn.App. at 425; Ransom, 56 Wn.App. at 715; Madry, 8 Wn.App. at 70.

5. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MR. CALVIN A FAIR TRIAL

a. Misconduct by the prosecutor may violate a defendant's constitutional right to a fair trial. A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for decorum in closing

argument. Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must decide first if the comments were improper and, if so, whether a "substantial likelihood" exits that the comments affected the jury verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id.

In Mr. Calvin's trial, the prosecutor's closing argument was improper because he (1) disparaged Mr. Calvin's attorney, accusing him of calling the State's witness a liar, and (2) expressed a personal opinion as to Mr. Calvin's credibility.

b. The deputy prosecuting attorney committed misconduct by disparaging defense counsel and suggesting counsel was calling the State's witness a liar. The prosecutor may not argue to the jury in a manner that disparages defense counsel or counsel's legitimate function; such an argument impacts the defendant's constitutional right to counsel. State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (misconduct to refer to defense counsel's argument as "bogus" and a "sleight of hand"); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (complaining of "misrepresentations" in defense counsel's argument as an example of "what people have to go through in the criminal justice system when they deal with defense attorneys"), cert. denied, 129 S.Ct. 2007 (2009); Reed, 102 Wn.2d at 146-47 (disparaging defendant's counsel and witnesses as outsiders with fancy cars); State v. Negrete, 72 Wn.App. 62, 66-67, 863 P.2d 137 (1993) (misconduct to argue defense counsel was paid to twist words), rev. denied, 123 Wn.2d 1030 (1994); United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005) (improper to argue defense counsel using "smoke and mirrors" and colluding with defendant to present a "story" to jurors).

It is also misconduct for the prosecutor to suggest that, in order to acquit the defendant, the jury must conclude that the State's

witnesses are lying, as this argument misstates the law, the role of the jury, and the burden of proof, and is thus misconduct. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997); State v. Barrow, 60 Wn.App. 869, 875-76, 809 P.2d 209, rev. denied, 118 Wn.2d 1007 (1991); State v. Casteneda-Perez, 61 Wn.App. 354, 263-63, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991). Finally, the prosecutor may not use closing argument to comment on the defendant's exercise of his constitutional rights, which include the right to confront witnesses and present a defense. U.S. Const. amends. VI, XIV; Const. art. I, § 22; see State v. Moreno, 132 Wn.App. 663, 672, 132 P.2d 1137 (2006) (misconduct to comment on defendant's constitutional right to proceed pro se). Here the deputy prosecuting attorney did all three.

In his rebuttal closing argument, the prosecutor attacked Mr. Calvin's attorney, William Johnston, by belittling his argument and accusing defense counsel of calling Ranger Moularas a liar. The deputy prosecutor began:

> I hate to sound too facetious but that was quite a story. You know, I think the defense counsel here is talking to you and he is telling you that Ranger Moularas is a fine person yet he is calling him a liar. That's what he's doing. This is just outrageous, he's calling him a liar.

RP 162. The court sustained defense counsel's objection, but only by suggesting that the prosecutor "alter the word, if you would, please." RP 162. The prosecutor then continued to accuse defense counsel of calling the State's witness a liar by use of a synonym:

> I understand, Your Honor. He is saying he is untruthful. He is saying he is not coming here and telling you the truth. He is saying the Ranger Moularas didn't tell the truth from the beginning. . . . For what reason? Why? I mean, what motive would Ranger Moularas have not to tell you the truth? To change his report about what actually happened? Why would he call him a fine person but also say he is not telling the truth? That's a big problem. If he is not telling the truth that a big problem. Big, big, big problem. You know, that's his theory, that Ranger Moularas is just coming in here with these terrible untruths.

RP 162-63.

After discussing the reasons the jury should believe the park ranger, the deputy prosecutor again returned to attacking defense counsel, stating, "You know, another thing for you to consider is whether or not to trust Mr. Johnston?" RP 164. Defense counsel's objection was sustained, but the prosecutor merely rephrased his argument, telling the jury to "consider his argument and decide if it's trustworthy." RP 164. Later the prosecutor accused defense counsel of blaming the victim:

> He is blaming the victim. He is blaming Ranger Moularas for being in a position and then getting assaulted. . . . Blaming the victim, that's not fair. Nobody wants to see that. It is not right.

RP 166.

The prosecutor's argument was misconduct because it disparaged Mr. Johnston, suggesting that he was a liar and the jury could not trust him. In addition, by suggesting that defense counsel was arguing that Ranger Moularas was lying, the prosecutor improperly suggested to the jury that it had to conclude the park ranger was lying in order to find Mr. Calvin not guilty. Finally, the prosecutor's complaint that defense counsel was "blaming the victim" was a comment on Mr. Calvin's right to cross-examine the State's witnesses, to testify in his own behalf, and to be represented by counsel.

c. The prosecutor committed misconduct by commenting on Mr. Calvin's credibility. A prosecutor may not ethically "comment on the credibility of the witnesses or the guilt and veracity of the accused." Monday, 171 Wn.2d at 676-77; Reed, 102 Wn.2d at 145; RPC 3.4(e). Thus, the Monday Court found the prosecutor committed misconduct when he assured the jury that all prosecutors know that "the word of a criminal defendant is inherently unreliable." Monday, 171 Wn.2d at 673.

In this case, the deputy prosecuting attorney was more direct. After mocking Mr. Calvin's testimony and accusing him of blaming the victim, the prosecutor told the jury that Mr. Calvin was trying to deceive them. RP 138-40. "He's just trying to pull the wool over your eyes." RP 140. Defense counsel's objection was overruled. RP 140. The prosecutor's expression of his personal opinion that Mr. Calvin was lying misconduct.

d. Mr. Calvin's' convictions must be reversed due to prosecutorial misconduct. In closing argument, the deputy prosecuting attorney argued that the jury could not believe Mr. Calvin or trust his lawyer. Defense counsel's objection to the prosecutor's argument that Mr. Calvin was trying to pull the wool over the juror's eyes was overruled. RP 140. Thus, this Court must reverse unless if there is a substantial likelihood the misconduct affected the jury verdict. Belgarde, 110 Wn.2d at 508.

Here, reversal is required. There was no physical evidence in this case and nothing to corroborate Ranger Moularas's testimony. Instead, the jury had to determine which witness it believed – Ranger Moularas or Mr. Calvin. This Court does not know how the jurors viewed witness credibility and cannot make credibility determinations. It must therefore conclude that the improper

comments impacted the jury verdict. See Saldivar v. Momah, 145 Wn.App. 365, 401, 186 P.3d 1117 (2008) (error in excluding prior consistent statements not harmless where impacted trial judge's determination that witness not credible), rev. denied, 165 Wn.2d 1049 (2009); State v. Barr, 123 Wn.App. 373, 98 P.3d 518 (2004) (introduction of witness's opinion that defendant guilty not harmless where case hinged on jury determination of witness credibility), rev. denied, 154 Wn2d 1009 (2005).

The court sustained two of defense counsel's objections when the prosecutor disparaged Mr. Calvin's attorney, but did so by telling the prosecutor to change his wording, not his meaning. RP 163, 164. Further objections by defense counsel would have been futile, because the court clearly approved of the prosecutor's line of argument and would not have provided a curative instruction. Thus, this Court should review this misconduct under the same standard as above and conclude there is a substantial likelihood the misconduct affected the jury verdict.

In the alternative, the prosecutor's argument was so flagrant and ill-intentioned that a corrective instruction would not have cured the damage. Belgarde, 110 Wn.2d at 508. A curative instruction does not necessarily cure the prejudice caused by

prosecutorial misconduct. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Stith, 71 Wn.App. 14, 21-23, 856 P.2d 415 (1993) (court's strongly-worded curative instruction could not cure prejudice where prosecutor's remarks struck at the heart of the right to a fair trial before an impartial jury and thus could not be cured; State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor elicited defendant's other bad acts in cross-examination of defendant's character witnesses).

The prosecutor attacked both Mr. Johnston and his argument by telling the jury he was not trustworthy and accusing him of attacking the victim. This personal attack was not necessary to respond to the defense argument, and no curative instruction could eliminate the prejudice caused by this unnecessary attack on defense counsel and his legitimate function. This Court must reverse Mr. Calvin's convictions and remand for a new trial. Reed, 102 Wn.2d at 148; State v. Walker, 164 Wn.App. 724, 738-39, 265 P.3d 191 (2011) (reversing despite lack of objection because of pervasive prosecutorial misconduct in closing argument in a case that hinged upon witness credibility).

6. THE SENTENCING COURT'S FINDING THAT MR. CALVIN HAD THE FINANCIAL ABILTY TO PAY A FINE AND COURT COSTS IS NOT SUPPORTED BY THE RECORD

At sentencing, the court ordered Mr. Calvin to pay a $250 fine and court costs of $450 in addition to mandatory penalties, for a total of $1,300. CP 17; 8/8/11RP 9. This amount did not include restitution, which the Judgment indicates could be ordered in the future. CP 18. The court ordered Mr. Calvin to make monthly payments of $100 beginning immediately and ordered that the interest accrue on the unpaid balance. CP 18.

The court also entered a written finding that Mr. Calvin had the financial ability to pay all of the financial obligations. CP 15. Finding of Fact 2.5 reads:

> ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court had considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

CP 15.

An identical finding was made by the trial court in State v. Bertrand, 165 Wn.App. 393, 404, 267 P.3d 511(2011). The Bertrand Court, however, found no evidence in the record to support the trial

court's finding that the defendant had the present or future ability to pay the legal financial obligations. Id. Determining the finding was therefore clearly erroneous, the court reversed the finding and remanded to strike it from the Judgment and Sentence. Id. at 404-05. In a footnote, the court noted that the State may not attempt to collect the financial obligations until there is a judicial determination of the defendant's ability to pay that takes her financial obligations and resources into account. Id. at 405 n.16.

There is also no evidence to support Finding of Fact 2.5 in Mr. Calvin's case. The trial court learned that defense counsel had been retained rather than appointed, but only because the court was considering ordering Mr. Calvin to pay the costs of court-appointed counsel as provided in the State's proposed Judgment. CP 17; 8/8/11RP 7. The court made no inquiry into Mr. Calvin's ability to pay, and there is no evidence that Mr. Calvin himself paid for his lawyer.[7]

Mr. Calvin testified at trial that he was a carpenter, but he also explained that he was living in an old mobile home that was in disrepair and did not even have running water. RP 1111-12. He also

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[7] Mr. Calvin was entitled to a court-appointed attorney based upon his income. SuppCP ___ (Declaration in Support of Motion for an Order of Indigency, sub. no. 69A, 8/17/11).

did not have $14 to pay to camp at Larrabee State Park on the night of the offense. RP 126. At sentencing, Mr. Calvin's attorney related that Mr. Calvin had a number of health problems and a surgery within the year. 8/8/11RP 5. Given the current economy, Mr. Calvin's health, and his inadequate housing, there is no evidence to support the court's conclusion that Mr. Calvin had the current and future ability to pay $1300 in addition to possible restitution.

Because there is no evidence to support the trial court's finding that Mr. Calvin has the present or future ability to pay the $1300 financial obligations it ordered, Finding of Fact 2.5 must be stricken. Bertrand, 165 Wn.App. at 405. Further, the court may not punish an offender for nonpayment of monetary obligations if he lacks the financial resources to pay them. Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). Thus, the State must take no action to collect the financial obligations until the court has inquired into Mr. Calvin's financial situation and determined if he has the present or likely future ability to pay the court-ordered financial obligations. Bertrand, 165 Wn.App. at 405.

F. CONCLUSION

Donald Calvin's convictions for third degree assault and resisting arrest must be reversed and dismissed because the State

did not prove every element of either crime beyond a reasonable doubt.

In the alternative, reversal and remand for a new trial is required because (1) defense counsel did not offer a jury instruction on self-defense, thus violating Mr. Calvin's right to effective assistance of counsel; (2) the court replaced a correct jury instruction during deliberation in a manner that violated the law of the case doctrine, the appearance of fairness doctrine, and the constitutional provision prohibiting comments on the evidence; and (3) the prosecutor committed misconduct by disparaging defense counsel in closing argument.

Additionally, there is no support in the record for the trial court's finding that Mr. Calvin had the present or future ability to pay the legal financial obligations ordered in the Judgment and Sentence, and the finding must be stricken.

DATED this 20th day of April 2012.

Respectfully submitted,

Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 67627-0-I
	)	
DONALD CALVIN,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ERIC RICHEY, DPA WHATCOM COUNTY PROSECUTOR'S OFFICE 311 GRAND AVENUE BELLINGHAM, WA 98225	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	DONALD CALVIN PO BOX 30333 BELLINGHAM, WA 98228-2333	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF APRIL, 2012.

X _____

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