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No. 67627-0-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

DONALD CALVIN , Appellant.

BRIEF OF RESPONDENT

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B. FACTS

1. Substantive Facts

On April 10th 2010 Donald Calvin drove to Larrabee State Park off of Chuckanut drive in Whatcom County arriving between 8:45 and 9:15 p.m. in the evening to access and use the showers at the park. RP 16, 19. Ranger Moularas had closed the main gate entrance to the park at 8:30

p.m. however, because the park closed for day use at 'dusk.' RP 16, 20. Moularas explained that sunset was at 7:55 p.m. that evening, so at the time he observed Calvin at the park entrance it was "beyond dusk." RP 16.

Ranger Moularas first noticed Calvin standing outside the closed park entrance gate, outside his car which was idling behind him. RP 17. It was very dark, though Calvin's vehicle lights were on. RP 24. Moularas was wearing his park ranger uniform and driving a marked ranger vehicle. RP 18. When he observed Calvin at the gate Moularas drove up to the gate area, turned off his ignition and his lights, unrolled his window identified himself as Ranger Moularas and asked Calvin what he was doing. RP 18, 34. Calvin, who appeared agitated, explained he just wanted to take a shower. RP 19. Moularas explained to Calvin that the park was closed and the day use facilities could only be used by campers at that point. RP 19.

Calvin appeared irritated with this information, wanting to know in a strained voice if Moularas would just let him in or how much it was going to cost him. RP 20. Moularas explained that walk-in site prices were $14.00. RP 38. Calvin, who was standing about a yard away from Ranger Moularas who was sitting in his ranger vehicle, began approaching and staring at Moularas in a hostile manner. RP 20. Ranger Moularas felt apprehensive just sitting in his vehicle belted in, so he exited his vehicle

for his safety and again explained Calvin could enter the park as a camper but if he wasn't intending to camp, he needed to leave. RP 21. Calvin, appearing agitated shouted to Moularas "what's your name?" RP 21. Moularas was concerned at that point that Calvin was unbalanced or under the influence of something and wasn't sure of the situation. Given that it was dark, he got his flashlight out to illuminate Calvin's person. RP 21. Moularas used a small flashlight pointing it at an angle towards Calvin's chest and asked if Calvin had been drinking. RP 21-23. Calvin yelled "no, I haven't. Why?" RP 23. To which Moularas explained he was just trying to figure out what was going on. RP 23.

Calvin then asked if the showers were locked, shot his hand up toward Moularas and stated "get that F-ing light out of my face." RP 23. Because Calvin was reaching out toward Moularas and walking forward closing the five foot gap between him and Moularas, Moularas took out his pepper spray and gave a one second burst in direction of Calvin's face. RP 24. Calvin, who was wearing glasses, continued forward toward Moularas, forcing the ranger to back up another 10 feet. RP 24, 62. Calvin had his fists up near his face in an aggressive posture as he continued advancing on Moularas, so Moularas deployed his service baton and struck him six times on his shoulder and chest shouting "Police, get on the ground; get back." RP 24, 54. Calvin did not respond initially.

Eventually, Calvin stopped his advance, turned and started walking down Chuckanut drive. RP 25. At this point Moularas put his baton away, grabbed Calvin and took him down to the ground slowly, using an arm bar take down. RP 27. Moularas cuffed one arm but Calvin would not yield his other arm, keeping it tense and forcefully at his side. RP 27-29. Moularas yelled to Calvin to "quit resisting, quit resisting." RP 27-28. After a minute of struggling, Moularas was able to handcuff Calvin's other arm, secure the situation and call for back up. RP 28-29.

At the scene, Calvin told authorities he didn't intend to assault anyone; he just wanted to take a shower. RP 82. Calvin referred to Moularas as "Ranger Dick" and also acknowledged he was angered because Moularas put a flashlight in his face. RP 82. At trial, Calvin testified Moularas approached him when he was getting in his car to leave after Moularas told him pay or leave because the park was closed for day use. RP 116. Calvin testified Moularas ordered him out of his car, asked if there was anything in his car he needed to be concerned with and then shined his flashlight in his eyes. RP 120. Calvin denied being angry or expressing anger but admitted that he referred to Moularas as Ranger Dick and raised his arm up when Moularas' flashlight was illuminated and that he may have yelled at Moularas. RP 126-7. Calvin also testified he did

not know he was under arrest or that he knew Moularas was a Park Ranger. RP 125, 130.

Calvin was charged with Assault in the Third Degree, Count I, pursuant to RCW 9A.36.031(1)(g), and Resisting Arrest, Count II, pursuant to RCW 9A.76.040. Following a jury trial, Calvin was convicted as charged. CP 14-21Calvin timely appeals. CP 5-13.

C. ARGUMENT

1. Looking at the evidence in the light most favorable to the State there is sufficient evidence in the record to support Calvin's assault in the third degree conviction.

Calvin contends the evidence presented below was insufficient to show beyond a reasonable doubt that he intended to place Ranger Moularas in fear of imminent bodily injury and that the Ranger Moularas' fear of imminent bodily injury was reasonable to support his assault in the third degree conviction.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant." Id. at 339. Such a challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses and persuasiveness of evidence. State v. Thomas, 150 Wn.2d 821, 83 P.2d 970 (2004).

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;
>
> 2) Assault in the third degree is a class C felony.

RCW 9A.36.031. The Washington Criminal Code does not further define "assault" in RCW 9A.36.031(1)(g). Washington recognizes however, three forms of assault; (1) assault by actual battery;(2) assault by attempting to inflict bodily injury on another while having the present ability to inflict such injury; or (3) assault by placing the victim in reasonable apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). Assault by placing the victim in reasonable apprehension of bodily harm requires the specific intent that the defendant

intended to cause reasonable apprehension of imminent bodily injury. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996), Byrd, 125 Wn.2d at 713. It also requires that the victim was a law enforcement officer engaged in the performance of official duties and that the law enforcement officer had a reasonable apprehension and imminent fear of bodily injury at the time of assault and Calvin's actions created that apprehension. State v. Brown, 140 Wn.2d 456, 463, 998 P.2d 321(2000), RCW 9A.36.031(1)(g).

Looking at the evidence in the light most favorable to the State, the evidence sufficiently demonstrates Calvin intended to place Ranger Moularas in fear of imminent bodily injury and that Ranger Moularas reasonably feared imminent bodily harm based on Calvin's conduct. "A person acts with intent when he acts with the objective or purpose to accomplish a result constituting a crime." State v. Ferreira, 69 Wn. App. 465, 468, 850 P.2d 541 (1993). Specific intent may not be presumed, although it can be inferred from evidence that the defendant pointed the gun at his victim. State v. Eastmond, 129 Wn.2d at 500. Intent may also be inferred as a logical probability from the facts and circumstances, including not only the manner act of inflicting the wound, but also the nature of the prior relationship and any previous threats. State v. Wilson,

125 Wn.2d 212, 217, 883 P.2d 320 (1994); Ferreira, 69 Wn. App. at 468-69.

Calvin was agitated and frustrated that Ranger Moularas would not let him enter Larrabee State Park to shower without paying a fee. RP 20. Ranger Moularas became concerned because Calvin appeared agitated, was approaching him with a hostile glare while he sat in his vehicle. Additionally, it was dark and the two were alone in an isolated area. RP 39. Moularas additionally surmised something was off about Calvin. RP 20, 21-3, 39. Moularas exited his vehicle for his safety essentially forcing Calvin to halt his initial advance on him while he sat in the truck. When Moularas took out and used a small flashlight to illuminate Calvin's person, Calvin became more agitated and angry, started advancing on Moularas again, reaching up with his arm toward Moularas and yelling at him to get that "F-ing light out of my face." RP 23-24. Calvin was acting in a manner toward Ranger Moularas that caused Moularas to take defensive measures, using a one second burst of pepper spray and backing away from Calvin. RP 24. Calvin nonetheless persisted forward through the pepper spray, raising his fists up to his face in an aggressive posture and continued to advance on Ranger Moularas backing the Ranger up approximately 10 additional feet toward the main roadway, Chuckanut. RP 25.

Examining these facts in the light most favorable to the state it is clear Calvin acted with purpose out of anger and frustration when he intentionally reached up toward Ranger Moularas and charged forward. Additionally, after the initial burst of pepper spray Calvin continued to charge forward and put his fists up to his face in an aggressive stance forcing Moularas to take additional defensive measures and continue to back up and away from Calvin. These facts support the jury's determination that Calvin, through his conduct and agitated state, intentionally placed Moularas in fear of imminent bodily injury. Moreover, these facts also demonstrate Moularas reasonably feared imminent bodily injury during this encounter. Ranger Moularas felt threatened enough throughout the encounter that he had to back away, felt compelled to use his pepper spray and finally had to deploy his service baton to defensively bat Calvin away from his person.

Calvin argues that the evidence is insufficient because he never uttered a "true threat" to the Ranger and that his sarcastic tone of voice alone does not create a reasonable fear of assault and that the facts when viewed from Calvin's perspective only show that Calvin walked toward Moularas and raised his hand. Br. of App. at 13, 15. But Moularas was not place in imminent fear of bodily injury by Calvin's words alone, instead his fear was based on Calvin's aggression and hostility combined with his

aggressive acts of reaching out and charging toward Moularas and even after the pepper spray continuing to take an aggressive stance and advancing on Ranger Moularas forcing the Ranger to back up over ten feet whilst taking defensive protective measures to deter Calvin's attack. These facts sufficiently support Calvin's conviction.

Contrary to Calvin's argument, State v. Godsey, 131 Wn.App. 278, 288, 127 P.3d 11, *rev. denied*, 158 Wn.2d 1022 (2006), while not directly on point, supports affirming Calvin's conviction. In Godsey the defendant's third degree assault conviction was sufficiently supported because Godsey created apprehension of an impeding assault in a deputy by taking a fighting stance (by raising his fists up) and charging him. This in not unlike what occurred here, where Calvin, angered by the flashlight, raised his arm in apparent agitation and anger and charged Ranger Moularas causing Moularas to take defensive measures. First, Ranger Moularas employed a one second burst of pepper spray but Calvin, who was wearing glasses at the time, continued charging toward him now with his fists toward Calvin's face in what Ranger Moularas thought was an aggressive posture. RP 24. Then, because Calvin continued to rush him, Ranger Moularas was forced to back away and deployed his service baton in order to get Calvin to stop his aggressive advance on him. These facts sufficiently demonstrate Calvin placed Moularas in reasonable fear of

bodily harm. Viewing all inferences in the light most favorable to the State, there is sufficient evidence in the record to support Calvin's assault in third degree conviction.

2. There is sufficient evidence in the record to support Calvin's resisting arrest conviction.

Next, Calvin asserts there is insufficient evidence to support his resisting arrest conviction because he alleges he did not know he was under arrest at the time he was allegedly resisting arrest. Br. of App. at 20. Calvin also asserts that there is insufficient evidence in the record to show Calvin used sufficient force to resist arrest to support his conviction. Br. of App. at 22 *citing* State v. Hornaday, 105 Wn.2d 120, 131, 713 P.2d 7 (1986).

Resisting arrest requires the state to prove Calvin "intentionally" prevented "or attempts to prevent a peace officer from lawfully arresting him." RCW 9A. 76.040(a). A person acts with intent if he "acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08,010(1)(a). Knowledge that a suspect is resisting an officer is an essential element of the crime. State v. Bandy, 164 Wash. 216, 2 P.2d 748 (1931).

First, Calvin asserts that as in an obstructing a law enforcement crime, where the state must show the defendant knew he was obstructing a

law enforcement officer, the state in this case must be able to prove Calvin understood he was under arrest in order to prove he was resisting arrest. Br. of App. at 20. Calvin contends there is insufficient evidence to show Calvin understood he was under arrest when he allegedly resisted arrest.

The resisting arrest statute does not require the state to prove as an element of the offense that Calvin *understood* he was under arrest to support his conviction, only that Calvin understood he was resisting an officer who was arresting him. Regardless, looking at the facts, taken in the light most favorable to the State, Calvin knew or should have known an officer was placing him under arrest or that his freedom of movement was being curtailed to a degree associated with arrest when Moularas shouted 'police, get on the ground" and then sought to place him in handcuff's. Ranger Moularas was driving a marked Ranger vehicle, was in uniform and identified himself initially as a Park Ranger when he first had contact with Calvin, and acting under the authority of an officer, informed Calvin that the park was closed and could only be used by those with a permit. RP 18-20. These facts combined with the fact that Moularas yelled at Calvin "police" and ordered him to the ground to detain and handcuff him sufficiently demonstrates Calvin knew or should have known an officer was arresting him. The statute requires the defendant to act with intent; it does not require an officer, who in this case

was in the midst of a struggle, to specifically state or announce "you are under arrest," as suggested by Calvin. The trier of fact was permitted to infer based on circumstantial evidence Calvin was aware he was being arrested even if Moularas did not specifically make that announcement. Moreover, Calvin should have understood by Moularas' words and conduct that his freedom of movement was being curtailed to a degree associated with arrest by virtue that Moularas was yelling at him to stop, get on the ground, and placing handcuff's on him. These facts support the jury determination that Calvin understood he was interacting with an officer, that the officer was arresting him and that Calvin intentionally resisted his arrest.

Next, Calvin contends there is insufficient evidence to support the jury determination that he used sufficient force to resist arrest, as opposed to being merely recalcitrant in his detention. But looking at the evidence in the light most favorable to the State, the evidence establishes Calvin intentionally failed to comply with Ranger Moularas orders. Calvin had to be taken to the ground by Ranger Moularas using a technique referred to as a slow arm bar take-down to effect the arrest. RP 25-26. Even after Moularas cuffed Calvin's left wrist, Calvin continued to struggle with Moularas and refused to yield his other arm, instead keeping it stiff at his

side. RP 27. Moularas repeatedly told Calvin to "quit resisting, quit resisting." RP 27-28. Finally, after struggling for a minute, Ranger Moularas was able to grab and cuff Calvin's other arm. Id.

One may resist arrest however, with various types of conduct. State v. Ware, 11 Wn.App. 738, 745, 46 P.3d 280 (2002) (*quoting* State v. Williams, 29 Wn.App. 86, 92, 627 P.2d 581 (1981). Calvin argues relying on State v. Hornaday, 105 Wn.2d 131, that there are insufficient facts in the record to demonstrate he used force in resisting his arrest and that instead the facts demonstrate he was merely recalcitrant. The facts demonstrate more than mere recalcitrance. First, Calvin refused to comply with Moularas' orders to stop and get on the ground. Moularas then had to use a slow arm technique to get Calvin to the ground, and then struggled with Calvin while he was trying to effect the arrest by handcuffing him. These facts stand in stark contrast to those in Hornaday, where the defendant after being arrested, merely refused to enter the backseat of the police car. There were no facts in the stipulated record that demonstrated Hornaday used any force to resist being placed into the back of the patrol car. Calvin's argument should be rejected.

3. Calvin's attorney was not ineffective by failing to request a self defense jury instruction that was not supported by the evidence or Calvin's defense theory.

Calvin asserts his attorney was constitutionally ineffective because he failed to propose a self-defense instruction. Calvin claims such an instruction was warranted because a suspect may resist a police officer in order to protect himself from actual bodily injury and because Calvin testified he was afraid of Moularas. Br. of App. at 23,26,28.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn. 2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995); Wilson, 117 Wn. App. at 15. Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." West, 139 Wn.2d at 46.

Calvin asserts that counsel was ineffective for failing to propose a self defense instruction so that he could argue that he was lawfully entitled to resist the arrest. Br. of App. at 26. In the context of resisting arrest a suspect is not entitled to resist arrest and consequently a self defense instruction, unless he is facing imminent, actual serious injury. The self defense rule that applies in the context of an arrest situation is distinct and more limited that the general self defense rule (hereinafter referred to as "arrest self defense"). State v. Garcia, 107 Wn. App. 545, 549, 27 P.3d 1225 (2001).

If a defendant alleges self-defense in connection with an arrest situation, he must produce some evidence that he was in actual, as opposed to apparent, imminent danger of serious injury or death in order to assert self defense. State v. Bradley, 141 Wn.2d 731, 737-38, 10 P.3d

358 (2000); State v. Garcia, 107 Wn. App. at 549. The defendant must produce evidence of actual *serious* injury because an arrest that "falls short of causing serious injury or death can be protected and vindicated through legal processes whereas loss of life or serious physical injury cannot be repaired in the courtroom." State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985) (emphasis added); *accord*, Bradley, 141 Wn.2d at 737-38; *see also*, WPIC 17.02.01 (a person may use force in resisting arrest "only if the person being arrested is in actual and imminent danger of serious injury."). Courts have consistently held that "[t]he use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable." Seattle v. Cadigan, 55 Wn. App. 30, 37, 776 P.2d 727, *rev. den.*, 113 Wn.2d 1025 (1989) (*quoting* State v. Goree, 36 Wn. App. 205, 209, 673 P.2d 194 (1983); *accord*, State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995) (citing number of cases for same proposition).

The parameters of raising self defense in an arrest context are the same no matter whether the arrest was lawful or not. No distinction is made as to whether the arrest was lawful or unlawful in determining whether a defendant is entitled to assert self defense in the context of an arrest. State v. Valentine, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997); Garcia, 107 Wn. App. at 550 n.2; State v. Westlund, 13 Wn. App. 460, 468, 536 P.2d 20, *rev. den.*, 85 Wn.2d 1014 (1975).

Furthermore, even if the defendant can show that he was actually in imminent danger of serious injury, the defendant must also show that the force used by the police was excessive and not in response to his own actions. Mierz, 127 Wn.2d at 476; State v. Ross, 71 Wn. App. 837, 842, 863 P.2d 102 (1993) ("arrestee's resistance of excessive force by a known police officer, effecting a lawful arrest, is justified only if he was actually about to be seriously injured."); Cadigan, 55 Wn. App. at 38 (use of force by officers was in response to defendant's resisting arrest and instruction on self defense was properly denied).

Calvin contends that all he needs to show in order to warrant an instruction on self defense to resisting an arrest is that there is "some evidence" to justify the giving of a self-defense instruction *citing* State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) and State v. George, 161 Wn.App. 86, 249 P.3d 202, *rev. denied*, 172 Wn.2d 1007 (2011). Calvin asserts a self defense instruction was warranted based on his testimony that he was confused and frightened when Ranger Moularas sprayed his face with pepper spray and then fended Calvin off with a baton. See, Br. of App. at 28, citing RP 119-21. Janes and George are inapplicable to a resisting arrest self defense scenario. Under Bradley and Holeman, *supra*, in order to warrant an instruction on "arrest self defense," Calvin must

show in the record some evidence that he was in danger of actual *serious* injury. The "arrest self defense" instruction is WPIC 17.02.01.[1]

Even if Calvin had requested an "arrest self defense" instruction, the trial court would not have abused its discretion in denying it because such an instruction was not factually supported and this instruction was not relevant to the defense theory of the case. The resisting arrest charge was based on Calvin's walking away, failing to stop and get on the ground and subsequent struggle with Moularas on the ground when Moularas was trying to get Calvin in handcuff's and effect his arrest. The defense theory at trial was that Calvin did not intend to assault Ranger Moularas but only to block the light of Moularas' flashlight from his face during their initial encounter, and that if Calvin did not commit assault in third degree, there could be no lawful arrest. RP 160. Calvin also argued he did not intend to resist arrest because he did not understand he was under arrest having just

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[1] WPIC 17.02.01 Lawful Force—Resisting Detention

It is a defense to a charge of (fill in crime) that force [used] [attempted] [offered to be used] was lawful as defined in this instruction.

A person may [use] [attempt to use] [offer to use] force [to resist] [to aid another in resisting] an arrest [by someone known by the person to be a [police] [correctional] officer] only if the person being arrested is in ***actual and imminent danger of serious injury***. The person [using] [or] [offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the force [used] [attempted] [offered to be used] by the defendant was not lawful. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty. (Emphasis added.)

been pepper sprayed and hit with a baton when Moularas arrested him. RP 160.

The jury was instructed here that to find the defendant guilty of resisting arrest, they had to find that the defendant intentionally attempted to prevent the officers from arresting him and that the arrest was lawful. CP 51-65 (Inst. No. 9). CP 31. The instructions given permitted defense counsel to argue fully Calvin's theory of the case since Calvin never argued he acted in self defense or faced any actual, imminent serious injury. No instruction was requested or given on "arrest self defense." RP 133. While Calvin was given a one second burst of pepper spray, Calvin was wearing glasses and the record does not demonstrate he faced actual imminent serious injury when Moularas was trying to effect his arrest.

In addition, Calvin was not entitled to an "arrest self defense" instruction because Moularas' actions were in response to his own. Moularas testified Calvin refused to comply with his demand to stop and get on the ground. Moularas was forced to use a slow arm technique to safely get Calvin to the ground and then had to struggle to get Calvin in handcuffs. The force used by Moularas was in response to Calvin's own conduct. Because Calvin was not faced with imminent actual serious injury, he was not factually entitled to such an arrest self defense instruction. *See*, Mierz, 127 Wn.2d at 476 (no ineffective assistance of

counsel for failing to assert self defense because defendant was not entitled to assert self defense in arrest context where defendant failed to show that there was an imminent threat of serious physical injury). Counsel was not ineffective for failing to propose a self-defense instruction to resisting arrest.

4. The trial court did not err substituting a definitional instruction after the jury asked for clarification of a phrase "unlawful force" not applicable to the case erroneously included in the original instruction, where the parties were given the opportunity to re-argue and where, the court cautioned the jury that it was not to consider the substituted definition instruction in isolation but in context to all the instructions given.

Calvin asserts his conviction should also be reversed because the trial court replaced a corrected definitional instruction after the jury asked for clarification of the phrase 'unlawful force' that was unwittingly left in the original assault definition instruction even though self defense was not an issue before the jury. Calvin contends the trial court substitution of a definitional instruction after deliberations had begun violated the law of the case doctrine, constitutes an impermissible comment on the evidence and violated the appearance of fairness doctrine.

At the close of arguments, the jury was instructed as follows:

> An assault is an act, with unlawful force, done with 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 the second day of deliberations the jury inquired of the court, "How does the law define unlawful force?" CP 50. The trial court then realized the jury had been misinstructed of the definition of assault by including the unlawful force and consent language. The phrase "unlawful force" is to be included in the definitional instruction "if there is a claim of self defense or other lawful use of force." *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal §35.50 at 547-48 (3d ed.2008). But, in Calvin's case there had been no request and a self defense theory was not pursued or supported by the facts. So, following the jury's question, the court informed the jury it had "misinstructed" them on the definition of assault in this case. RP 178. The court then withdrew Instruction 5 and replaced the instruction with an amended definitional instruction. RP 178-9, CP 59. The substituted instruction read:

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

CP 59.

Calvin contends the trial court violated the law of the case doctrine in answering the jury question by removing an erroneous definitional instruction and replacing it with a corrected instruction. CrR 6.15(f)(1) however, contemplates that additional instructions may be given providing, in part, that "[a]ny additional instruction upon any point of law shall be in writing." CrR 6.15(f). Whether to give further instructions in response to a request from a deliberating jury is within the discretion of the trial court. State. v. Beckin, 163 Wn.2d 519, 182 P.3d 944(2008), State v. Lanadon, 42 Wn.App. 715, 718, 713 P.2d 120 (1986), *see also* CrR 6.15(f)(1). A court abuses its discretion only where the court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The law of the case doctrine simply holds that where parties do not object to jury instructions, such instructions become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The law of the case doctrine is inapplicable to when or whether a trial court may within its discretion correct or provide additional instructions to a deliberating jury.

Calvin argues nonetheless, relying on State v. Hobbs, 71 Wn.App. 419, 421, 859 P.2d 73 (1973) and Hickman, 135 Wn.2d 97, that as soon as the jury is instructed, the law of the case doctrine precludes the court

from further instructing or correcting any jury instructions. In Hickman, the 'to convict' instruction included an additional element that the acts in question occurred in Snohomish County. Id. at 101-102. Based on the law of the case doctrine, the appellate court held the state was required to prove this added unnecessary element and Hickman was permitted to challenge the sufficiency of the evidence based on the additional element for the first time on appeal. Id. Hickman is not applicable to this case because it did not involve giving supplemental instructions and should not be read narrowly as to render CrR 6.5(1)(f) meaningless.

In Hobbs, the appellate court held trial court abused its discretion amending the "to convict" instruction to eliminate an extraneous element – venue – during jury deliberations. While the Court in Hobbs recognized a trial court does have authority to amend jury instructions during deliberations, it held, relying primarily on State v. Ransom, 56 Wn.App. 712, 714, 785 P.2d 469 (1990), that the supplemental instruction served to remove an element of venue that the state had undertaken the burden of proving by including it in their submitted "to convict" instruction. In Ransom, the trial court abused its discretion by giving a supplemental instruction that reflected a theory the state had not previously advanced at trial.

Here, the trial court did not correct or amend the "to convict" instruction, did not introduce a new theory but instead corrected the instruction to reflect the arguments and theories properly before the jury. Supplemental instructions should not go beyond maters that have either been or could have been argued to the jury. State v. Hobbs, 71 Wn.App. at 424-5. In this case, the "to convict" instruction did not have or add an element that the state had to prove Calvin assaulted with unlawful force-thus, the "to convict" instruction was correct and did not reference an additional element. Moreover, the inclusion of the phrase "unlawful force" in the definitional instruction did not add an element to the charged crime. Unlawful force would only be an element of the charged crime if perhaps accidentally included in the "to convict" instruction and such instruction was not corrected or if self-defense was an issue. *See*, State v. Brooks, 142 Wn.App. 842, 176 P.3d 549 (2008). The trial court therefore did not abuse its discretion by correcting the assault definition instruction in response to the jury's question.

a. Appearance of fairness

Next, Calvin contends the trial court violated appearance of fairness doctrine by responding to the jury's question by giving a corrected assault definition for them to use during deliberations.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing. State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674 (1995). "'The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.'" State v. Madry, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972), *quoted* in State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). "Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will succeed." State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007).

Calvin appears to argue that by advising the jury they were misinstructed and removing a inapplicable phrase from the definitional instruction and resubmitting the correct jury instruction, that any independent observer would perceive the trial court was not neutral and was instead acting with actual or potential bias. Calvin's claim is without merit. Particularly where the trial court's actions were in response to a jury question, where the trial court discussed the issue with both parties and gave the parties an opportunity to re-argue their cases after giving the supplemental instruction to the jury.

b. Impermissible comment on the evidence

Lastly, Calvin asserts the trial court's comment and giving of a supplemental instruction amounted to an impermissible comment on the evidence.

The Washington Constitution prohibits a judge from commenting on the evidence providing, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. Art. IV, §16. A court does not comment on the evidence by simply giving its reasons for a ruling. In re Det. Of Pouncy, 144 Wn.App. 609, 622, 184 P.3d 651 (2008), *aff'd*, 168 Wn.2d 382, 229 P.3d 678 (2010). Rather, a comment on the evidence occurs only if the court's attitude toward the merits of the case is reasonably inferable from the court's statement. State v. Cerny, 78 Wn.2d 845, 855, 480 P.2d 199 (1971), *vacated in part on other grounds by* Cerny v. Washington, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d (1972).

Contrary to Calvin's arguments, the trial court did not impermissibly introduce facts or give any indication of its attitude toward the case by responding to the jury question and acknowledging that the instruction questioned was incorrect and then giving the jury the corrected instruction and further instructing them that the instruction was to be used in conjunction with all the remaining instructions given. The trial court

was acting within its discretion on matters of law and did not impermissibly comment on the evidence.

5. Alleged prosecutorial misconduct did not deprive Calvin of a fair trial.

Calvin next asserts he was deprived of a fair trial because the prosecutor committed misconduct during closing arguments. Br. of App. at 42. Specifically, Calvin alleges the prosecutor disparaged Calvin's attorney, accused the defense of calling the State's witness a liar and expressed his personal opinion regarding Calvin's credibility. Id.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998).

Absent an objection, a claim of misconduct is waived unless it is so flagrant or ill intentioned that it creates an incurable prejudice. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993); State v. Russell, 125 Wn.2d 24, 82, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Misconduct does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Defense counsel's decision not to object or move for mistrial is strong evidence that the prosecutor's argument was not critically prejudicial to the appellant. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Prosecutor's have wide latitude in closing to argue the evidence and arguing inferences from the record. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Moreover, a prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. State v. Russell, 125 Wn.2d at 85-86. While a prosecutor may not personally vouch for a witness, it is not misconduct for a prosecutor to comment on a witness's credibility if it is based on the evidence and is not

a personal opinion. State v. Fiallo-Lopez, 78 Wn. App. 717, 730-31, 899 P.2d 1294 (1995).

First, Calvin argues the prosecutor, during rebuttal argument impermissibly disparaged opposing counsel by "belittling his argument and accusing defense counsel of calling Ranger Moularas a liar." Br. of App. at 44. The record reveals that Calvin's attorney did question Moularas' credibility and the reliability of his statements and version of events during his closing argument. Calvin's defense counsel argued there were two versions of the facts, Calvin's and Ranger Moularas, and that to find Calvin guilty, the jury would "have to find Park Ranger Moularas version was the correct one." RP 153. Calvin's attorney then went on to argue that Calvin's version was corroborated by Deputy Osborn's initial statement on probable cause. RP 155. He then pointedly questioned why Osborn subsequently changed his statement. Calvin's attorney argued there was no explanation given for Deputy Osborn amending his statement to delete two sections from initial statement on probable cause statement except that it "enhances and makes considerably stronger the State's case here and avoids the debacle of having a police officer impeached." RP 156.

In direct response the prosecutor argued on rebuttal that Calvin had quite a story. "I think the defense counsel here is talking to you and he is

telling you that Ranger Moularas is a fine person yet is calling him a liar. That's what he is doing. This is just outrageous; he's calling him a liar." RP 162. Calvin objected and Calvin's objection was sustained. Thereafter, the prosecutor rephrased, paraphrasing Calvin's argument by stating Calvin was in fact questioning the credibility of Ranger Moularas version of events. Id. The prosecutor's statement accurately summarized Calvin's argument and the prosecutor was permitted to respond. Calvin placed the veracity of the various versions of the facts presented squarely before the jury. Therefore the credibility of the two versions of fact before the jury was fair game for argument and the prosecutor should be given great latitude to argue the evidence.

To the extent the prosecutor initially used inflammatory language, contending Calvin was calling Moularas a liar, Calvin objected and the trial court cured any potential prejudice by cautioning the prosecutor to alter his language. Such alleged misconduct did not otherwise undermine the fairness of Calvin's trial or otherwise warrant reversal.

Next, Calvin argues the prosecutor committed error by later arguing during rebuttal in response to Calvin's argument that the jury should "consider whether or not to trust" defense counsel. Br. of App. at 45, RP 164. It is improper for a prosecutor to disparagingly comment on defense counsel's role or to impugn a defense attorney's integrity. State v.

Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011). Calvin did object however, the trial court sustained the objection and the prosecutor went on to clarify "you can consider his argument and decide if it's trustworthy." RP 164. While the prosecutor's initial statement during argument was improper, the record reflects prejudice if any was minimal, potential prejudice was cured by the prosecutor rephrasing his argument to explain that the jury needed to focus on the evidence and decide whether the state proved his case beyond a reasonable doubt. RP 167. Calvin cannot show how this isolated statement during rebuttal could have affected the jury verdict. If the argument, even after corrected was still worrisome, Calvin would have asked for a curative instruction or a mistrial. This Court can infer Calvin didn't request either because the concern for prejudice based on the entirely of closing arguments was minimal. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Calvin also argues the prosecutor improperly argued Calvin was blaming the victim during argument and that this was an impermissible comment on Calvin's right to cross-examine the state's witnesses, to testify on his own behalf and to be represented by counsel. Br. of App. at 46. The prosecutor's argument, taken in context to the evidence and arguments made, was appropriate. Calvin fails to meet his burden and articulate from the record how the prosecutor's rebuttal argument

infringed on Calvin's right to testify, his right to counsel or right to cross examine witnesses. Calvin's argument should be rejected.

Finally, Calvin asserts the prosecutor committed misconduct by commenting on Calvin's credibility during closing arguments by asserting Calvin's testimony was not credible or consistent with the evidence and that Calvin was "just trying to pull the wool over your eyes." Br. of App. at 46, RP 140. Calvin argues the prosecutor improperly expressed his personal opinion that Calvin was lying.

It is misconduct for a prosecutor to give his personal opinion as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Prejudicial error will not be found, however, unless it is "clear and unmistakable" that counsel is expressing a personal opinion, and not arguing an inference from the evidence. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *quoting* State v. Sargent, 40 Wn.App. 340, 698 P.2d 598 (1995).

The prosecutor's arguments, taken in context, demonstrate the prosecutor was permissibly arguing Calvin's version of events and explanation for his behavior was not credible. Moreover, at no time did the prosecutor express his personal opinion regarding Calvin's credibility. Calvin's argument should be rejected.

6. Calvin waived his right to object to the imposition of legal financial obligations by failing to object to their imposition below.

Calvin alleges that the trial court erred by finding that he has the ability either in the present or future to pay legal financial obligations, premised largely upon the court's alleged failure to consider his ability to pay at the time of sentencing. Calvin bears the burden of demonstrating he can raise this issue for the first time on appeal by showing that the sentencing court exceeded its statutory authority in assessing the amounts or demonstrate that the error he alleges is a manifest one of constitutional magnitude.

In order to assert a constitutional claim for the first time on appeal, an appellant must demonstrate that the alleged error is a manifest error of constitutional magnitude. RAP 2.5(a). "Manifest" means that a showing of actual prejudice is made. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *see also*, State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (error is manifest if it had "practical and identifiable consequences" in the case). If the error was manifest, the court must also determine if the error was harmless. Lynn, 67 Wn. App. at 345. The burden is on the defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

The imposition of legal financial obligations standing alone, however, is not enough to raise constitutional concerns. *See*, State v. Curry, 118 Wn.2d 911, 915 n.3, 829 P.2d 166 (1992). There is no constitutional requirement that a court make a specific finding regarding a defendant's ability to pay. *See*, State v. Curry, 118 Wn.2d at 916 (under the constitution court need not make any specific finding but need only consider defendant's ability to pay as long as there is a mechanism for a defendant who ultimately is unable to pay to have the judgment modified). Calvin cannot demonstrate this is an issue of constitutional magnitude that warrants review for the first time on appeal.

Similarly, Calvin cannot show there is any statutory basis to assert for the first time on appeal there is insufficient evidence in the record to show the court considered Calvin's ability to pay LFO's by failing to raise it at sentencing. A standard range sentence cannot be appealed. RCW 9.94A.585; State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). Limited review is available only "if the sentencing court failed to comply with procedural requirements of the Sentencing Reform Act ("SRA") or constitutional requirements." Osman, 157 Wn.2d. at 481-82.

In order to appeal based on the court's failure to follow a procedural requirement, the appellant must show that "the sentencing court had a duty to follow some specific procedure required by the SRA,

and that the court failed to do so." State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). There is no requirement that a court make a specific finding regarding a defendant's ability to pay before legal financial obligations are imposed. State v. Curry, 118 Wn.2d at 916.

For example, the court in this case imposed a $500.00 victim assessment penalty. Under RCW 7.68.035(1)(a), this assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigency. Similarly, pursuant to RCW 43.43.7454(1), a $100.00 biological sample fee must be included in every sentence for which a biological sample must be taken. This includes every case in which a person is convicted of a felony. Id. Again, there is no exception for indigent defendants.

Additionally, there is nothing in the record to show that Calvin will not have the ability to pay his legal financial obligations *in the future*, given the length of the time Calvin has to satisfy his judgment. Pursuant to RCW 10.01.160(3), a court may order the defendant to pay costs incurred by the state in its prosecution if the defendant "is or will be able to pay them." The fact that Calvin is pursuing an appeal does not automatically mean he otherwise doesn't have the ability to pay *any* costs, particularly where the court noted Calvin retained private counsel for trial. As noted in Curry:

> [Defendants] argue additionally that the orders of indigency entered for purposes of appeal are sufficient to show that they cannot, in fact, pay the financial obligations imposed. We disagree. The costs involved here are on a different scale that the costs involved in obtaining counsel and mounting an appeal.

Curry, 118 Wn.2d at 915 n.2, in part. A defendant's indigent status at the time of sentencing does not preclude the imposition of court costs, and a defendant's inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *rev. den.*, 165 Wn.2d 1044 (2009); *see also*, State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (the time to address the defendant's ability to pay is at the time the State seeks to enforce collection as court's determination at sentencing is speculative). Calvin therefore waived any error regarding trial court's alleged failure to consider his ability to pay before imposing legal financial obligations at sentencing.

Even if not waived, Calvin's argument fails. Collection of legal financial obligations are governed by RCW 9.94A.760. The sentencing court should "set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligations." RCW 9.94A.760(1). The Department of Corrections (DOC) is authorized to collect these amounts during the period of supervision. RCW 9.94A.760(8). "[T]he department may make a recommendation to the

court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances." To determine the appropriateness of the payment schedule, DOC may require the defendant to provide information under oath concerning his assets and earning capabilities. RCW 9.94A.760(7)(a).

These statutes do not require a showing of ability to pay before the court may collect legal financial obligations. Rather, RCW 9.94A.760(8) authorizes DOC to collect the monthly payment amount set by the court. This does not mean that the defendant's ability to pay is irrelevant. Rather, his financial situation may be a basis for modifying the monthly amount. RCW 9.94A.760(7)(a).

In arguing that a finding of ability to pay is required before imposition and collection, Calvin relies on Division Two's decision in State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011). That decision must be examined in light of the prior cases on which it was based: (1) the Supreme Court's decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and (2) this Division's decision in State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991).

In Curry, the Supreme Court differentiated between two different kinds of legal financial obligations: court costs and the victim penalty assessment. Court costs are governed by RCW 10.01.160. That statute

provides imposition of costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). The statute further provides for remission of costs or modification of the method of payment on a showing that payment would impose manifest hardship on the defendant or his immediate family. RCW 10.01.160(4). The Supreme Court held that these statutory provisions satisfied constitutional requirements. The court rejected any requirement for specific findings regarding a defendant's ability to pay.

> According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

Curry, 118 Wn.2d at 916. Curry went on to consider the validity of victim penalty assessments. Unlike RCW 10.01.160, the statute on victim assessments does not contain any provision for consideration of indigency. The court nonetheless held that the statute was constitutionally valid:

> [T]here are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants. Under [former] RCW 9.94A.200, a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. . .Thus, no defendant

> will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

Curry, 118 Wn.2d at 918 (citations omitted). Under Curry, the imposition nor the collection of the victim penalty assessment depends on a prior showing of ability to pay. Rather, the proper time for consideration of indigency is at a sanctions hearing. If the lack of payment is not willful, sanctions may not include incarceration. The statute governing the biological sample fee is substantially identical to that governing the victim assessment, so the same reasoning should apply to those fees as well.

In Baldwin, this Division applied the holding of Curry. The trial court had imposed $85 in court costs and $500 for recoupment of attorney fees. With regard to the $85 in court costs, this court held that Curry was dispositive as to their validity. Baldwin, 63 Wn. App. at 308-09. The $500 attorney fee assessment, however, implicated the defendant's constitutional right to counsel. Further analysis was therefore necessary. Id. at 309. This court nonetheless held that the assessment was valid without a specific finding of ability to pay. Under RCW 10.01.160, the court was required to consider the defendant's financial resources and the record reflected the court had done so. The pre-sentence report indicated that the defendant was employable. Consequently, the imposition of the

$500 assessment was not an abuse of discretion. Baldwin, 63 Wn. App. at 311-12.

In Bertrand, Division Two purported to apply this court's holding in Baldwin, but its analysis is murky. The trial court in Bertrand imposed $4,304 in "legal financial obligations." The opinion does not specify the nature of these "obligations." The record indicated that the defendant was disabled. There was apparently no other information in the record concerning the defendant's ability to pay. Bertrand, 165 Wn. App. at 398 ¶ 7. Division Two analyzed this situation as follows:

> Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for us to review whether "the trial court judge took into account the financial resources of the defendant and the nature of the burden" imposed by LFOs under the clearly erroneous standard. Baldwin, 63 Wn. App. at 312. .... The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court's finding ... that [the defendant] has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding ... was clearly erroneous.

Bertrand, 165 Wn. App. at 617 ¶ 19. In following this analysis, Division Two appears to have applied Baldwin out of context. The quoted language from Baldwin is based on RCW 10.01.160, which governs imposition of court costs. Baldwin applied this requirement to attorney

fees as well. Id. at 310. In Bertrand, however, the court applied this analysis to "legal financial obligations," without specifying their nature. If the obligations at issue consisted solely of court costs and attorney fees, the court was correct. RCW 10.01.160(4) requires a trial court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." If, however, the holding of Bertrand is extended beyond this context, it is wrong. Statutes involving other kinds of legal financial obligations do not contain similar requirements. In particular, there is no such requirement in the statutes governing biological samples or for the imposition of the victim assessment fee.

After the Bertrand court overturned the finding concerning ability to pay, it went on to consider the appropriate remedy. It cited the following language from Baldwin:

> [T]he meaningful time to examine the defendant's ability to pay is *when the government seeks to collect the obligation.* . . The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship.] Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*

Bertrand, 165 Wn. App. at 405 ¶ 20, *quoting* Baldwin, 63 Wn. App. at 310-11 (Bertrand court's emphasis). Based on this language, the Bertrand court concluded:

> Although the trial court ordered [the defendant] to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding [of ability to pay] forecloses the ability of the Department of Corrections to begin collecting LFOs from Bertrand until after a future determination of her ability to pay. Thus, because Bertrand can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

Bertrand, 165 Wn. App. 393 at 405 ¶ 21. This conclusion misstates the analysis of Baldwin. That case discussed two ways in which a defendant's ability to pay is considered at the time of collection. First, the defendant cannot be incarcerated for non-willful failure to pay. Second, the defendant may petition for a remission of costs. Baldwin, 63 Wn. App. at 310-11; *see* Curry, 118 Wn.2d at 917-18 (discussing safeguards for indigent defendants who fail to pay crime victim assessments). Both of these remedies, however, require an affirmative showing by the defendant. At a violation hearing, the defendant bears the burden of showing that his failure to pay was not willful. State v. Woodward, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). Similarly, a petition for remission of costs should be granted only on an affirmative showing of manifest hardship. RCW 10.01.160. Thus, contrary to what Bertrand says, nothing in Baldwin requires an affirmative showing of ability to pay before financial obligations can be imposed or collected.

Any such holding would essentially negate the Supreme Court's analysis in Curry. There, the court held that both court costs and the victim penalty assessment could be imposed without any specific finding of the defendant's ability to pay. Curry, 118 Wn.2d at 916-17. Under Bertrand, however, the obligations cannot be *collected* without such a finding. What purpose is served by imposing legal financial obligations if nothing can be done to collect them?

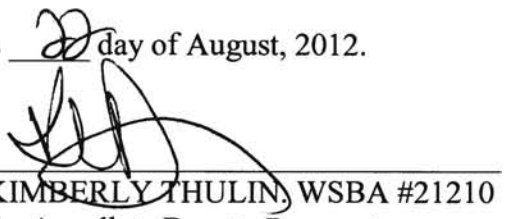
Even if this Court determines Calvin may challenge the trial court's imposition of a victim assessment fee, court costs, fine and DNA collection fee in his judgment and sentence, this Court should apply Curry and find that the imposition of these obligations was authorized and appropriate. The trial court's finding concerning the ability to pay, in context, is of no legal significance because it has no impact on the court's ability to impose the obligations. Moreover, the trial court's finding is arguably supported where the record reflects Calvin was an able bodied 55 year old based on the facts of this case, had the ability to drive, and had previously retained private counsel below. While there was mention of possible surgery in the next year at sentencing, nothing in the record suggests Calvin would not have the ability in the future to pay the court costs. Therefore the trial court's general finding regarding Calvin's current or future ability to pay was not error. And even if the trial court's

finding regarding the ability to pay is subject to challenge and not sufficiently supported by the record, striking the finding does not negate the authority of the court to otherwise impose the financial obligations challenged. Calvin's challenge should be rejected.

D. CONCLUSION

Based on the foregoing, the State respectfully requests this court affirm Calvin's judgment and sentence for assault in the third degree and resisting arrest.

Respectfully submitted this 22 day of August, 2012.



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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Elaine Winters, addressed as follows:

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Sydney A. Kuss
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08/22/2012
Date