NO. 44438-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES BRADLEY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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2. There was insufficient evidence James Bradley committed the offense of obstructing a law enforcement officer when his conviction rested on his constitutionally protected behavior.

3. The State did not prove Bradley had the intent to deprive the owner of property as required to convict him of theft in the third degree.

4. The jury's verdict was not based on unanimous agreement of an act underlying the allegation of theft that was proven beyond a reasonable doubt.

5. Bradley's convictions for vehicle prowling in the second degree and theft in the third degree violate double jeopardy.

6. The court impermissibly imposed discretionary legal financial obligations based on an unsupported finding of Bradley's ability to pay.

7. Finding of fact 2.5 in the judgment and sentence is not supported by substantial evidence in the record. CP 97.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A deadly weapon sentencing enhancement requires proof that the perpetrator used a weapon in a manner likely to inflict death. During a dispute over wages owed to him, Bradley swung a baseball bat in the air and hit the complainant's car while requesting that he receive payment for his work. When a baseball bat was not actually used or nearly used to harm a person, has the State met its burden of proving the baseball bat was used in a manner likely to inflict death?

2. Obstructing a law enforcement officer may not be based on constitutionally protected conduct such as speech or the passive refusal to submit to a warrantless seizure. Bradley refused to exit a tool shed at his home for "a few seconds" after the police told him to come out when the police did not have a warrant. Was Bradley's conviction for obstructing a law enforcement officer predicated on exercising his constitutional rights?

3. Theft requires the intent to deprive an owner of his property for some substantial period of time. Bradley took but immediately relinquished control of two items belonging to another. Did the prosecution fail to prove beyond a reasonable doubt that Bradley intended to deprive the owner of either item?

4. Double jeopardy prohibits multiple convictions for the same offense, based on the elements as charged in an individual case. Bradley was charged with vehicle prowling in the second degree and theft in the third degree based on the same act of reaching into someone's car and taking property. The legislature has not declared its intent to punish these offenses separately. Does it violate double jeopardy to separately punish Bradley for both vehicle prowling and theft of property from a car?

5. A person's ability to pay legal financial obligations must be found by the court by clear evidence. No evidence supported the court's finding that Bradley was able to pay discretionary court costs after he was convicted for an incident arising from his inability to pay his basic expenses. Is there insufficient evidence in the record to support the court's conclusion that Bradley has the ability to pay non-mandatory fees?

C. STATEMENT OF THE CASE.

Sage Sanchez hired James Bradley, who he knew through church, to repair his father's motor home. RP 175. Sanchez initially paid Bradley daily for his work, but later delayed paying Bradley until Sanchez could cash a check from his father. RP 177-79. Sanchez told

Bradley his father's check would arrive on September 11, 2012, but Sanchez did not cash this check until the next day. RP 178. In the afternoon of September 12, 2012, Sanchez drove to Bradley's home to pay him for the prior week's work. RP 182. Bradley had also worked on Monday, September 10, 2012, and he told Sanchez several times that he needed to be paid to meet his bills. RP 178, 180, 186.

Bradley was outside gardening and talking to several neighbors when Sanchez handed Bradley the money he owed him for the prior week of work. RP 186. Bradley was upset that Sanchez was not also paying him for the work he had done on Monday. *Id.* Sanchez insisted that Bradley would have to wait until the next time his father's check came, on September 22, 2012, to be paid for additional work. *Id.*

Bradley became upset. He took a baseball bat from his house and told Sanchez, "you're going to pay [me] or I'm going to take out every cent or every dollar on this truck." RP 188. He swung the bat at Sanchez's truck, a 1988 Ford Ranger. *Id.* Bradley repeatedly told Sanchez he wanted to be paid and hit the truck with the bat three times, while Sanchez repeated that he would pay him after his father's next pay period. RP 189, 194, 287-88. The truck had several dents but Sanchez was not sure if Bradley caused them or they were already

there. RP 190-93. Bradley raised the bat and pointed it in Sanchez's direction from as close as five feet away. RP 197.

Sanchez walked across the street and asked a neighbor Kimberly Gordhamer if he could come into her home and call the police. RP 198-99, 304. Gordhamer did not know Sanchez and refused. RP 304. Bradley walked after Sanchez and the two men circled a neighbor's car, with Bradley demanding that Sanchez pay him. They moved around the car, with the two men keeping a distance between them and remaining on opposite sides, until Sanchez said, "fine, I'll pay you." RP 200-01, 217. Bradley walked back to his house and told Sanchez he would take his leaf blower as collateral. RP 202. Bradley reached into Sanchez's car through the driver's window and took the keys. RP 257.

Bradley never hit Sanchez or got close enough to hit him. RP 384. Sanchez agreed that Bradley never swung the bat at him although he feared he could be hit. RP 214. Four neighbors and Bradley's housemate Elizabeth Blankenship watched the incident. RP 241, 247-77, 256, 321-22, 371.

After the incident, Blankenship saw Bradley come into the house, put down the bat, throw the keys on a couch, and walk outside toward a trail that leads to another street. RP 278, 287-88.

The police arrived quickly. RP 316. While Blankenship was speaking to the police, she received a text message from Bradley asking her to tell him when the police left. RP 279. Bradley sent another message telling Blankenship he was in the tool shed. RP 279. Blankenship and another neighbor told the police they should check the tool shed. RP 279-80.

Police officer William Granlund and a partner went to the tool shed in the backyard and said, "Tacoma police," and "if someone is in there, come out with their hands up." RP 345-46. No one answered. RP 346. After waiting "[j]ust a few seconds," Granlund opened the shed door. RP 346-47. Bradley was inside, sitting down with his hands up. RP 349, 350. Bradley was taken into custody without incident. RP 350.

The prosecution charged Bradley with second degree assault while armed with a deadly weapon; malicious mischief in the third degree; theft in the third degree; vehicle prowling in the second degree; and obstructing a law enforcement officer. CP 27-29. Bradley was convicted of these offenses after a jury trial and received a standard range sentence of 14 months for second degree assault, consecutive to 12 months for the deadly weapon enhancement, and consecutive terms of two months for each of the four gross misdemeanor convictions. CP

100, 108. The court also imposed $600 of mandatory legal financial obligations in addition to $1500 of discretionary fees for a court-appointed attorney. CP 98.

D. ARGUMENT.

1. **Because a deadly weapon enhancement requires a weapon be used in a manner readily capable of death, the prosecution did not prove Bradley was armed with a deadly weapon**

a. *The prosecution must prove that the accused person committed all essential elements of a crime.*

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is insufficient to support a verdict where mere speculation, rather than

reasonable inference, supports the government's case." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). A "mere modicum" of evidence is inadequate because it does not "rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320.

Bradley was charged with second degree assault with a deadly weapon, as well as a deadly weapon enhancement, pursuant to RCW 9A.36.021(1)(c) and RCW 9.94A.533. A "deadly weapon" is defined differently as an element of second degree assault than it is for purposes of the deadly weapon enhancement. *Compare* RCW 9A.04.110(6), *with* RCW 9.94A.825.

A "deadly weapon" when used as a means of committing second degree assault is defined as a firearm or

> any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is *readily capable of causing death or substantial bodily harm.*

RCW 9A.04.110(6) (emphasis added); *see* RCW 9A.36.021(1)(c).

A "deadly weapon" for the purposes of the additional penalty imposed as a sentencing enhancement is defined as a firearm, certain listed weapons, or

> an implement or instrument which has the capacity to inflict death and *from the manner in which it is used, is likely to produce or may easily and readily produce death.*

RCW 9.94A.825 (emphasis added).[1]

The critical difference between these two definitions is that a deadly weapon for second degree assault must be used under circumstances showing it is "readily capable of causing death or substantial bodily injury,"[2] while a deadly weapon for the sentencing enhancement must be actually used in a manner likely to produce death.

Principles of statutory construction dictate that a penal statute is construed narrowly and strictly. *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); *State v. Bell*, 83 Wn.2d 383, 388, 518 P.2d 696 (1974) ("we must constrain ourselves and the trial court to a literal and strict interpretation of the criminal statutes"). When the legislature uses different words or includes different language in similar statutes, it is presumed the legislature intended different

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[1] A baseball bat is not listed as a *per se* deadly weapon in RCW 9.94A.825. *See generally State v. Samaniego*, 76 Wn.App. 76, 80, 882 P.2d 195 (1994).

[2] Substantial bodily injury is defined as:

> bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110(4)(b).

results. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003).

A weapon may meet the "capable of causing substantial bodily injury" standard if it could fracture someone's nose or cause swelling and pain lasting several days. *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011); *State v. Weber*, 137 Wn.App. 852, 861-62, 155 P.3d 947, *rev. denied*, 163 Wn.2d 1001 (2007). By limiting a deadly weapon sentencing enhancement to one used in a manner likely to produce death, while creating a lesser standard that includes being capable of causing substantial bodily injury for second degree assault, the legislature demonstrated its intent to reserve the added punishment to the most serious and actually lethal situations. The possibility of causing substantial bodily injury is insufficient for a deadly weapon sentencing enhancement. The prosecution must prove the weapon was in fact used by the perpetrator in a manner likely to produce or readily capable of causing death.

b. *The prosecution did not prove Bradley used a baseball bat in a manner likely to produce death.*

Bradley used a baseball bat as a tool to demand Sanchez pay him the wages he earned for work he had performed. He told Sanchez

he would hit his car with the bat until he was paid and he swung the bat at Sanchez's car, a 1988 Ford Ranger. RP 188-89, 214. He also followed Sanchez around a neighbor's car while holding the bat, repeatedly demanding that Sanchez pay him what he was owed. RP 199, 277. But the witnesses agreed that Bradley never swung the bat at Sanchez's body. RP 199, 241, 262, 277, 321-22, 371. Bradley did not get close enough to touch Sanchez with the bat, did not reach toward Sanchez as if trying to hit him, and could have moved closer to Sanchez if that was his intent. RP 199, 321, 371, 384.

As soon as Sanchez promised to give Bradley the money he owed him that day, Bradley stopped pursuing Sanchez. RP 201. He walked away when Sanchez agreed to pay him. RP 201.

It is possible that a baseball bat could be a deadly weapon, just as a glass bottle could be a deadly weapon when used to injure someone. *See State v. Shilling*, 77 Wn.App. 166, 169, 889 P.2d 948 (1995) ("as used" in bar fight, glass bottle proven to be deadly weapon under RCW 9A.04.110(6)). However, Bradley did not use the baseball bat in a manner likely to produce death as required under RCW 9.94A.825.

A baseball bat is not a *per se* deadly weapon, otherwise there would be Little Leaguers routinely risking felony adjudications. A baseball bat may be used for nefarious purposes in threatening or hitting another person. However, to qualify as a deadly weapon for purposes of the sentencing enhancement, Bradley was required to actually use it in a manner likely to produce death. *See e.g.*, *State v. Skenandore*, 99 Wn.App. 494, 499-500, 994 P.2d 291 (2000) (homemade spear not deadly weapon for purposes of second degree assault where it "could have" taken out an eye but not as actually used).

For example, a machete is a potentially dangerous and lethal weapon. However, in *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 256 P.3d 277 (2011), the Supreme Court disapproved of a Court of Appeals decision that had treated a machete as a deadly weapon (under the RCW 9A.04.110(6) definition) based on its "very nature and size." *Id.* at 368 n.6 (disapproving of *State v. Gamboa*, 137 Wn.App. 650, 653, 154 P.3d 312, 314 (2007)). In *Martinez*, the Court criticized *Gamboa* for concluding that a bloody machete found inside a burglarized home was a deadly weapon without evidence of how it was used against a person. *Id.* Although the machete was obviously a

dangerous weapon with potential to cause great harm, it may not constitute a deadly weapon if it was not used as one. *Id.*

The prosecution's closing argument demonstrates the insufficiency of the evidence that Bradley used the baseball bat in a manner likely to cause death as required for the sentencing enhancement. The State discussed how the bat was capable of breaking a bone, which could meet the substantial bodily injury prong of a deadly weapon used to commit assault. RP 438. But the prosecutor mustered no facts specific to the case that showed Bradley used the bat in a manner readily capable of causing death. RP 438-39. Instead, the prosecutor asked the jury to "[i]magine" how a bat could hurt the human skull "depending on where someone gets hit." RP 439. The reason the prosecutor asked the jury to "imagine" about whether a bat could theoretically seriously hurt someone and made no specific argument about how Bradley used the baseball bat in such a manner was because the testimony did not support such a finding.

The prosecutor acknowledged that the definitions of deadly weapon were "a little different" for assault and the sentencing enhancement but offered no theory under which, as actually used, Bradley was likely to have inflicted death with the baseball bat. RP 442.

Bradley used a baseball bat to threaten Sanchez so Sanchez would pay him but never used the bat in a manner likely to cause Sanchez's death. The essential elements of the deadly weapon enhancement were not proven by sufficient evidence.

c. *The deadly weapon enhancement must be vacated.*

When there is insufficient evidence to prove the essential elements of a deadly weapon enhancement, the enhancement may not be imposed. *State v. Gurske*, 155 Wn.2d 134, 143-44, 118 P.3d 333 (2005). Bradley's sentencing enhancement must be reversed and vacated.

2. **There was insufficient evidence that Bradley's failure to immediately come out of his home to submit to a warrantless arrest constituted obstructing a law enforcement officer.**

a. *An obstruction conviction may not be based on a person's exercise of constitutionally protected rights.*

To prove Bradley committed the offense of obstructing a law enforcement officer, the prosecution needed to establish beyond a reasonable doubt that he willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of his official powers or duties. RCW 9A.76.020(1); CP 27.

Because the elements of obstruction are broad enough to encompass constitutionally protected speech and conduct, the statute is construed narrowly. *State v. Williams*, 171 Wn.2d 474, 478, 251 P.3d 877 (2011). The mere refusal to answer questions cannot be the basis of an arrest for obstruction of a police officer because speech is protected by the First Amendment. *State v. White,* 97 Wn.2d 92, 106, 640 P.2d 1061 (1982); *State v. Hoffman,* 35 Wn.App. 13, 16, 664 P.2d 1259 (1983).

Additionally, a mere refusal to open the door to police may be constitutionally protected conduct. The police lack inherent authority to demand entry into a person's home or to "meander around the curtilage and engage in warrantless detentions and seizures of residents." *United States v. Perea-Rey*, 680 F.3d 1179, 1188-89 (9th 2012); *Kentucky v. King,* __ U.S. __ , 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011); U.S. Const. amend. 4; Wash. Const. art. I, § 7. Police also cannot demand that a person incriminate himself. U.S. Const. amend. 5; Wash. Const. art. I, § 9. A person cannot be prosecuted for exercising his right to refuse warrantless police entry into his home. *United States v. Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978); *see State v. Gauthier*, _Wn.App. _ , 298 P.3d 126, 130 (2013) ("because the Fourth Amendment gives

individuals a constitutional right to refuse consent to a warrantless search," such refusal "is privileged conduct that cannot be considered as evidence of criminal wrongdoing").

In *Prescott*, an apartment resident refused to open her door as requested by the police, who lacked a warrant, and she was prosecuted for hindering the police. 581 F.2d at 1347. The court ordered a new trial on other grounds, but also barred evidence of her refusal to let the police into her home at a re-trial. The court reasoned that when an "officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused." *Id.* at 1350. The passive refusal to open a door upon a police request cannot be penalized "regardless of one's motivation." *Id.* at 1351; *Cf. State v. Budik*, 173 Wn.2d 727, 739, 272 P.3d 816 (2012) (passive non-disclosure of information to police not "obstruction" in context rendering criminal assistance statute).

There are occasions when the police may enter a home without a warrant, but none are present in Bradley's case. In *State v. Steen*, 164 Wn.App. 789, 794-95, 265 P.3d 901 (2011), *rev. denied*, 173 Wn.2d 1024 (2012), police officers were responding to an emergency situation

involving an unresolved report of domestic violence and believed that either a suspect or injured person could be inside a locked trailer. They commanded anyone inside the trailer to come out but no one responded. *Id.* at 795. Finally the police entered, found Steen inside, and tried to determine his identity. *Id.* at 796. Steen refused to give the police his name or date of birth. *Id.* After spending 45 minutes locating Steen's identifying information, he was arrested for an outstanding warrant and charged him with obstructing law enforcement officers. *Id.* This Court affirmed Steen's obstruction conviction because the police were in the midst of investigating an emergency situation when Steen refused to exit the locked trailer and then would not provide his name for an extended period of time. *Id.* at 800-01. Unlike *Steen*, the police were not responding to an on-going emergency when they were trying to arrest Bradley on his own property.

b. *Bradley's minimal and constitutionally protected conduct may not be used to convict him of obstruction.*

The arresting officers went to the shed after they were told Bradley might be there. RP 279-80. Within "just a few seconds" of announcing their presence outside the shed, they opened the door and found Bradley inside with his hands raised as the police had requested.

RP 346, 349-50. The shed door was unlocked and unobstructed, and Bradley cooperated when the police opened the door. *Id.* Arresting officer Granlund considered Bradley to have been "taken into custody without incident." RP 350.

Unlike *Steen*, the police were not investigating an on-going emergency when they requested Bradley exit this shed on his own property. The reported incident was over, the complainant was safe, and the alleged perpetrator's identity was known. The police were there to arrest Bradley and not to locate an injured person. Bradley was at his home, unlike Steen who did not live in or have permission to be in the trailer. RP 271; *see Steen*, 164 Wn.App. at 796 n.2. Bradley was in an unlocked shed and as soon as the police opened the shed door, which the officer said was within seconds of initially announcing their presence outside the shed, Bradley was fully cooperative. RP 346, 349-50. He had his hands up, as ordered, and submitted to the arrest. RP 349-50. He simply passively refused to exit a shed that was part of the curtilage of the home and he cannot be punished for this constitutionally protected conduct.

c. *The obstruction conviction must be reversed.*

It is constitutionally impermissible to convict Bradley based on his refusal to open a door on his own property when confronted with a warrantless request that he submit to arrest. *Prescott*, 581 F.2d at 1350-51; *Williams*, 171 Wn.2d at 484-86. He did not threaten the police, give false information, or actively impede an emergency investigation. His silence in the face of a demand from the police cannot be used against him and there was no evidence of obstruction other than Bradley's failure to open the door to police at a time when he knew they were looking for him. The obstruction statute does not penalize this constitutionally protected behavior. *See Williams*, 171 Wn.2d at 486.

3. **Taking and then immediately dropping another person's property close to where it was taken and in a place easily recovered by the complainant does not establish the intent to deprive required to commit theft**

a. *Theft requires a taking with the intent to deprive the owner of the property for a substantial period of time.*

Theft in Washington requires the specific intent to deprive another of property or services, combined with a wrongful taking. *State v. Walker*, 75 Wn.App. 101, 106, 897 P.2d 957 (1994); RCW 9A.56.020 (1). "Theft" means "[t]o wrongfully obtain or exert

unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." RCW 9A.56.020(1)(a).

The deprivation must be of some duration; "the theft statute proscribes the continued or permanent unauthorized use" of property. *Walker*, 75 Wn.App. at 108; *see also State v. Walters*, 162 Wn.App. 74, 86, 255 P.3d 835 (2011). In *Walker*, the court compared the essential elements of theft with taking a motor vehicle without the owner's permission. *Walker* held that the two statutes were not concurrent because taking a motor vehicle involved taking a car "for a spin around the block," where theft requires the person must intend to deprive the owner of its use "for a substantial period of time." 75 Wn.App. at 106. Although the intent to permanently take property is not a mandatory element of theft, theft requires an intent to maintain at least a "continued" deprivation of property belonging to another. Id. at 107.

The prosecution charged Bradley with theft of a non-specified item. CP 28; CP 66 (Instruction 16). At trial, the State elicited evidence that Bradley may have taken two items from Sanchez's truck: a leaf blower and car keys. Two witnesses saw Bradley take a leaf blower from Sanchez's truck and put it on his porch, although a third witness

said Sanchez had previously left the leaf blower for Bradley to use and he simply retrieved it on the date of the incident. RP 291, 304, 382. Sanchez said Bradley told him he would take the leaf blower "as collateral." RP 201.

Other witnesses saw Bradley take Sanchez's keys from the truck by reaching into the open driver's window. RP 234, 257. However, the uncontested evidence showed that Bradley dropped the keys on a couch when he entered the house, left the keys there, and left the house. RP 287-88. Bradley's housemate saw Bradley put the keys down and walk away. *Id.* The police returned the keys to Sanchez. RP 203.

Bradley could not have committed theft of the leaf blower because even if he took it out of Sanchez's truck without permission, he moved it only to the front porch in a place openly viewed by the owner as well as the neighbors. RP 304, 382. Bradley left the scene immediately and retained no control over the leaf blower. RP 339. At most, he moved the leaf blower but did not take it with the intent to deprive the owner of his property.

Additionally, Bradley did not demonstrate the necessary intent to deprive the owner of the car keys when he immediately abandoned them and walked away. RP 287-88. He did not hide them or keep them.

Instead, in view of his housemate, he dropped the keys on the couch and left the house, knowing that Sanchez was nearby. RP 287-88. The prosecution did not establish that he had the intent to deprive Sanchez of the keys.

b. *The remedy for insufficient evidence is dismissal.*

When several acts could constitute the charged offense, the prosecution must either elect the act on which the prosecution relies or have the court instruct the jury that it must unanimously agree on a specific act or incident that constitutes the crime. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "[A] defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the prosecution has failed to prove an essential element of the charged crime under any alternative presented, it has not met its burden of proof. *Winship*, 397 U.S. at 364.

Here, the jury was not instructed that it must unanimously agree on the act constituting the theft and it heard evidence of two separate takings. There was insufficient evidence that Bradley took possession of the leaf blower that he put on the porch and also inadequate proof of the intent to deprive based on the keys Bradley took but immediately

left behind on the couch in a place where the complainant could easily recover them. Even if the jurors could have relied on the keys, there is no record or reason to believe they unanimously rested their verdict on the keys.

Absent proof of every essential element of theft, the conviction must be reversed and the charge dismissed. *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The insufficient proof of either act requires dismissal, or alternatively, remand for a new trial if only one alternative could serve as the basis of a theft conviction.

4. **Where the essential elements of vehicle prowl and theft as charged constitute the same offense, it violates double jeopardy to separately punish Bradley for both convictions**

a. *Double jeopardy is violated when separate punishments are imposed for the same offense.*

The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. *Blockberger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9.

A conviction and sentence violate double jeopardy if, under the "same evidence" test, the two crimes are the same in law and fact.

Orange, 152 Wn.2d at 816. A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one would have been sufficient to warrant a conviction for the other. *Id.* at 816.

"[D]ouble jeopardy will be violated where *the evidence required* to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other." *Id.* at 820 (internal citations omitted, emphasis in original). *Id.* at 820. The same elements test focuses on "the facts used to prove the statutory elements," not merely viewing the generic statutory language of the two offenses. *Id.* at 818-19.

For example, convictions for rape and rape of a child based on the same act violate double jeopardy even though "the elements of the crimes facially differ." *State v. Hughes*, 166 Wn.2d 675, 684, 212 P.3d 558 (2009). Similarly, first degree assault and first degree attempted murder are the same offense where the convictions were based on a single gunshot directed at the same victim. *Orange*, 152 Wn.2d at 820. In both *Hughes* and *Orange*, the same facts established the same act, even though the intents required for each offense were not identical. Similarly, vehicle prowl in the second degree and theft in the third

degree based on taking property from inside a car as charged in the case at bar violate double jeopardy.

b. *Vehicle prowl and theft resting on the same factual allegations constitute the same offense for double jeopardy purposes.*

A person commits vehicle prowl in the second degree if "with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a vehicle . . . ." RCW 9A.52.100(1). Theft in the third degree requires proof that a person wrongfully obtains "property or services" of another valued at less than $750 with the intent to deprive the owner thereof. RCW 9A.56.050(1); RCW 9A.56.020(1). As charged, the claim of vehicle prowl rested on Bradley reaching his arm inside Sanchez's truck to take the keys or the leaf blower; the theft allegation rested on Bradley taking the keys or leaf blower from the truck.[3]

In *State v. Lass*, 55 Wn.App. 300, 308, 777 P.2d 539 (1989),the Court of Appeals concluded that the offenses of vehicle prowling in the second degree and taking a motor vehicle merged for purposes of double jeopardy. The merger doctrine is another means by which a

[3] The prosecutor insisted there was sufficient evidence to support a conviction for theft based on the leaf blower or the keys. RP 391-92, 444-45.

court may determine that the legislature provided that to prove one offense, the prosecution must also prove an act that is also defined as a crime. *State v. Frohs*, 83 Wn.App. 803, 806, 924 P.2d 384 (1996). The *Lass* Court concluded that vehicle prowling, which requires entering a car with the intent to commit a crime therein, may merge with taking a motor vehicle, which inherently requires entering a car and then taking or riding it. 55 Wn.App. at 308. The court held that the lesser offense of vehicle prowling in the second degree was a necessary element of taking a motor vehicle and double jeopardy principles precluded punishment for both offenses. *Id.*

The legislature knows how to declare its intent to impose separate punishments for commonly overlapping offenses. For example, it enacted an "anti-merger" statute for burglary, which expressly shows the legislative intent to hold a person separately accountable for a burglary as well as the necessary predicate element of intending to commit a crime inside a building. RCW 9A.52.050. Yet the legislature limited this anti-merger statute to burglary, even though vehicle prowling is a similar offense requiring the intent to commit a crime upon entering a type of structure and is contained in the same chapter of RCW 9A.52. Id. The failure to use similar language in statutes of the

same chapter indicates a legislative intent to treat the offenses differently. *Delgado*, 148 Wn.2d at 728-29.

A further indication of legislative intent is the fact that it has not expressed any disapproval of *Lass* or otherwise indicated its intent that vehicle prowl in the second degree may not merge with the offense that was intended to be committed therein. *See State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000) (legislature presumed to be aware of judicial rulings); *see e.g.*, *Laws* 2011, ch. 165, §1 ("[i]n response to *State v. Hall*, 168 W.2d 726 (2010)," legislature amended witness tampering statute to clarify double jeopardy unit of prosecution).

The Supreme Court granted review of the only decision to disagree with *Lass*'s double jeopardy holding but the State later conceded that it would dismiss the second degree vehicle prowling conviction and the Supreme Court's opinion did not reach the double jeopardy issue.[4] In *L.U.*, the case for which the Supreme Court granted review, Division One distinguished *Lass* and questioned its double

[4] "[I]n light of our acceptance of the State's concession and request that the charge of second degree vehicle prowling be dismissed, we do not reach Unga's argument that the conviction for vehicle prowling should be reversed on double jeopardy grounds." *State v. Unga*, 165 Wn.2d 95, 113, 196 P.3d 645 (2008).

jeopardy analysis. *State v. L.U.,* 137 Wn App. 410, 417, 153 P.3d 894 (2007), *aff'd on other grounds, sub nom. Unga*, 165 Wn.2d at 113. L.U. stole a car, damaged the steering column, and wrote graffiti inside the car; he was convicted of both taking a motor vehicle in the second degree and vehicle prowl in the second degree. 137 Wn.App. at 412-13. Division One held that, unlike *Lass*, "L.U.'s criminal act involved an injury to property (the graffiti on the dashboard) that was not merely incidental to the crime of taking a motor vehicle without permission." *Id.* at 417.

Similarly to *Lass*, Bradley caused no damage to the car when he reached his arm inside and took property. Any theft of property inside a car would necessarily require entering the car and Bradley's intrusion was as minimal as possible, involving only reaching an arm into the car through an open window. RP 234. Under the facts as charged, these two offenses constitute the same crime for which the legislature did not intend separate punishments. *Orange*, 152 Wn.2d at 820.

The remedy for a double jeopardy violation is to dismiss and vacate one of the offenses. Because both vehicle prowl in the second degree and theft in the third degree are gross misdemeanors, the court

may determine the offense with lesser penalties attached or elect one offense to vacate. *See Hughes*, 166 Wn.2d at 686 n.13.

5. The court impermissibly imposed discretionary court costs based on a finding of Bradley's ability to pay that was not supported by the record

When a court requires an indigent defendant to reimburse the state for authorized costs, it must also expressly find the defendant has the financial ability to pay the costs imposed. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). Imposing costs without finding the accused has the ability to pay would violate equal protection by imposing extra punishment on a defendant due to his poverty. *Fuller*, 417 U.S. at 48 n.9 ("an order to repay can be entered only when a convicted person is financially able").

The court's finding of a person's ability to pay must be supported by evidence in the record. *State v. Bertrand*, 165 Wn.App. 393, 403-04, 267 P.3d 511 (2011), *rev. denied*, 175 Wn.2d 1014 (2012). The court must "[take] into account the financial resources of the defendant and the nature of the burden" imposed by the legal financial obligations. *Id.* at 404 (quoting *State v. Baldwin,* 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

The judgment and sentence contains a judicial finding of Bradley's ability to pay discretionary legal financial obligations, yet there was no evidence supporting such a finding. CP 97 (Finding of Fact 2.5). The incident arose from Bradley's desperation when Sanchez refused to immediately pay the $75 he owed Bradley because of Bradley's expenses such as rent and providing for his children. RP 218. As soon as Sanchez promised to immediately pay Bradley his wages, Bradley stopped acting aggressively and walked away. RP 201.

In *Bertrand*, the trial record showed the defendant was poor and disabled, and thus presumably would not be in a position to afford non-mandatory fees. Likewise, the record showed Bradley's poverty as well as his inability to afford the basic needs of rent and providing for his children. RP 180, 208, 212, 274.

The court's finding that Bradley had the ability to pay was clearly erroneous "because it lacks support in the record." *Bertrand*, 165 Wn.App. at 403-04. The court imposed $1500 of discretionary fees for a court-appointed lawyer without a record showing with sufficient clarity that the judge took Bradley's financial resources into account and the nature of the burden imposed by the financial fees imposed. CP 97-98; *Bertrand*, 165 Wn.App. at 403-04; *see Baldwin*, 63 Wn.App. at

312. The record shows Bradley subsists very close to the margins of any earned income and struggles to meet his most basic needs. The court's finding of his ability to pay additional, discretionary court fees is clearly erroneous and should be stricken.

E. CONCLUSION.

For the reasons stated above, Mr. Bradley respectfully asks this Court to reverse his convictions for a deadly weapon enhancement, obstruction of law enforcement, and third degree theft based on the insufficiency of evidence. Alternatively, the double jeopardy violation requires vacation of either the vehicle prowling or third degree theft convictions, and the unsupported finding of Bradley's ability to pay discretionary legal financial obligations should be stricken.

DATED this 9th day of July 2013.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 44438-1-II
v.	)	
	)	
JAMES BRADLEY,	)	
	)	
APPELLANT.	)	

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