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Division I
State of Washington

Supreme Court No. 90745-5
(COA No. 71647-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES BRADLEY,

Petitioner.

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STATE OF WASHINGTON

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW.

Petitioner James Bradley asks this Court to accept review of the Court of Appeals decision terminating review dated June 16, 2014, for which reconsideration was denied on August 4, 2014. Copies are attached as Appendix A and B, respectively.

B. ISSUES PRESENTED FOR REVIEW

1. A deadly weapon sentencing enhancement requires proof that the perpetrator used a weapon in a manner likely to inflict death, unless it is a listed as *per se* deadly weapon. A baseball bat is not listed as a *per se* deadly weapon, no published decisions have treated it as one, and unpublished decisions conflict. Should this Court grant review to decide whether a baseball bat is a per se deadly weapon, thereby relieving the prosecution from proving a bat was used in a manner likely to inflict death, even though a bat is not listed as a statutory *per se* deadly weapon?

2. The Court of Appeals deemed the bat as enough like a metal pipe or bar to be a *per se* deadly weapon. The bat was not admitted into evidence and the jury made no finding that the bat was the equivalent of a metal pipe. Does it undermine an accused person's right to a unanimous jury verdict for the appellate court to decide the factual issue of whether a bat is the same as a metal pipe?

3. 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. If a baseball bat is not a per se deadly weapon, and it was not 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?

4. A conviction for 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 hid in a tool shed in his yard and delayed exiting for "a few seconds" when the police arrested him without a warrant. Should this Court grant review to determine whether obstructing a law enforcement officer occurs when police try to arrest a person in his home without a warrant and the "obstruction" is only a short delay in making the arrest?

5. Theft requires the intent to deprive an owner of his property for a substantial period of time according to several Court of Appeals opinions. Bradley took but immediately relinquished control of two items belonging to another. Does theft require more than a temporary taking of property that is immediately abandoned in a place where it will be recovered by the owner? When there are two items allegedly taken but one taking does not

constitute theft, does there need to be a unanimous jury verdict explaining the factual basis of the conviction?

6. 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 and a published Court of Appeals decision held double jeopardy barred convictions for both. Does it violate double jeopardy to separately punish Bradley for vehicle prowling and theft of property from a car based on the same conduct?

7. 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 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 to repair his father's motor home. RP 175. Sanchez delayed paying Bradley until Sanchez could cash a check from his father. RP 177-79. 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 needed to be paid to meet his bills. RP 178, 180, 186.

Bradley was outside gardening when Sanchez handed Bradley the money he owed him for the prior week of work. RP 186. 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 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 repeated that he wanted to be paid and hit the truck with the bat three times, but Sanchez said he would not be paid for several weeks. RP 189, 194, 287-88. 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 Kimberly Gordhamer if he could come into her home and call the police. RP 198-99, 304. Gordhamer refused. RP 304. Bradley followed Sanchez and the two men circled a neighbor's car, with Bradley demanding that Sanchez pay him. They moved around the car, 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 window and took keys. RP 257.

Bradley never hit Sanchez or got close enough to hit him. RP 384. Sanchez said 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.

Police arrived quickly. RP 316. While Blankenship was speaking to the police, Bradley sent her a text message asking to tell him when the police left and saying he was in the tool shed. RP 279. Blankenship and another neighbor told the police to 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 unlocked shed door. RP 346-47. Bradley sitting inside with his hands up. RP 349, 350. He 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. The Court of Appeals' conclusion that a baseball bat is a *per se* deadly weapon conflicts with other decisions and illogically construes the statute

a. *The statutory definition of a per se deadly weapon does not list baseball bats, as other courts have recognized*

RCW 9.94A.825 exclusively lists specific weapons deemed *per se* deadly and relieves the State of proving these tools were use in a manner likely to cause death when imposing a sentencing enhancement. Penal statutes are given "a strict and literal interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). RCW 9.94A.825 defines a deadly weapon as:

> For purposes of this section, a deadly weapon is 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. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

The court cannot amend an exclusive statutory list by imputing or inferring other language not expressly in the statute. *See State v. K.L.B.*, _ Wn.2d _, 628 P.3d 886, 888 (2014). It is a "usurpation" of the separation of powers for the court to extend punishment to conduct not contained in a penal statute, even if the omission may be inadvertent. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 186, 163 P.3d 782 (2007).

There are no published decisions holding that a baseball bat is a *per se* deadly weapon under the enhancement statute which relieves the State of proving the bat was used in a deadly manner. Unpublished decisions conflict.[1] In the unpublished decision *State v. Parks*, 165 Wn.App. 1013 (2011), Division Three held, "A bat is not a deadly weapon per se; 'thus, the inherent capacity and 'the circumstances in which it is used' determine

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[1] These unpublished decisions are not cited for authority, but to show a developing conflict in the Court of Appeals and demonstrate that substantial public interest favors review. GR 14.1; RAP 13.4.

whether the weapon is deadly.'" (citing *State v. Shilling,* 77 Wn.App. 166, 171, 889 P.2d 948 (1995)). But in *dicta* in *State v. Freedman*, 176 Wn. App. 1024 (2013), *rev. denied*, 179 Wn.2d 1018 (2014), Division One "noted" that "a bat is sufficiently similar to a 'metal pipe or bar used or intended to be used as a club," which would make it a deadly weapon as a matter of law.'"

In other jurisdictions, baseball bats are not considered *per se* deadly weapons, regardless of how used. "Whether a baseball bat is a deadly weapon under California law depends on the manner in which it is used. *Gill v. Ayers*, 342 F.3d 911, 915 (9th Cir. 2003) (citing *People v. McCullin,* 19 Cal.App.3d 795, 801, 97 Cal.Rptr. 107 (1971)); *see also M.D. v. State*, 873 So.2d 525, 526 (Fla. Dist. Ct. App. 2004) ("The small bat does not qualify as a "deadly weapon" under the statute); *State v. Traeger*, 29 P.3d 518, 522 (N.M. 2001) ("baseball bat should not be classified as a bludgeon, and by extension should not be classified as a deadly weapon as a matter of law"); *In re S.B.*, 117 S.W.3d 443, 446 (Tex. App. 2003) ("a baseball bat is not a deadly weapon *per se*"); *see generally People v. Talbert*, 484 N.Y.S.2d 680 (N.Y. App. Div. 1985) (explaining that club-like item would not be illegal "billy" if merely similar to a billy club).

The Court of Appeals deemed the baseball bat Bradley used to hit a car to be a *per se* deadly weapon and relieved the State of its burden to prove it was used in a manner readily capable of causing death by classifying it as a "metal pipe or bar used or intended to be used as a club." Slip op. at 5. But this analogy is strained and unlikely. Most every *per se* weapon is listed by its specific name, showing that if the Legislature intended to include a common item like a baseball bat, it would have done so expressly. The "metal pipe or bar" weapon must be construed narrowly in keeping with all other listed *per se* deadly weapons. *See e.g.*, *Leach*, 161 Wn.2d at 186; *K.L.B.*, 628 P.3d at 888.

The common sense definition of a baseball bat is not the equivalent of a metal pipe or bar. A metal pipe is hollow, but a bat is not. *See* Merriam-Webster Dictionary on-line[2] (defining pipe as "a long, hollow tube for carrying water, steam, gas, etc."); Wikipedia, http://en.wikipedia.org/wiki/Baseball_bat (baseball rules provide "Bats are not allowed to be hollowed"). A bat is shaped and balanced, permitting control over the implement, unlike a metal bar that is likely to be wielded dangerously and without control if used as a club.

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[2] http://www.merriam-webster.com/dictionary/pipe

The Court of Appeals' strained construction of the statute is demonstrated by the lack of any published cases in Washington holding that a baseball bat is a *per se* deadly weapon for which additional punishment may be imposed regardless of the circumstances of its use.

As the New York court explained in *Talbert* when deciding whether a wooden stick met the criteria of a billy club as a *per se* illegal weapon, "everyday objects, such as wooden sticks and tool handles, can look, in general terms, like a billy and, in criminal hands, can serve the purpose of a billy," but the specific items as *per se* weapon "must be strictly interpreted." *Id.* An object that "does not fit the strict definition may still be a prohibited weapon . . . if there exists the requisite intent to use the object unlawfully against another." *Id.*

The reason courts are reluctant to treat an everyday object as a *per se* deadly weapon is the unintended exposure to increased punishment for actions that are common place and not inherently dangerous. A baseball bat may be used as a deadly weapon, but it exceeds the language and purpose of the statute to deem it a *per se* deadly weapon for which the State need not prove it was used in a deadly manner.

b. *The Court of Appeals opinion denies Bradley his right to have a jury unanimous determine the factual question of whether a bat is a metal pipe*

The baseball bat used during the incident was never taken by the police or presented to the jury. It was not admitted as an exhibit. The jury never saw whether the bat was actually made of metal or some other material. Its size or weight was never offered into evidence. The State did not prove that it was regulation size as opposed to being the kind used in t-ball or as a toy.

The Court of Appeals concluded that the jury "could have" deemed the bat aluminum, despite of its absence at the trial court for the jury to assess its material, and concluded that it was enough like a metal pipe or bar to be a per se deadly weapon. Slip op. at 5. But the opinion never acknowledges that the jury did not make such a finding.[3]

"When alternative means of committing a single offense are presented to a jury, each alternative means must be supported by substantial evidence in order to safeguard a defendant's right to a unanimous jury determination." *State v. Garcia*, 179 Wn.2d 828, 835-36, 318 P.3d 266 (2014); *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). If

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[3] In its answer to Mr. Bradley's motion to reconsider, the State alleged that the bat was admitted into evidence as a photograph, but it did not cite an exhibit and Mr. Bradley is not aware of any exhibit documenting the bat's material or size. *See* Answer to Appellant's Motion to Recosider, at 5.

one of the alternative means presented to the jury is not supported by substantial evidence, the verdict must be vacated unless the reviewing court finds that the verdict could only have been based on the alternative that was supported by substantial evidence. *Id.* at 836, 843.

As explained in detail in Appellant's Opening and Reply Briefs, there was insufficient evidence that the baseball bat was "actually used in a manner likely to produce death," which is an essential element of the non-per se deadly weapon "prong" of RCW 9.94A.825. Opening Brief at 10-14; Reply Brief at 1-4. The prosecutor did not argue to the jury that the bat was a *per se* deadly weapon. RP 441-42. Instead, it told the jury to think of it as something capable of producing death, using the analogy of a pipe or club. *Id.* There was no election or single-minded effort to convince the jury that the bat was a metal pipe or bar and thus a per se deadly weapon. The record does not show the State proved the bat was a metal pipe or bar to the jury.

The Court of Appeals did not address Bradley's right to a unanimous jury determination of the alternative means or sufficient proof of both alternatives presented to the jury. *Garcia*, 179 Wn.2d at 835-36. The jury's verdict does not rest on the novel theory used on appeal. The jury was not asked to treat the baseball bat as a per se weapon because it was metal. The bat's material was barely mentioned during the trial and it

was never produced for the jury to know whether it was metal or wood, and yet the Court of Appeals holding hinges on the assumption that it was metal. There was not sufficient evidence for the jury to conclude this bat was actually used in a manner likely to produce death, not merely some injury, and the absence of such evidence undermines the deadly weapon verdict under the theory put forward by this Court's opinion.

2. A person's brief refusal to leave one's home to submit to a warrantless arrest does not constitute the offense of obstruction, contrary to the Court of Appeals opinion

Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence to support a conviction. *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.

When a statute criminalizes speech, "it must be interpreted with the commands of the First Amendment clearly in mind." *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215, 1218 (2004) (internal citation omitted). In *Kilburn*, the appellant argued that his conviction for felony harassment must be based on unprotected, threatening speech. This Court agreed, construing the statute closely so only "true threats" are criminally prohibited. *Id.* at 43.

Similarly, Bradley's conviction for obstruction may not rest on engaging in constitutionally protected acts. *See* RCW 9A.76.020(1); CP 27. Yet the State only showed Bradley waited in a shed on his property until the police knocked and demanded he come out; at that time he submitted to the arrest. This constitutionally protected conduct does not meet the elements of obstruction.

A person has the constitutionally protected right to be free from unjustified intrusions into his own home or private affairs. The police lack inherent authority 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); U.S. Const. amend. 4; Wash. Const. art. I, § 7. Police cannot demand that a person incriminate himself. U.S. Const. amend. 5; Const. art. I, § 9. A person cannot be prosecuted for exercising his right to refuse a warrantless seizure. *See State v. Gauthier*, 147 Wn.App.258, 264, 298 P.3d 126 (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").

Just as the mere refusal to answer questions upon arrest cannot constitute a crime, a minimal delay in exiting one's own property does not

constitute obstruction based on the constitutional protections surrounding one's home. *See State v. White,* 97 Wn.2d 92, 106, 640 P.2d 1061 (1982).

The Court of Appeals declined to address Bradley's challenge to the insufficient evidence of obstruction by treating it as an unpreserved claim that it would not consider on appeal. Slip op. at 6. But the State's burden of proof is not waived by failing to raise the insufficiency of evidence at the trial court level. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The prosecution must prove each element beyond a reasonable doubt without regard to the vigor with which the defense contests an element. *See City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989) (although "Slack has not raised this issue [of sufficiency of the evidence] at any other stage of the proceedings ... this will not bar him from raising the issue for the first time on appeal").

Review should be granted and the obstruction conviction reversed because Bradley was merely accused of engaging in the constitutionally protected conduct of hiding in a shed on his property for a few minutes and then complying with the police request to exit the shed. The police had no warrant. His brief delay in submitting to arrest does not constitute obstruction.

3. This Court should accept review to determine whether theft is proved by taking and then immediately dropping another person's property nearby where easily recovered

a. *Several Court of Appeals opinions hold that theft requires an intentional taking 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).

Several decisions hold that 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 distinguished theft from taking a motor vehicle without the owner's permission on the basis that 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.

Walker logically describes the legislative intent in criminalizing the wrongful taking of property. A taking that lasts momentarily and ends with the property abandoned within the vicinity of where it was taken and where easily retrieved by the owner does not constitute the intent to deprive the owner of property in a meaningful way. This Court should address whether *Walker* is a valid statement of the law.

b. *Bradley's momentarily movement of property does not constitute theft.*

The prosecution charged Bradley with theft of an unspecified itemn. CP 28; CP 66 (Instruction 16). It claimed he 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 but a third witness said Sanchez previously lent Bradley the leaf blower and Sanchez was retrieving it. RP 291, 304, 382. Sanchez said Bradley told him he would take the leaf blower "as collateral." RP 201. Undisputely, the leaf blower remained in plain view and was easily retrieved.

Bradley was alternatively accused of taking Sanchez's car keys by reaching into the open driver's window. RP 234, 257. Uncontested evidence showed Bradley took the keys, dropped them on a couch in the

house, and left. RP 287-88. Bradley's housemate witnessed this and the police returned the keys to Sanchez. RP 203, 287-88.

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 *without* the intent to deprive the owner of his property.

Additionally, Bradley did not intend to deprive the owner of his car keys by taking them immediately abandoning them. 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 present. RP 287-88. The prosecution did not establish that he had the intent to deprive Sanchez of the keys.

"[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 it must unanimously agree on the act constituting the theft but it heard evidence of two separate takings. There was insufficient evidence Bradley stole the leaf blower by putting it on the porch and inadequate proof he intended to deprive the owner of his keys when he put them on the couch in a place where the complainant could easily recover them. Even if taking the keys could be theft, there is no record that the jury 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. This Court should grant review to address whether a momentary, temporary taking constitutes theft and whether theft was proved.

4. **Where vehicle prowl and theft are based on reaching into a car and taking the same property, 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. The same elements test focuses on "the facts used to prove the statutory elements," not the generic statutory language of the two offenses. *Id.* at 818-19.

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 vehicle prowl involved Bradley reaching his arm into Sanchez's truck and

taking keys or the leaf blower; likewise, the theft rested on taking the same items from the truck.[4]

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 court held that vehicle prowling in the second degree was a necessary element of taking a motor vehicle; 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. The "anti-merger" statute for burglary 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.

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[4] The prosecutor insisted there was sufficient evidence to support a

The Legislature has never expressed any disapproval of *Lass* or 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).

This Court granted review of the only decision to disagree with *Lass*'s double jeopardy holding, but in that case the State later conceded and dismissed the second degree vehicle prowling conviction, so the Court's opinion did not reach the double jeopardy issue.[5] In the underlying Court of Appeals decision, Division One distinguished *Lass* and questioned its double 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

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conviction for theft based on the leaf blower or the keys. RP 391-92, 444-45.

[5] "[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).

property (the graffiti on the dashboard) that was not merely incidental to the crime of taking a motor vehicle without permission." *Id.* at 417.

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. This Court should grant review and resolve the question left unresolved in *Unga*.

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 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 is able 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 includes a boilerplate finding of Bradley's ability to pay discretionary legal financial obligations, yet there was no evidence supporting it. CP 97 (Finding of Fact 2.5). On the contrary, Bradley's financial desperation triggered the incident. Bradley needed the $75 Sanchez owed him to meet his basic living expenses. RP 218. As soon as Sanchez agreed to pay Bradley his wages, Bradley walked away. RP 201.

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 without accounting for the burden imposed by these non-mandatory fees. CP 97-98;

Bertrand, 165 Wn.App. at 403-04; *see Baldwin*, 63 Wn.App. at 312. The court's finding of Bradley's ability to pay discretionary court fees should be stricken.

E. <u>CONCLUSION</u>

Based on the foregoing, Petitioner James Bradley respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 3rd day of September 2014.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2014 JUN 16 AM 9:03

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71647-6-I
Respondent,	)	DIVISION ONE
v.	)	
JAMES BRADLEY,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: June 16, 2014

SPEARMAN, C.J. — James Bradley appeals his conviction and sentence for 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. He argues that the evidence was insufficient to support the deadly weapon enhancement, the theft conviction, and the obstruction conviction; that it violated double jeopardy to punish him for both vehicle prowl and theft; and that the trial court impermissibly imposed legal financial obligations. In a statement of additional grounds, Bradley argues that the prosecutor committed misconduct by misstating the definition of assault.

FACTS

Sage Sanchez hired James Bradley to repair Sanchez's father's motor home. On September 12, 2012, Sanchez went to Bradley's house in Tacoma to pay Bradley $540 for work he had done repairing Sanchez's father's motor home the previous week.

Bradley told Sanchez he needed to be paid an additional $75 for work he did two days prior, so he could pay his bills. Sanchez told Bradley he would receive the rest of the money as soon as Sanchez's father deposited another check. Bradley said "'I see how this is going to go.'" Verbatim Report of Proceedings (VRP) (12/04/12) at 187. He went into his house and retrieved an aluminum baseball bat. Bradley then told Sanchez, "'[y]ou're going to pay me, or I'm going to take out every cent or every dollar on this truck.'" VRP (12/4/12) at 188. Bradley hit the truck with the bat three times, leaving dents. Sanchez was one or two feet away when Bradley began hitting the truck. Bradley then chased Sanchez around the truck with the bat raised, demanding to be paid.

Sanchez went across the street and asked a neighbor if he could go inside her house to call 911. She said no. Sanchez saw Bradley coming towards him with the bat, so he went to the opposite side of the car parked in front of the neighbor's house. Sanchez walked around the car quickly two or three times, trying to keep away as Bradley continued to chase him with the bat raised. Sanchez testified that he was afraid because "someone his size, if you get hit in the head with the bat at a full swing, you can probably die." 12/4/12 RP 201. However, Sanchez said Bradley never swung the bat at him.

Sanchez then said "'[f]ine. I'll pay you. Just, just stop. You need to stop.'" VRP (12/4/12) at 201. Bradley then walked back towards Sanchez's truck and said he was going to take Sanchez's leaf blower as collateral. Bradley removed the leaf blower from Sanchez's truck and placed it on the porch. Bradley then reached into the truck through the driver's window, removed the keys from the ignition, went into the house, and dropped the keys on the couch, and left.

Police officers arrived quickly in response to 911 calls from several neighbors who witnessed the incident. Police searched the area looking for Bradley but were initially unable to find him. Elizabeth Blankenship, who lived at the same house as Bradley, received a text message from Bradley telling her that he was in the backyard tool shed and asking her to let him know when the police left. Blankenship notified the police. Two police officers knocked on the tool shed door, announced "Tacoma police, if someone is in there, come out with [your] hands up." VRP (12/5/12) at 345-46. There was no reply. They entered the tool shed and found Bradley.

Bradley was arrested and charged with one count of assault in the second degree while armed with a deadly weapon, one count of malicious mischief in the third degree, one count of theft in the third degree, one count of obstructing a law enforcement officer, and one count of vehicle prowling in the second degree. A jury found Bradley guilty as charged. Bradley 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. Bradley appeals.

DISCUSSION

Bradley argues that the evidence was insufficient to find him guilty of the deadly weapon sentence enhancement, obstructing a police officer, or third degree theft. "When reviewing the sufficiency of the evidence to support a conviction, 'the question is whether, after viewing the evidence in the 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. Myles, 127 Wn.2d 807, 816, 903 P.2d 979 (1995), quoting State v. Joy,

121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

Deadly Weapon

Bradley does not challenge his conviction for second degree assault with a deadly weapon. Rather, he argues that the evidence was insufficient to impose a deadly weapon sentencing enhancement. When used as a means of committing second degree assault, a "deadly weapon" is defined as an explosive, firearm, or "any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, ... is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6); see RCW 9A.36.021(1)(c). In contrast, if an instrument is not on the statutory list of per se deadly weapons, it qualifies as a "deadly weapon" for sentencing enhancement purposes only if it "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. Baseball bats are not on the statutory list of per se deadly weapons. Thus, Bradley argues that the baseball bat does not qualify as a "deadly weapon" for sentencing enhancement purposes because there is insufficient evidence that he used it in a manner that was likely to produce or may easily and readily produce death. Whether a weapon is deadly is a question of fact, which the State must prove beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).

We need not reach the question of whether Bradley used the aluminum bat in a manner that was likely to produce or may easily or readily produce death. Jury Instruction No. 34 stated in relevant part:

> A deadly weapon is an implement or instrument that 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. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and <u>any metal pipe or bar used or intended to be used as a club</u>.

CP at 85 (Emphasis added.) The second sentence of this instruction provided the jury with the statutory list of deadly weapons per se, and the first sentence provided them with the statutory definition for deadly weapons that are not included on the per se list. RCW 9.94A.825. Bradley did not object to this instruction. Therefore, the jury was entitled to consider whether the aluminum bat was a deadly weapon under either prong of the definition. The jury could have found that an aluminum bat qualifies as a deadly weapon per se because it meets the definition of "any metal pipe or bar used or intended to be used as a club." We uphold the deadly weapon sentencing enhancement.

<u>Obstruction</u>

Bradley argues that his conviction for obstructing a law enforcement officer must be reversed because he had a constitutionally protected right to refuse warrantless police entry into the shed where he was hiding.[1] He contends that "passive refusal to

[1] "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1).

consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." U.S. v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978). The State argues that the right to refuse a warrantless entry does not apply to toolsheds on other people's property. This argument lacks merit, because the record clearly shows that Bradley was hiding in a shed in his own backyard.

However, Bradley did not move to dismiss the obstruction charge below based on his right to refuse warrantless police entry into his shed. The record shows that defense counsel merely made a cursory oral motion to dismiss the charge based on insufficient evidence, which the trial court promptly denied without further argument.[2] Under RAP 2.5(a), an issue first raised on appeal may be reviewed by an appellate court where it is a manifest error affecting a constitutional right. For this exception to apply, Bradley must show that "(1) the error implicates a specifically identified constitutional right, and (2) the error is 'manifest' in that it had 'practical and identifiable consequences' in the trial below." State v. Bertrand, 165 Wn. App. 393, 400, 267 P.3d 511 (2011) review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). We cannot conclude that the alleged error is "manifest." Bradley's argument is based on the premise that, absent a warrant, he was not obligated to respond to the officer's commands. But it is not clear that police needed a warrant in this situation. Bradley's housemate Elizabeth Blankenship testified that she gave consent for the police to search the home, and told them that Bradley was hiding in the shed. Nor is it clear that Bradley had a reasonable

[2] The State correctly observes that Bradley does not challenge the sufficiency of the evidence as to any of the elements of the crime of obstructing a law enforcement officer. He carefully couches his argument in terms of the insufficiency of the evidence based on his constitutional right to refuse warrantless entry, without assigning error or arguing that the evidence was otherwise insufficient to support the conviction. Accordingly, we do not address the question of whether Bradley's behavior was sufficient to support the obstruction conviction.

expectation of privacy in the shed. Because the warrantless entry issue was not raised below, the record on these fact-specific issues is undeveloped. Accordingly, we cannot further analyze the warrantless entry question. "RAP 2.5(a) does not mandate appellate review of a newly-raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not 'manifest'." State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Theft

"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 or her of such property or services. . . ." RCW 9A.56.020(1)(a). "A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred and fifty dollars in value. . . ." RCW 9A.56.050(1).

Bradley contends that there was insufficient evidence of his intent to deprive Sanchez of the leaf blower and truck keys because he merely moved the leaf blower to the front porch, dropped the keys on the couch, and then left the home, knowing that Sanchez was nearby and could easily recover the items. See State v. Walker, 75 Wn. App. 101, 879 P.2d 957 (1994), Bradley asserts that theft requires a taking with the intent to deprive the owner of the property for a substantial period of time. Bradley is mistaken. In Walker, the court held that the statutes regarding taking a motor vehicle without permission and theft in the first degree are not concurrent. In reaching that holding, the court noted that "the joyriding statute proscribes the initial unauthorized use of an automobile, while the theft statute proscribes the continued or permanent unauthorized use of an automobile." Id. at 108. Walker cannot be read as support for

the proposition that there is a minimum period of time that must pass before the intent element of theft is established.

Moreover, Bradley's argument that he lacked the intent to deprive because Sanchez could have easily returned to Bradley's house to collect the leaf blower and keys is not persuasive. Sanchez fled the scene after Bradley chased him with a baseball bat. Witnesses testified that Bradley removed the leaf blower from Sanchez's truck and placed it on the porch, and that he removed the keys from Sanchez's truck, brought them inside, and dropped them on the couch. Sanchez testified that he did not give Bradley permission to do this. The evidence is sufficient to support the conviction.

Bradley further argues that reversal is required because the jury heard evidence of two separate alleged takings and it was not instructed that it must unanimously agree on the act constituting the theft. Where multiple acts are alleged, any one of which could constitute the crime charged, the State must either elect the act on which it relies, or the court must instruct the jury that they must reach a unanimous verdict on at least one particular criminal act. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). However, no unanimity instruction is required if the acts were part of a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). "To determine whether there is a continuing course of conduct, we evaluate the facts in a commonsense manner including (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010). Here, it is clear that the theft of the leaf blower and keys were a continuing course of conduct. The takings occurred consecutively during the same incident, between the same parties at the same location,

and were for the purpose of extracting value from Sanchez. Moreover, there was ample evidence to support a conviction on both counts. Kitchen, 110 Wn.2d at 412 (unanimity instruction required where a rational juror could have entertained reasonable doubt as to whether one or more of the acts occurred). No unanimity instruction was required.

Double Jeopardy

Bradley argues that his convictions for third degree theft and second degree vehicle prowling violated double jeopardy. "We review alleged double jeopardy violations de novo." State v. Lust, 174 Wn. App. 887, 890, 300 P.3d 846 (2013).

The state and federal double jeopardy clauses protect a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." In re Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Here, because the statutes do not expressly disclose legislative intent, we apply the "'same evidence'" test to determine whether the prohibition against double jeopardy has been violated. Orange, 152 Wn.2d at 816. "Under the 'same evidence' test, offenses are not constitutionally the same and double jeopardy does not prevent convictions for both offenses if each offense, as charged, includes an element not included in the other and proof of one offense would not necessarily prove the other." State v. Fuentes, 150 Wn. App. 444, 450, 208 P.3d 1196 (2009) (citing State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). "We are to consider the elements of the

crimes both as charged and as proved." State v. Nysta, 168 Wn.App. 30, 47, 275 P.3d 1162 (2012), review denied, 177 Wn.2d 1008, 302 P.3d 180 (2013)).

Bradley argues that the same evidence test applies because the two crimes were based on the act of reaching into Sanchez's truck to remove the keys.[3] To convict Bradley of theft in the third degree, the State was required to prove that he wrongfully obtained or exerted unauthorized control over the property or services of another, valued at $750 or less, with intent to deprive the owner thereof. RCW 9A.56.050(1); RCW 9A.56.020(1)(a). To convict Bradley of second degree vehicle prowling, the State was required to prove that he entered or remained unlawfully in a vehicle with intent to commit a crime against a person or property therein. RCW 9A.52.100(1). Under the facts of this case, the evidence required to support the conviction for third degree theft was sufficient to also convict Bradley of second degree vehicle prowling. But each crime requires proof of an element that is not necessary to prove the other. It is possible to commit third degree theft without unlawfully entering a vehicle, and it is possible to commit second degree vehicle prowling without wrongfully obtaining or exerting unauthorized control over the property of another. This demonstrates legislative intent that the act of unlawfully entering a vehicle be punished in addition to other criminal acts that may be committed therein. Thus, the crimes are not identical in law, and double jeopardy was not violated under the same evidence test.

[3] Because the leaf blower was removed from the bed of Sanchez's truck, Bradley did not commit the crime of vehicle prowling when he removed it. The same is not true for the theft of the keys, which required Bradley to enter the interior of the truck to remove them from the ignition. Accordingly, even if we were to conclude that the theft of the keys merged with the crime of vehicle prowling, the theft of the leaf blower would stand.

Bradley also argues that double jeopardy was violated because the crimes merged. "Merger is a judicial doctrine used to determine whether the Legislature intended to impose multiple punishments for an act that violates more than one statute." State v. L.U., 137 Wn. App. 410, 415, 153 P.3d 894 (2007) (citing State v. Eaton, 82 Wn. App. 723, 729, 919 P.2d 116 (1996)). The merger doctrine applies "where the degree of one offense is elevated by conduct constituting a separate offense." State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (citing State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983)).

Bradley, relying on State v. Lass, 55 Wn. App. 300, 308, 777 P.2d 539 (1989), argues that the second degree vehicle prowling merged with the third degree theft conviction. In Lass, Division Two held that the crime of second degree vehicle prowling merged with the crime of taking a motor vehicle without permission because the defendant had to unlawfully enter the vehicle in order to take it without permission and no additional steps were required to complete both charges. Bradley similarly argues that second degree vehicle prowling merged with third degree theft because he had to unlawfully enter Sanchez's truck in order to wrongfully obtain the keys and leaf blower. This argument is not persuasive. In L.U., 137 Wn. App. at 416-17, we disagreed with Lass and held that second degree vehicle prowling does not merge with the crime of taking a motor vehicle without permission. In so holding, we noted that the test for applying the merger doctrine is not whether additional steps were necessary to complete both charges, but whether proof of one crime elevates another to a higher

degree.[4] L.U., 137 Wn. App. at 416. Proof of second degree vehicle prowling does not elevate the crime of theft to a higher degree. Thus, the merger doctrine does not apply.

Legal Financial Obligations

Bradley argued that the trial court impermissibly imposed legal financial obligations (LFOs) based on a finding of his ability to pay that was not supported by the record.[5] But Bradley did not object to the imposition of costs at either of his sentencing hearings. Therefore, he has waived his ability to challenge them on appeal.[6] RAP 2.5(a); State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010, 311 P.3d 27 (2013).

We also agree with the State that the issue is not ripe for review. The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. RCW 10.01.160(4); Baldwin, 63 Wn. App. at 310-11.

> The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is clearly somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the obligation.

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[4] The Washington Supreme Court affirmed L.U. on other grounds without reaching the double jeopardy issue, noting that the State asked that the charge of second degree vehicle prowling be dismissed. State v. Unga, 165 Wn.2d 95, 113 196 P.3d 645 (2008).

[5] RCW 10.01.160(3) provides that "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."

[6] In State v. Bertrand, 165 Wn.App. 393, 395, 267 P.3d 511 (2011), the court allowed a disabled defendant to challenge the imposition of discretionary LFOs on appeal, despite her failure to raise the issue below as required by RAP 2.5(a). We are not compelled to do the same in this case. Blazina, 174 Wn. App. at 911.

State v. Smits, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). Bradley may challenge the trial court's imposition of LFOs when the government seeks to collect them.

Statement of Additional Grounds

In a statement of additional grounds for review, Bradley argues that there was insufficient evidence to convict him of second degree assault. "A person is guilty of assault in the second degree if he or she ... [a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c). "[S]pecific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

Bradley contends that the evidence shows his intention was to get paid, not to create apprehension of bodily harm. He points out that he never tried to hit Sanchez with the bat and ended the chase when Sanchez agreed to pay. But criminal intent may be inferred "from conduct that plainly indicates such intent as a matter of logical probability." State v. Abuan, 161 Wn. App. 135, 157, 257 P.3d 1 (2011). The record shows that Bradley struck Sanchez's truck three times while standing a few feet from Sanchez, then chased Sanchez across the street and around two vehicles while brandishing the bat and demanding money. The evidence was sufficient to support the conviction.

Bradley also argues that the prosecutor made false statements regarding the definition of assault during rebuttal closing argument. "Where, as here, defense counsel does not object to the alleged misconduct, we deem the defendant to have waived the issue on appeal unless the misconduct is 'so flagrant and ill-intentioned that it evinces

an enduring and resulting prejudice' incurable by a jury instruction." State v. Larios-Lopez, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

During closing argument, defense counsel argued that Bradley did not commit second degree assault because Bradley directed his anger at the truck, not Sanchez. He therefore urged the jury to consider a lesser included offense: "I think if you are inclined to find any crime as it relates to Mr. Bradley, the bat against Mr. Sanchez, it's unlawfully displaying a weapon. . . . This is an intimidation situation involving a weapon which is the lesser included here." VRP (01/18/13) at 455. In rebuttal, the prosecutor argued:

> But let's assume for the sake of argument that he wasn't intending to injure Sage Sanchez, but just to intimidate, as defense counsel says. Fine. It's still assault. And this is very key: Defense counsel told you in their opening statement, there is no assault here because the Defendant never hit Sage, and there is no assault here because the Defendant never got close enough to hit Sage. The defendant, there is no assault here because the Defendant had no intent to hit Sage.
>
> The fact is, let's say that those are all true, and they are true. There is still an assault. What they failed to point out to you is that none of those are elements of the crime. I don't have to prove that he hit Sage. I don't have to prove that he was close enough to hit Sage. I don't have to prove that he did not intend to hit Sage. I only have to prove that he intended to create fear of injury. And that was proven.

VRP (01/18/13) at 463-64.

Bradley contends that the prosecutor relieved the State of the burden to prove his intent beyond a reasonable doubt by implying that intimidation is an element of assault and that his intent was irrelevant. Bradley misunderstands the prosecutor's argument. Viewed in context, it is apparent that the prosecutor responded appropriately

to defense counsel's argument by pointing out that the State did not need to prove that Bradley actually intended to injure Sanchez, but only that he intended to create fear of injury.

Affirmed.

Spearman, C.J.

WE CONCUR:

Leach, J.

Becker, J.

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	DIVISION ONE
Respondent,	)	
	)	No. 71647-6-I
v.	)	
	)	ORDER DENYING MOTION
JAMES BRADLEY,	)	FOR RECONSIDERATION
	)	
Appellant.	)	
	)	

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 4th day of August, 2014.

FOR THE COURT:

Spearman, C.J.

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STATE OF WASHINGTON
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