NO. 44492-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NAAMAN WASHINGTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 11-1-02132-9

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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B. STATEMENT OF THE CASE.

1. Procedure

On May 23, 2011, based on an incident that occurred the day before, the State filed an information charging Naaman Washington with: Count I, Unlawful Possession of a Controlled Substance with Intent to Deliver, Marijuana; and Count III, Unlawful Possession of a Controlled Substance with Intent to Deliver, Hydrocodone.[1] CP 1-2. Count I and III included an enhancement allegation that the defendant was armed with a firearm. CP 1.

On March 19, 2012, the State filed an Amended Information that added Count IV, Unlawful Possession of a Firearm in the First Degree;

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[1] Presumably Count II was filed only against his co-defendant.

and Count V, Unlawful Possession of a Firearm in the First Degree. CP 5-7. The Amended Information also alleged a second firearm sentence enhancement as to Counts I and III. CP 5-7.

On January 16, 2013, the case was formally assigned to the Honorable Judge Orlando for trial. CP 197; CP 195[2] On January 16, 2013, the defense filed a Motion to Dismiss Pursuant to *Knapstad*/CrR 3.6. CP 69-100. That same day, the case went before the Honorable Judge James Orlando for a suppression hearing. CP 197. The court denied the suppression motion. CP 199; CP 188-191.

On January 17, 2013, the State submitted a Second Amended Information that removed the firearm sentence enhancements on Counts I and III. CP 199; CP 157-58.[3] A jury was empaneled on January 17. CP 199.

For purposes of the charges of unlawful possession of a firearm, the parties entered a stipulation regarding Defendant's Criminal History, and stipulated that he had previously been convicted of a serious offense. CP 142-43.

On January 23, 2013, the jury returned verdicts finding the defendant guilty as to counts I, III, and IV. CP 159-162.

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[2] The print-date of the form is January 16. It was not filed until January 18, however the court empaneled the jury on January 17.

[3] The Second Amended Information was not actually stamped as filed until January 23, 2013.

On February 1, 2013, the court sentenced the defendant to a total of 67 months of confinement. CP 166-179.

The defendant timely filed the notice of appeal on February 11, 2103. CP 180.

This brief is the State's response to the appellant's brief.

2. Facts

a. Facts at CrR 3.6 hearing

The following is taken from the courts findings and conclusions regarding the CrR 3.6 motion.

FINDINGS OF FACT

1. The Court found Trooper Meldrum and Jerry Clark to be credible witnesses.

2. Trooper Meldrum stopped California Smith-Usher at approximately 9:50 pm on May 22, 2011 on I-5 past the M Street overpass in Tacoma. The place where Smith-Usher stopped is a no-park, tow away zone on I-5.

3. The trooper stopped Smith-Usher because his driver's license was suspended. On contact, the trooper determined Smith-Usher was the driver and defendant was sitting in the front passenger seat. The trooper told Smith-Usher the reason for the stop and informed him that the traffic stop was being recorded.

4. Trooper Meldrum smelled a strong odor of marijuana coming from inside the car. He then saw a Taco Bell bag filled with pre-packaged

baggies of marijuana sitting between defendant's feet. The trooper noted that the bag was so full that the marijuana was protruding out of the bag. Defendant acknowledged possession of the marijuana.

5. Trooper Meldrum arrested defendant. The trooper found a bottle containing 22 hydrocodone pills in defendant's pocket during a search incident to arrest. The bottle did not have a label. Defendant said it wore off.

6. Defendant gave the trooper medical marijuana authorization paperwork from CannaPath for Latoya Cole. He gave the trooper a second piece of paper purported to be caregiver authorization which had no header for a business and did not have any identifying name on it other that the name of Latoya Cole and defendant's name as the listed caregiver.

7. Trooper Meldrum arrested Smith-Usher for DWLS 3 and placed him into custody.

8. Trooper Pearson arrived to assist. The troopers prepared the car for impound because Smith-Usher's car was in a no-park, tow-away zone. Trooper Meldrum retrieved defendant's wallet, cell phone, and the bag from the front passenger's side of the car. The marijuana was in a Taco Bell bag which held several separate pre-packaged baggies of marijuana. WSP dispatch informed the troopers that Smith-Usher and defendant were convicted felons. Trooper Meldrum drove defendant and Smith-Usher to Pierce County Jail.

9. Jerry Clark, a Gene's Towing driver, arrived to impound defendants' car. Clark did a impound inventory of the car and found two handguns in the car. He contacted WSP dispatch and told them about the guns. WSP dispatch informed Trooper Meldrum who had just dropped off Smith-Usher and defendant at Pierce County Jail.

10. Trooper Meldrum went to Gene's Towing's lot and met with Clark, who told the trooper, he was doing his inventory of the vehicle, per his company's policy and found a handgun inside the locked glove box. He stated he also found a handgun inside the pocket of a black jacket located on the rear seat placed directly behind the driver. He informed me that the black pistol was inside the glove box.

11. Trooper Meldrum observed the black pistol lying on the passenger seat. The second gun was lying on the roof of the Taurus on top of black jacket. Jerry Clark told Trooper Meldrum that he wanted the trooper to take the firearms because his company does not like giving loaded guns to people when they come to pick up their cars after an impound.

12. Trooper Meldrum took the firearms to his patrol car. He did a records check and determined someone reported one of the firearms stolen through Seattle PD. The trooper subsequently got a warrant to seize the weapons through Judge Larkin.

13. Trooper Meldrum listened to the audio-visual recording of the traffic stop described above. He heard defendant make statements

regarding dominion and control of the firearm which Jerry Clark found in the back seat of Smith-Usher's car.

CONCLUSIONS OF LAW

1. Defendant's motion to dismiss pursuant to ***State v. Knapstad*** is denied. The State demonstrated a dispute as to material facts and presented sufficient evidence to support its charges against defendant.

2. The troopers validly impounded defendants' car and the troopers lawfully conducted a pre-impound inventory search of the car.

3. Trooper Meldrum legally secured the firearms pursuant to a valid seizure warrant.

4. Defendant's motion to dismiss pursuant to CrR 3.6 is denied. All evidence seized by the troopers is admissible.

b. Facts at Trial

The facts at trial are substantially similar to those presented at the CrR 3.6 hearing. Accordingly, they are not repeated. If necessary for purposes of the State's argument, specific references will be made to the record.

C. ARGUMENT.

1. THE TRIAL COURT'S FINDINGS ARE VERITIES ON APPEAL.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal.

State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. ***Hill***, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In ***Henderson Homes, Inc v. City of Bothell***, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

> It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also*, ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. ***Rickert v. Pub.Disclosure Comm'n***, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing ***State v. Luther***, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See*, ***Hoke v. Stevens-Norton, Inc***, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); *See also*, ***Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.***, 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

The court reviews conclusions of law ***de novo***. ***State v. Smith***, 154 Wn. App. 695, 699, 226 P.3d 195 (2010) (citing ***State v. O'Neill***, 148 Wn.2d 564, 571, 62 p.3d 489 (2003); ***State v. Eisfeldt***, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

Here, the defendant has not assigned error to any of the trial court's findings. Accordingly, they are verities on appeal.

2. THE APPELLANT CANNOT MEET HIS BURDEN TO SHOW THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE AN ALTERNATIVE SUPPRESSION CHALLENGE.

The defendant claims that his trial counsel was ineffective for failing to introduce Trooper Meldrum's dashboard video at the suppression hearing. Br. App. at 20. However, the State is a bit befuddled by this

claim as the dashboard video was introduced into the record as Exhibit 7. *See* CP 185; Exhibit 7 [which was remarked for purposes of trial]. The State played the video for the court in its case in chief on the suppression motion, and reviewed the video with testimony from Trooper Meldrum. 2RP 49, ln. 14 to p. 51, ln. 25.

Moreover, defense counsel argued that the seizure of the marijuana was unlawful both in his briefing, and at oral argument. *See* CP 19-20; 2RP 97, ln. 19 to p. 98, ln. 18. Indeed, defense counsel specifically argued that the entry into the car and retrieval of the marijuana was proper pursuant to an inventory. *See* 2RP 99, ln. 3-6, ln. 11-14; p. 107, ln. 17-21.

Defendant's claim on appeal appears to be that his trial counsel did not present argument specifically based on the portion of the video that showed Trooper Meldrum retrieve the marijuana, and for that reason, trial counsel was ineffective.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of

the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. ***McFarland***, 127 Wn.2d at 333-34; ***State v. Riley***, 121 Wn.2d 22, 846 P.2d 1365 (1996).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: 1) not objecting fell below prevailing professional norms; 2) that the proposed objection would likely have been sustained; and 3) that the result of the trial would have been different if the evidence had not been admitted. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting

State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "*exceptional deference must be given when evaluating counsel's strategic decisions.*" ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***McNeal***, 145 Wn.2d at 362). [Emphasis added.]

Trial counsel's failure to anticipate changes in the law does not constitute deficient performance. ***State v. Slighte***, 157 Wn. App. 618, 624, 238 P.3d 83 (2010).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. ***McFarland***, 127 Wn.2d at 338 n. 5. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. ***McFarland***, 127 Wn.2d at 334.

In presenting his claim on this issue, the defendant encourages this court to draw inferences and make factual determinations regarding Trooper Meldrum's conduct based upon evidence in the video. *See*, Br. App. at 18 ("Thus, there is no indication that Trooper Meldrum...," "Taken

together, this evidence establishes..."); Br. App. at 19 ("The only plausible explanation of this evidence is that...").

It is not the proper role of this Court to draw inferences or make factual determinations. Appellate court's do not make factual determinations. ***State v. Walters***, 162 Wn. App. 74, 255 P.3d 835 (2011); ***Doyle v. Lee***, 166 Wn. App. 397, 406, 272 P.3d 256 (2012). *See also*, ***Thorndike v. Hesperian Orchards, Inc.***, 54 Wn.2d 570, 572-575, 343 P.2d 183 (1959). The Court should decline the defendant's improper invitation to make its own independent factual findings based on the video.

Moreover, as indicated above, the defendant has the burden to show both that trial counsel's representation fell below prevailing professional norms; the proposed objection would likely have been sustained, and that the result of the trial would likely have been different if the evidence was not admitted. ***Davis***, 152 Wn.2d at 714. The defendant cannot meet his burden as to any of those three requirements. The entire claim is based upon self-serving inferences from what does or does not appear on Trooper Meldrum's dashboard video. *See* Br. App. at 16-17.

The court held that the marijuana was properly seized pursuant to the plain view exception to the warrant requirement in the course of Trooper Meldrum's conducting an inventory of the vehicle prior to it being

impounded. 2RP 110, ln. 1-25 *See,* ***State v. Tyler***, 177 Wn.2d 690, 302 P.3d 165 (2013). Under the plain view exception, an officer must (1) have a prior justification for the intrusion, (2) inadvertently discover the incriminating evidence; and (3) immediately recognize the item as contraband. ***State v. Temple***, 170 Wn. App. 156, 164, 285 P.3d 149 (2012).

Here, Trooper Meldrum had the prior justification for search - the inventory pursuant to the impound. The marijuana had already been inadvertently discovered when Trooper Medrum initially contacted the vehicle, observed it in open view, recognized it was marijuana (including plain smell), and the defendant acknowledged that it was marijuana. The marijuana was also immediately recognizable as contraband for the same reasons.

The defense position rests on the argument that Trooper Meldrum could not have been conducting an inventory pursuant to impound because that was done by Trooper Pearson. Br. App. at 17-19. However, that argument is also without merit. Nothing precludes the officers from working together as a team and dividing up the different aspects of the inventory process. Trooper Meldrum inventoried the interior of the vehicle prior to removing the suspects from the scene so that he could determine if any valuables were present before he left. CP 189 (Finding 8)

Trooper Pearson then completed the inventory on the exterior of the vehicle.

The defense claims that Trooper Meldrum's retrieval of the evidence "...had everything to do with retrieval of evidence, and nothing to do with inventorying the interior of the car." Br. App. at 19. However, that argument is belied by the fact that Trooper Meldrum collected the marijuana along with the defendant's cell phone, keys, wallet, and charger. 2RP p. 32, ln. 24 to p. 33, ln. 21; p. 46, ln. 22-25; Ex. 3. He secured the marijuana because it was valuable, worth between about $1,050 and $3,150 based on Trooper Meldrum's testimony. 2RP 33, ln. 17-21.

Most importantly, the defendant's argument that Trooper Meldrum's retrieval of the evidence "...had everything to do with retrieval of evidence and nothing to do with inventorying the interior of the car[,]" is directly contrary to the courts express findings. CP 189 (Finding 8); 2RP 110, ln. 21-25.

Here, the trial court found that the troopers were credible. CP 188 (Finding 1). The trial court also found that the troopers conducted a pre-impound inventory of the vehicle. CP 189 (Finding 8). This included Trooper Meldrum's retrieval of the wallet, keys, and marijuana. *See* CP 189 (Finding 8). These findings are all unchallenged and therefore verities

on appeal. They are also supported by substantial evidence from the suppression hearing.

The defendant has failed to meet his burden to show that trial counsel was ineffective. Nothing in the video contradicts the trial court's findings. The central fallacy of the defendant's argument is that only one trooper could conduct the inventory, with the implication that Trooper Medrum did not conduct an inventory because Trooper Pearson did. The evidence here is that before he left the scene, Trooper Meldrum inventoried the interior of the vehicle in order to secure the suspects' valuables. There is nothing to suggest that Trooper Pearson separately inventoried the interior of the vehicle, and indeed, it appears that he did not since he too failed to find the two firearms. Nothing in the video contradicts this. In fact the video reinforces it.

What the defense is really arguing for is a re-interpretation of the facts.

The defendant fails to meet his burden to show that trial counsel's failure to present the remaining video fell below prevailing professional norms. It added nothing to the issue of whether or not Trooper Meldrum was conducting an inventory of the interior of the vehicle. For that reason, the defendant also fails to meet his burden to show that the motion likely

would have been granted or that the result of the trial likely would have been different.

For all of these reasons, the claim should be denied.

3. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST AN AFFIRMATIVE DEFENSE INSTRUCTION AS TO THE DEFENDANT'S POSSESSION OF MARIJUANA WHERE THE DEFENDANT FAILED TO PUT FORTH SUFFICIENT EVIDENCE TO SHOW THAT HE WAS ENTITLED TO THE DEFENSE.

Chapter 69.51A. RCW (Medical Cannabis) provides that a defendant who is in compliance with the requirements of the chapter and is charged with violations of state law relating to cannabis, may raise an affirmative defense at trial. *See* RCW 69.51A.043; RCW 69.51A.047.

The medical cannabis chapter provides an apparent three tier system of protection from criminal charges for users of medical cannabis by qualified patients or their designated providers. For the first tier, the medical use of cannabis shall not constitute a crime for persons enrolled in the Department of Health registry as qualified patients, or their designated providers. *See* RCW 69.51A.040(2). *See generally*, RCW 69.51A.040. For the second tier, qualified patients and designated providers who are not enrolled with the DOH registry, but present their valid documentation to use medical cannabis to questioning law enforcement officers, may raise an affirmative defense through proof at trial that they otherwise meet

the requirements of RCW 69.51A.040. RCW 69.51A.047. For the third tier, qualifying patients and designated providers who do not present their valid documentation to questioning law enforcement officers may also raise an affirmative defense through proof at trial that they are in compliance with all the requirements of Chapter 69.51A RCW.

It should be noted that despite the apparent three-tier structure, for all practical purposes the chapter actually only provides a single level of protection against criminal charges: that a defendant may raise an affirmative defense at trial through proof at trial that they were in compliance with the requirements of Chapter 69.51A RCW. That is because the first tier of protection under RCW 69.51A.040, which provides that the medical use of cannabis *shall not constitute a crime* for persons who present their proof of registration with the department of health is unavailable because Governor Gregoire vetoed the registry provisions, so that it is impossible to comply with the condition precedent of registering with the department of health. *See*, 2011 Laws of Washington Ch. 181, § 901. *See also*, reviser's note following RCW 69.51A.030. Thus, the only defenses available are the affirmative defenses to be proved at trial under RCW 69.51A.043, and .047, which for all practical purposes are functionally equivalent.

Under both RCW 69.51A.043, and .047, a defendant may raise the affirmative defense if the qualifying patient or designated provider is in

compliance with all other terms and conditions of the Chapter 61.51A RCW. *See*, RCW 69.51A.043(1)(c); 69.51A.047. Both provisions require the person asserting the defense to be a qualifying patient or designated provider.

A qualifying patient means a person who, among other requirements, has been diagnosed by a [specified class of] health care professional as having a terminal or debilitating condition. RCW 69.51A.010(4)(a), (b). Terminal or debilitating conditions are defined by statute and includes six specified conditions, as well as any other condition duly approved by the Washington state medical quality assurance commission. RCW 69.51A.010(6). A list of final orders on petitions to add qualifying conditions can be found on the Department of Health web site at: http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuanaCannabis/PetitionstoAddQualifyingConditions.aspx.

Here, the defendant claimed that he was the designated provider to Latanya Cole. 4RP 241, ln. 10 to p. 242, ln. 11. He claimed both he and Ms. Cole lived in Federal Way when he became her designated provider. 5RP 270, ln. 22 to p. 271, ln. 25. He testified that her qualifying condition was scoliosis, and some other sort of back ailments. 4RP 239, ln. 1-6; 5RP 271, ln. 1-7. He was present on October 14, 2010, when she obtained a medical marijuana certificate from CannaPath in Tacoma and they gave

him a form indicating that he was her designated provider. 4RP 240, ln. 7-24; Ex. 15. The designated provider form had no header on it.

As of the trial date, the defendant was unaware of Ms. Cole's then current residence. 4RP 245, ln. 2-5. He claimed she told him that if his case drug out she wouldn't be able to come to court. 5RP 278, ln. 6-8. The record contains no evidence whatsoever as to her underlying condition and whether it was a qualifying condition under RCW 69.51A.10(6).

Where there was no evidence to support such a showing, the defendant failed to make the preliminary showing entitling him to raise the affirmative defense. Accordingly, he was not entitled to the instruction.

The defendant also claimed that when he was contacted by Trooper Meldrum, he had come from Seattle, obtained the marijuana and had attempted to deliver it to Ms. Cole, but that he was unable to locate her, so they were headed on their way back to Seattle with the marijuana. 4RP 244, ln. 12 to p. 245, ln. 1; p. 256, ln. 20-24. Smith Usher, the driver of the vehicle, had picked the defendant up at the defendant's girlfriend's house in the Skyway area of south Seattle between 6:30 and 7:00 p.m. on May 22, 2011. 5RP 275, ln. 8-15; p. 276, ln. 11-12.

The defendant testified that he got the marijuana from a buddy he knew as "Pops" who was starting his own upcoming dispensary and was growing different strands for other people that he knew. 5RP 273, ln. 7-25; p. 274, ln. 19-20. The defendant would help "Pops" with supplies and

would give him about $150 to $200 per month. 5RP 273, ln. 9-18. "Pops was operating in the Tacoma area and the defendant got the marijuana at issue in this case from Pops at the Shell station on 56th Street. 5RP 273, ln. 19-22; p. 279, l n. 2-7. They then attempted to meet Ms. Cole, but were unable to make contact with her at 72nd and Portland Avenue. 5RP 278, ln. 19-25.

These facts suggest the implausibility that she was a legitimate qualifying patient, or that he was legitimately a designated provider to her. It would make no sense for him to continue as her designated provider when he lived in South Seattle and she was in South Tacoma. It is also implausible that he went to the trouble to come to Tacoma from South Seattle, but didn't make prior arrangements to meet her, and decided to leave shortly after he failed to contact her, particularly when he had someone else drive him because his own car wasn't working. It is implausible that rather than going to a legitimate medical marijuana business, he was buying marijuana for her medical use on the street at a gas station from someone named "Pops."

The record lacked any evidence whatsoever that would entitle the defendant to raise the medical cannabis affirmative defense. Nor was trial counsel ineffective for failing to put such evidence forth where the information that does exist in the record suggests that the defendant was not a legitimate designated provider so that the defense had no ability to make the required showing.

For this reason, trial counsel was not ineffective. It was a sound tactical decision not to seek the instruction where the record lacked sufficient facts to support the trial court giving such an instruction.

Nor can the defendant meet his burden to show any prejudice where the record is insufficient to show that he was entitled to raise the defense in the first place.

It is also worth noting that the evidence in the record failed to establish that the defendant was in compliance with any other requirement under Chapter 61.51A RCW. The record also provides no evidence that the "documentation" the defendant provided to Trooper Meldrum was in fact valid.

For all these reasons, the defendant's claim that trial counsel was ineffective for failing to seek a jury instruction on the medical cannabis affirmative defense is without merit and should be denied.

4. SUFFICIENT EVIDENCE SUPPORTED THE CONVICTION IN COUNT IV FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, WHERE THE DEFENDANT STIPULATED THAT HE HAD PREVIOUSLY BEEN CONVICTED OF A SERIOUS OFFENSE.

The defense claims that as to Count IV, the State failed to meet its burden to prove that the defendant had previously been convicted of a felony that was a serious offense. Br. App. at 26. The defense claims that this is so notwithstanding that the defendant stipulated that the defendant

had previously been convicted of a serious felony. Br. App. at 26; CP 142-43. In making its claim, the defense relies on jury instruction 19 which advises the jury that evidence of the defendant's prior convictions may only be considered for purposes of weighing the defendant's credibility, and for no other purpose. Br. App. at 26; CP 125.

The defense argument is without merit because the stipulation was that the defendant had been previously convicted of a serious offense, an element of the crime, and not a stipulation as to the admissibility of evidence, so that instruction 19 did not limit the jury's use of the stipulation.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn.

App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> [...]great deference [. . .] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

The court has twice previously considered and rejected the argument raised here. *See*, ***State v. Wolf***, 134 Wn. App. 196, 139 P.3d 414

(2006); ***State v. Ortega***, 134 Wn. App. 617, 142 P.3d 175 (2006), *review denied* 160 Wn.2d 1016 (2007). (The defense has appropriately identified ***Ortega*** as authority contrary to their argument. *See*, Br. App. at 29. The defense apparently failed to find ***Wolf*** as it is not cited in their brief.) In ***Ortega***, the court held that a jury instruction directing the jury to consider evidence of prior convictions only for purposes of impeachment did not preclude conviction of the defendant based upon his stipulation to prior convictions. ***Ortega***, 134 Wn. App. at 621-23. In ***Wolf***, the court held that where the defendant stipulated to the element that he had been convicted of a prior serious offense, his claim that his conviction lacked sufficient evidence, because the stipulation was not admitted into evidence was without merit. ***Wolf***, 134 Wn. App. 196. The court held that by entering the stipulation Wolf waived the right to put the State to its burden of proof as to that element. ***Wolf***, 134 Wn. App. 196.

Here, the parties entered a stipulation that was read to the jury. It provided that:

> Members of the Jury, evidence is going to be presented to you by means of a stipulation. A stipulation is an agreement between the parties as to what the evidence would be if it were presented to you through testimony or exhibits. The facts contained in this stipulation are not in dispute. This evidence is entitled to the same consideration, and it's to be judged as to credibility and weight, and otherwise considered by you insofar as possible in the same way as if a witness were testifying from the stand here. The stipulation is as follows:

> NAAMAN JAMAL WASHINGTON had previously been convicted of a felony which is a serious offense.

CP 142-43; 5RP 320, ln. 5-20.

Jury instruction 19 stated:

> You may consider the evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give the defendant's testimony and for no other purpose.

CP 125.

Under the law of the case doctrine, jury instructions to which a party does not object become the law of the case. ***State v. Hickman***, 135 Wn.2d 97, 954 P.2d 900 (1998). Thus, in criminal cases, when the State does not except to instructions that add unnecessary or additional elements to the "to convict" instruction, the State assumes the burden of proving those elements. ***State v. Hickman***, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); ***State v. Willis***, 153 Wn.2d 366, 103 P.3d 1213 (2005).

The court reviews challenged jury instructions ***de novo*** "in the context of the instruction as a whole." ***State v. Pirtle***, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). When reviewing a jury instruction, the court reads the instruction as a reasonable juror would. ***State v. Killingsworth***, 166 Wn. App. 283, 288, 269 P.3d 1064 (2012). *See also,* ***State v. Moultrie***, 143 Wn. App. 387, 394, 17 P.3d 776 (2008) (reviewing adequacy of unanimity instruction based upon how ordinary juror would interpret it); ***State v. Atkins***, 156 Wn. App. 799, 236 P.3d 897 (2010)

(holding that to determine whether a jury instruction creates a mandatory presumption the reviewing court examines whether a reasonable juror would interpret the presumption as mandatory). *See also,* ***State v. Hayward***, 152 Wn. App. 632, 642, 217 P.3d 354 (2009).

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and when read as a whole properly inform the jury of the applicable law." ***State v. Clausing***, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). *See also,* ***State v. Marchi***, 158 Wn. App. 823, 246 P.3d 556 (2010). Additionally, instructions that contain harmless surplussage are not a ground for reversal. *See,* ***State v. Hammond***, 64 Wn.2d 591, 392 P.2d 1010 (1964).

However, it is reversible error if the instruction(s) relieve the state of its burden to prove beyond a reasonable doubt each essential element of the crime charged. ***State v. Sibert***, 168 Wn.2d 306, 230 P.3d 142 (2010).

Procedurally, this case differs from a typical challenge to a jury instruction for two reasons. First, the defense is not asserting a challenge to the instruction. Instead, the defense attempts to rely on instruction which they acknowledge is erroneous under the facts of this case, but to which the State failed to object below. *See* Br. App. at 26. However, Instruction 19, upon which the defense relies, does not require the State to assume the burden of proving additional elements of the crime. Indeed, it is not a "to convict" instruction. Rather, it directs the jury as to how to use

the evidence in the case before it. In that regard, it differs from any other Washington case on jury instructions that the State could identify.

The claim raised by the defendant raises a fundamental legal issue: what is the nature of a stipulation, and in what way is it related to or different from a jury instruction?

"A stipulation is an express waiver ... conceding for the purposes of the trial the truth of some alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it." ***State v. Wolf***, 134 Wn. App. 196, 139 P.3d 414 (2006) (quoting ***Key Design, Inc. v. Moser***, 138 Wn.2d 875, 893-94, 983 P.2d 653 (1999)).

Stipulations have the effect of withdrawing a fact from issue, "...and dispensing wholly with the need for proof of the fact." ***Mukilteo Retirement Apartments, L.L.C. v. Mukilteo Investors L.P.***, ___ Wn. App. ___, 310 P.3d 814, 821 n. 8 (2013) (quoting ***Key Design, Inc. v. Moser***, 138 Wn.2d 875, 983 P.2d 653 (1999) (Madsen concurring/dissenting and citing 2 McCormick on Evidence §254)).

For purposes of this analysis, Washington case law relating to stipulations for trial can generally be divided into two types. The first type is a stipulation as to the admission of evidence. *See,* ***State v. Korum***, 157 Wn.2d 614, 648-49, 141 P.3d 13 (2006); ***In re the Dependency of G.A.R.***, 137 Wn. App. 1, 150 P.3d 643 (2007). *See also,* ***Pirtle***, 127 Wn.2d at 652-53. Such a stipulation most typically eliminates one party's burden to prove foundational requirements for admission of an item of evidence.

Under such a stipulation, the stipulated item of evidence is admitted, however, it remains for the jury to determine what weight and effect to give to that admitted item of evidence.

The second type of stipulation is a stipulation that undisputed facts are true. *See, e.g.,* ***Sprint Spectrum, L.P. v. State, Dept. of Revenue***, 174 Wn. App. 645, 656, 302 P.3d 1280 (2013); ***Mechling v. City of Monroe***, 152 Wn. App. 830, 222 P.3d 808 (2009). *See,* ***Thompson v. State, Dept. of Licensing***, 138 Wn.2d 783, 982 P.2d 601 (1999) (holding defendant stipulated to accuracy of BAC readings, but the BAC evidence was nonetheless otherwise inadmissible based on collateral estoppel).

In the criminal context, the second type of stipulation can also include a stipulation that the element of the crime is satisfied and not at issue. *See,* ***State v. Vreen***, 99 Wn. App. 662, 994 P.2d 905 (2000).

Indeed, as with this case, such a stipulation most commonly occurs where the defendant stipulates to the existence of a prior conviction or other bad act that satisfies an element of the crime so as to avoid the admission of more specific information regarding the offense or act that could unfairly prejudice the defendant in the eyes of the jury. *See,* ***State v. Johnson***, 90 Wn. App. 54, 950 P.2d 981 (1998); ***State v. Ortega***, 134 Wn. App. 617, 142 P.3d 175 (2006).

It is worth noting that the WPIC Committee recognize the different effects of these two types of stipulations by employing a different instruction for each type. Cp. WPIC 4.76 with 4.77.

The court's opinion in ***State v. Wolf*** is controlling on this issue. *See*, ***Wolf***, 134 Wn. App. 196. In ***Wolf***, just as in this case, the defendant was charged with being a felon in possession of a firearm. ***Wolf***, 134 Wn. App. at 196. Just as the defendant did here, Wolf stipulated to a necessary element of the charge: that he had previously been convicted of a serious offense. ***Wolf***, 134 Wn. App. at 196. He entered into that stipulation for the same reason the defendant did here, in order to keep the name of his serious offense from the jury. ***Wolf***, 134 Wn. App. at 196. In ***Wolf***, the stipulation was never admitted into evidence. ***Wolf***, 134 Wn. App. at 196. On appeal, ***Wolf*** argued that as a result, the jury lacked sufficient evidence to find him guilty because the State failed to prove that he had been convicted of a prior serious offense. ***Wolf***, 134 Wn. App. at 198-99. However, the court denied his claim, holding that by stipulating to the element, the defendant waived his right to put the government to its proof of the element. ***Wolf***, 134 Wn. App. at 199.

Here, the defendant stipulated that he had previously been convicted of a felony which is a serious offense. CP 143.

Because a stipulation as to an element waives the defendant's right to hold the State to its burden of proof as to that element, the defendant is precluded from bringing a claim that there was not sufficient evidence of that element. Accordingly, the best that can be said of the defendant's argument on this issue on appeal is that jury instruction 19 is irrelevant to this issue, and is therefore insufficient to support the defendant's claim.

The defendant's claim in this issue is without merit and should be denied.

It is also worth noting that instruction 19 did serve a separate valid purpose where the defendant testified and on direct examination referred to his prior criminal history. *See*, 4RP 241, ln. 10-12. *See also*, 5RP 266, ln. 7-20.

Even if the court were to hold that by his stipulation the defendant did not waive his right to challenge the State's burden of proof as to that element, he is not entitled to relief unless several additional questions are answered in his favor: Should instruction 19 properly interpreted be interpreted as the defense asserts? Do the stipulation and instruction 19 conflict with each other so that they cannot be read as complementary to each other? If they do conflict, what is the legal effect of that conflict? The answers to these three questions are intertwined and not fully separate from each other. However, all would have to be answered in the defendant's favor for him to prevail.

Further, even if the court were to view the stipulation read to the jury and instruction 19 as inconsistent with each other, the defendant is not entitled to relief. Certainly it can be error to present conflicting instructions to the jury on a material point or issue. *See* 89 C.J.S. Trials § 700. In the context of criminal cases, this can particularly be the case

where one instruction involves an erroneous statement of the law that lessens the State's burden of proof. *See, e.g.*, C.J.S. Trials § 700. On the other hand, "[t]he mere fact that one instruction conflicts with another is not alone reason for condemning it." *See*, 89 C.J.S. Trials § 700 (citing ***Green v. Baum***, 132 S.W.2d 665 (Mo. 1939)). Further, correct instructions do not become erroneous merely because they are in conflict with an incorrect instruction given for the opposite party. 89 C.J.S. Trials § 700 (citing ***King v. City of St. Louis***, 155 S.W.2d 557 (Mo. 1941)).

The defense claims that jury instruction 19 precluded the jury from considering the stipulation for any purpose other than weighing the defendant's credibility. However, the parties did not stipulate to evidence that demonstrated the defendant had previously been convicted of a serious felony offense. Rather, they stipulated that the defendant had previously been convicted of a felony, which is a serious offense. In other words, the parties did not stipulate to evidence, rather, they stipulated that a fact which constituted an element of the offense was not in dispute and had been conclusively established. As a result, jury instruction 19 is irrelevant to the stipulation and does not limit it.

By his stipulation, the defendant waived his right to put the State to its poof of the element that he was convicted of a prior serious offense. Accordingly, this issue should be denied as without merit.

5. THE DEFENDANT'S CLAIM THAT THE COURT IMPROPERLY IMPOSED SOME OF THE LEGAL FINANCIAL OBLIGATIONS IS WITHOUT MERIT WHERE THE COURT OF APPEALS MODIFIED THE OPINION UPON WHICH THE DEFENDANT RELIES, SO THAT IT NO LONGER STANDS FOR THE POSITION FOR WHICH THE DEFENDANT ATTEMPTS TO USE IT, THE ISSUE WAS NOT PRESERVED FOR APPEAL, AND IS NOT RIPE FOR REVIEW.

The defendant claims that there was insufficient evidence to support the trial court's finding that the defendant had the present or future ability to pay his discretionary legal financial obligations (LFOs). Br. App. at 33ff.

a. The Issue Was Not Preserved For Appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. ***State v. Kirkpatrick***, 160 Wn.2d 873, 879, 161 P.3d 990 (2007) (citing RAP 2.5(a)). The opinion in ***Kirkpatrick*** was overruled on other grounds by ***State v. Jasper***, 174 Wn.2d 96, 271 P.3d 876 (2012)).

In ***State v. Blazina***, Division II of the Court of Appeals declined to review the LFO issue for the first time on appeal. ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P.3d 492 (2013). *See also,* ***State v. Lundy***, ___ Wn. App. ___, 308 P.3d 755, 763 (2013) (Johanson, A.C.J., concurring); ***State v. Ralph***, 175 Wn. App. 814, 827, 308 P.3d 729 (2013) (Johanson, A.C.J., concurring). In ***State v. Calvin***, Division I initially granted Calvin's claim for relief from his LFOs, but then reconsidered and denied that relief. *See*, Appendix A (***State v. Calvin***, No. 67627-0-I, Order Granting Respondent's Motion For Reconsideration And Amending Opinion.); ***State v. Calvin***, ___ Wn. App. ___, 302 P.3d 509 (2013). Unfortunately, the version of the opinion available on Westlaw as of the time of the filing of this brief has not been updated to reflect the court's amendment of its opinion. *See*, Appendix B (Westlaw copy of ***State v. Calvin***)[4] The defendant's claim appears to be largely based upon the holding in ***Calvin*** that has since been reconsidered, so that the holding in ***Calvin*** no longer supports the defendant's position, but rather is contrary to it. *See*, Br. App. at 34; Appendix A.

In this case, the defendant did not claim any of the three circumstances listed under RAP 2.5(a) in which an issue could be raised for the first time on appeal. The defendant made no objection to the imposition of LFO's. 7RP 410, ln. 23-25. Therefore, the defendant did

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[4] Also odd is the fact that this document lacks a Westlaw electronic document number.

not properly preserve this issue for appeal. The Court of Appeals did not abuse its discretion in declining to review the issue substantively.

b. The Issue Is Not Ripe For Review.

Trial courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay:

> The 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.

Within the statute are safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs.

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(4).

The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See,* ***State v. Blank***, 131 Wn.2d 230, 930 P.2d 1213 (1997); ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311. S*ee also,* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. ***Crook***, 146 Wn. App. at 27. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d 230, 241–242.

Here, the judgment and sentence recites that the court considered or, in the language of the statute, "took account" of, the defendant's present and likely future financial resources:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay future legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's

> status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 29. That recitation satisfied the prerequisites for imposing discretionary financial obligations.

The "boilerplate" finding of ability to pay on the Judgment and Sentence is likely an effort to standardize compliance with RCW 10.01.160(3) and ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992). As the Court of Appeals observed in ***Calvin*** and ***Lundy***, it is unnecessary under the statute. ***Calvin***, 302 P. 3d at 521; ***Lundy***, 308 P. 3d at 760. Because it is unnecessary, its inclusion creates confusion and should probably be removed from the form judgment and sentence. *See*, ***Lundy***, at 760, n. 7. However, the form as it currently exists with that boilerplate is promulgated and distributed by the Supreme Court through the Supreme Court Pattern Forms Committee via the Administrative Office of the Courts, so any modification should be pursued at that level. *See*, CrR 7.2(d).

Confusion and caution by the trial courts stems from the language in RCW 10.01.160(3). The first sentence says that the court "shall not" order costs "unless the defendant is or will be able to pay them" (emphasis added). While ***Curry*** and numerous cases following have stated that the court need not enter specific findings, trial courts are left to ask themselves how to order costs without "finding" that the defendant can or

will be able to pay. *See*, ***Curry***, 118 Wn.2d at 916. RCW 10.01.160(4) permits a defendant to seek relief from payment, based upon financial hardship. However RCW 10.01.160(3) would seem to bar the order in the first place, absent a finding.

In ***Lundy***, the Court notes that this confusion also stems from a misreading of the fifth factor in ***Curry***, 118 Wn.2d at 915: "A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end." Division II points out that ***Curry*** does not say that "a repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations." ***Lundy***, 308 P.3d at 760, n. 9.

Although the trial court also "found" that the defendant had the present or likely future ability to pay the financial obligations, that conclusion or finding is immaterial and does not warrant relief even if it is not supported by the record. *See* ***State v. Caldera***, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

The defendant has the burden to show indigence. *See* RCW 10.01.020; ***Lundy***, 308 P.3d at 759, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs, because compliance with the conditions imposed under a Judgment and Sentence are essential. ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not

incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. Here, the State has not attempted to collect legal financial obligations from the defendant nor established when he is expected to begin repayment of these obligations. *See* CP 171. The State has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. *See,* ***Lundy***, 308 P. 3d at 761.

The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature. The challenge to the order requiring payment of legal financial obligations is not ripe for review.

c. The Trial Court Did Not Err In Ordering The Defendant To Pay Legal Financial Obligations.

Where the issue is considered substantively, Divisions I and II do not differ on the application of the law, especially since Division I modified its opinion in ***Calvin***.

Different components of defendant's financial obligations require separate analysis because some LFO's are mandatory and some are discretionary. ***State v. Baldwin***, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); ***State v. Curry***, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992). The sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard. ***Baldwin***, 63 Wn. App. at 312. However, the decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. ***Baldwin***, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against burden of his obligation before imposing attorney fees. ***Baldwin***, 63 Wn. App. at 312; *see also,* ***State v. Wimbs***, 68 Wn. App. 673, 847 P.2d 8 (1993), *rev'd on other grounds by*, ***State v. McGee***, 122 Wn.2d 783, 864 P.2d 912 (1993).

Pursuant to RCW 10.01.160, the court may require defendants to pay court costs and other assessments associated with bringing the case to trial. The statute includes safeguards:

> (1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.
>
> [...]
>
> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(1), (4).

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

Since ***Blazina*** was decided, Division II of the Court of Appeals has published another case discussing the same LFO issue: ***Lundy***, 308 P.3d 755 (2013).

The distinction between discretionary and mandatory legal financial obligations is important. The legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing mandatory obligations. *See*, RCW 9.94A.505, RCW 9.94A.753(4) and (5); ***Lundy***, at 759. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g.*, ***State v. Kuster***, 175 Wn. App. 420, 306 P.3d 1022 (2013). Therefore, in the present case, the review ultimately concerns the discretionary amounts of $250 in defense counsel recoupment.

Here, the defendant argued that the trial court erred when it concluded that he had the present or future ability to pay mandatory and discretionary LFOs. The defendant relied on ***Bertrand*** for the proposition that the record does not contain evidence that demonstrates the defendant's present or future ability to pay LFOs. Brief of Appellant 33-34 (citing ***State v. Bertrand***, 165 Wn. App. 393, 405, 267 P.3d 511 (2011)). The Court in ***Bertrand*** found error in the trial court's finding that Bertrand had the present or future ability to pay LFOs because she was disabled and the record contained no evidence to support its finding.

Division I of the Court of Appeals does not actually conflict with Division II in applying the law in these cases. Recently, in ***State v. Parmelee***, 172 Wn. App. 899, 917, 292 P.3d 799 (2013), the defendant argued that the trial court erred by imposing non-mandatory legal financial

obligations without finding that he had any ability to pay. Division I rejected this argument, holding that the court's discretionary LFO order did not require findings (citing ***Curry***, 118 Wn.2d at 916), and that the issue of ability to pay would be considered when the State tried to collect (citing ***Blank***, 131 Wn.2d at 242). ***Parmelee***, 172 Wn. App. at 918.

The holding in ***Calvin*** was that the trial court's ruling was "clearly erroneous" when the trial court found that an unemployed carpenter could likely pay the LFO's in the future depends on facts and evidence. While the factual conclusion is open to debate, the Court relied upon ***Baldwin*** and ***Curry*** for the legal principles involved. ***Calvin***, 302 P.3d at 521. In ***Calvin***, the Court correctly noted that the trial court need not make a finding, but only take the defendant's financial resources "into account." ***Calvin***, 302 P.3d at 521.

In factual contrast, in the present case, nothing in the record suggests that the defendant lacks the present and future ability to pay his LFOs. The defendant was 34 years old when sentenced, and the court imposed a sentence of 67 months. The defendant will be less than 40 years old upon release. There is no reason to believe he is disabled, so at this point there is a reasonable basis to believe that upon release he would be able to get a job and pay off his legal financial obligations.

This Court should affirm the trial court's imposition of LFOs because in conjunction with statutory authority, which compels the court to impose LFOs, the court properly found that the defendant has the present or future ability to pay LFOs.

The defendant fails to demonstrate that the trial court's order was "clearly erroneous."

D. CONCLUSION.

The defendant fails to satisfy his burden to show that trial counsel was ineffective for not seeking to play for the court the portions of the trooper's dash-cam video that showed the trooper conducting the inventory of the vehicle. Nothing in the video was contrary to the trooper's testimony, and the defendant's claim that Trooper couldn't have been conducting an inventory because Trooper Pearson completed the inventory on the exterior of the vehicle is without merit. Where the defendant fails to show that trial counsel's conduct fell below prevailing norms, or that the ultimate outcome likely would have been different, the claim should be dismissed as without merit.

The defendant fails to meet his burden to prove show that trial counsel was ineffective for failing to request a medical cannabis affirmative defense instruction. The defendant was not entitled to the instruction where there was no competent evidence that he was a

legitimate designated provider, or that the qualifying patient to whom he was allegedly the provider had a specified qualifying condition. Indeed, the evidence that did exist was to the contrary. Because the defendant did not satisfy the requirements to entitle him to the medical cannabis affirmative defense, the claim should be denied as without merit.

The defendant's claim that his conviction for unlawful possession of a firearm was not supported by sufficient evidence that he had a prior conviction for a serious felony offense is without merit. The defendant stipulated that he had previously been convicted of a felony which is a serious offense. By that stipulation, he waived his right to put the government to its proof of that element.

The defendant's claim that the trial lacked sufficient evidence to support its discretionary imposition of discretionary legal financial obligations is without merit. The issue is not properly raised in an appeal, is not ripe, and also fails on the merits because in its imposition of the LFOs, the trial court is not required to have evidence before it of the defendant's present or future ability to pay. Rather, such a claim may only be brought once the defendant is released from custody and the State acts to enforce the obligation.

Because all the defendant's claims are without merit, his appeal should be denied.

DATED: November 22, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-22-13
Date Signature

Appendix A
State v. Calvin, No. 67627-0-I
Order Granting Respondent's Motion For Reconsideration and Amending Opinion

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

STATE OF WASHINGTON, Respondent, v. DONALD L. CALVIN Appellant.	)	No. 67627-0-I ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION AND AMENDING OPINION

The respondent, State of Washington, filed a motion for reconsideration. The appellant, Donald Calvin, has filed an answer. A panel of the court has determined that the motion should be granted, and the published opinion filed May 28, 2013 shall be amended. Now, therefore, it is hereby

ORDERED that the motion is granted; it is further

ORDERED that the published opinion filed May 28, 2013 be amended as follows:

DELETE the last two sentences of the first paragraph on page 1 that read:

We affirm his convictions. Because there is no evidence to support the trial court's finding that Calvin has the ability to pay court costs and the record does not otherwise show that the trial court considered Calvin's financial resources, we remand for the trial court to strike the finding and the imposition of court costs.

REPLACE those sentences with the following sentence:

We affirm.

DELETE section V. Legal Financial Obligations, which begins on page 20 and ends on page 22, in its entirety.

REPLACE that section with the following:

V. Legal Financial Obligations

The trial court ordered Calvin to pay a total of $1,300 in legal financial obligations (LFOs), including $450 in court costs. It also entered a boilerplate finding stating that had the ability to pay LFOs:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

Calvin challenges the imposition of $450 in court costs, arguing that the boilerplate finding is not supported by evidence, and that the trial court was required to determine whether he had the ability to pay before ordering the payment of costs. The State argues that Calvin did not preserve this issue for review and cannot raise it for the first time on appeal. We agree with the State.

Under RCW 10.01.160(3), "[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." Our Supreme Court has made several things clear about this

statute. First, the sentencing court's consideration of the defendant's ability to pay is not constitutionally required. State v. Blank, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997) ("the Constitution does not require an inquiry into ability to pay at the time of sentencing"). Accordingly, the issue raised by Calvin is not one of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a).

Second, the imposition of costs under this statute is a factual matter "within the trial court's discretion." State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002); In re Pers. Restraint of Shale, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). Calvin's failure to object below thus precludes review.

Third, "[n]either the statute nor the constitution requires a sentencing court to enter formal, specific findings" regarding a defendant's ability to pay. Curry, 118 Wn.2d at 916. The boilerplate finding is therefore unnecessary surplusage. If a challenge to the court's discretion were properly before us, striking the boilerplate finding would not require reversal of the court's discretionary decision unless the record affirmatively showed that the defendant had an *inability* to pay both at present and in the future.

Finally, even if the finding were properly before us for review, we would conclude that it is not clearly erroneous.[1] Calvin testified to his high school

education, some technical training, and his past employment as a carpenter, including a brief time in the union. Calvin also had retained, not appointed, counsel at trial. These facts are sufficient to support the challenged finding under the clearly erroneous standard.

Calvin also challenges the imposition of a $250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the court even take a defendant's financial resources into account before imposing a fine, let alone enter findings. Calvin has not articulated any basis for striking the fine.

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[1] We review the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646, 837 P.2d 646 (1991). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

DELETE the first paragraph on page 24 with reads:

We affirm Calvin's convictions and remand for the trial court to strike the finding that Calvin has the present or future ability to pay LFOs and the imposition of $450 in court costs.

REPLACE that paragraph with the following paragraph:

We affirm.

DATED this 22nd day of October, 2013.

Appelwick, J.

WE CONCUR:

Spearman, A.C.J.

Grosse, J.

Appendix B
Westlaw version of
State v. Calvin, ___ Wn. App. ___, 302 P.3d 509 (2013)
[printed 11-20-2013]

302 P.3d 509
(Cite as: 302 P.3d 509)

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Donald L. CALVIN, Appellant.

No. 67627–0–I.
May 28, 2013.

Background: Defendant was convicted in the Superior Court, Whatcom County, Steven J. Mura, J., of assault in the third degree and resisting arrest in connection with altercation with park ranger. Defendant appealed.

Holdings: The Court of Appeals, Appelwick, J., held that:
(1) evidence supported convictions;
(2) trial counsel's failure to request a self-defense instruction was not deficient, as element of ineffective assistance;
(3) prosecutor was entitled to respond to defense counsel's argument that ranger was untruthful in his version of events;
(4) prosecution's unobjected-to advisement to jury to consider whether defense counsel's argument was trustworthy, and prosecutor's unobjected-to statement that defense counsel was "blaming the victim," were not so flagrant and ill-intentioned as to irreparably prejudice defendant;
(5) prosecutor did not make not an improper expression of personal opinion as to credibility of witnesses or defendant's guilt or innocence; and
(6) trial court did not abuse its discretion, after including "unlawful force" in original jury instruction defining assault despite lack of a specific defense argument that use of force was somehow lawful, in responding to jury's question during deliberations as to how the law defined "unlawful force" by giving a new definition that omitted the "unlawful force" language; but
(7) record did not support trial court's finding that defendant had ability to pay court costs and did not otherwise show that trial court took defendant's financial resources into account.

Convictions affirmed and case remanded.

West Headnotes

[1] Assault and Battery 37 ⚿91.5(3)

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k91.1 Weight and Sufficiency of Evidence
37k91.5 Degrees of Assault
37k91.5(3) k. Second or lesser degree. Most Cited Cases

Finding that park ranger had reasonable apprehension and fear of bodily injury was supported, in prosecution for assault in the third degree, by evidence that charged incident occurred in a dark, isolated area and by ranger's testimony that defendant was aggravated and appeared unbalanced or under the influence, and that defendant reached his hand toward ranger, swore at him multiple times, and eventually forced him to back up about ten feet. West's RCWA 9A.36.031(1)(a).

[2] Assault and Battery 37 ⚿60

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k60 k. Degrees. Most Cited Cases

Proof that defendant made a true threat is not an element of assault in the third degree. West's RCWA 9A.36.031(1)(a).

[3] Assault and Battery 37 ⚿91.5(3)

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k91.1 Weight and Sufficiency of Evid-

ence
37k91.5 Degrees of Assault
37k91.5(3) k. Second or lesser degree. Most Cited Cases

Finding that defendant intended to create fear of bodily injury was supported, in prosecution for assault in the third degree, by defendant's acknowledgment that he was angry when park ranger shined flashlight on him and may have told ranger to get "that fucking flashlight out of my face," and by ranger's testimony that defendant put his hand up and moved toward ranger as he made that statement and that, after ranger sprayed defendant with pepper spray, defendant kept his fists up toward his face and continued to come toward ranger such that ranger had to back up approximately ten feet. West's RCWA 9A.36.031(1)(a).

|4| Obstructing Justice 282 ⚿170(5)

282 Obstructing Justice
282k166 Evidence
282k170 Weight and Sufficiency
282k170(5) k. Resisting arrest. Most Cited Cases

Finding that defendant had knowledge that park ranger was a law enforcement officer was supported, in prosecution for resisting arrest, by evidence that ranger was wearing his uniform and driving a marked car at time of incident, that ranger identified himself as such when he first approached defendant, and that he identified himself as "police" when he took defendant to the ground.

|5| Obstructing Justice 282 ⚿170(5)

282 Obstructing Justice
282k166 Evidence
282k170 Weight and Sufficiency
282k170(5) k. Resisting arrest. Most Cited Cases

Finding that defendant knew he was under arrest was supported, in prosecution for resisting arrest, by evidence that law enforcement officer identified himself as "police," told defendant to get on the ground, and started to place handcuffs on him, even if defendant was not explicitly informed that he was under arrest.

|6| Obstructing Justice 282 ⚿170(5)

282 Obstructing Justice
282k166 Evidence
282k170 Weight and Sufficiency
282k170(5) k. Resisting arrest. Most Cited Cases

Finding that defendant attempted to prevent his arrest was supported, on charge of resisting arrest, by evidence that park ranger advised defendant to stop resisting while defendant was on the ground, that ranger struggled with defendant for approximately one minute before he was able to handcuff defendant's second hand, and that ranger did not have defendant fully under control during that time.

|7| Obstructing Justice 282 ⚿126(3)

282 Obstructing Justice
282k117 Interfering with Performance of Official Duties
282k126 Resisting Arrest or Detention
282k126(3) k. What constitutes resistance; force or violence. Most Cited Cases

"Force" is not an element of the crime of resisting arrest.

|8| Criminal Law 110 ⚿1947

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1945 Instructions
110k1947 k. Offering instructions. Most Cited Cases

To determine whether counsel was deficient, as element of ineffective assistance, by failing to propose a jury instruction, the court considers whether the defendant was entitled to the instruction and whether there was a strategic or tactical reason not to request the instruction. U.S.C.A. Const.Amend. 6 .

|9| Criminal Law 110 ⚿1947

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1945 Instructions
110k1947 k. Offering instructions. Most Cited Cases

Trial counsel's failure to request a self-defense instruction was not deficient, as element of ineffective assistance in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger, but was supported by a clear strategic reason; defendant argued that he did not assault ranger and did not resist arrest, and to also argue that he used force against ranger only in self-defense would have been completely contradictory. U.S.C.A. Const.Amend. 6; West's RCWA 9A.36.031(1)(a).

|10| Assault and Battery 37 ⚿67

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-defense. Most Cited

In general, reasonable force in self-defense is justified if there is an appearance of imminent danger.

|11| Assault and Battery 37 ⚿67

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-defense. Most Cited

The use of force in self-defense against an arresting law enforcement officer is permissible only when the arrestee actually faces an imminent danger of serious injury or death.

|12| Criminal Law 110 ⚿1171.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(1) k. Conduct of counsel in general. Most Cited Cases

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial.

|13| Criminal Law 110 ⚿1134.16

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.16 k. Arguments and conduct of counsel. Most Cited Cases

Appellate court reviews a prosecutor's conduct in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions.

|14| Criminal Law 110 ⚿2103

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2103 k. In general. Most Cited Cases

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.

|15| Criminal Law 110 ⚿1037.1(1)

110 Criminal Law
110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(1) k. Arguments and conduct in general. Most Cited Cases

Absent a timely objection, reversal based on prosecutorial misconduct is required only if the conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.

|16| Criminal Law 110 ⚿2175

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2164 Rebuttal Argument; Responsive Statements and Remarks
110k2175 k. Inferences from and effect of evidence. Most Cited Cases

Prosecutor was entitled to respond, in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger, to defense counsel's argument that ranger was untruthful in his version of events.

|17| Criminal Law 110 ⚿2153

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2153 k. Attacks on opposing counsel. Most Cited Cases

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity.

|18| Criminal Law 110 ⚿1037.1(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular statements, arguments, and comments. Most Cited Cases

Prosecution's unobjected-to advisement to jury to consider whether defense counsel's argument was trustworthy, and prosecutor's unobjected-to statement that defense counsel was "blaming the victim," were not so flagrant and ill-intentioned as to irreparably prejudice defendant in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger.

|19| Criminal Law 110 ⚿2098(1)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿2139

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2139 k. Expression of opinion as to guilt of accused. Most Cited Cases

A prosecutor may not express his personal opinion of the credibility of witnesses or the guilt or innocence of the accused.

|20| Criminal Law 110 ⚿2098(2)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(2) k. Credibility of accused. Most Cited Cases

Criminal Law 110 ⚖2106

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2106 k. Assault and battery. Most Cited Cases

Criminal Law 110 ⚖2124

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2124 k. Obstructing justice, bribery, and perjury. Most Cited Cases

Prosecutor's recitation of things that did not make sense in defendant's testimony, followed by statement that defendant was "just trying to pull the wool over your eyes," was not an improper expression of personal opinion as to credibility of witnesses or defendant's guilt or innocence, but a permissible explanation of the evidence, in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger.

|21| Criminal Law 110 ⚖847

110 Criminal Law
110XX Trial
110XX(I) Instructions: Objections and Exceptions
110k847 k. Effect of failure to object or except. Most Cited Cases

Jury instructions not objected to become the law of the case; thus, when the State adds an unnecessary element to a to-convict instruction and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence.

|22| Criminal Law 110 ⚖863(2)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) k. Requisites and sufficiency. Most Cited Cases

Trial court did not abuse its discretion, after including "unlawful force" in original jury instruction defining assault despite lack of a specific defense argument that use of force was somehow lawful, in responding to jury's question during deliberations as to how the law defined "unlawful force" by giving a new definition of assault that omitted the "unlawful force" language; trial court identified and corrected a problem in original instruction, there was no suggestion that defendant adapted his trial strategy to inclusion of "unlawful force" language, defense counsel was given opportunity to reargue case but declined, and supplemental instruction correctly stated the law.

|23| Criminal Law 110 ⚖755.5

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k754 Instructions Invading Province of Jury
110k755.5 k. Comments on facts or evidence in general. Most Cited Cases

A jury instruction that states the law correctly and concisely and is pertinent to the issues of the

case does not constitute a comment on the evid- ence.

[24] Criminal Law 110 ⚿1042.3(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.3 Sentencing and Punishment
110k1042.3(1) k. In general. Most Cited Cases

Illegal or erroneous sentences may be challenged for the first time on appeal.

[25] Criminal Law 110 ⚿1134.32

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.32 k. Particular issues in general. Most Cited Cases

Appellate court reviews under the clearly-erroneous standard the trial court's decision to impose discretionary legal financial obligations (LFOs) on a criminal defendant.

[26] Costs 102 ⚿292

102 Costs
102XIV In Criminal Prosecutions
102k292 k. Liabilities of defendant. Most Cited Cases

Different components of the legal financial obligations (LFOs) imposed on a defendant require separate analysis.

[27] Costs 102 ⚿314

102 Costs
102XIV In Criminal Prosecutions
102k313 Taxation or Allowance of Bill
102k314 k. In general. Most Cited Cases

Statutory provision that bars a trial court from ordering a defendant to pay court costs unless defendant is or will be able to pay them does not require the trial court to enter formal, specific findings; rather, it is only necessary that the record is sufficient for appellate court to review whether the trial court took the defendant's financial resources into account. West's RCWA 10.01.160(3).

[28] Costs 102 ⚿314

102 Costs
102XIV In Criminal Prosecutions
102k313 Taxation or Allowance of Bill
102k314 k. In general. Most Cited Cases

Record did not support trial court's finding that defendant had ability to pay court costs and did not otherwise show that trial court took defendant's financial resources into account, as required before ordering him to pay costs; the only evidence of past employment was defendant's testimony at trial that he used to be a carpenter, there was no evidence of present or future employment, the only evidence of his financial resources was his testimony that he lived in a mobile home that did not have running water, and trial court made no inquiry at sentencing into defendant's resources or employability. West's RCWA 10.01.160(3).

[29] Fines 174 ⚿1.5

174 Fines
174k1.5 k. Imposition and liability in general. Most Cited Cases

Trial court was not required, under statute enumerating maximum sentence for defendant's convictions of assault in the third degree and resisting arrest, to enter findings or even take into account defendant's financial resources before imposing fine of $250. West's RCWA 9A.20.021.

[30] Criminal Law 110 ⚿1838

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel

110k1834 Appearing Both Pro Se and by Counsel; Hybrid Representation

110k1838 k. Defendant filing pro se motions while represented by counsel. Most Cited Cases

Appellate court only considers issues raised in a pro se statement of additional grounds for review if those issues adequately inform appellate court of the nature and occurrence of the alleged errors. RAP 10.10.

|31| Criminal Law 110 ⚿1838

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1834 Appearing Both Pro Se and by Counsel; Hybrid Representation
110k1838 k. Defendant filing pro se motions while represented by counsel. Most Cited Cases

Habeas Corpus 197 ⚿290.1

197 Habeas Corpus
197I In General
197I(C) Existence and Exhaustion of Other Remedies
197k290 Appeal, Error, or Other Direct Review of Conviction
197k290.1 k. In general. Most Cited Cases

Issues that involve facts or evidence not in the record are properly raised through a personal restraint petition, not a pro se statement of additional grounds for review. RAP 10.10.

***512** Elaine L. Winters, Washington Appellate Project, Attorney at Law, Seattle, WA, for Appellant.

Donald Lee Calvin, Bellingham, WA, pro se.

***513** Kimberly Anne Thulin, Whatcom Cty. Pros. Atty's Office, Whatcom County Prosecutor's Office, Attorney at Law, Bellingham, WA, for Respondent.

APPELWICK, J.

¶ 1 After an altercation with a park ranger, Calvin was convicted of assault in the third degree and resisting arrest. He argues that his convictions are not supported by substantial evidence, that he was entitled to a self-defense instruction, that he was prejudiced by prosecutorial misconduct, that the trial court erred by correcting and replacing an instruction during jury deliberations, and that there is no evidence to support a finding that he has the ability to pay legal financial obligations. We affirm his convictions. Because there is no evidence to support the trial court's finding that Calvin has the ability to pay court costs and the record does not otherwise show that the trial court considered Calvin's financial resources, we remand for the trial court to strike the finding and the imposition of court costs.

FACTS

¶ 2 In April 2010, Alexander Moularas was a park ranger at Larrabee State Park in Bellingham. The park closes to day users half an hour after sunset. On April 10, Ranger Moularas closed the gate at 8:30 p.m. At around 9:15 p.m., he discovered a car idling in front of the closed gate. Ranger Moularas was driving a dark blue truck with a white stripe across it, a park shield on the door, and a law enforcement light bar on top. He was wearing his uniform

¶ 3 When he pulled up, Ranger Moularas saw Donald Calvin standing outside of his idling vehicle. Ranger Moularas rolled his window down, shut off the ignition, and announced himself as a ranger. Calvin was aggravated, said that he just wanted to take a shower, and asked if Ranger Moularas was going to let him in. Ranger Moularas informed Calvin that the facilities were closed at that point and only available to campers. In a strained tone, Calvin asked how much it was going to cost him to get in. Ranger Moularas responded that the price for camping was $14.

¶ 4 Calvin approached the park vehicle and came within two feet of the open window. Ranger

Moularas was trained not to be approached in his vehicle. He became apprehensive because of Calvin's proximity to his window and the minimal lighting in the area. He exited his vehicle and repeated that Calvin could enter as a camper, but needed to leave if he had no intention of camping. Calvin asked for Ranger Moularas's name. Ranger Moularas responded by giving his first and last name, and Calvin shouted, "Well, at least you know your damn name." At that point, Ranger Moularas thought Calvin might have been under the influence of intoxicants. He took out his flashlight and pointed it at Calvin's chest. Calvin said, "Get that F-ing light out of my face," put his hand up, and reached toward Ranger Moularas. They were standing approximately five feet apart.

¶ 5 Ranger Moularas told Calvin to get back. When Calvin did not retreat, he sprayed him with a quick burst of pepper spray. Calvin advanced such that Ranger Moularas had to back up approximately 10 feet. He yelled at Calvin to get back and get on the ground. When Calvin kept coming with his hands toward his face in an aggressive posture, Ranger Moularas struck him with his baton approximately six times.

¶ 6 Calvin began walking away. Ranger Moularas holstered his baton and went after Calvin to arrest him for assault. He yelled, "Police, get on the ground," grabbed Calvin's left arm, and took him to the ground. He was able to cuff Calvin's left wrist, but Calvin would not yield his right arm. Ranger Moularas told Calvin to quit resisting and give his arm, but Calvin struggled for approximately a minute before Ranger Moularas could get the second cuff on. Ranger Moularas read Calvin his rights and Whatcom County sheriffs took him from the scene. Calvin referred to Ranger Moularas as "ranger dick."

¶ 7 The State charged Calvin with assault in the third degree and resisting arrest. Calvin offered a different version of events at trial. He testified that he initially approached Ranger Moularas's vehicle because he could not understand what he was saying. ***514** When Ranger Moularas asked him to leave, he returned to his vehicle. According to Calvin, only then did Ranger Moularas get out of his vehicle. He walked over toward Calvin, who was by then sitting in his car, shined his flashlight in, and told Calvin to get out. When Calvin got out, Ranger Moularas shined a flashlight in his eyes. Calvin put his hands up to block the light and Ranger Moularas immediately sprayed him with pepper spray. Calvin testified that he had no intent to harm Ranger Moularas, and did not move toward Ranger Moularas before Ranger Moularas started to beat him. But, Calvin acknowledged that he was angry. Calvin knew Ranger Moularas was associated with the park, but denied knowing he was a ranger. Calvin denied resisting arrest, but stated he rolled and twisted to avoid being hit by Ranger Moularas's baton.

¶ 8 The jury found Calvin guilty on both charges. He appeals.

DISCUSSION

I. *Sufficiency of the Evidence*

¶ 9 Calvin argues that neither his conviction for assault in the third degree nor his conviction for resisting arrest is supported by sufficient evidence. Evidence is sufficient to support a conviction if, after the evidence and all reasonable inferences from it is viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *State v. Green,* 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

A. *Assault in the Third Degree*

¶ 10 As instructed in this case, the elements of assault in the third degree are that (1) Calvin committed an act with the intention of placing Ranger Moularas in apprehension and fear of bodily injury, (2) the act in fact created a reasonable apprehension and imminent fear of bodily injury, (3) Ranger Moularas was a law enforcement officer who was performing his official duties, and (4) the acts occurred in the State of Washington. Whether Calvin intended to actually inflict bodily injury is immater-

ial under the jury instructions. Calvin argues that there was insufficient evidence to prove that Ranger Moularas's fear of bodily injury was reasonable or that he intended to place Ranger Moularas in fear of bodily injury.

1. *Reasonable Apprehension and Fear*

[1] ¶ 11 The incident occurred in a dark, isolated area. Ranger Moularas testified that Calvin was aggravated and appeared unbalanced or under the influence. He testified that Calvin reached his hand toward him, swore at him multiple times, and eventually forced him to back up about 10 feet. Those facts are sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Ranger Moularas's apprehension and fear were reasonable.

¶ 12 Calvin's arguments to the contrary are unavailing. He first offers other reasonable interpretations of the evidence. For instance, he claims he has trouble hearing and it is normal to approach someone when you are talking. He also argues he raised his hands to his face only after Ranger Moularas aimed a flashlight at him, and put his fists towards his face only when Ranger Moularas sprayed him with pepper spray. But, in a sufficiency inquiry the court views the evidence in the light most favorable to the State. Calvin's alternative interpretations are irrelevant.

¶ 13 Calvin next compares the State's evidence to other cases in which there was more evidence that apprehension and fear were reasonable. In *State v. Brown,* a police officer was placed in reasonable fear when the defendant spun around, unzipped his jacket, removed a cigarette lighter that looked like a handgun, and pointed the lighter at the officer. 140 Wash.2d 456, 461–62, 998 P.2d 321 (2000). In *State v. Godsey,* a police officer was placed in reasonable fear when the defendant approached him with fists up, invited him to " '[c]ome on,' and took a step toward him." 131 Wash.App. 278, 288, 127 P.3d 11 (2006) (alteration in original). But, those were not sufficiency cases. The mere fact that Calvin's actions in this case were not as overt as the defendants' acts in those cases does not mean there was insufficient evidence here.

***515** [2] ¶ 14 Finally, Calvin argues that he did not make a true threat and the use of a strained or sarcastic tone of voice does not create a reasonable fear of assault. But, Calvin's tone was not the only evidence that Ranger Moularas's fear was reasonable. And, the State was not required to prove that Calvin made a true threat because that is not an element of assault. *See* RCW 9A.36.031(1)(a).

2. *Intent*

[3] ¶ 15 In arguing that he did not have the requisite intent, Calvin points to his own testimony and compares this case to another case with more egregious facts to demonstrate that he had no intent to place Ranger Moularas in fear of bodily injury. Neither of those tactics establishes the absence of facts sufficient to find that Calvin intended to create a fear of bodily injury. Calvin acknowledged that he was angry when Ranger Moularas shined the flashlight on him and conceded that he may have told Ranger Moularas to get "that fucking flashlight out of my face." Ranger Moularas testified that as Calvin said that, he put his hand up and moved toward him. After Ranger Moularas sprayed Calvin with pepper spray, Calvin kept his fists up toward his face and continued to come toward him such that he had to back up approximately 10 feet. Calvin's acknowledged anger, combined with his movement toward Ranger Moularas, provide sufficient evidence for a rational trier of fact to find that Calvin intended to create a fear of bodily injury.

B. *Resisting Arrest*

[4] ¶ 16 The jury was instructed that, to convict Calvin of resisting arrest, the State had to prove that he intentionally prevented or attempted to prevent a peace officer from lawfully arresting him. Calvin argues that he could not have committed the crime of resisting arrest, because he did not know that Ranger Moularas was a law enforcement officer, did not know that he was under arrest, and did not use force.

¶ 17 Calvin relies on *State v. Bandy* for the pro-

position that, "it is essential that [the] accused have knowledge that the person obstructed is an officer" and "it is incumbent on an officer, seeking to make an arrest, to disclose his official character, if not known to the offender." 164 Wash. 216, 219, 2 P.2d 748 (1931). In *Bandy*, a woman was convicted of interfering with a public officer in the performance of his duties after interfering with the arrest of her father. *Id.* at 217–19, 2 P.2d 748. There was insufficient evidence to support her conviction, because there was no evidence that arresting officers displayed badges and there was no other reason for anyone in the area to understand that her father was being arrested. *Id.* at 219–21, 2 P.2d 748. In contrast, in this case Ranger Moularas was wearing his uniform and driving a marked car at the time of the incident. When he first approached Calvin, he identified himself as a ranger. When he took Calvin to the ground, he identified himself as "police." At trial, Calvin acknowledged that he knew Ranger Moularas was in a marked vehicle, knew he was associated with the park, and recognized that he was enforcing park rules. That evidence was sufficient for a rational trier of fact to determine that Calvin knew Ranger Moularas was a law enforcement officer.

[5] ¶ 18 Calvin next asserts that Ranger Moularas never said he was under arrest. He relies on cases in which the defendants were explicitly informed they were under arrest before they resisted. *See State v. Ware*, 111 Wash.App. 738, 740–41, 46 P.3d 280 (2002); *State v. Simmons*, 35 Wash.App. 421, 422, 667 P.2d 133 (1983). But, neither of those cases holds that an arresting officer must formally state that a person is under arrest for that person to be aware they are under arrest. A rational trier of fact could find that when a law enforcement officer identified himself as "police," told Calvin to get on the ground, and started to place handcuffs on him, Calvin knew he was under arrest.

[6][7] ¶ 19 Calvin also argues that he did not use the force necessary to be convicted of resisting arrest, because he was merely recalcitrant. His argument is based on a single sentence in *State v. Hornaday*, 105 Wash.2d 120, 131, 713 P.2d 71 (1986). In that case, the evidence showed that, after the ***516** defendant was arrested, he refused to voluntarily enter the backseat of the police and had to be forcibly placed there. *Id.* at 122, 713 P.2d 71. Counsel commented at trial that the defendant swung his elbow at a police officer, but there was no testimony that supported that assertion. *Id.* at 131, 713 P.2d 71. Thus, the court came to the sensible conclusion that a defendant, already detained, is merely "recalcitrant" and does not commit resisting arrest by refusing to voluntarily enter a police car. *Id.* at 131, 713 P.2d 71. Despite Calvin's persistent argument that he did not use sufficient force to be convicted of resisting arrest, "force" is not an element of the crime. The State bore the burden to prove that Calvin prevented or attempted to prevent his arrest. While Calvin was on the ground, Ranger Moularas advised him to stop resisting. Ranger Moularas testified that he struggled with Calvin for approximately one minute before he was able to handcuff Calvin's second hand. During that time, Ranger Moularas did not have Calvin fully under his control.

¶ 20 There was sufficient evidence to establish that Calvin knew Ranger Moularas was a law enforcement officer, knew he was being placed under arrest, and attempted to prevent his arrest.

II. *Self–Defense Instruction*

[8] ¶ 21 Calvin argues that defense counsel was ineffective in failing to request a self-defense instruction. To prevail on a claim of ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The reasonableness inquiry presumes effective representation. *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). To determine whether counsel was deficient by failing to

propose a jury instruction, the court considers whether the defendant was entitled to the instruction and whether there was a strategic or tactical reason not to request the instruction. *Id.; State v. Powell,* 150 Wash.App. 139, 154–55, 206 P.3d 703 (2009).

[9] ¶ 22 Here, there was a clear strategic reason not to request a self-defense instruction, and even if one had been proposed, Calvin was not entitled to it. Calvin argued that he did not assault Ranger Moularas and did not resist arrest. To also argue that he used force against Ranger Moularas only in self-defense would have been completely contradictory.

[10][11] ¶ 23 Further, Calvin did not present evidence that would have supported a self-defense instruction. In general, reasonable force in self-defense is justified if there is an appearance of imminent danger. *State v. Bradley,* 141 Wash.2d 731, 737, 10 P.3d 358 (2000). But, the use of force in self-defense against an arresting law enforcement officer is permissible only when the arrestee actually faces an imminent danger of serious injury or death. *Id.* at 737–38, 10 P.3d 358. Calvin merely asserts that "a person in Mr. Calvin's position would have been afraid that he was facing imminent and serious bodily harm." That argument goes to the appearance of danger, not the existence of actual danger. Calvin has not shown that he would he have been entitled to a self-defense instruction had one been proposed. He has not established that he received ineffective assistance of counsel.

III. *Prosecutorial Misconduct*

[12][13][14][15] ¶ 24 Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *State v. Monday,* 171 Wash.2d 667, 675, 257 P.3d 551 (2011). The court reviews a prosecutor's conduct in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions. *Id.* A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Boehning,* 127 Wash.App. 511, 519, 111 P.3d 899 (2005). Absent a timely objection, reversal is required only if the conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could ***517** not have been neutralized by a curative instruction to the jury. *State v. Warren,* 165 Wash.2d 17, 43, 195 P.3d 940 (2008). Calvin argues the prosecutor committed misconduct by misstating the law, disparaging defense counsel, commenting on Calvin's constitutional rights, and commenting on Calvin's credibility.

A. *Misstating the Law*

¶ 25 In rebuttal closing argument, the prosecutor argued:

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

¶ 26 The trial court sustained defense counsel's objection and asked the prosecutor to "alter the word." The prosecutor continued:

> I understand, Your Honor. He is saying he is untruthful. He is saying that he is not coming here and telling you the truth. He is saying that Ranger Moularas didn't tell the truth from the beginning. Well, actually maybe told the truth right to Deputy Osborn but after that no. For what reason? Why? I mean, what motive would Ranger Moularas have to not tell you the truth? To change his report about what had actually happened? Why would he call him a fine person but also say he is not telling the truth? That's a big problem. If he is not telling the truth that's a big problem. Big, big, big problem. You know, that's his theory, that Ranger Moularas is just coming in here with these terrible untruths.

Defense counsel did not object to the prosec-

utor's revision.

¶ 27 Calvin argues that the prosecutor's arguments suggested that the jury had to find that Ranger Moularas was lying in order to acquit Calvin. Such an argument misstates the law, the role of the jury, and the appropriate burden of proof. *State v. Fleming,* 83 Wash.App. 209, 213, 921 P.2d 1076 (1996).

[16] ¶ 28 But, the prosecutor is entitled to respond to defense counsel's arguments. Defense counsel argued in closing that Calvin and Ranger Moularas offered different versions of events and that the jury had to find that Ranger Moularas's version was correct to find Calvin guilty. Defense counsel argued that Calvin's version of events was corroborated by an initial statement of probable cause prepared by a responding officer, and Ranger Moularas's version was contradicted by the statement. The prosecutor was entitled to respond to defense counsel's argument that Ranger Moularas was untruthful.

B. *Disparaging Counsel and Commenting on Constitutional Rights*

¶ 29 The prosecutor stated, "You know, another thing for you to consider is whether or not to trust [defense counsel]?" The trial court sustained defense counsel's objection. The prosecutor then advised the jury to, "consider [defense counsel's] argument and decide if it's trustworthy." Defense counsel did not object to the prosecutor's revised statement. The prosecutor also argued:

> He is blaming the victim. He is blaming Ranger Moularas for being in a position and then getting assaulted. Gee, if Ranger Moularas didn't contact him nothing would have happened, right? There would be no crime. Blaming the victim, that's not fair. Nobody wants to see that. It's not right.
>
> Defense counsel did not object.

¶ 30 Calvin argues that these statements were misconduct, because the prosecutor disparaged defense counsel and because a complaint that defense counsel is blaming the victim is a comment on the defendant's right to cross-examine the State's witnesses.

[17] ¶ 31 It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. *State v. Thorgerson,* 172 Wash.2d 438, 451, 258 P.3d 43 (2011). Thus, in *Thorgerson,* it was improper for the prosecutor to refer to the defense counsel's presentation of the case as " 'bogus' " and " 'sleight of hand.' " *Id.* at 451–52, 258 P.3d 43. But, defense counsel did not object and the court ***518** concluded that a curative instruction would have alleviated any prejudicial effect of the attack on defense counsel's strategy. *Id.* at 452, 258 P.3d 43. In *Warren,* it was improper for the prosecutor to tell the jury that the " 'number of mischaracterizations' " in defense counsel's argument was " 'an example of what people go through in a criminal justice system when they deal with defense attorneys.' " 165 Wash.2d at 29, 195 P.3d 940. But, defense counsel did not object and the court concluded that the comments were not so flagrant and ill-intentioned that no instruction could have cured them. *Id.* at 30, 195 P.3d 940. In *State v. Negrete,* the prosecutor told the jury he had " 'never heard so much speculation' " in his life, and that defense counsel " 'is being paid to twist the words of the witnesses.' " 72 Wash.App. 62, 66, 863 P.2d 137 (1993) (emphasis omitted). Defense counsel objected and the trial court sustained the objection, but defense counsel did not request a mistrial or a curative instruction. *Id.* at 66, 863 P.2d 137. The court determined that the remark was improper, but not irreparably prejudicial. *Id.* at 67, 863 P.2d 137. It noted that defense counsel's failure to move for a curative instruction or mistrial strongly suggested the argument did not appear particularly prejudicial in the context of the trial. *Id.* at 67, 863 P.2d 137.

[18] ¶ 32 In this case, the prosecutor advised the jury to consider whether defense counsel's argument was trustworthy and stated that defense coun-

sel was "blaming the victim." Those statements are not as inflammatory as the prosecutors' statements in *Thorgerson, Warren,* or *Negrete.* Although defense counsel initially objected to one of the statements, the objection was sustained and defense counsel did not object to the prosecutor's altered argument. Calvin has failed to show, and the record does not demonstrate, that further objection would have been futile. Thus, he must establish that the prosecutor's comments were so flagrant and ill-intentioned that he was irreparably prejudiced. The fact that defense counsel did not make further objections, or request a mistrial or curative instruction, strongly suggests that the comments did not appear unduly prejudicial in the context of trial. Calvin has failed to establish that any prejudice could not have been eliminated by a curative instruction.

¶ 33 Calvin also urges that the prosecutor's comment that defense counsel was "blaming the victim" was a comment on Calvin's rights to cross-examine the State's witnesses, to testify on his own behalf, and to be represented by counsel. His argument is limited to a bare assertion that his rights were violated, together with citation to the United States Constitution and a case in which the prosecutor argued that the defendant only represented himself because he had a strong desire to have power and be in control. *See State v. Moreno,* 132 Wash.App. 663, 672, 132 P.3d 1137 (2006). Calvin has failed to articulate how his rights were violated by the prosecutor's comments.

C. *Commenting on Calvin's Credibility*

[19] ¶ 34 A prosecutor may not express his personal opinion of the credibility of witnesses or the guilt or innocence of the accused. *State v. Reed,* 102 Wash.2d 140, 145, 684 P.2d 699 (1984). But, prosecutors are entitled to argue inferences from the evidence, and there is no prejudicial error unless it is " 'clear and unmistakable' " that counsel is expressing a personal opinion. *State v. Brett,* 126 Wash.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Sargent,* 40 Wash.App. 340, 344, 698 P.2d 598 (1985)). Thus, it was not improper for the prosecutor to argue, "I would suggest that one reason you might want to believe Pat Milosevich on that issue is that she at the time those events were occurring was watching her husband of 33 years being blown away by a .410 shotgun." *Id.* at 175, 892 P.2d 29. In contrast, it was improper for a prosecutor to state, "I believe Jerry Lee Brown, I believe him," *State v. Sargent,* 40 Wash.App. 340, 343–44, 698 P.2d 598 (1985) (emphasis omitted).

[20] ¶ 35 In this case, the prosecutor recited a long list of things that did not make sense in Calvin's testimony when compared to other evidence and his own inconsistent testimony. Then, the prosecutor told the jury that Calvin was "just trying to pull the wool over your eyes." The trial court overruled defense counsel's objection. The prosecutor's ***519** remarks more closely align with the statements in *Brett* than with the statements in *Sargent.* In context, the comments reflect an explanation of the evidence, not a clear and unmistakable expression of personal opinion.

IV. *Law of the Case Doctrine*

¶ 36 Pursuant to CrR 6.15, it is within the province of the trial court to instruct the jury. Prior to giving the instructions, the parties are afforded an opportunity to object to the giving of any instruction or the refusal to give a requested instruction. CrR 6.15(c). Thus, any problems with jury instructions should generally be resolved before deliberations begin. But, the trial court also has discretion to give supplemental instructions. *See, e.g., State v. Ng,* 110 Wash.2d 32, 42, 750 P.2d 632 (1988); *State v. Frandsen,* 176 Wash. 558, 563–64, 30 P.2d 371 (1934); *State v. Miller,* 78 Wash. 268, 275–76, 138 P. 896 (1914); *State v. Frederick,* 32 Wash.App. 624, 626, 648 P.2d 925 (1982). CrR 6.15(f) expressly contemplates that the trial court may provide additional instructions after deliberations begin, so long as the instructions do not "suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." Calvin nevertheless argues

the trial court erred by correcting and replacing an instruction during jury deliberations.

¶ 37 The trial court originally gave an assault definition based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.50, at 547 (3d ed. 2008) (WPIC) that included the term "unlawful force:"

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

¶ 38 During deliberations, the jury asked the trial court, "How does the law define 'unlawful force?' " The trial court correctly reasoned that the instruction misstated the posture and facts of the case. The term "unlawful force" is only necessary in the definition of assault when there is a specific argument from the defense that the use of force was somehow lawful. *See* WPIC 35.50, at 548. Without any specific lawful force argument, self-defense or otherwise, the trial court was faced with a dilemma. It could issue a response such as, "unlawful force is force that is not lawful." But, that response would be unhelpful. Alternatively, it could give a supplemental instruction that enumerated each type of lawful force. But, that option would give Calvin the benefit of arguments that he did not make. Instead, the trial court drafted a new definition of assault that omitted the "unlawful force" language. Defense counsel objected on the grounds that the State made a mistake and had to live with that mistake, because the instructions had already been submitted. The trial court elected to give the new instruction:

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

The trial court gave defense counsel an opportunity to reargue all or portions of the case. Counsel declined and asked for a mistrial. But, in doing so, defense counsel expressed that Calvin would not be waiving a claim of double jeopardy.

[21] ¶ 39 Under the law of the case doctrine jury instructions not objected to become the law of the case. *State v. Hickman,* 135 Wash.2d 97, 101–02, 954 P.2d 900 (1998). Thus, when the State adds an unnecessary element to a to-convict instruction and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence. *Id.* at 105, 954 P.2d 900. Here, Calvin contends that the State undertook to prove "unlawful force."

¶ 40 Although the State argues that the law of the case doctrine applies only when an element is added to a to-convict instruction, the doctrine is not limited to that application. ***520** It is a broad doctrine that has been applied to to-convict instructions and definitional instructions. *See, e.g., City of Spokane v. White,* 102 Wash.App. 955, 964–65, 10 P.3d 1095 (2000); *State v. Price,* 33 Wash.App. 472, 474–75, 655 P.2d 1191 (1982); *Englehart v. Gen. Elec. Co.,* 11 Wash.App. 922, 923, 527 P.2d 685 (1974). It has been applied in both criminal and civil cases. *See, e.g., Hickman,* 135 Wash.2d at 102, 954 P.2d 900; *Crippen v. Pulliam,* 61 Wash.2d 725, 732, 380 P.2d 475 (1963).

¶ 41 The doctrine is based on the premise that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury. *Hickman,* 135 Wash.2d at 101 n. 2, 954 P.2d 900. Thus, a party cannot challenge unobjected to jury instructions for the first time on appeal, or conversely disavow jury instructions on appeal that were acquiesced to below. That basic function serves to avoid prejudice to the parties and ensure that the appellate courts review a case under

the same law considered by the jury.

¶ 42 Here, an objection preserved the issue for review and the jury reached a verdict based on the supplemental instruction. Because the trial court has discretion to give supplemental instructions, the issue is not whether the law of the case doctrine bound the State to the "unlawful force" language at the time the jury was given instructions. Rather, our inquiry is whether the trial court abused its discretion when the jury sought further clarification and the trial court identified and corrected a problem. In *State v. Ransom,* the State charged the defendant with possession of cocaine with intent to deliver. 56 Wash.App. 712, 712–13, 785 P.2d 469. The State did not pursue an accomplice theory against the defendant. Jd. at 713. But, during deliberations the jury asked the trial court:

> "If someone is an accessory to the actual or constructive or attempted transfer of a controlled substance from one person to another are they both guilty of the same?"

Id. The trial court then gave an accomplice instruction over defense counsel's objection. *Id.* The Court of Appeals reversed. *Id.* at 715, 785 P.2d 469. It concluded that, although the trial court has discretion to give further instructions after deliberations begin, those instructions may not go beyond matters that had been, or could have been, argued to the jury. *Id.* at 714, 785 P.2d 469. The defendant was entitled to rely on the fact that the State chose not to pursue accomplice liability, which is a distinct theory of criminal culpability. *Id.* Accordingly, the trial court erred and a new trial was granted. *Id.* at 715, 785 P.2d 469.

¶ 43 In *State v. Hobbs,* the State acquiesced to an unnecessarily narrow venue element that required the jury to find that the defendant committed the crime in King County. 71 Wash.App. 419, 420–21, 859 P.2d 73 (1993). During jury deliberations, the trial court granted the State's motion to amend the instruction by deleting "King County" and inserting "State of Washington." *Id.* at 421, 859 P.2d 73. Defense counsel explained both below and on appeal that she was aware during trial that the State was not going to be able to prove venue and made strategic trial decisions based on that knowledge. *Id.* at 424, 859 P.2d 73. On appeal, we recognized that the trial court can give supplemental instructions so long as they do not go beyond matters that had been, or could have been, argued to the jury. *Id.* at 424, 859 P.2d 73. But, because defense counsel had adapted her trial strategy to the State's additional undertaking, we found that there was actual prejudice. *Id.* at 420, 425, 859 P.2d 73. We held that when presented with the State's motion to amend, the trial court's only viable options were to hold the State to its election or declare a mistrial. *Id.* at 425, 859 P.2d 73. We remanded for a new trial where the jury could be properly instructed from the outset. *Id.* at 425, 859 P.2d 73.

[22][23] ¶ 44 Unlike in those cases, there was no prejudice here. There is no evidence, or even any suggestion, that Calvin adapted his trial strategy to the inclusion of the "unlawful force" language. Defense counsel was given the opportunity to reargue the case but declined. Calvin does not articulate why that remedy was inadequate. Further, there is no dispute that the trial court's supplemental instruction was a correct statement of the ***521** law. Calvin did not argue lawful force and was not entitled to any lawful force instructions or the inclusion of unlawful force in the definition of assault. The trial court did not abuse its discretion. [FN1]

> FN1. Calvin also argues that the trial court's substitution violated the appearance of fairness doctrine and constituted an impermissible comment on the evidence. It is unclear how those doctrines are violated when the trial court deliberated in response to an inquiry from the jury, discussed the issue with both parties, gave a legally correct substitute instruction, and gave the parties an opportunity to reargue their cases. A jury instruction that states the law

> correctly and concisely and is pertinent to the issues of the case does not constitute a comment on the evidence. *State v. Johnson,* 29 Wash.App. 807, 811, 631 P.2d 413 (1981). Calvin's claims have no merit.

V. *Legal Financial Obligations*

[24] ¶ 45 The trial court ordered Calvin to pay a total of $1,300 in mandatory and discretionary legal financial obligations (LFOs). It is also entered a boilerplate finding stating that Calvin had the ability to pay LFOs:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

Calvin argues that the finding is not supported by evidence, and that the trial court was required to determine whether Calvin had the ability to pay before ordering the payment of costs.[FN2]

> FN2. Calvin did not make these arguments below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wash.2d 472, 477, 973 P.2d 452 (1999).

[25][26] ¶ 46 We review the trial court's decision to impose discretionary LFOs under the clearly erroneous standard. *State v. Baldwin,* 63 Wash.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). Different components of the LFOs imposed on a defendant require separate analysis. *Id.* Here, Calvin challenges the imposition of $450 for court costs and a $250 fine.

A. *Court Costs*

[27] ¶ 47 The trial court may order a defendant to pay court costs pursuant to RCW 10.01.160. But,

> The 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.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. *See State v. Curry,* 118 Wash.2d 911, 916, 829 P.2d 166 (1992). Rather, it is only necessary that the record is sufficient for us to review whether the trial court took the defendant's financial resources into account. *State v. Bertrand,* 165 Wash.App. 393, 404, 267 P.3d 511 (2011), *review denied,* 175 Wash.2d 1014, 287 P.3d 10 (2012). But, where the trial court does enter a finding, it must be supported by evidence.

[28] ¶ 48 In this case, the only evidence of past employment was Calvin's testimony at trial that he used to be a carpenter. There was no evidence at all of present or future employment. And, the only evidence of Calvin's financial resources was his testimony that he lived in a mobile home that did not have running water.[FN3] At sentencing, the trial court did not make any inquiry into Calvin's resources or employability. Indeed, the State does not even argue that there is evidence to support the finding. Rather, it argues that "there is nothing in the record to show that Calvin will not have the ability to pay his legal financial obligations *in the future.* " (Emphasis in original.) But, the inquiry is simply whether there is evidence to support the finding actually entered.[FN4] The ***522** trial court's finding is not supported. And, the record does not show that the trial court took Calvin's financial resources and ability to pay into account.

> FN3. Calvin did not have court-appointed defense counsel, but the record does not establish who paid for his attorney.

> FN4. In the absence of a finding, our inquiry would be whether the record revealed that the trial court took Calvin's fin-

> ancial resources into account and considered the burden it would impose on him as required by RCW 10.01.160.

¶ 49 We remand for the trial court to strike the finding and the imposition of court costs.

B. *Fine*

[29] ¶ 50 Calvin also challenges the imposition of a $250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the trial court enter findings or even take into account a defendant's financial resources before imposing a fine. Calvin has not articulated any basis for striking the fine.

VI. *Statement of Additional Grounds*

[30][31] ¶ 51 A defendant may submit a pro se statement of additional grounds for review pursuant to RAP 10.10. Our review of such statements, however, is subject to several practical limitations. For instance, we only consider issues raised in a statement of additional grounds that adequately inform us of the nature and occurrence of the alleged errors. *State v. Alvarado,* 164 Wash.2d 556, 569, 192 P.3d 345 (2008). Further, we only consider arguments that are not repetitive of briefing. RAP 10.10(a). Finally, issues that involve facts or evidence not in the record are properly raised through a personal restraint petition, not a statement of additional grounds. *Alvarado,* 164 Wash.2d at 569, 192 P.3d 345.

¶ 52 In an impassioned statement of additional grounds, in which Calvin asks that we reverse on a moral basis, Calvin lists 29 assignments of error. Six of those assignments of error, concerning the trial court's substitution of a jury instruction, defense counsel's failure to request a self-defense instruction, and the sufficiency of the evidence, are repetitive of appellant counsel's briefing. Another 17 of his assignments of error concern the effectiveness of defense counsel, and particularly whether defense counsel adequately emphasized certain evidence or legal arguments. But, " '[d]eficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Studd,* 137 Wash.2d 533, 551, 973 P.2d 1049 (1999) (emphasis omitted) (alteration in original). Further, those arguments largely rely on facts or evidence outside the record. Calvin's remaining six arguments concern juror misconduct. But, there is no evidence of juror misconduct in the record. To the extent that Calvin's arguments concern facts and evidence not in the record, his concerns should be raised in a personal restraint petition.[FN5]

> FN5. At our direction, the court clerk denied Calvin's motion to continue oral argument for 120 days, for leave to submit a pro se supplemental brief, for leave to file a personal restraint petition, and to have his pro se supplemental brief and personal restraint petition heard simultaneously with his direct appeal. In the week before oral argument, Calvin filed two additional motions. He first filed a motion to modify the clerk's ruling. Calvin miscomprehends the original denial. He does not need leave to file a personal restraint petition. However, we deny his request to continue this case so that he may file an additional brief and a personal restraint petition to be heard together with his direct appeal. In a second motion, filed only one court day before oral argument, Calvin asked to withdraw ten arguments from his statement of additional grounds and partially withdraw another eight. We deny his request.

¶ 53 We affirm Calvin's convictions and remand for the trial court to strike the finding that Calvin has the present or future ability to pay LFOs and the imposition of $450 in court costs.

WE CONCUR: SPEARMAN, A.C.J., and GROSSE , J.

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(Cite as: 302 P.3d 509)

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