

NO. 46998-7

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT EUGENE FORD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John Hickman

No. 13-1-00932-5

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it exercised its inherent authority to reasonably control safety in the courtroom by directing that the defendant not use a laser pointer?
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3. Considering the evidence in the light most favorable to the prosecution, was sufficient evidence introduced to prove the damage element of first degree malicious mischief, where both the victim and her insurance adjuster testified about monetary losses well in excess of \$5,000.00?
4. Has the defendant sustained his burden of showing both deficient performance and prejudice for ineffective assistance where the defense-proposed reasonable doubt instruction was constitutionally adequate and where it supported the defendant's theory of the case?

5. Did the trial court abuse its discretion at sentencing when it calculated the offender score and entered a restitution order, both of which were based on agreement of the parties, and where the court actually considered ability to pay before entering the legal financial obligations order?

B. STATEMENT OF THE CASE.

1. Procedure.

On March 5, 2013, Robert Eugene Ford (the “defendant”) was charged with first degree robbery and first degree malicious mischief. CP 1-2. The charges were never amended and the case was assigned for trial on October 29, 2014. 1 RP 3.

Testimony commenced on November 4, 2014. In its case in chief, the State called four witnesses: (1) the victim Joan Searls [3 RP 172.], the first-responding patrol officer, Joshua Miller [3 RP 216.], Ms. Searls’ grandson via video deposition [3 RP 285-86.], and her insurance adjuster, Harry Osborn [3 RP 246-47.]. The defendant called a defense investigator, Mike Dahlstrom [3 RP 290.], and the defendant [4 RP 319]. In rebuttal the State re-called Officer Miller. 4 RP 382.

Testimony concluded on November 5, 2014. 4 RP 407. Both the prosecution and defense submitted proposed jury instructions. CP 52-77. CP 19-51. The trial court adopted the defense proposed reasonable doubt

instruction [CP 23. CP 57.] and gave lesser included instructions for both charges. CP 67, 80.

The parties delivered their closing arguments on November 6, 2014. Neither the prosecution nor defense lodged an objection during the initial arguments. 5 RP 439-483. Both attorneys argued the meaning of reasonable doubt in light of the issues and evidence. 5 RP 451-53, 454-57. The only closing argument objection was raised during the prosecution's rebuttal when the defense objected to the prosecution's characterization of the defense theory of the case and strategy. 5 RP 485. That objection was sustained and the court issued an immediate curative admonition and curative instruction: "Okay. It is argument. It's not evidence, and the Court has no reason to believe that the defense intentionally mislead anyone." 5 RP 485.

The jury deliberated and returned guilty verdicts on November 6, 2014. Sentencing was set for December 12, 2014. 6 RP 510. At the sentencing hearing, the defendant's offender score and standard range were agreed to. Both parties calculated the defendant as having a score of nine plus with a standard range of 63 to 84 months on the robbery charge, and nine with a range of 43 to 57 months concurrent on the malicious mischief charge. 6 RP 510-12. CP 128. The defendant was sentenced to a less than mid-range sentence of 72 months. *Id.*

The trial court also ordered restitution. CP 138-39. The defendant agreed to entry of the restitution order which provided for payments of

\$500.00 to the victim, Ms. Searls, for her deductible, and \$33,227.02 to her insurance company. *Id.* In regard to the amount of restitution and the imposition of non-mandatory legal financial obligations, the defense agreed to the amount but argued for leniency:

As far as restitution, we did the math. I did the math. We did it during trial. The math is what it is. That's what the insurance company paid out. We're not going to contest that. We'll sign that and agree to that. That's what the insurance company is out, and I think that was proven to this Court. Otherwise, I would ask that the Court take into account the fact that he is indigent in determining any other non- mandatory LFOs.

6 RP 515. The defense attorney further argued against non-mandatory recoupment for his services as the defendant's public defender. *Id.* He urged the court to "keep it at a bare minimum if possible." *Id.* The court did so and ordered a very reasonable recoupment at only \$1,000.00. CP 126. The defendant filed his timely notice of appeal the same day as the sentencing. CP 140.

## 2. Facts.

The incident that led to the robbery and malicious mischief charges occurred on Thanksgiving Day, November 22, 2012. The victim, Joan Searls, was at home cooking Thanksgiving dinner for her family.

3 RP 174. Her home was situated next to her small business, a coin-operated laundromat. From her home she was able to monitor the laundromat via video surveillance. 3 RP 175.

Ms. Searls saw the defendant come into the laundromat with a load of clothes. 3 RP 175-76. She went back to cooking but a half hour later noticed that the defendant was “trying to rifle in to one of the dryer coin boxes” with a crow bar. *Id.* She reacted by calling out to her grandson for help, putting on footwear and going immediately to the laundromat. 3 RP 176.

Ms. Searls positioned herself at the front door. 3 RP 177. She challenged the defendant. *Id.* The defendant reacted by gathering up his things including a reusable shopping bag that appeared to contain the money from the machines. 3 RP 177-78, 212. The defendant headed for the front door and as he approached Ms. Searls, “he put his left hand out and I just --it knocked me off balance, and he continued on out.” 3 RP 178, 212. Ms. Searls sustained minor injuries from a fall as a result of contact by the defendant: “And I'm trying to catch my balance, and I fell down right near the entrance of the laundromat where there's a mat on the floor and got like a rug burn on my knee. And I also fell into the door casing for the front door, and so I had a -- it bruised my arm.” 3 RP 179. The defendant fled in a waiting vehicle from which Ms. Searls and her grandson were able to get a license plate number. 3 RP 180.

Ms. Searls also testified about the monetary amount of damage to the laundromat. She testified that the total for “fixing the machines that could be fixed, combined with the replacing the machines that could not be fixed” was approximately \$25,000. 3 RP 190. On cross examination

she explained in more detail that 28 of 30 machines were damaged during the incident or “every machine except for the last [two].” 3 RP 194.

Furthermore, on cross examination she itemized the full monetary value of her loss and acknowledged receiving and depositing checks totaling more than \$34,000 from her insurance company in connection with the incident. 3 RP 209.

The patrol officer, Joshua Miller, testified about his investigation of the incident. He recovered the crow bar used to break into the coin boxes, looked for fingerprints, and took photos. 3 RP 219-22, 236. He acknowledged that he had “noticed damage to where I think I would be putting it in the report” including damage to seven dryers, the soap vending machine, but not to the washers. 3 RP 239. From a license plate number from Ms. Searls and Department of Licensing photos, he was able to identify a potential suspect, the defendant. 3 RP 224-25. He compiled and presented photo lineups separately to Ms. Searls and her grandson from which the defendant was identified. 3 RP 225-29.

The insurance adjuster, Harry Osborn, testified in detail about the full scope of the damage. He took photos showing the details of the damage, Exhibits 18A-H. 3 RP 248-258. He also testified about the itemization of the claim. For the “cost to fix the machines that could be fixed” he issued a check for “around \$5,900.” 3RP 259. He also testified that the cost to replace the machines that had to be replaced was “\$19,500-something”. 3 RP 262. There were other amounts paid as part of the

claim such as damage to the flooring that occurred when the machines were replaced and lost income. 3 RP 263.

On cross examination Mr. Osborn explained that his claim photos were taken approximately three weeks after the incident. 3 RP 275. But he had also received photos taken earlier from Ms. Searls. *Id.* He also detailed for the defense attorney the checks written for the claim. 3RP 276-284. Mr. Osborn was not asked whether he had any reason to doubt the legitimacy of the claim or whether he had any suspicions that it had been inflated or fraudulently submitted by Ms. Searls.

The defendant's testimony contradicted Ms. Searls in two respects. First, he claimed that he "absolutely" ran through "where the space was open rather than charge – try to charge through her." 4 RP 325-26. He claimed that she was injured because she grabbed the back of his shirt, "And when I looked back, she was on the ground. . . ." 4 RP 327.

The defendant also disputed the amount of damage that he caused. He was asked directly whether he had damaged "28, 30 machines" and responded, "No, sir. Only three." 4 RP 328. He implied that he had not been in the laundromat for the thirty minutes that Ms. Searls had reported. Instead he claimed, "No. I just wanted it as quick as I could and get out of there." *Id.* On cross he was asked to specify, by using a pen on one of the photographs, which machines he was admitting having damaged. 3 RP 340. The prosecutor was careful to make sure the record showed what the



defendant had marked: “We won’t be able to see the initial in the brown. Do it in white, if you would please.” *Id.*

The defendant was impeached during the State’s rebuttal. Officer Miller was re-called and testified that more than three machines were damaged: “I walked inside the laundromat and saw seven dryers that were damaged. Each of the dryers had pry marks on them. In three of the dryers, the coin boxes were taken out and the coins were missing from them.” 4 RP 385. After having been presented with the photos taken by the insurance adjuster, he further testified that the damage in those photos was consistent with the damage he remembered from the day of the incident. 4 RP 387.

The parties’ presented their closing arguments the day after testimony was completed. The defense did not argue a simple general denial; instead the defense attorney argued, “So we’ve just proven to you that Mrs. Searls’ claims of damages and what her grandson said is not supported by the evidence, and we showed you why, that he couldn’t -- my client couldn’t have damaged those machines in the amount of time that he was there. It just physically could not happen.” 5 RP 474.

The prosecution responded to the defense arguments in its rebuttal. The prosecutor argued that Ms. Searls’ account had been consistent and that the insurance adjuster documented no evidence of insurance fraud. 5 RP 487-88. He addressed the issue of the amount of damage: “When the defense says there’s a difference between the way Officer Miller

describes the damage and Harry Osborn describes the damage, of course there [is]. They're two different people. Two different people walk into a situation or a room, and they start focusing on this and focusing on that, and it never completely matches up." 5 RP 488.

After the closing arguments, the jury deliberated for the remainder of the day. 5 RP 500. It returned guilty verdicts consisting of lesser included second degree robbery for count one and first degree malicious mischief for count two. CP 124. The defendant was sentenced on December 12, 2013, and this timely appeal followed.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION TO PROVIDE FOR ORDER AND SECURITY IN THE COURTROOM WHEN IT ACTED REASONABLY TO CONTROL SAFETY BY DIRECTING THAT THE DEFENDANT NOT USE A LASER POINTER.

Laser devices have become inexpensive and ubiquitous. RCW 9A.49.001. For these reasons, and because they represent a danger if misused, discharge of a laser under certain circumstances can be either a class C felony or gross misdemeanor. *See* RCW 9A.49.020(1)(a)-(f) and RCW 9A.49.030(a)-(c).

In this case, during cross examination of the defendant, the prosecution requested permission that "the witness be permitted to have a laser pointer" in order to explain his testimony using a photograph. 4 RP

338-40. The defendant was then on trial for a class A violent felony offense and a non-violent class B felony. The court denied the request after input from a security officer. *Id.* Moments later the prosecution asked permission to have the defendant mark the exhibit by requesting, “Could the witness be permitted to have a pen or pencil to mark the exhibit with.” *Id.* The defense attorney agreed with the court’s preference for a pen, apparently out of a concern for permanence of the record, by saying: “Your honor, I would agree, as long as it’s made clear what he’s marking on the record. . . .” 4 RP 339-40. The defense attorney’s request was honored and the exhibit was marked with a white pen. 4 RP 340.

In context the trial court’s directive that the prosecution have the defendant use a pen had nothing to do with security. The concern was the quality of the record. As to the laser pointer, the trial court’s ruling could be deemed an exercise of the trial court’s inherent authority to exercise reasonable control of the courtroom for the safety and security of the parties, court staff and the general public. *State v. Monschke*, 133 Wn. App. 313, 336, 135 P.3d 966(2006) (“But a trial court has inherent authority to determine what security measures are necessary to maintain decorum in the courtroom and to protect the safety of courtroom occupants.”), citing *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418, 33 P.3d 735 (2001).

The trial court’s response to the prosecution’s question was quick, reasonable, not calculated to cause prejudice, and not objected to. 4 RP

339. A court has inherent authority to respond to courtroom security issues as circumstances may demand, even to the extent of “the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial. . . .” *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (Deployment of four uniformed state troopers in the first row of the courtroom gallery behind the defendant throughout the trial was held not to violate the defendant’s right to a fair trial.).

Where restraints are concerned, “A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury.” *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981) (“A broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be ‘potentially dangerous’ is a failure to exercise discretion.”). Furthermore trial courts are “cautioned that the use of handcuffs, shackles and other forms of physical restraints should be used only as measures of ‘last resort’.” *State v. Finch*, 137 Wn.2d 792, 850, 975 P.2d 967 (1999), citing *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). These limitations exist “to assure the guaranty under the sixth and fourteenth amendments to the United States Constitution that the defendant receives a fair and impartial trial by protecting certain constitutionally recognized rights, including the right to be presumed innocent, the right to testify on one's own behalf, and the

right to assist and confer with counsel during trial.” *In re Personal Restraint of Davis*, 152 Wn.2d 647, 693-94, 101 P.3d 1 (2004), citing *State v. Hartzog*, 96 Wn.2d at 398.

Drastic security measures such as holding a criminal trial within the confines of a jail are not favored, because “[R]eason, principle, and common human experience” tell us that the average juror does not take for granted a visit to a jail. . . . The average juror does not frequent the jailhouse for the very reason that a jailhouse is not meant to be a public space. Unlike a courthouse, in which the public is welcome to—and in some instances required to—conduct all manner of business, a jail serves a specific purpose not generally applicable to the public at large.” *State v. Jaime*, 168 Wn.2d 857, 863, 233 P.3d 554, 557 (2010) (citations omitted), citing *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

The brief exchange in this case concerning a laser pointer was a far cry from *Jaime*, *Hartzog*, or *Finch*. It had no impact on the defendant’s constitutional trial rights. Nowhere is this more evident than in the jury’s verdicts. In his testimony, the defendant conceded the issues of identity, presence at the scene, motive, and the theft element of the robbery charge. He disputed the injury element of robbery. 4 RP 325-26. His hope was that the jury would side with him rather than the victim on that issue. The jury returned a lesser included verdict of second degree robbery, and therefore could be viewed as siding with the defendant on the injury issue.

Had there been any prejudice to the defendant from the laser pointer exchange, the credibility of his testimony about the injury would have been evident in the jury's verdict.

The defendant's testimony did not suffer. There was no abuse of the defendant's constitutional trial rights, especially in light of the standard of review, namely "whether the trial court has abused its broad discretion to provide for order and security in the courtroom." *State v. Hartzog*, 96 Wn.2d at 401, citing *People v. Duran*, 16 Cal.3d 282, 293, 545 P.2d 1322, 127 Cal.Rptr. 618 (1976). In a split second the trial court in this case dealt with a question about an instrument having dangerous potential. Trial judges are called upon to make such decisions daily under an infinite variety of potentially hazardous circumstances. In light of the defendant having been referred to throughout as a "witness," there was only slight, if any, differentiation of his testimony as compared to the other witnesses.

Such slight prejudice is at worst harmless error if error at all. *State v. Finch*, 137 Wn.2d at 861-62. In *Finch* the defendant was shackled throughout the guilt and penalty phase of a death penalty trial. The Supreme Court reviewed the overwhelming evidence and concluded that based on "the compelling evidence admitted during trial of the Defendant's guilt, we believe that any reasonable jury would have reached the same result in the absence of the trial court's error." *Id.*

Here, the evidence concerning the robbery was controverted in only one significant respect. The defendant's testimony contradicted that of the victim concerning whether he used force thereby causing the victim's injury. The jury did not find him guilty of first degree robbery and thus the only reasonable conclusion is that he received the benefit of the doubt and there was no prejudice. Accordingly, whether this Court were to find no abuse of discretion, or alternatively that any error was harmless, there is no basis for overturning the defendant's conviction due to court security measures.

2. CONSIDERING THE PROSECUTION'S ARGUMENT IN CONTEXT, AND THE DEFENSE ARGUMENT THAT IT REBUTTED, THE DEFENDANT HAS NEITHER SHOWN ABUSE OF DISCRETION, NOR ERROR SO FLAGRANT AND ILL-INTENTIONED THAT AN INSTRUCTION COULD NOT HAVE CURED IT.

In a claim of prosecutorial error<sup>1</sup>, the defendant bears the burden of establishing that the complained of conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997), citing *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986) and *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). Where the issue is error in closing argument, the impropriety analysis must take into account that a prosecutor is permitted wide latitude to argue the facts in

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<sup>1</sup> “‘Prosecutorial misconduct’ is a term of art but is really a misnomer when applied to alleged mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Words such as “misconduct” can have repercussions beyond the case at hand and can over time undermine the public’s confidence in the criminal justice system. Both the National District Attorneys Association (NDAA) and the American Bar Association’s Criminal Justice Section (ABA) urge courts to reserve the phrase “prosecutorial misconduct” for intentional acts, rather than trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited February 16, 2016); National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010), [http://www.ndaa.org/pdf/prosecutorial\\_misconduct\\_final.pdf](http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf) (last visited February 16, 2016). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant’s arguments in this case, the State will use the phrase “prosecutorial error.” The State urges this Court to use the same phrase in its opinions.



evidence, draw reasonable inferences from the evidence and express those inferences to the jury. *Id.* at 727, citing *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998) and *State v. Fiallo–Lopez*, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995).

Furthermore the prosecutor’s argument is examined “in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) (Prosecutor’s argument that “[victim] has come in here to be 100 percent honest” was not improper in light of the prosecutor’s review of the evidence of the victim’s admissions, and where “[i]n context, it is clear that the prosecutor was not personally vouching for the credibility of [the victim].”), citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994).

Where a defendant objects, the standard of review is abuse of discretion. *State v. Gregory*, 158 Wn.2d at 809. If impropriety is established, prejudice is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where no objection is made, a defendant is deemed to have waived any error and must show not only improper conduct and prejudice, but must further show that the alleged error was so flagrant and ill-intentioned that an instruction could

not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).

In this case, without addressing the argument as a whole, the defendant complains of several discrete portions of the prosecutor's rebuttal argument. Opening Brief, pp. 15-23. Before the rebuttal the defense attorney argued vigorously that the defendant was guilty of only misdemeanor theft, not robbery, and only of second degree malicious mischief. 5 RP 483. Concerning the malicious mischief, the defense attorney invited the jury to infer that the victim had fabricated or inflated her property damage claim by fraudulently damaging her own property. 5 RP 468. Concerning the robbery, he invited the jury to find the defendant's credibility was better than the victim's in regard to the injury and force elements. 5 RP 478. The prosecutor responded to both of these arguments in rebuttal.

The prosecutor responded first to the robbery arguments. The defense attorney argued that in connection with her insurance claim, the victim had fraudulently claimed more damage than what the defendant had done and admitted to in his testimony. 5 RP 473-75. The primary evidence pointed to in support of this argument was the difference between what the patrol officer remembered of the damage versus the amount of damage documented later by the insurance adjuster. *Id.*

The prosecutor rebutted the defense attorney's argument. He first reviewed the victim's consistent descriptions of the damage (1) to the 911

operator [5 RP 486.], (2) to the first-responding police officer [*Id.*], (3) in her hand-written statement [*Id.*], and (4) in her testimony on the stand [5 RP 487.]. She was consistent in all of these versions. The prosecutor then pointed out that the insurance adjuster was an “expert, on [the damage] issue in this case. His name’s Harry Osborn. That’s the man’s job.” 5 RP 487-88. There was no hint of fraud in the victim’s insurance claim and there was no testimony from the insurance adjuster suggesting that there was. The prosecutor argued that the difference in the testimony of the two witnesses was explained by the difference in their areas of responsibility:

When the defense says there’s a difference between the way Officer Miller describes the damage and Harry Osborn describes the damage, of course there is. They’re two different people. Two different people walk into a situation or a room, and they start focusing on this and focusing on that, and it never completely matches up. 5 RP 488.

The defense would have this court view the rebuttal argument as referring to facts not in evidence, of creating and debunking a “straw man” or of disparaging the defense theory. The only sense in which the rebuttal argument disparaged the defense theory was in pointing out that the theory was not supported by the evidence or common sense. What was not in evidence were facts supporting insurance fraud. A prosecutor may properly “argue the facts in evidence, draw reasonable inferences from the evidence and express those inferences to the jury.” *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Nor was the prosecution's argument a straw man. The prosecution did not engage in "misrepresenting defense counsel's argument in rebuttal, effectively creating a straw man easily destroyed in the minds of the jury. . . ." *State v. Thierry*, 190 Wn. App. 680, 694, 360 P.3d 940 (2015). The prosecutor responded to the defense attorney's actual argument, namely that because a police officer recalled less damage than the insurance adjuster, the victim must have committed fraud. The prosecutor properly focused on the evidence not conspiracy theorizing in his rebuttal argument. *See State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) ("Because the defense elicited this testimony that she made consistent statements to others who did not testify, the question of such consistency became fair game for comment in closing, where the prosecutor has great latitude to argue from the evidence.")

The prosecutor's argument focused on the actual evidence whereas the defense attorney had invited speculation about a fraudulent insurance claim. The prosecutor commented on the lack of evidence supporting the insurance fraud theory as "legitimate defense strategy" but also as a distraction. 5 RP 485. An objection was raised and sustained to the rhetoric used. The court immediately ruled as follows: "Okay. It is argument. It's not evidence, and the Court has no reason to believe that the defense intentionally mislead anyone." *Id.* No other objections were made and the absence of any other objections supports the view that the argument as a whole was not error, and certainly not error that was so

“flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d at 760-61.

Despite lack of objection, the defendant also claims that the prosecution improperly argued reasonable doubt. It should be pointed out that the prosecutor read verbatim from the court’s reasonable doubt instruction [5 RP 492.] immediately before the complained of argument, and then said in addition:

Now, some people will look at that and say, well, that’s not a very good explanation. Well, I defy you to come up with a better one. Truth beyond a reasonable doubt, to a really large extent, we leave it up to you. You have to figure out what convinces you. What I suggest to you is if you believe it in your heart, if you believe it in your mind, if you believe it in your gut, you’re convinced beyond a reasonable doubt.

5 RP 492.

The prosecutor’s argument was no more objectionable than the defense attorney’s. The defense attorney sought to quantify reasonable doubt:

And that word “abiding” doesn’t mean anything different. That’s one of those words that doesn’t have one of those magic legal words. It means what it means in its ordinary day talk: Permanent, lasting.

So that means that the State has to so convince you that the accused is guilty of the crimes charged -- of each element of the crimes charged – so that after you’ve reached that verdict, ten minutes, ten hours, ten days, ten years, you still have to be convinced yeah, they did do that. If you wake up tomorrow morning and say, well, gee, maybe not, or you walk outside the door on the way to your car and say well,

gee, maybe not, you don't have that abiding belief,  
permanent and lasting belief. 5 RP 456-57.

In context neither of these arguments was error. The prosecution did not minimize its burden of proof, it embraced it and invited the jury to apply the actual text of the instruction. This was not a fill-in-the-blank argument where the jury might be urged that in order to acquit they must say, "I don't believe the defendant is guilty because. . . ." *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936, 940 (2010). By contrast the defense argument strayed closer to the line because it could be argued that it improperly "[purported] to quantify the level of certainty required to satisfy the beyond a reasonable doubt standard . . . ." *State v. Fuller*, 169 Wn. App. 797, 826-27, 282 P.3d 126 (2012). However, in context few trial or appellate courts would find fault with the defense argument since it amounted to nothing more than a rhetorical emphasis of the permanence aspect of "abiding belief."

The defendant's arguments concerning prosecutorial error should be rejected. With one exception that was dealt with by the trial court when it ruled on the one objection, the argument did not approach the line of impropriety. Considering the standards of review, the content of the argument in context, and in light of the evidence admitted at trial, no error has been shown and certainly none that could be called flagrant and ill-intentioned.

3. VIEWED IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, SUFFICIENT EVIDENCE WAS INTRODUCED TO PROVE THE DAMAGE ELEMENT OF THE MALICIOUS MISCHIEF CHARGE.

The well-established sufficiency of the evidence standard strikes an appropriate balance between the jury's right to determine the facts and appellate review of the defendant's constitutional rights. In a sufficiency case, the inquiry on review "must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979). *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628, 631 (1980). "This inquiry does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. 'Instead the relevant question 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.'" *Id.* at 221, quoting *Jackson v. Virginia*, 443 U.S. at 318.

One of the most important safeguards of appropriate appellate review in a sufficiency case, is that "[a]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936

(2006). A number of other safeguards also ensure deference to the jury's fact finding function in a sufficiency challenge. First, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Second, "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Finally, the court defers "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970, abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

This sufficiency challenge is to the knowledge element of the first degree malicious mischief charge. The elements of first degree malicious mischief were provided to the jury in Instruction 21. CP 108. The defendant interposed no exception or objection to the court's instruction. The first element concerned the defendant's actions: the defendant had to cause "physical damage to the property of another in an amount exceeding \$5,000. . . ." *Id.* The second elements concerned his mental state: the defendant must have "acted knowingly and maliciously. . . ." *Id.* Thus the instruction required that the defendant's actions, namely causing "physical damage" must have been done "knowingly." Unwitting damage, or



damage of which the defendant was not aware, would not have been sufficient.

In light of the evidence, including the defendant's testimony, there was no dispute as to knowledge. The defendant intentionally entered the laundromat in order to steal money and intentionally pried open the cash boxes. There was no claim from the defendant that he entered for a benign purpose or that he accidentally (albeit repeatedly) broke open the cash boxes, or that he was unaware that he had pried them open. The defendant planned from the beginning to force open the cash boxes and acted exactly according to his plan. Under these circumstances the argument that he acted without knowledge is not well taken.

The defendant argues that the State had to prove the defendant knew the monetary value of the damage he caused. The plain terms of the malicious mischief statute belie this argument. The statute requires that the act be accomplished knowingly but does not require that the defendant know the monetary result of his act. RCW 9A.48.070(1)(a). This statute is no different from other statutes that differentiate the degrees of crimes based on monetary value. RCW 9A.56.030-050 (first, second and third degree theft), RCW 9A.56.150-170 (first, second and third degree stolen property possession), RCW 9A.56.350 (first and second degree organized retail theft). If statutes criminalizing various degrees of theft, possession of stolen property, or damage to property depended on the defendant having knowledge of the value of property, such crimes could rarely be

rarely be prosecuted. In the midst of a criminal act few if any defendants pause to conduct an appraisal of the value of stolen or damaged property.

The interpretation of the knowledge element offered by the defendant is inconsistent with the notion of market value. Instruction No. 18 defined value as “the market value of the property at the time and in the approximate area of the act.” CP 105. The instruction was consistent with valuation authority which provides that: “Value is the market value of the property at the time and in the approximate area of the offense. . . Market value is the ‘price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.’ Market value is based not on the value to any particular person, but rather on an objective standard.” *State v. Shaw*, 120 Wn. App. 847, 850, 86 P.3d 823, 825 (2004) (citations omitted), quoting *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995), quoting *State v. Clark*, 13 Wn. App. 782, 787, 537 P.2d 820 (1975). Were the State to be required to prove that the defendant was aware of the market value of property such as commercial, coin-operated laundromat equipment, the prosecution of offenses related to such equipment would be nigh impossible.

The defendant has provided no authority that stands for the proposition that the state must prove that the defendant knew the market value of stolen or damaged property in a property crime case. The *Killingsworth* case in particular offers no support because it did not involve the value of property. *State v. Killingsworth*, 166 Wn. App. 283,

290, 269 P.3d 1064 (2012). *Killingsworth* specifically pointed out that the knowledge “instruction stated in part that a person ‘acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. *It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.*’” *Id.* (emphasis in the original).

*Killingsworth* thus contradicts rather than supports the novel interpretation offered by the defendant.

In this case evidence supporting the value of the damage was supplied by the victim and her insurance adjuster. Admittedly the evidence was disputed by the defendant who claimed that he damaged only a couple of the laundry machines. The defense theory was that the victim must have inflated her insurance claim. That theory was rejected by the jury when it convicted the defendant of the first degree malicious mischief charge. There is no basis under the instructions or evidence to overturn that conviction for insufficiency of the evidence as to knowledge.

4. INEFFECTIVE ASSISTANCE HAS NOT BEEN SHOWN WHERE THERE IS NO SHOWING OF DEFICIENT PERFORMANCE OR PREJUDICE, AND WHERE THE REASONABLE DOUBT INSTRUCTION SUPPORTED THE DEFENSE LEGAL THEORY.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 89

L. Ed. 2d 657 (1984). When such testing has occurred the Sixth Amendment is satisfied “even if defense counsel made demonstrable errors” in judgment or tactics. *Id.* This is because “[t]he essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

To prevail on an ineffective assistance claim a defendant must prove that his counsel’s performance was deficient and that the deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficiency means that the representation fell below an objective standard of reasonableness. *State v. McFarland*, 327 Wn.2d 322, 335, 880 P.2d 1251 (1995). Furthermore there is “a strong presumption” that defense counsel’s performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). In order to rebut the presumption, “the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel’s performance.” *Id.* at 42, citing *State v. Richenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522

(1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968) (“What may seem important and favorable to the defendant after the trial may during trial have appeared inconsequential or damaging to his attorney.”).

A non-standard reasonable doubt instruction that does not offend the constitution cannot by itself establish ineffective assistance. This is because insofar as the constitution is concerned, “no specific wording is required, jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241, 1243 (2007), citing *State v. Coe*, 101 Wn.2d 772, 787–88, 684 P.2d 668 (1984). In this case the reasonable doubt instruction communicated the State’s burden in clear, unmistakable terms when it said, “The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.” CP 90.

Adequate and proper explanation of reasonable doubt has challenged courts and attorneys for many years. “Scholars will continue endlessly to debate the best definition of reasonable doubt.” *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656, *review denied*, 133 Wn.2d 1014 (1997). *Castle* found no error in the use of a non-standard reasonable doubt instruction even though a pattern instruction existed and was in general use. The same court considered yet another non-standard reasonable doubt instruction in *State v. Cervantes*, 87 Wn. App. 440, 442,

942 P.2d 382 (1997). In *Cervantes*, the court stated, “The instruction here has both problems and virtues, but we find it satisfies due process, and we affirm.” *Id.* Eight years after *Cervantes* the same court disapproved a similar instruction in favor of the current Supreme Court-approved, pattern reasonable doubt instruction. *State v. Castillo*, 150 Wn. App. 466, 474, 208 P.3d 1201, 1206 (2009) (“We note further that we approved, with reservations, a very similar instruction in *Cervantes*.”).

For a period of time, the instruction in *Castle* was approved for general use. *See* 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part). Eventually however the Supreme Court in *Bennett* simplified matters by directing that trial courts cease using the *Castle* instruction, in favor of the current standard WPIC 4.01. *State v. Bennett*, 161 Wn.2d at 318. In doing so the court determined “as have other courts, that the *Castle* instruction satisfies the constitutional requirements of the due process clause of the United States Constitution” but at the same time declined to “endorse the instruction” for use in Washington. *Id.* at 315.

In this case the instruction at issue was proposed by the defense attorney. It was not the *Castle* instruction. It was a predecessor to the current pattern instruction. 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01 (1998 pocket part). The instruction omitted a sentence from first paragraph of the *Bennett*-approved

instruction. That sentence stated directly that the defendant did not bear the burden of proving that a reasonable doubt exists.

The prosecution in this case proposed no reasonable doubt instruction, much less an alternative to the defense proposal. 4 RP 420-22. Neither party drew the court's attention to the omission of the sentence from the current version of the pattern instruction. *Id.* Neither party objected to the instruction as given. *Id.* The citation at the bottom of the defense proposed inaccurately suggested that it was in fact the current pattern instruction. CP 23. From the lack of discussion or controversy during the instruction conference it may be reasonably inferred either that (1) both parties and the court were unaware that the instruction was not the current pattern jury instruction, or (2) the defense attorney knew the instruction was not current but proposed it anyway and the prosecution and trial court were unaware of the misleading citation.

If the defense attorney proposed a non-**Bennett** instruction on purpose, it can be demonstrated that the instruction suited the defense purposes. The instruction supported the defense theory of the case. The defendant testified. He admitted having caused damage, but not as much as the victim reports [4 RP 328.], and he admitted having stolen money, but denied any physical contact that could support the force element of robbery [4 RP 325-26.]. The missing sentence from the reasonable doubt instruction benefited the defense because the defense theory depended on the defendant's version of events being viewed as credible and the

victim's not. The omission of the sentence specifying that the defendant had no burden was tactically sound.

The defense attorney used the instruction to his advantage. He argued that the defense had proved doubt:

So we've just proven to you that Mrs. Searls' claims of damages and what her grandson said is not supported by the evidence, and we showed you why, that he couldn't -- my client couldn't have damaged those machines in the amount of time that he was there. 5 RP 474.

In an ineffective assistance claim the defendant bears the burden of showing that “no conceivable legitimate tactic” can explain the defense attorney’s decision. *State v. Grier*, 171 Wn.2d at 42. Furthermore the defense must show prejudice. *State v. McFarland*, 127 Wn.2d at 335. Tactics aside, no prejudice can be shown in this case. The defendant was convicted of lesser included second degree robbery. Because no weapon was involved, the only difference between first degree and second degree robbery was bodily injury. It was undisputed that the victim was injured and that the defendant caused the injury (although not in the way the victim described) when he fled from the laundromat with the stolen money. From the lesser included verdict it can be reasonably inferred that the jury was not convinced that the prosecution had sustained its burden of proof as to the injury element in light of the defendant’s testimony. Thus the jury likely concluded that the defendant had proved that a reasonable doubt existed as to the injury element.



If it had been given, the correct pattern instruction arguably would have confused matters. The defense attorney argued, “That’s what the law of robbery is, but I’ve already proven to you from the fact of the injuries that she received and from the amount of things he had in his hand, one, he didn’t have a free hand. And, two, if he did and he didn’t push her, she wouldn’t have obtained the injuries that she had.” 5 RP 478. The defense strategy was to prove that the defendant was credible and the victim was not. The argument depended on the jury believing that the defendant had proved the defendant’s credibility. An instruction telling the jury that the defendant had no burden of proof would have undermined the defense.

Considering the strong presumption that defense counsel operated competently, at least insofar as the constitutional standard for ineffective assistance is concerned, there is no reason to view the non-standard pattern instruction as conclusive proof of ineffective assistance.

5. THE TRIAL COURT DID NOT COMMIT SENTENCING ERROR IN THE CALCULATION OF THE OFFENDER SCORE, IN THE RESTITUTION ORDER, OR IN THE IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

- a. The trial court correctly calculated the defendant's offender score based on the agreement of the parties; any error concerning out of state convictions had no effect on the prison sentence.

The standard for determining a defendant's offender score from out-of-state criminal history begins with a statutory comparability requirement. RCW 9.94A.525(3). "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." *Id.* The State must prove the foreign conviction is comparable to a Washington crime by preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). An out-of-state conviction, not proved to have been comparable by a preponderance of the evidence, may not be used to increase the defendant's offender score. *State v. Weiland*, 66 Wn. App. 29, 831 P.2d 749 (1992).

A court's analysis of comparability requires application of a two part test. *State v. Olsen*, 180 Wn.2d 468, 472-73, 325 P.3d 187 (2014), *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). An out-of-state conviction is equivalent and therefore comparable to a Washington offense if it is either (1) legally comparable, or (2) factually comparable.

*In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). An offense is legally comparable if, after a comparison of the elements of the out-of-state crime with the elements of the analogous Washington crime, “the foreign conviction is identical to or narrower than the Washington statute, and thus contains all the most serious elements of the Washington statute. . . .” *State v. Olsen*, 180 Wn.2d at 472-73. The comparison must be of the Washington criminal statute in effect at the time the out-of-state crime was committed. *In re Lavery*, 154 Wn.2d at 255, citing *State v. Morley*, 134 Wn.2d 588, 605–06, 952 P.2d 167 (1998).

In this case the defendant challenges the inclusion of a 1987 Florida burglary conviction in his offender score. The prosecution submitted a statement of the defendant’s criminal history, of which the defense said, “The State has provided me with the certified copies of the convictions, Your Honor. His range is what it is, and there’s no dispute of that from everything I’ve seen.” 6 RP 512. It is also important to note that deletion of the Florida burglary and the resulting reduction of the offender score by one point would have had no impact on the defendant’s sentencing range for the more serious of the defendant’s two convictions, the robbery. CP 120-21. Because the court calculated an offender score of ten, one point less would have left the defendant still with an offender score of nine and the same sentencing range. *Id.*

The defense attorney reviewed the prosecution’s evidence supporting the offender score calculation. 6 RP 512. No objection was

interposed as to the Florida burglary. If anything it was acknowledged by both the attorney and the defendant. *See* 6 RP 517. The record is silent as to the exact section of the Florida burglary statute at issue. If there was error, it can be said to have been harmless. Other than commenting in general terms on the defendant's multiple prior convictions in Washington and elsewhere, the trial court did not base its below mid-range sentence in any way on the presence or absence of the Florida burglary. In fact the court sided with the defense as to the total sentence, saying "I happen to agree with Mr. Sepe based on the nature of this particular crime. I think 72 months, 6 years, is more than enough time to figure it out and keep the streets safe, at least for a while, while you're in jail. So I'm going to give you 72 months. I'll give you 57 months on the other count, to run concurrently." 6 RP 519.

Harmless error is established concerning a standard range sentence were the record "clearly indicate[s] that the sentencing court would have imposed the same sentence without the prior unclassified prior convictions and the resultant change in offender score." *State v. McCorkle*, 88 Wn. App. 485, 499-500, 945 P.2d 736(1997) *aff'd*, 137 Wn.2d 490 (1999). *See State v. Cabrera*, 73 Wn. App. 165, 170, 868 P.2d 179 (1994) ("Since the court sentenced [the defendant] near the bottom of what it believed was the correct range, we cannot conclude that it would have chosen a sentence near the top of the range using a lower offender score.").

In this case, review of the sentencing hearing supports the view that the trial judge would have imposed 72 months regardless of whether the offender score was nine or one point above nine. 6 RP 519-20. But if the calculation was error and not harmless error, the trial court's calculation of the offender score should be reversed and this case should be remanded for re-sentencing with an opportunity for the parties to present evidence concerning the Florida burglary conviction. RCW 9.94A.530(2), *State v. Jones*, 182 Wn.2d 1, 9, 338 P.3d 278, 282 (2014).

- b. The trial court did not abuse its discretion by accepting the agreement of the parties as to the amount of restitution and ordering an amount calculated from the victim's actual monetary loss.

A sentencing court has the statutory authority to impose restitution as part of an offender's sentence. RCW 9.94A.753. Review of whether a trial court exceeded its authority is *de novo*, as is interpretation of the restitution statute. *State v. Burns*, 159 Wn. App, 74, 78, 244 P.3d 988 (2010). A trial court has discretion to determine the amount of restitution and its decision will be overturned only if "if the decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), *affirmed*, 161 Wn.2d 517, 166 P.3d 1167 (2007), citing *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992), quoting *State ex rel. Carroll v.*

*Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “In short, the restitution statute allows the trial court considerable discretion in determining restitution, ‘which ranges from none (in some extraordinary circumstances) up to double the offender’s gain or the victim’s loss.’” . . . Nor does the statute require that “the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum.” *State v. Tobin*, 132 Wn. App. at 174 (citation omitted), quoting *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005).

The trial court in this case ordered restitution in an amount calculated from the victim’s actual loss. This was with the agreement of the defense. 6 RP 515. *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192, 211 (2005) abrogated on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (“To determine the amount of restitution, the trial court can either rely on a defendant’s acknowledgment or it can determine the amount by a preponderance of evidence.”), citing *State v. Hunsicker*, 129 Wn.2d 554, 558–59, 919 P.2d 79 (1996) and *State v. Ryan*, 78 Wn. App. 758, 761, 899 P.2d 825 (1995). There can be no abuse of discretion where the trial court heard the trial testimony and admitted trial exhibits supporting the amount of the loss, especially where the defense had cross examined the witnesses on that very point and expressly agreed with the calculation.

The defendant’s argument depends on the Court’s willingness to graft additional language onto the restitution statute. The defendant

argues that there is a limit on the amount of restitution, namely “the lower of the two amounts must control the court’s restitution order.” Opening Brief, p. 35. The statutory text states simply: “The amount of restitution shall not exceed double the amount of the offender’s gain or the victim’s loss from the commission of the crime.” RCW 9.94A.753(3). It does not add the phrase, “whichever is less” at the end. There is no basis in the statutory text, nor in any case interpreting it for the construction advocated by the defendant.

The interpretation offered by the defendant is absurd. In violent crimes there is often no monetary gain to the offender whereas medical bills and other expenses can be extremely high. If the restitution statute were construed as limited by the defendant’s gain, no restitution could be ordered whatsoever in many such cases. Instead the statute provides for the recovery of “easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury” and for the court to also take into account “the offender’s gain . . . from the commission of the crime.” RCW 9.94A.753(3). There is a limit on the amount of restitution but it is double the amount of the victim’s loss or the defendant’s gain depending on which basis is used for the calculation.

- c. The trial court conducted an individualized inquiry concerning the defendant's ability to pay non-mandatory legal financial obligations and properly exercised its discretion to impose obligations that will not be burdensome.

When imposing discretionary legal financial obligations (“LFO’s”), a trial court must include in its record “that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.” *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). In making such an individualized determination it is important to bear in mind that “[s]entencing judges have traditionally been given discretion in the sources and types of evidence used for determining a defendant’s sentence.” *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2d 78 (1992). Moreover, on direct review an “appellate court may refuse to review any claim of error which was not raised in the trial court.” *State v. Blazina*, *supra* at 832, quoting RAP 2.5(a).

In most violent crime cases legal financial obligations are the least of the defendant’s concerns at sentencing. That having been said, the trial court in this case actually did make a brief individualized inquiry. The defense attorney advocated for leniency regarding LFO’s when he said, “I would ask that the Court keep it at a bare minimum if possible.” The trial



court appeared to agree. It appeared to decide that the defendant would not have to pay attorney's fees for the trial, but only for pre-trial proceedings: "Mr. Sepe, I really appreciate your civic duty, but the taxpayers deserve to get some reimbursement. For the effort you put into this and the success that you got, I think \$1,000 may cover the preliminary motions, so I'm going to do \$1,000 DAC recoupment and the rest of the legal financial obligations." 6 RP 519.

*Blazina* should not be read, as the defendant would have this Court read it, as mandating a lengthy contested hearing about money at all sentencing hearings. Rather the court should give consideration to the defendant's individual circumstances commensurate with the rest of the issues in the sentencing hearing. *State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015). In this case the court did so and its decision making should be upheld.

The defendant did not object to the trial court's legal financial ruling. This Court certainly has discretion to review or not review an unpreserved claim of error under RAP 2.5(a). In this case this Court should decline review. It cannot be said that the trial court had no information before it from which an individualized determination could be made. It knew that the defendant was indigent and that he claimed to have committed the crimes to get gas money to travel to Yakima. 4 RP 334. It also knew that the defendant faced several years in prison and from that fact could easily infer that he may have difficulty finding employment

after release. Even with those facts in mind, the trial court could hardly be faulted for believing that the taxpayer's were deserving of minimal reimbursement from the defendant. In the event honest effort does not permit the defendant to succeed in paying, a remission hearing can be scheduled at any time pursuant to RCW 10.01.160(4) to remit all or part of his non-mandatory LFO's.

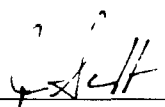
In light of the record from the trial and the sentencing hearing in this case, and with the legal remedy provided by RCW 10.01.160(4) in mind, there is no reason to reverse the trial court's LFO sentence. Even if an individualized inquiry is not an issue waived by the defendant, the trial court's LFO sentence should nevertheless be upheld.

D. CONCLUSION.

For the foregoing reasons the defendant's conviction and sentence should be affirmed.

DATED: February 18, 2016

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>office</sup>~~US~~ 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.

2/19/16  
Date

*[Handwritten Signature]*  
(Signature)

**PIERCE COUNTY PROSECUTOR**

**February 19, 2016 - 10:11 AM**

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