Supreme Court No. 99865-5
(COA No. 373690)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LANCE ALAN THOMASON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Lance Thomason, petitioner, asks this Court to accept review of the Court of Appeals decision terminating review pursuant to RAP 13.3 and RAP 13.4(b)(1)-(4).

B. ISSUES PRESENTED FOR REVIEW

1. Lance Thomason took less than $15 in food items in a grocery store and left without paying. Outside, a security guard grabbed him, and he struck the guard and ran away. For this he was convicted of second degree robbery. The trial judge observed that such conduct amounts to little more than a "glorified shoplifting" but denied Mr. Thomason's request for an exceptional sentence, lamenting that it had no discretion to impose below the minimum standard range sentence of over five years in prison.

The Court of Appeals affirmed the trial court's mistaken belief it lacked discretion to impose a mitigated sentence based on the unique nature of this misdemeanor-level conduct qualifying as a serious felony. This Court should accept review of the Court of Appeals decision that conflicts with this Court's caselaw finding that a de minimus violation of a statute justifies

a downward departure from the standard range. RAP 13.4(b)(1). Moreover, imposing mandatory lengthy sentences on poor people who commit minor crimes fuels a costly and unjust system of mass incarceration which is a matter of substantial public interest. RAP 13.4(b)(4).

2. Ineffective assistance of counsel requires reversal where counsel's performance was deficient and prejudice results. Here, two police officers' testimony was rife with improper propensity evidence, improper opinion, hearsay, and a violation of the best evidence rule. Nonetheless, trial counsel did not interpose a single objection.

This unchallenged, improper testimony raised the risk the jury would convict based on propensity and the aura of reliability surrounding law enforcement witnesses. Still, the Court of Appeals found counsel's failure to object was "strategic," contrary to the requirement that the trial strategy must also be reasonable. RAP 13.4(b)(1)&(3).

C. STATEMENT OF THE CASE

Plainclothes security guard Daniel Swartz followed Lance Thomason out of the Yoke's grocery store, believing he had

taken a few food items without paying. RP 124–28. Outside, Mr. Swartz grabbed Mr. Thomason's arm, showed him a badge, and "asked him to come back in the store." RP 129–30. Mr. Thomason tried to pull himself free, and Mr. Swartz shouted at him to "stop resisting." RP 130–31.

Mr. Thomason swung a fist at Mr. Swartz three times, hitting him in the face the third time. RP 131–32. Mr. Thomason escaped Mr. Swartz's grasp by slipping out of his sweatshirt, and ran. RP 131–32. In light of the low value of the items— under $15 dollars— Mr. Swartz let him go. RP 133, 157–58.

For this the State charged Mr. Thomason with one count of first-degree robbery, reduced to second-degree robbery on the first day of trial. RP 14; [1] CP 1-2, 46.

The State played surveillance video recorded at Yoke's for the jury. RP 141. The video supported Mr. Swartz's testimony that a man in a grey sweatshirt and cap—identified by Mr. Swartz as Mr. Thomason—entered Yoke's, and a man in a black T-shirt and jeans—identified by Mr. Swartz as himself—

[1] Citations to the verbatim report of proceedings without specifying a date are to the trial, held January 13 and 14, 2020.

followed the man in the gray sweatshirt through the store. RP 142–43; Ex. P-22 at IMG_0166.MOV, IMG_0167.MOV, IMG_0168.MOV, IMG_0171.MOV.[2] But at each point in the video when Mr. Thomason is supposed to have taken merchandise or concealed it in his clothes, the action took place off camera or behind an obstruction. RP 144–46; Ex. P-22 at IMG_0167.MOV, IMG_0168.MOV.

Mr. Thomason's mother, Kathy Thomason, was called by the State to testify. RP 111–12. Kathy[3] said police came to her house, which is near Yoke's, to ask whether anyone had gone into the house on the day of the incident. RP 113. She showed the officers footage recorded by surveillance cameras installed at the house, which depicted Mr. Thomason walking through Kathy's property. RP 114. The officers did not try to collect the surveillance footage. RP 171.

Spokane police officers Ron Van Tassel and Darryl Groom testified as well. Officer Van Tassel recited Kathy's out-of-court

[2] Exhibit P-22, the Yoke's surveillance video, consists of 11 video files in .MOV format.

[3] Kathy's first name is used to distinguish her from Mr. Thomason; no disrespect is intended.

statement that Mr. Swartz's description of the Yoke's suspect sounded like Mr. Thomason. RP 167–68. He also described the contents of the video, despite admitting he could have collected the video himself and was unable to explain why he did not. RP 168–69, 171. He further said that he was able to identify Mr. Thomason based on "[p]hotographs that we have through our system, our computer system." RP 169. Mr. Thomason's trial counsel raised no objections to any of Officer Van Tassel's testimony. RP 161–72.

Officer Groom recalled going to Yoke's, speaking to Mr. Swartz, and reviewing surveillance video. RP 176–78. The officer recited Mr. Swartz's out-of-court statements about the incident, as well as Kathy's statements to Officer Van Tassel about her son matching Mr. Swartz's description of the suspect. RP 177–78, 184. He also identified Mr. Thomason as the suspect in court, despite never having seen him before trial except in the surveillance video played for the jury. RP 184–85. Trial counsel did not object to any of Officer Groom's testimony either. RP 174–85.

The jury found Mr. Thomason guilty. CP 62. At sentencing, the State and trial counsel recommended a sentence at the low end of the standard range: 63 months. 1/23/20 RP 4, 6. Mr. Thomason, however, requested an "exceptional sentence" of 12 months. 1/23/20 RP 9.

The court expressed frustration at the standard range sentence for what it described as a "glorified shoplifting charge," in which "someone shoplifts and it ends up turning into a robbery because of a chain of events with security personnel generally, just like what happened here." 1/23/20 RP 10. Nonetheless, the court insisted the "only discretion" it had to sentence Mr. Thomason within the standard-range, and sentenced him to the minimum 5.25-year prison term. 1/23/20 RP 10-12; CP 103–04. The court found Mr. Thomason indigent, waived mandatory fees but ordered restitution in the "de minimis" amount of $14.98. 1/23/20 RP 12; CP 107.

The Court of Appeals rejected Mr. Thomason's contention on appeal that the unique nature of his offense conduct—a poor person's theft of a small amount of food inside the store followed by a struggle with a plainclothes security guard outside the

store—belonged to a distinct and less culpable category that the Legislature did not necessarily consider, and was thus a valid mitigating circumstance the court could consider in departing from the standard range. Op. at 9-11.

The Court of Appeals also found it was "strategic," rather than ineffective assistance, for Mr. Thomason's counsel to not object to the portions of the police officer's testimony that were inadmissible propensity and hearsay evidence. Op. at 7.

D. ARGUMENT

1. **A "glorified shoplifting"—the taking of less than $15 in food and using relatively minor force to evade security—meets this Court's criteria for a mitigating factor in support of an exceptional sentence for the offense of second degree robbery.**

The SRA "structures" sentencing discretion to "insure that sentences are commensurate with the punishment imposed on others committing similar offenses." *State v. Law*, 110 Wn. App. 36, 43, 36 P.3d 374 (2002) (citing RCW 9.94A.010(3)); RCW 9.94A.010; RCW 9.94A.515; RCW 9.94A.525. The SRA provides a "standard sentence range," from within which the court selects the sentence "it deems appropriate." RCW 9.94A.530(1). The trial court is not constrained to sentence within the standard

range. If it finds "substantial and compelling reasons justifying an exceptional sentence," it may depart downward and impose a sentence below the standard range. RCW 9.94A.535. The SRA provides a list of mitigating circumstances a court may consider. RCW 9.94A.535(1).

A factor not listed in RCW 9.94A.535(1) may provide a basis for departure below the standard range it if meets a "two-part test." *State v. O'Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015) (citing *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). First, the factor cannot be one the Legislature "*necessarily* considered . . .when it established the standard sentence range." *Id.* Second, the "factor must be 'sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *Id.*

The manner in which the offense was committed can be a mitigating circumstance if it is categorically less culpable than other cases of the same offense in a way the Legislature did not necessarily anticipate. *See State v. Alexander*, 125 Wn.2d 717, 726–27, 888 P.2d 1169 (1995). In *Alexander*, this Court considered whether the delivery of an "extraordinarily small

amount" of cocaine could support a mitigated exceptional sentence for delivery of a controlled substance. *Id.* "[T]he Legislature did not necessarily consider" this factor, this Court reasoned, because the precise amount of drugs delivered is neither an element of the offense nor a fact considered in computing the standard range. *Id.* at 726–27. And the small amount of cocaine—less than one-tenth of a gram—was distinct enough to separate the defendant's offense from other instances of delivery of a controlled substance. *Id.* at 727. The defendant's "low level of involvement" in the transaction was also a mitigating factor for similar reasons. *Id.* at 728–29.

The "glorified shoplifting" version of second-degree robbery Mr. Thomason was convicted of here satisfies both parts of the test. As relevant here, the Legislature defines "robbery" as taking property from the presence of another against their will, using or threatening force to "obtain or retain possession of the property." RCW 9A.56.190; *see* RCW 9A.56.210(1) ("A person is guilty of robbery in the second degree if he or she commits robbery."). In short, robbery consists of both "a property crime and a crime against the person," *State v. Nelson*, 191 Wn.2d 61,

76, 419 P.3d 410 (2018) (quoting *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005)), without requiring any specific relationship in time or place between the taking and the use of force.

As proven to the jury, Mr. Thomason's "property crime" and "crime against the person" occurred at different times and in different places—taking $14.98 of merchandise inside the store, and later striking the security guard who accosted him outside the store. RP 125–27, 129–32, 1/23/20 RP 12. In fact, as Mr. Swartz was in plain clothes posing as a customer, Mr. Thomason likely did not know anyone was watching him inside the store and did not expect to use any degree of force before Mr. Swartz grabbed him outside. RP 123, 125.

If charged separately, these two acts would amount to third-degree theft, *see* RCW 9A.56.050(1) (theft of items worth less than $750), and fourth-degree assault, *see* RCW 9A.36.041(1) (assault without any of the criteria for superior degrees or custodial assault). Both offenses are gross misdemeanors in the circumstances of this case, RCW 9A.36.041(2); RCW 9A.56.050(2), and, if sentenced concurrently,

the highest sentence Mr. Thomason would face would be the 12 months he asked for, RCW 9.92.020.

The Legislature did not necessarily consider the possibility that its definition of robbery would cause the prosecutor to cobble together these two otherwise distinct misdemeanors, committed at different times, into the class B felony of second-degree robbery. RCW 9A.56.210(2); *see Alexander*, 125 Wn.2d at 724–25 ("not all exceptional fact patterns can be anticipated").

Still, the Court of Appeals rejected Mr. Thomason's claim that under this Court's caselaw, the unique facts of his case permitted the court to exercise its discretion and impose an exceptional sentence. Op. at 7-11. The Court of Appeals misconstrued the applicable caselaw by conflating "unique" with "uncommon." Op. at 11. Based on other examples of prosecutors charging people with robbery for using force outside a store to retain property taken inside the store, this Court concluded this category of offense conduct is at least somewhat common. *Id.* (citing *State v. Manchester*, 57 Wn. App. 765, 790 P.2d 217 (1990); *State v. Phillips*, 9 Wn. App. 2d 368, 372, 444 P.3d 51

(2019)). Because this category of robbery appears not to be uncommon, the Court of Appeals determined it is not "unique." *Id.*

This misconstrues this Court's reasoning in *Alexander,* which demonstrates that a category of offense conduct does not have to be uncommon to be unique. In *Alexander*, delivery of an "extraordinarily small amount" of cocaine is a unique and less culpable category of offense conduct that supports an exceptional sentence. 125 Wn.2d at 726–27. This does not mean this offense conduct was uncommon. What made the offense conduct unique was not its rarity, but its distinctiveness—delivery of only a very small amount is "not inherent in all crimes which are part of the class of crimes defined by" the pertinent statute. *Id.* at 727.

As in *Alexander*, theft of low-value food items inside a store combined with a low-level assault outside the store is "not inherent in all crimes which are part of the class of crimes defined by" RCW 9A.56.190 and RCW 9A.56.210(1). *Id.* Such offense conduct is therefore a unique category of robbery, common or uncommon.

Because Mr. Thomason's offense conduct belongs to a distinct and less culpable category that the Legislature did not necessarily consider, it is a valid mitigating circumstance. *O'Dell*, 183 Wn.2d at 690; *Alexander*, 125 Wn.2d at 726–27. This Court should accept review of the Court of Appeals decision that misapplied this Court's reasoning to find the trial court lacked the discretion to impose an exceptional sentence. RAP 13.4(b)(1).

This Court should also grant review because warehousing poor people in prison for minor crimes is a matter of substantial public interest. RAP 13.4(b)(4). The widespread imposition of long sentences sets Washington State apart from other democratic societies, raises significant issues of fairness and "is an inefficient and expensive way to protect public safety." Katherine Beckett & Heather D. Evans, "About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State,"*A Report for ACLU of Washington State* (Feb. 2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state (last accessed 6/4/21).

This Court should accept review. RAP 13.4(b)(1)&(4).

2. The Court of Appeals decision that finds a failure to object to pervasive and prejudicial inadmissible testimony is "strategic" rather than ineffective, misapplies the test for ineffective assistance of counsel.

The Sixth Amendment and article I, section 22 of the Washington State Constitution guarantee not merely the assistance of counsel, but the *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Ineffective assistance requires reversal where (1) "defense counsel's conduct . . . fell below an objective standard of reasonableness," and (2) "the deficient performance resulted in prejudice." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Courts generally presume reasonable performance, and will not find deficient performance where counsel's conduct amounted to "legitimate trial strategy or tactics." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). The presumption is rebutted where "no conceivable legitimate tactic" can "explain[] counsel's performance." *Reichenbach*, 153 Wn.2d at 130 (citing

State v. Aho, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)). For example, "counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason." *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019) (citing *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998)).

Even if defense counsel had a strategic or tactical reason for certain actions, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Here, trial counsel failed to object to multiple instances of inadmissible evidence. In the most egregious example, the State asked Officer Van Tassel testified that he did not recognize Mr. Thomason while watching Kathy's surveillance video, but later saw him in "[p]hotographs that we have through our system, our computer system." RP 169. In other words, Officer Van Tassel saw multiple mug shots of Mr. Thomason in the Spokane Police Department's database. RP 169.

By making clear to the jury the police department had Mr. Thomason's "photograph 'on hand,'" Officer Van Tassel's

testimony implied Mr. Thomason "had previously been arrested or convicted on another charge" in violation of ER 404. *State v. Henderson*, 100 Wn. App. 794, 803, 998 P.2d 907 (2000). As a result, Van Tassel's testimony raised a "prejudicial inference of criminal propensity." *State v. Sanford*, 128 Wn. App. 280, 286–87, 115 P.3d 368 (2005). Yet trial counsel failed to object to this inadmissible and highly prejudicial statement. RP 169.

Relatedly, Officer Van Tassel's testimony describing the contents of Kathy's surveillance video violated the best evidence rule. Under this rule, a party may "prove the content of a . . . recording" only by way of the recording itself, unless the original was "lost" or "destroyed." ER 1002, 1004(a). "By far the most common means of proving loss or destruction" of an original is "a diligent but unsuccessful search." *United States v. McGaughey*, 977 F.2d 1067, 1071 (7th Cir. 1992) (alteration omitted) (quoting 5 Weinstein's Evidence ¶ 1004(1)[05] at 1004–18 (1983)).[4]

Officer Van Tassel made no attempt to retrieve Kathy Thomason's surveillance footage—in fact, he admitted he

[4] Courts "may look to federal case law" analyzing federal evidence rules that "mirror" Washington's. *In re Det. of Pouncy*, 168 Wn.2d 382, 392 n.9, 229 P.3d 678 (2010); *compare* ER 1004 *with* Fed. R. Evid. 1004.

"probably should have grabbed it." RP 171. Officer Groom testified the police "were not able to get a copy" of the footage, RP 184, but the State's evidence shows this to be false—the Yoke's footage was obtained by video recording it in real time as it played on a computer screen, Ex. P-22, and Officer Van Tassel said he could have recorded Kathy's footage with a body camera, RP 171. His testimony describing the contents of the video therefore violated the best evidence rule. Yet, again, counsel raised no objection. RP 168–69.

Unlike Kathy's video, the State played surveillance footage from Yoke's during the trial. RP 141–50; Ex. P-22. Officer Groom testified he reviewed the footage when he visited the store and spoke with Mr. Swartz. RP 176, 178. This video was Officer Groom's only opportunity to see what Mr. Thomason looks like—like the jury, he saw Mr. Thomason in person for the first time at trial. RP 11, 184. Yet the State asked Officer Groom to identify Mr. Thomason from the witness stand. RP 184–85.

Because Officer Groom was in no better position to identify Mr. Thomason from the surveillance video than the jury, his in-court identification was an improper opinion on

guilt. *State v. George*, 150 Wn. App. 110, 119, 206 P.3d 697 (2009); *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). Counsel did not object to this inadmissible testimony either. RP 184–85.

Lastly, both police officers' testimony was rife with inadmissible hearsay. Officer Van Tassel testified Mr. Swartz told him he saw Mr. Thomason go into a house, and parroted Mr. Swartz's account of being assaulted at the store. RP 163–64, 167. The officer also related Kathy's statements that Mr. Swartz's description of the suspect sounded like Mr. Thomason, and that he was the man shown in her surveillance video. RP 167–69. Likewise, Officer Groom recalled Mr. Swartz's narrative of what had happened at Yoke's. RP 177–78. Had defense counsel objected to these statements, the State would have had to prove either they were not hearsay or a hearsay exception applied. *See State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015) (proponent of evidence must prove admissibility).

Here, there was no reason for the officers to relate Mr. Swartz's and Kathy Thomason's statements except to improperly bolster their credibility. The out-of-court statements

were therefore inadmissible hearsay. *Id.* And counsel raised no objection to any of them. RP 163–64, 167–69, 177–78.

The Court Appeals found this failure to object was "strategic" because "identity was not an issue at trial." Op. at 7. Even if the jury could have acquitted based on a lack of evidence Mr. Thomason stole anything, this is not a reasonable trial strategy. *See Flores–Ortega,* 528 U.S. at 481. The damage the two officers' inadmissible testimony did to Mr. Thomason's case was substantial. Juries tend to imbue officers' statements with "a special aura of reliability." *State v. Kirkman*, 159 Wn.2d 918, 928–29, 155 P.3d 125 (2007). By referring to Mr. Thomason's multiple mug shots, describing the contents of Kathy's unproduced surveillance video, and identifying Mr. Thomason from the witness stand, the officers invited the jurors to discard any doubts they might have about whether Mr. Thomason stole anything, and to instead rely on the officers' presumed expertise. By reciting Kathy's and Mr. Swartz's statements, the officers implicitly endorsed their testimony, buttressing their credibility.

Counsel's failure to object to any of the inadmissible testimony or to any part of the State's presentation was ineffective, not a reasonable strategy.

E. CONCLUSION

Based on the foregoing, petitioner Lance Thomason respectfully requests this that review be granted pursuant to RAP 13.4(b)(1)-(4).

DATED this 4th day of June, 2021.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. LANCE A. THOMASON, Appellant.	)))))))))	No. 37369-0-III UNPUBLISHED OPINION

STAAB, J. — A jury found Lance Thomason guilty of second degree robbery for placing food items under his clothes at a grocery store, exiting the store without paying for the items, and striking a security guard when confronted in the parking lot. At sentencing, both parties recommended the low-end of the standard range. After expressing dissatisfaction with the charges and resulting sentencing range, the court accepted the joint recommendation and sentenced Mr. Thomason to 63 months.

Mr. Thomason appeals. He argues that his trial counsel was ineffective for failing to object to the evidence. He also challenges his sentence, arguing that the trial court abused its discretion by (1) failing to recognize that it had discretion to impose an

exceptional downward sentence, (2) imposing a lifetime protection order, and (3) imposing a community custody supervision fee after finding him indigent.

We affirm the conviction as well as the standard-range sentence. We remand for reconsideration of the protection order and the community custody supervision fee.

FACTS

1. UNDERLYING FACTS AND INVESTIGATION

Lance Thomason entered a Yoke's Fresh Market in September 2018, around four in the afternoon. He picked up meat and cheese from one part of the store before he walked to the natural foods section and tucked the food under his clothing. A security guard in plain clothes followed Mr. Thomason around the store. He did not have eyes on Mr. Thomason the entire time, and at points watched him through rows and in the reflection of glass doors.

The guard confronted Mr. Thomason in the parking lot after he exited the store. The guard grabbed Mr. Thomason's arm, displayed a badge, and tried to get him to go back in the store. Mr. Thomason tried to pull himself free. The guard warned Mr. Thomason that he was only making the situation worse. Mr. Thomason struck the guard three times, the third time with a closed fist to the cheek. Mr. Thomason eventually escaped by pulling out of his shirt and running.

The guard collected the shirt, called law enforcement, and got into his own car to look for Mr. Thomason. He found Mr. Thomason running through a neighborhood, and

observed him go into a house. Eventually a car pulled up to the house. Mr. Thomason got in the passenger side and the vehicle drove away. The guard testified at trial that before the robbery, Mr. Thomason arrived at the store in this same vehicle. The guard reported the license plate number to law enforcement.

Mr. Thomason was eventually charged with second degree robbery.

2. TRIAL

At trial, the security guard testified along with two police officers and Mr. Thomason's mother. The State also presented the store's surveillance footage. Kathy Thomason, testified that she owned the house that Mr. Thomason entered on the day of the incident. When officers arrived to ask her questions, she showed them surveillance footage from the side of her house. She described the video as showing her son, Lance Thomason, entering her home shortly after the incident at Yoke's. The surveillance footage was not preserved by law enforcement or played during trial.

Corporal Ron Van Tassel testified that he was one of the investigating officers. He testified that he visited with Ms. Thomason and when he described the suspect, she indicated that the description fit her son, Lance. Corporal Van Tassel also testified that he watched a security video with Ms. Thomason, and she identified her son, Lance Thomason, in the video. When asked if he was able to later identify Mr. Thomason, Corporal Van Tassel testified that he was able to pull up "[p]hotographs that we have through our system." Report of Proceedings (RP) (Cochran) at 169. Officer Darryl

Groom also testified about the video's contents and Ms. Thomason's identification of her son during the investigation.

Mr. Thomason's defense theory at trial was that he did not steal anything. During closing argument, his attorney pointed out that despite the struggle in the parking lot, and Mr. Thomason's baggy pants, Mr. Thomason did not drop anything, and no food items were left behind in the parking lot. The security guard never saw Mr. Thomason discard items, and Ms. Thomason never testified to finding food items left at her house after the incident. Without sufficient evidence to prove a theft, defense counsel argued that Mr. Thomason could not be convicted of second degree robbery.

The jury disagreed and returned a verdict of guilty.

3. SENTENCING

At sentencing, the parties agreed that Mr. Thomason's offender score was 10, and his sentencing range was 63-84 months. Both parties recommended a 63-month sentence. During allocution, Mr. Thomason made comments about a plea agreement and drug court contract that were apparently considered before trial, although defense counsel advised that Mr. Thomason did not qualify for drug court. Mr. Thomason asked for an "exceptional sentence" of 12 months, equivalent to the 12 months he would have served had he entered drug court.

Before imposing its sentence, the trial court expressed general dissatisfaction with the guideline sentence for this crime:

> I don't—I don't like these charges. I'm not faulting the state; that's not what I mean. But this is a particular charge I—I—and some of my judicial colleagues call it the glorified shoplifting charge where someone shoplifts and it ends up turning into a robbery because of a chain of events with security personnel generally, just like what happened here. So I agree with Mr. Zeller that it's a pretty significant punishment for what happened.
>
> Unfortunately, and I know the state agrees with me, I don't have much discretion here. The only discretion I have is the time period between 63 and 84 months. That's all I've got. That's the only discretion I have. I wish I had more.

RP (Cochran) at 10.

The court ultimately accepted the joint recommendation and imposed a sentence of 63 months, lamenting that it had no discretion to go lower. The court also imposed a lifetime no-contact order against Mr. Thomason regarding the guard. Mr. Thomason was found indigent. The court waived multiple legal financial obligations (LFOs) and said that it would "prefer to waive" the crime victim assessment but had no discretion to do so. The judgment and sentence contained a requirement for Mr. Thomason to pay a community custody supervision fee.

Mr. Thomason now appeals his conviction and sentence to this court.

ANALYSIS

A. DID TRIAL COUNSEL'S FAILURE TO OBJECT TO TESTIMONY CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL?

Mr. Thomason argues that his trial attorney was ineffective because he failed to object to hearsay and propensity evidence. In order to show ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant has the burden to show that counsel performed below an objective standard of reasonableness under "prevailing professional norms," and after "considering all the circumstances." *Id*. at 688. Courts must be highly deferential, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689.

However, error alone does not warrant reversal absent prejudice. *Id.* at 691. The defendant must also prove prejudice. *Id*. at 693. This showing requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. The error must undermine confidence in the outcome. *Id*.

In the context of objections, Washington courts presume "that the failure to object was the product of legitimate trial strategy." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). Whether to object or not is a "classic example of trial tactics. Only in

egregious circumstances . . . will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

In this case, Mr. Thomason points to several instances where he suggests trial counsel should have objected: the officer's testimony that he recognized Mr. Thomason from photographs in "our system," officers' testimony describing the security video, an officer's in court identification of Mr. Thomason despite having only seen him in surveillance footage, and several potential instances of hearsay.

All of these instances pertain to identifying Mr. Thomason as the suspect. But identity was not an issue at trial. Defense counsel conceded that it was Mr. Thomason at the store and at his mother's house. Instead, defense counsel argued there was insufficient evidence that Mr. Thomason left the store with stolen items. If the jury agreed, it could not convict Mr. Thomason of robbery. Given this defense strategy, there are reasonably strategic reasons why counsel would not object to evidence concerning identity. We do not find that counsel's performance was deficient.

B. DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO RECOGNIZE THAT IT HAD DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE?

Mr. Thomason contends that the trial court failed to consider an exceptional sentence downward and that the unique facts of this case justify such an exceptional sentence. The State initially responds by arguing that Mr. Thomason failed to preserve this issue for appeal. We disagree.

Although defense counsel asked for a sentence within the standard range, Mr. Thomason clearly asked for an exceptional downward sentence of 12 months. This placed the issue of an exceptional sentence before the court. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) ("When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law.").

While the issue of an exceptional sentence was before the court, neither Mr. Thomason nor his attorney provided a basis for such a sentence, other than Mr. Thomason's comments about plea negotiations. Generally speaking, a sentence within the standard range is not appealable. RCW 9.94A.585(1). Under Washington law, "no defendant is entitled" to a sentence below the standard range, but "every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A trial court abuses its discretion when it erroneously believes it lacks the authority to consider an exceptional sentence. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Mr. Thomason argues that the trial court's comment, that it had no discretion to sentence outside the standard range, is per se abuse of discretion. This is true, however, only if the trial court disregarded facts before it that could legally support an exceptional

sentence. If there were no factors justifying an exceptional sentence, the trial court did not have discretion to go outside of the standard range.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, provides that a court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The statute lists 11 non-exclusive mitigating factors that, if proved by a preponderance of the evidence, may justify an exceptional downward sentence. RCW 9.94A.535(1).

On appeal, Mr. Thomason does not allege that any of the statutory factors could be used to justify an exceptional sentence in his case. Instead, Mr. Thomason argues that the "unique nature" of his offense, i.e., stealing a small amount of food and assaulting a security guard in the parking lot provided a mitigating circumstance not otherwise contemplated by the SRA.

When a court considers a mitigating factor not listed in RCW 9.94A.535(1)'s illustrative list, it must analyze that factor with a two-part test to determine if it can support a downward sentence. *State v. O'Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015). The court must first ask whether the legislature "necessarily considered" the factor when establishing the standard range. *Id*. The court must then ask whether that factor is "sufficiently substantial and compelling" to differentiate the instant crime from another in the same category. *Id*.

Very few courts have found mitigating factors to support an exceptional sentence that were not "necessarily considered" by the legislature when it established the standard range. In *State v. Alexander*, the Washington Supreme Court examined whether possessing "an extraordinarily small amount" of a drug could be considered a mitigating factor under the statute. 125 Wn.2d 717, 727, 888 P.2d 1169 (1995). The court found the legislature did not necessarily consider this factor, given that the code specified an upper limit for the amount of drug, but not a bottom limit, and that such a small amount made the crime distinct from other instances of the crime in the same category. *Id*.

In *State v. Garcia*, the trial court listed several factors to support an exceptional downward sentence for failing to register as a sex offender. 162 Wn. App. 678, 685, 256 P.3d 379 (2011). These included the defendant's transportation difficulties, failed attempts to comply, his obligation to register with two different agencies located 40 miles apart, and the de minimus nature of his violation. Ultimately, this court upheld the exceptional sentence, finding that all of the listed factors—except the last one—were not considered by the legislature. In reaching this conclusion, the court made clear that "exceptional sentences based upon the size of the violation is an evaluation of proportional seriousness, a factor that the legislature has already taken into consideration." *Id.*

In this case, Mr. Thomason argues that the de minimus nature of his crime places it within a unique category, worthy of an exceptional sentence. Mr. Thomason was found

guilty of second degree robbery for stealing food from a store and assaulting a security guard while trying to escape. Mr. Thomason does not cite any authority to support his argument that these facts are unique. *See, e.g.*, *State v. Manchester*, 57 Wn. App. 765, 790 P.2d 217 (1990) (Defendant could be convicted of first degree robbery for using force to retain property after he left store without paying for it); *State v. Phillips*, 9 Wn. App. 2d 368, 372, 444 P.3d 51 (2019) (second degree robbery for stealing a case of beer and fighting with employees outside of the store).

Nor does the trial court's expressed frustration suggest that this is a unique case. To the contrary, the court noted that these facts were so common that they had a colloquial name: glorified shoplifting. The court's frustration was not with this case in particular, but with the standard range in general. But a court's general disagreement with the legislative decision on the sentencing guidelines for a particular crime is not a mitigating factor justifying an exceptional sentence. *See State v. Serrano*, 95 Wn. App. 700, 715, 977 P.2d 47 (1999).

At sentencing and on appeal, Mr. Thomason fails to put forth factors that would justify a sentence outside the standard range. Without a sufficient justification, the court lacked authority to impose an exceptional sentence. Consequently, the court did not abuse its discretion in reaching this conclusion.

C. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPOSING A LIFETIME PROTECTION ORDER AND ORDERING A COMMUNITY CUSTODY SUPERVISION FEE?

Mr. Thomason argues that the trial court abused its discretion by imposing a lifetime protection order at sentencing. The State concedes error.

Courts are empowered to impose crime-related prohibitions as part of a sentence. RCW 9.94A.505(9). These can include no-contact orders. *State v. Armendariz*, 160 Wn.2d 106, 118, 156 P.3d 201 (2007). The term of a crime-related prohibition cannot exceed the statutory maximum sentence for the offense. *Id*. at 119-20. In this case, the court imposed a lifetime no-contact order on Mr. Thomason. The statutory maximum sentence for second degree robbery is ten years. It was error to impose a no-contact order longer than that maximum sentence.

Mr. Thomason also challenges the imposition of the community custody supervision fee. At sentencing, the court found Mr. Thomason indigent and made an attempt to identify the discretionary fees and waive them. The community custody supervision fee is included in the judgment and sentence as boilerplate language. The court did not strike it out. The State contends the trial court has discretion to waive this fee and did not abuse its discretion by imposing it.

The State is correct that the fee does not require waiver upon a finding of indigency. In 2018, the legislature amended RCW 10.01.160(3) to require courts to waive discretionary costs for indigent defendants. LAWS OF 2018, ch. 269, § 6(3).

"Costs" are "limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." RCW 10.01.160(2); *see State v. Clark*, 191 Wn. App. 369, 375, 362 P.3d 309 (2015). While the statute provides examples of waivable costs, not all discretionary LFOs qualify as "costs" within the meaning of the statute. *Clark*, 191 Wn. App. at 375-76.

One such LFO is a community custody supervision fee, incurred by the State for the post-conviction supervision of the defendant. RCW 9.94A.703(2)(d). While the community custody fee is discretionary, and thus waivable by the trial court, it is not a "cost" that requires waiver under RCW 10.01.160(3). *State v. Starr*, __ Wn. App. __, 479 P.3d 1209, 1211 (2021). Consequently, the trial court is not required to inquire into a defendant's ability to pay before imposing this supervision assessment.

While the court is not required to waive the fee, in this case it appears that the court was attempting to waive any and all discretionary fees and missed this boilerplate language.

D. STATEMENT OF ADDITIONAL GROUNDS (SAG)

Mr. Thomason raises four additional issues in his statement of additional grounds. He contends that (1) there was insufficient evidence to convict him of second degree robbery, (2) his right to a speedy trial was violated, (3) the State improperly filed an

amended information, and (4) his constitutional right to not be put in jeopardy for the same crime twice was violated. We address these allegations in turn.

Mr. Thomason first argues that the State did not prove every necessary element of robbery because the amended information stated that he took property "from the person and in the presence" of the guard. The court addressed this same issue at a half-time motion at trial and concluded that the State properly followed the practice of charging in the conjunctive and proving in the disjunctive. This issue is not meritorious. *State v. Dixon*, 78 Wn.2d 796, 802-03, 479 P.2d 931 (1971).

Mr. Thomason next contends that his right to a speedy trial was violated. The trial court granted a continuance requested by Mr. Thomason's counsel over Mr. Thomason's objection. The court found the continuance was necessary for defense counsel to prepare for trial, was required in the administration of justice, and did not prejudice the defendant.

A court's decision to grant a continuance is reviewed for abuse of discretion. *State v. Ollivier*, 178 Wn.2d 813, 822, 312 P.3d 1 (2013). "[G]ranting defense counsel's request for more time to prepare for trial, even 'over defendant's objection, to ensure effective representation and a fair trial,' is not necessarily an abuse of discretion." *State v. Saunders*, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009) (quoting *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984)). The rule provides that a court may continue a trial upon motion of a party when required in the administration of justice if the

defendant is not prejudiced. CrR 3.3(f)(2). The court must state on the record or in writing the reasons for the continuance. *Id.* A continuance granted under this provision tolls speedy trial from the date of the original trial to the new trial date. CrR 3.3(e)(3).

In this case, defense counsel's motion to continue the trial, even over Mr. Thomason's objection, waives any objection to the continuance. CrR 3.3(f)(2). The continuance was not an abuse of discretion and Mr. Thomason's speedy trial rights were not violated.

Mr. Thomason next contends that the court should not have allowed the prosecution to file an amended information, lowering the charge from first degree robbery to second degree robbery on the eve of trial. Defense counsel did not object to this motion below. He argues now that this prejudiced his ability to present a defense. Second degree robbery is a lesser degree of the same crime. Proving the charge does not rely on any additional facts, and in fact shrank Mr. Thomason's potential sentence. He was not prejudiced by the amended information.

Finally, Mr. Thomason appears to argue that amending the information subjects him to prosecution twice for the same criminal conduct. His argument is unclear and without merit. We decline to address it.

CONCLUSION

Remand to modify the term of the protection order from lifetime to 10 years. The trial court's failure to strike the community supervision fee was a clerical error. We direct the trial court to strike the fee on remand.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, J.

Pennell, C.J.

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MAY 6, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LANCE A. THOMASON, Appellant.	)))))))))	No. 37369-0-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of April 6, 2021 is hereby denied.

PANEL: Staab, Lawrence-Berrey, Pennell

FOR THE COURT:

REBECCA PENNELL
Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 37369-0-III
	)	
LANCE THOMASON,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF JUNE, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	LARRY STEINMETZ [lsteinmetz@spokanecounty.org] [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X]	LANCE THOMASON 868974 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF JUNE, 2021.

X_____

Washington Appellate Project
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