No 42939-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RONNIE MULLALLY,

Appellant.

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

The Honorable Richard Melnick

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Washington Constitutional Provisions

United States Supreme Court Decisions

United States Constitutional Provisions

Statutes

A. ASSIGNMENTS OF ERROR

1. In violation of Mullally's right to a defense protected by the Sixth Amendment and article I, section 22, the trial court erred in refusing to instruct the jury on the lesser-included offense of attempted robbery in the second degree.

2. Jury instruction 13 was a comment on the evidence prohibited by article IV, section 16 of the Washington Constitution.

3. The trial court's order that Mullally pay legal financial obligations is not supported by the record or by statute and violates the Fourteenth Amendment guarantee of due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. According to statute, an attempt is necessarily a lesser-included offense of any completed offense. Further, an accused person is entitled to an instruction on a lesser-included offense whenever the evidence viewed in the light most favorable to the accused supports the issuance of the instruction. Mullally was convicted of robbery in the second degree based upon an event in which he shoplifted several items from a Target store, briefly resisted a store security officer's efforts to detain him, and then abandoned the items. Should this Court hold that the trial court erroneously refused to instruct the jury on the lesser included

offense of attempted robbery in the second degree? (Assignment of Error 1)

2. The Washington Constitution prohibits judicial comments on the evidence. A judge violates the constitutional prohibition when he conveys his personal attitude towards the merits of the case or removes a disputed factual issue from the jury's consideration. Mullally was charged with assault in the third degree based upon an alleged punch that followed a Target security officer's physical contact with him. The trial court issued the jury a non-pattern instruction that a store employee has a lawful right to apprehend or detain someone they have probable cause to believe is a shoplifter, implicitly conveying the court's opinion on the merits and removing the factual question of the lawfulness of the security officer's conduct from the jury's consideration. Was the instruction a prohibited judicial comment? (Assignment of Error 2)

3. The record must support a trial court's determination regarding an offender's ability to pay legal financial obligations. The trial court determined that Mullally was indigent, but nevertheless imposed $4,150 in costs without making any determination regarding his past, present, or future ability to pay.

Was the imposition of costs clearly erroneous? (Assignment of Error 3)

4. A trial court's authority in sentencing is solely derived from statute. According to statute, although a court may impose legal financial obligations, costs cannot include expenses inherent in providing a constitutionally guaranteed jury trial. The court in this case imposed a $1200 "trial per diem fee." Where no statutory authority exists for the fee and imposition of the fee would chill the constitutionally-protected right to a jury trial, must the fee be stricken? (Assignment of Error 3)

5. Principles of due process impose the burden of proving facts at sentencing on the State. Mullally was obligated to pay a "trial per diem fee" of $1200, recoupment for court-appointed counsel of $1,000, and additional costs related to "defense expert and other defense costs" of $400. Where the State did not present any evidence of the basis for the fees, must these legal financial obligations be stricken as invalid? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Seth Kelton, an investigator working for Target Stores, was in the camera room of a Clark County store observing the live feed from the in-store security cameras, when he saw appellant Ronnie

Mullally select three "high dollar" DVD box sets and then three X-Box Kinects and place them in a shopping basket. RP 91-97.[1] Kelton thought Mullally was going to do a "grab and run," so he positioned himself outside the store to apprehend him. RP 99.

When Mullally exited the store, Kelton approached him and said, "Target security." RP 100. He then body-checked Mullally against a wall, causing him to lose his balance. RP 139-40. Kelton tried to push the shopping basket, which Mullally still was holding, out of Mullally's hand. RP 103-04. After striking at the basket three times, Kelton eventually succeeded in knocking the basket out of Mullally's hand, and Mullally swung at him and fled to a waiting car. RP 104-05. The retail value of the items that Mullally attempted to take was $540.

Mullally was charged in Clark County Superior Court with one count of robbery in the second degree and one count of assault in the third degree. CP 6-7. At trial, over Mullally's objection, the court refused to instruct the jury on the lesser-included offense of attempted robbery in the second degree. RP 233-35. The court also instructed the jury, pursuant to the State's request, and over

[1] The verbatim report of proceedings is contained in two consecutively-paginated volumes, the first containing a transcript from December 12, 2011, and the second containing transcripts from December 13, 2011 and December 19, 2011. They are referred to in this brief as "RP" followed by page number.

Mullally's objection, "A merchant, or an employee of a merchant, has a lawful right to apprehend or detain a person they have probable cause to believe has committed theft." CP 32. Mullally was convicted of both counts as charged. RP 309-10; CP 37-38.

At sentencing, the court found Mullally was indigent and qualified for court-appointed counsel on appeal, and noted that he was indigent at the start of the case. RP 332. Nevertheless, the court imposed costs consisting of a $500 victim assessment fee, $450 "court costs" (determined based upon a $200 criminal filing fee and a $250 jury demand fee), a $1,000 fee for court-appointed counsel, a $1,200 trial per diem charge, $400 for "court-appointed defense expert and other costs", a $500 fine, and a $100 DNA collection fee, for a total of $4,150. RP 43. Mullally appeals.

D. ARGUMENT

1. **The trial court's refusal to instruct the jury on attempted robbery in the second degree violated Mullally's right to a defense.**

a. An accused person has the constitutional right to a defense which includes the right to adequate jury instructions.

The right of an accused person to present a defense is protected by the state and federal constitutions. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297

(1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI; Const. art. I, § 22. The right to a defense includes the right to those instructions that are necessary to argue the defense theory to the jury. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Walters, 162 Wn. App. 74, 82, 255 P.3d 835 (2011). The failure to instruct the jury on the defense theory of the case where it is supported by the evidence is reversible error. Williams, 132 Wn.2d at 260.

b. Attempted robbery in the second degree was statutorily a lesser-included offense of robbery in the second degree.

"A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). By statute, an attempt is a lesser-included offense of every completed crime. RCW 10.61.003;[2] RCW 10.61.006;[3] RCW

---

[2] RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

[3] RCW 10.61.006 provides:

> In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

10.61.010.[4] Necessarily, at trial, an accused person legally may be convicted of an attempt to commit the completed offense. RCW 10.61.006; RCW 10.61.010. According to statute, attempted robbery in the second degree was a lesser-included offense of robbery in the second degree.

c. Attempted robbery in the second degree was factually a lesser-included offense of robbery in the second degree.

In denying the requested attempted second degree robbery instruction, the trial court ruled:

> I don't know that [Mullally] had the intent to commit robbery, as opposed to the intent to commit theft, and then he committed the robbery . . . Therefore, the attempted robbery does not come into play. That's my thinking, in doing the research I did this morning. So I think any of the references to attempted robbery will be removed.

RP 234-36.

It is not clear what "research" the court conducted in order to arrive at this conclusion, as the court did not reference the cases or

---

[4] RCW 10.61.010 provides:

> Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

statutory authority on which it relied. However pertinent decisions establish that the trial court's reasoning was flawed and its ruling incorrect.

The trial court appeared to have understood that attempted robbery in the second degree was legally a lesser included offense of the completed offense of robbery in the second degree. See RCW 10.61.003; .006; 010; State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000); State v. Peterson, 133 Wn.2d 885, 892, 948 P.2d 381 (1997). Paradoxically, however, the court concluded that factually a lesser-included offense instruction was not warranted, because the court believed Mullally's intent was to commit a misdemeanor theft, rather than a robbery. RP 234-36. In other words, the court concluded that in order to issue an instruction on attempted robbery in the second degree, it had to find Mullally's intent was to commit the completed offense at all times, and the court believed the evidence did not support this conclusion.

As established, the court's ruling was contrary to statute. RCW 10.61.003. It was also at odds with the established test for determining whether an accused person is entitled to have the jury instructed on a proposed lesser-included offense.

> [A] requested jury instruction on a lesser included or inferior degree offense should be administered "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater."

Fernandez-Medina, 141 Wn.2d at 456 (citing State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) and Beck v. Alabama, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 692 (1980)).

Robbery is defined by statute as follows:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190.

The force "must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance 'to the taking.'" State v. Johnson, 155 Wn.2d 609, 610, 121 P.3d 91 (2005). Washington's transactional view of robbery permits a prosecution for the crime to lie where the taking occurs outside the presence of the victim, and the necessary force is found in the forceful retention of property that is peacefully taken. Id.

The trial court's error here was in concluding that the "intent" prong of the attempt statute applied only to the initial shoplifting of the items in the Target store. However although it was reasonable for the court to conclude that at the time Mullally took the items from the Target shelf he intended only a theft, the court was obligated to view the facts in their entirety and consider them in the light most favorable to Mullally. This the court did not do.

The undisputed facts established that Kelton, a Target security officer, attempted to stop Mullally, and Mullally resisted Kelton and did not drop the shopping basket containing the items he had taken from the store. For purposes of the analysis here, therefore, Mullally intentionally used force to "retain possession of the property" or "overcome resistance to the taking." RCW 9A.56.190. Viewed in the light most favorable to Mullally, the facts established that at some point during the charged incident, he had the intent to commit the completed offense of robbery. Cf., State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987) (intent behind robbery is to acquire property); State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000) (in prosecution for unlawful

imprisonment, court holds mens rea modifies each element of "restraint").

"[T]he specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The trial court should have given the requested instruction on attempted robbery in the second degree.

d. The failure to instruct the jury on attempted robbery in the second degree requires reversal.

As noted, the failure to issue instructions to the jury that are necessary to argue the defense theory of the case requires reversal. Williams, 132 Wn.2d at 260. It is not the province of trial judges to weigh the evidence; this is the jury's role alone. As the Court in Fernandez-Medina remarked, a result which would uphold the trial court's refusal to issue the instruction

> would empower trial courts to deny a request for an instruction on the basis that the theory underlying the instruction is "inconsistent" with another theory that finds support in the evidence. This would require the judge presiding at a jury trial to weigh and evaluate evidence, and would run afoul of the well-supported principle that "[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses."

Fernandez-Medina, 141 Wn.2d at 460 (citation omitted).

The trial court admitted that the evidence presented in support of a robbery was weak and the force alleged to have been used by Mullally *de minimis*. RP 190-91. Given the equivocal evidence, the jury could have evaluated the facts and determined that they supported only an attempt to commit the crime of robbery in the second degree, not the completed offense. This Court should hold that the trial court's failure to instruct the jury on the lesser-included offense of attempted second degree robbery requires reversal of Mullally's conviction.

2. **Jury instruction 13 was a judicial comment on the evidence prohibited by article IV, section 16 of the Washington Constitution.**

a. Jury instruction 13 violated the Washington Constitution's prohibition on judicial comments on the evidence.

Article IV, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The prohibition on judicial comments has two components. First, the constitutional provision bars a judge from conveying his or her personal attitudes towards the merits of a case. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Second, the provision

prohibits a trial judge from instructing the jury that matters of fact have been established as a matter of law. Id.

The prosecutor submitted a proposed jury instruction based upon the holding of State v. Miller, 103 Wn.2d 792, 698 P.2d 554 (1985). RP 249; Supp. CP ___ (Sub No. 47). The State's proposed instruction read, "A merchant, or an employee of a merchant, has a lawful right to apprehend or detain a person they have probable cause to believe has committed theft." CP 32.

Mullally objected to the instruction. RP 249. He noted that the court had declined to instruct the jury on his self-defense claim and questioned the relevance of the additional instruction. Id. He also argued that the inclusion of the word, "apprehend" was improper. RP 253. Over Mullally's objection, the court gave the instruction to the jury. CP 32; RP 254.

In Miller, the case relied upon by the State, the Supreme Court reaffirmed that store personnel may detain a suspected shoplifter if they have probable cause. 193 Wn.2d at 794-95. The Court noted that although there is no statutory authority to use force to effect a detention, this authority derives from common law. Id. at 795 (citation omitted).

Nevertheless, in this case, Kelton's lawful authority to detain Mullally was not relevant to the charged assault in the third degree absent an effort by Mullally to claim self-defense. The trial court refused to instruct the jury on any self-defense claim, RP 240, and so whether the detention in fact was lawful was not before the jury.

The jury was properly instructed that "A person commits the crime of assault in the third degree when he assaults another with intent to prevent or resist the lawful apprehension or detention of himself." CP 31 (Instruction No. 12). The jury also was instructed that to convict Mullally of third degree assault, they had to find that he committed assault with intent to prevent or resist the lawful apprehension or detention of himself or another person. CP 33 (Instruction No. 14). There thus was no need for further instructions.

Washington has adopted pattern jury instructions. Although the approval of an instruction by the Washington Pattern Jury Instruction committee does not necessarily mean that it is approved by the Washington Supreme Court, "pattern instructions generally have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state." State v. Bennett, 161 Wn.2d 303, 308, 165 P.3d 1241 (2007).

By giving the jury a non-pattern instruction regarding Kelton's authority to "apprehend or detain" Mullally, the court violated both aspects of the prohibition on judicial comments. A judge need not expressly convey his or her personal feelings on an element of an offense; it is sufficient if they are merely implied. State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). Here, while not expressly stating an opinion about what had been proven, the trial court conveyed its personal attitudes toward the merits of the case – i.e., its opinion that Kelton's attempt to forcibly apprehend Mullally was lawful. Additionally, the court removed a disputed issue from the jury's consideration by in essence informing the jury that Kelton's actions were lawful.

In evaluating this latter argument, this Court should be mindful that the holding in Miller was very specific. The Court emphasized the authority of a shopkeeper to detain; it did not embellish upon or expand this limited grant of authority. See Miller, 193 Wn.2d at 794-95. The trial court, however, included language that tracked the definition of assault in the third degree by informing the jury that Kelton had the authority to apprehend Mullally. This Court should conclude that jury instruction 13

violated the constitutional prohibition on judicial comments on the evidence.

b. The error was prejudicial.

Judicial comments on the evidence are presumed to be prejudicial. The burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006); accord Jackman, 156 Wn.2d at 745.

Here, there is no basis in the record from which this Court may conclude the error was harmless. As the trial court noted, the evidence that Mullally committed theft was unequivocal, but the evidence of robbery was "weak" (in the court's words). RP 190-91. The judge's opinion regarding the lawfulness of Kelton's response to the shoplifting may well have swayed the jury to reject any doubts it had about whether Mullally in fact assaulted Kelton. This Court should conclude the comment was prejudicial.

3. **The trial court's order obligating Mullally to pay legal financial obligations was not supported by any determination that he had the ability to pay, adequate proof at sentencing, or statutory authority.**

a. An order imposing legal financial obligations must be supported by a record showing that the defendant has the ability to pay.

Before a court may obligate an accused person to pay legal financial obligations ("LFOs"), the record must show that the court "took into account the financial resources of the defendant and the nature of the burden" imposed by LFOs. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (quoting State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991)). A judicial finding that a person has the ability to pay LFOs will be affirmed unless it is "clearly erroneous."

In Bertrand, the judgment and sentence reflected the following:

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

Bertrand, 165 Wn. App. at 404 (emphasis in original). This portion of the judgment and sentence relied upon RCW 9.94A.753, which requires a court to consider an offender's "present, past, and future ability to pay" before fixing a payment schedule for restitution payments. The requirement also derives from the United States Supreme Court's opinion in Fuller v. Oregon, 417 U.S. 40, 49-54, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), in which the Court upheld an

Oregon recoupment statute. Fuller, 417 U.S. at 49-54; see also State v. Barklind, 87 Wn.2d 814, 817-18, 557 P.2d 314 (1976) (setting forth constitutionally-required requirements of recoupment statute); U.S. Const. amend. XIV; Const. art. I, § 3.

b. The court did not make a determination of Mullally's ability to pay legal financial obligations before imposing them.

In this case, the trial court imposed LFOs consisting of a $500 victim assessment fee, a $200 criminal filing fee, a $250 jury demand fee, a $1,000 fee for court-appointed counsel, a $1,200 trial per diem charge, $400 for "court-appointed defense expert and other costs", a $500 fine, and a $100 DNA collection fee, for a total of $4,150. CP 43. The court did not make a finding about Mullally's ability to pay, but rather left the checkbox relating to legal financial obligations unticked. CP 41. In other words, there is no evidence whatsoever that the court considered Mullally's present, past, or future ability to pay before ordering the legal financial obligations.

In fact, the sole reference in the record to the LFOs comes from an otherwise-unidentified individual named "Ms. Clark," who stated at the start of the sentencing hearing, "There's a trial per

diem here indicating $1200.00. I get paid a day and a half for what happened in this case." RP 316-17.

The court imposed the LFOs despite acknowledging Mullally's indigency for purposes of appeal. RP 332-33. The court stated,

> I'll just sign the order [of] indigency. The basis, if you want to do a motion [in forma pauperis] is that he was indigent, went to trial under indigency. You haven't won the lottery or gotten any inheritance since you have been in custody, correct? So his economic situation hasn't changed.

RP 333.

The record must show that the trial court took into account Mullally's resources and ability to pay before imposing LFOs. Bertrand, 165 Wn. App. at 404. As the absence of a finding on the Judgment and Sentence and the court's discussion of Mullally's indigency for purposes of appeal indicate, the court did not consider Mullally's ability to pay. The legal financial obligations should be stricken.

c. The order for a "trial per diem fee" was not statutorily authorized.

A court's authority during sentencing is solely that which is authorized by statute. In re Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008); State v. Skillman, 60 Wn. App. 837, 838, 809 P.2d 756

(1991). "If this were not true, a defendant would not have the opportunity to know in advance the legal consequences of his or her conduct," which would violate his or her right to fair notice of the penalties to which his conduct could expose him. Skillman, 60 Wn. App. at 838.

As a condition of his sentence, the court may require a defendant to pay costs. RCW 10.01.160(1). However costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2).

> They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

Id. (emphasis added).

The judgment and sentence in this case reflects the statutory authority for all of the costs imposed with one significant omission: the $1200 "trial per diem fee." CP 43. This fee should not be confused with the jury fee, which is statutorily permitted (and was ordered in this case). RCW 10.46.190. The fee does not appear to have been authorized by any other statute, and was included in the judgment and sentence without explanation other than the interjection by "Ms. Clark" regarding what she believed she should

"get paid . . . for." RP 191. It is difficult to conceive how this fee could be imposed without conflicting with the directive that fees not include "expenses inherent in providing a constitutionally guaranteed jury trial." RCW 10.01.160(2). Absent any explanation in the record for the fee or statutory authority, this Court should conclude that the fee was impermissible and strike it from the judgment and sentence.

d. The State did not provide evidence to support the fees for "trial per diem," court-appointed counsel, or "other defense costs."

The State bears the burden of proving facts alleged at sentencing. State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999).

> Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.

Id.

This Court recently held that a prosecutor's "bare assertions" at sentencing are not evidence and it is not permissible to treat the accused's silence as acknowledgment regarding the propriety of the sentence imposed. State v. Hunley, 161 Wn. App. 919, 929, 253 P.3d 448, review granted, 172 Wn.2d 1014 (2011).

A court is statutorily permitted to require a convicted defendant to pay costs. RCW 10.01.160(1). The maximum cost that can be imposed in many instances is fixed by statute. See e.g. RCW 10.01.160(2). The fees imposed for "court appointed counsel," "trial per diem," and "defense expert" are not fixed by statute. Without any proof, record, or explanation of the amounts ordered, the court nevertheless imposed these costs for a total amount of $2,600. Recoupment of attorneys' fees may be constitutionally authorized, but this is beside the point. In light of the State's burden of proof at sentencing, the record must establish more than that a figure was plucked out of thin air.

The record in this case should have shown what Mullally's counsel was paid, and why the court believed it was permitted to collect an additional $400 for the "court appointed defense expert and other defense costs."[5] Likewise, the "trial per diem" fee needed to be grounded in fact, and the record had to support the imposition of the fee.

It was not Mullally's duty to ensure that an adequate record supported the sentence; this obligation lay with the State. Ford, 137 Wn.2d at 481; Hunley, 161 Wn. App. at 928-29. The State did not

[5] No expert testified in Mullally's trial.

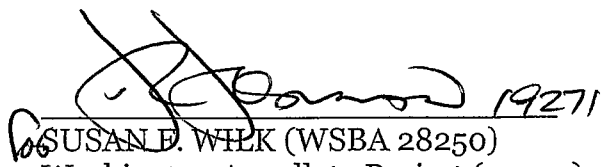
meet its burden. This Court should vacate the order imposing costs.

E. CONCLUSION

This Court should reverse Mullally's conviction for robbery in the second degree and remand with direction that on retrial, the trial court should instruct the jury on the lesser included offense of attempted robbery in the second degree. This Court should also conclude that jury instruction 13 was a prohibited judicial comment on the evidence, and reverse Mullally's conviction for third-degree assault. Finally, this Court should vacate the order imposing legal financial obligations on the basis that the costs imposed were not predicated upon a determination of Mullally's ability to pay, were not statutorily authorized, and were not proven.

DATED this 30th day of April, 2012.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 42939-0-II
v.	)	
	)	
RONNIE MULLALLY,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANNE MOWRY CRUSER	( )	U.S. MAIL
CLARK COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
PO BOX 5000	(X)	E-SERVICE VIA COA PORTAL
VANCOUVER, WA 98666-5000		prosecutor@clark.wa.gov
[X] RONNIE MULLALLY	(X)	U.S. MAIL
751309	( )	HAND DELIVERY
COYOTE RIDGE CORRECTIONS CENTER	( )	_____
PO BOX 769		
CONNELL, WA 99326		

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF APRIL, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

April 30, 2012 - 3:44 PM

Transmittal Letter

Document Uploaded: 429390-Appellant's Brief.pdf

Case Name: STATE V. RONNIE MULLALLY

Court of Appeals Case Number: 42939-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Maria A Riley - Email: **maria@washapp.org**

A copy of this document has been emailed to the following addresses:

Anne.cruser@Clark.wa.gov