Supreme Court No. 89399-3
Court of Appeals No. 42939-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONNIE MULLALLY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Ronnie Mullally, the appellant below, asks this Court to accept review of the Court of Appeals opinion, No. 42939-0-II, filed September 17, 2013. A copy of the Court's slip opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred and denied Mullally his Sixth Amendment right to a defense when it ruled that as a matter of law attempted robbery in the second degree was not a lesser included offense of robbery in the second degree because the court found Mullally intended only to commit theft. RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Whether the Court of Appeals improperly invoked the invited error doctrine to deny Mullally relief on direct appeal on a meritorious issue based on a strained and patently unfair reading of the record. RAP 13.4(b)(4).

3. Whether the trial court improperly commented on the evidence, contrary to Wash. Const. art. IV, § 16, when it issued the jury a non-pattern instruction that a store employee has a lawful right to apprehend or detain someone he or she has probable cause to believe is a shoplifter. RAP 13.4(b)(3); RAP 13.4(b)(4).

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, Mullally requested the Court instruct the jury on

[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.

the lesser included offense to robbery in the second degree of attempted robbery in the second degree. RP 233-35. The court refused the request because the court believed that Mullally intended to commit not robbery, but theft. RP 235. When the trial judge stated, "I think the evidence in the case is that [Mullally] intended to commit the crime of theft", defense counsel responded, "I agree with you." Id. The court then explained that this was why "the attempted robbery does not come into play." Id. The court stated that references to attempted robbery would be "removed", and defense counsel asked whether this meant the court would not give the requested attempt instruction. RP 236. The court responded, "correct."

The court also instructed the jury, pursuant to the State's request, and over 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.

On appeal, Mullally argued, *inter alia*, that the court erred as a matter of law in refusing the instruction, and that the court's non-pattern jury instruction regarding the lawfulness of a shopkeeper's use of force was a comment on the evidence. The court of appeals rejected these arguments, finding that defense counsel had *invited* the failure to give the attempt instruction simply by stating, "I agree" in response to the court's

statement that Mullally intended to commit theft, and that the non-pattern instruction was not a prohibited judicial comment. As set forth below, this Court should grant review.

D. ARGUMENT

1. **This Court should review the violation of Mullally's right to a defense presented by the trial court's legally incorrect ruling denying a lesser-included-offense instruction of attempted robbery on the charge of robbery in the second degree.**

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 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.

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[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.

[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.

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 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 Court of Appeals' refusal to reach Mullally's meritorious argument based on an "invited error" theory is based on a false and unfair reading of the record.

Even though the trial court committed an error of law in refusing the lesser included offense instruction, and even though Mullally is plainly entitled to reversal of his conviction and a new trial based on the error, the Court of Appeals chose not to afford him relief. Specifically, the Court determined that defense counsel's statement "I agree," signified that "Mullally's counsel expressly agreed that the trial court's decision was correct." Slip Op. at 4-5. The Court held that by making this statement counsel invited the error and waived the issue. Slip Op. at 5.

This is an unfair, inaccurate, and, frankly, preposterous characterization of the record. It is absolutely plain from the context of the remark that defense counsel was agreeing with the court's statement that Mullally intended to commit only a theft. RP 235. The context also makes it plain that defense counsel was not waiving and did not intend to waive his request for a lesser included offense instruction. The Court of Appeals' invocation of the invited error doctrine to preclude relief for Mullally is cynical, contrived, and unfair.

e. The issue raised is both an important constitutional issue and a question of substantial public interest, meriting review.

As established, under Washington law, an attempt to commit an offense is necessarily a lesser-included offense of the completed offense, and an accused person has an absolute statutory right to be convicted of an attempt to commit an offense (and to have a jury instructed on attempt) if the facts, viewed in the light most favorable to the defendant, establish that the inchoate offense was committed. The trial court's tortured analysis reveals a fundamental misunderstanding of this right, demonstrating the need for this Court to clarify the issue. The constitutional error should have resulted in reversal of Mullally's robbery conviction. This Court should grant review.

2. **This Court should review the important constitutional question whether 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. This 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. The Court of Appeals nevertheless determined that the instruction was not a prohibited comment. Slip Op. at 6-7. The Court was incorrect. This Court should grant review, and hold 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

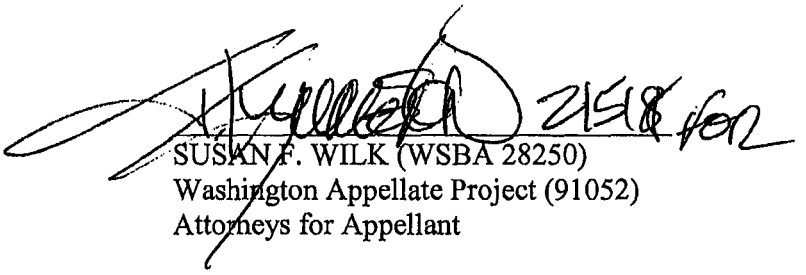
Mullally in fact assaulted Kelton. This Court should conclude the comment was prejudicial.

E. CONCLUSION

For the foregoing reasons, and pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), this Court should grant review.

DATED this 11th day of October, 2013.

Respectfully submitted:



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. RONNIE JOHN MULLALLY, Respondent.	No. 42939-0-II UNPUBLISHED OPINION

JOHANSON, A.C.J. — Ronnie John Mullally appeals his jury trial convictions for second degree robbery and third degree assault and various aspects of his sentence. He argues that (1) the trial court erred in refusing to instruct the jury on the lesser included offense of attempted second degree robbery, (2) one of the jury instructions was a judicial comment on the evidence, and (3) his legal financial obligations (LFOs) are improper on several grounds. In his statement of additional grounds[1] (SAG), he contends that (1) the 63-month sentence for third degree assault exceeds the five-year statutory maximum for the offense, (2) his convictions for both robbery and assault violate double jeopardy, (3) he received ineffective assistance of counsel on several grounds, and (4) the robbery conviction is not supported by sufficient evidence. We affirm the convictions, but remand for resentencing.

[1] RAP 10.10.

FACTS

I. BACKGROUND

On April 5, 2011, Target Store loss prevention investigator Seth Aaron Kelton observed Ronnie John Mullally select several items,[2] place them in his hand basket, and then walk toward the front doors. Suspecting that Mullally was going "to do a grab and run," Kelton followed Mullally and positioned himself outside the store. 1 Verbatim Report of Proceedings (VRP) at 99.

When Mullally exited the store without paying for the items in his basket, Kelton approached him and identified himself as Target security. Mullally did not respond and attempted to walk past Kelton. Kelton again identified himself as security and told Mullally to "get against the wall." 1 VRP at 138, 141. Kelton briefly pushed Mullally, trying to get him up against the wall, but Mullally "push[ed] off the wall," forced himself past Kelton, and continued to try to walk past Kelton. 1 VRP at 101, 103. Kelton attempted to knock the hand basket out of Mullally's hands; Kelton succeeded on the third try. After dropping the basket, Mullally hit Kelton in the right shoulder. Mullally then drew back his arm as if he was going to try to hit Kelton again, and Kelton backed away. Mullally ran 30 or 40 feet into the parking lot where he was picked up by a waiting car; the car sped away. The State charged Mullally with second degree robbery and third degree assault.

[2] Kelton later testified that these items were valued at approximately $540.

II. PROCEDURE

A. Trial

At trial, Kelton testified as described above.[3] The State also showed the jury a security video of the entire incident.

The State proposed a lesser included offense instruction on attempted second degree robbery. After discussing the instruction at length, the trial court found that it was not factually supported. After the trial court made its decision, defense counsel responded, "I agree with you." 2 VRP at 237.

The trial court gave the jury the following instruction, jury instruction 13:

> A merchant, or employee of a merchant, has a lawful right to apprehend or detain a person they have probable cause to believe has committed theft.

Clerk's Papers (CP) at 32. Mullally objected to this instruction, arguing that the instruction was not appropriate because the trial court had not allowed Mullally's self-defense instruction. Mullally did not argue that the instruction was an incorrect statement of the law or that it was a judicial comment on the evidence. The jury convicted Mullally of second degree robbery and third degree assault.

B. Sentencing

The trial court sentenced Mullally to 63 months on each count. In the judgment and

[3] The State's only other witness was the driver of the car that picked up Mullally and drove away. This witness testified that he had driven Mullally to the store to run "errands." 1 VRP at 164. Mullally did not present any witnesses.

sentence, the trial court also imposed $4,150 in LFOs. These fees included: (1) a $500 victim assessment fee; (2) $450 in court costs (a $200 filing fee and a $250 jury demand fee), (3) a $1,000 court appointed attorney fee, (4) a $1,200 "[t]rial per diem," (5) $400 for court appointed defense expert and other defense costs, (6) a $500 fine under RCW 9A.20.021, and (7) a $100 DNA collection fee. CP at 43-44.

At the sentencing hearing, the only mention of LFOs occurred when a "Ms. Clark"[4] advised the trial court, "There's a trial per diem here indicating $1,200. I get paid a day-and-a-half for what happened in this case." 2 VRP at 316-17. The trial court did not orally address any other LFO or Mullally's ability to pay on the record, and Mullally did not object to any LFOs. Additionally, on the judgment and sentence, the trial court did not check the box indicating that it had considered Mullally's ability or likely future ability to pay his LFOs. Mullally appeals his convictions and his sentence.

ANALYSIS

I. ATTEMPTED SECOND DEGREE ROBBERY INSTRUCTION

Mullally first argues that the trial court erred when it refused to instruct the jury on the lesser included offense of attempted second degree robbery. This argument fails.

The record shows that the State originally proposed a lesser included offense instruction on attempted second degree robbery. The trial court refused to give this instruction, and

[4] The record does not identify who Ms. Clark is or what a "trial per diem" is. Nor do the parties clarify this in their briefs.

Mullally's counsel expressly agreed that the trial court's decision was correct. Thus, under the invited error doctrine, Mullally has waived this issue and we do not consider it further. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (the invited error doctrine prohibits "'setting up an error at trial and then complaining of it on appeal'") (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)); *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (courts "will deem an error waived if the party asserting such error materially contributed thereto.").

II. No Judicial Comment on the Evidence

Mullally next argues that jury instruction 13 was a judicial comment on the evidence.[5] Mullally did not object to jury instruction 13 on this ground at trial. Accordingly, we must first determine whether this is a manifest constitutional error that he can raise for the first time on appeal. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). We conclude that it is not and that Mullally has failed to preserve this issue for appellate review.

A judicial comment on the evidence has constitutional implications, so our first inquiry is whether the trial court in fact commented on the evidence. *See* Wash. Const. art. IV, § 16. We hold that it did not. Trial judges are prohibited from commenting upon the evidence presented at

[5] Mullally also argues that this instruction was irrelevant. But a person commits third degree assault if he assaults another with intent to prevent or resist *lawful* apprehension or detention, thus this instruction was clearly relevant to the third degree assault charge. RCW 9A.36.031(1)(a).

trial. WASH. CONST. art. IV, § 16; *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). "An impermissible comment is one [that] conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). A jury instruction that does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001).

Jury instruction 13 stated:

> A merchant, or employee of a merchant, has a lawful right to apprehend or detain a person they have probable cause to believe has committed theft.

CP at 32. This instruction is a correct statement of the law. *State v. Miller*, 103 Wn.2d 792, 698 P.2d 554 (1985) (store personnel may detain a suspected shoplifter if they have reasonable grounds to believe the person is committing or attempting to commit theft or shoplifting).[6]

Mullally also argues that this instruction "removed a disputed issue from the jury's consideration by in essence informing the jury that Kelton's actions were lawful." Br. of Appellant at 15. But the instruction merely established that Kelton had the legal authority to detain Mullally *if* he (Kelton) had probable cause to believe Mullally had committed theft; whether the State had proven probable cause was left to the jury.

[6] Mullally does not argue that the instruction's use of the probable cause standard rather than the reasonable grounds standard established in *Miller* was error.

Because the instruction was a correct statement of the law and the instruction did not convey the trial court's personal attitudes towards this case, Mullally fails to show that the instruction was an impermissible comment. Having failed to show any error, Mullally also fails to establish a manifest constitutional error, and he cannot raise this issue for the first time on appeal.

III. LEGAL FINANCIAL OBLIGATIONS

Mullally next argues that (1) the trial court failed to make any findings about his current or future ability to pay LFOs and there is no evidence that the trial court considered his ability to pay before ordering the LFOs, (2) the "trial per diem fee" was not statutorily authorized (quoting CP at 43), and (3) the State failed to present any evidence supporting several of the LFOs. Because the State has not yet sought to enforce the LFOs, Mullally is not an aggrieved party and this issue is not yet ripe. RAP 3.1; *State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011); *see also State v. Lundy*, No. 42886-5-II, 2013 WL 4104978 at *5 (Wash. Ct. App. Aug. 13, 2013). Furthermore, Mullally did not object at his sentencing hearing to the imposition of these costs.[7] RAP 2.5(a).

Here, the record shows Mullally had previously been employed, and there was no indication that Mullally would necessarily be unemployable in the future; additionally, the judgment and sentence did not state that Mullally had to start payments at any time. Thus,

[7] We note that although we addressed a trial court's finding of current or future ability to pay in *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012), despite Bertrand's failure to object as required by RAP 2.5(a), "that rule does not compel us to do so in every case." *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *petition for review filed*, No. 89028-5 (Wash. July 8, 2013).

Mullally has not shown that RAP 2.5(a) or RAP 3.1 should not apply here.[8] Accordingly, his LFO challenges are not properly before us.

As to Mullally's argument that the record does not support the imposed LFOs, because we remand for resentencing on the third degree assault conviction and Mullally did not object to these LFOs below, the State may want to make a more complete record regarding Mullally's ability to pay and present any relevant evidence to support the amount of the LFOs. For example, it is not clear from the record what costs the "trial per diem fee" represents and therefore we cannot determine whether that fee is statutorily authorized. *See State v. Thiefault*, 160 Wn.2d 409, 417 n.4, 158 P.3d 580 (2007) (remand with an opportunity for the State to prove classification of an offense at a sentencing hearing is appropriate when the defendant failed to object or otherwise put the State on notice as to any potential defects).

IV. SAG

A. Third Degree Assault Sentence Exceeds Statutory Maximum

In his pro se SAG, Mullally next contends that his 63-month sentence on his third degree assault conviction exceeds the statutory maximum for the offense. He is correct.

Third degree assault is a class C felony. RCW 9A.36.031(2). The statutory maximum for a class C felony is 60 months. RCW 9A.20.021(1)(c). Thus, the trial court erred when it imposed a 63-month sentence on the third degree assault conviction. Accordingly, we vacate this sentence and remand for resentencing.

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[8] We acknowledge that Division One of this court has addressed objections to LFOs differently in *State v. Calvin*, ___ Wn. App. ___, 302 P.3d 509 (2013). We decline to follow *Calvin*. Not only is our current case law on this issue contrary to *Calvin*, but unlike in *Calvin*, the trial court did not enter any finding regarding Mullally's ability to pay for us to consider.

B. No Double Jeopardy

Mullally further contends that his second degree robbery and third degree assault convictions violate double jeopardy under the merger doctrine because the robbery was based on the assault. Mullally is incorrect.

We review double jeopardy claims de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Under the merger doctrine, when separate criminal conduct raises another offense to a higher degree, the court presumes that the legislature intended to punish both offenses only once. *Freeman*, 153 Wn.2d 765, 772-73. Here, the assault did not elevate the robbery to a higher degree, so the merger doctrine does not apply.

Furthermore, a defendant may commit robbery without committing an assault, but this requires that the State prove a separate act of force to prevent double jeopardy from precluding two convictions. *State v. Smith*, 9 Wn. App. 279, 511 P.2d 1032 (1973), *review denied*, 82 Wn.2d 1013 (1973). Here, the act of force necessary to commit the robbery was Mullally's pushing past Kelton and resisting Kelton's attempts to knock the hand basket out of his hand. The later acts of force, Mullally's punching Kelton in the shoulder, and Mullally drawing back his arm as if he was going to try to hit Kelton again, causing Kelton to back away, occurred after Mullally dropped the merchandise and was to ensure Mullally's escape, not to facilitate the robbery. Thus the third degree assault had an independent purpose, and the two convictions do not violate double jeopardy. *Freeman*, 153 Wn.2d at 778-79 (citing *State v. Prater*, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981) (when the defendant struck the victim after completing a

robbery, there was a separate injury and intent justifying a separate assault conviction, especially when the assault did not further the robbery), *review denied*, 97 Wn.2d 1007 (1982)).

C. Ineffective Assistance of Counsel

Mullally next contends that he received ineffective assistance of counsel on several grounds. Again, we disagree.

To establish ineffective assistance of counsel, Mullally must show that (1) counsel's performance was objectively unreasonable; and (2) the deficient performance prejudiced the defense. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Mullally bears the burden of proving both parts, and failure to establish either part defeats the ineffective assistance of counsel claim. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687).

Furthermore:

> The threshold for the deficient performance prong is high, given the deference afforded to defense counsel's decisions in the course of representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) *adhered to in part on remand*, 168 Wn. App. 635, 278 P.3d 225 (2012). To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33, 246 P.3d 1260. Also, counsel's performance is not deficient when her or his conduct can be characterized as legitimate trial strategy or tactics. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

State v. Embry, 171 Wn. App. 714, 761, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005 (2013).

Mullally first asserts that his counsel was ineffective for failing to obtain an expert to examine the security videos and, apparently, to lip read to determine what Kelton was saying.[9] But there is nothing in the record supporting Mullally's assertion that Kelton failed to identify himself, accordingly Mullally cannot show prejudice based on this record.

Mullally next asserts that his counsel should have proposed a lesser included offense instruction on third degree theft. But, "[c]ounsel's decision to not request an instruction on a lesser-included offense does not constitute ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal." *Embry*, 171 Wn. App. at 761 (citing *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009)). Here, "[a]lthough risky, an all or nothing approach" on the more serious offense, "was at least conceivably a legitimate trial strategy." *Grier*, 171 Wn.2d at 42. Thus, Mullally does not establish ineffective assistance of counsel on this ground.

Finally, Mullally argues that his counsel was ineffective in failing to propose any jury instructions. But defense counsel proposed some instructions. Furthermore, other than his reference to the third degree assault instruction, which we address above, Mullally fails to identify any specific instruction counsel should have proposed. Without knowing what instructions Mullally believes his counsel should have proposed we cannot determine whether Mullally was prejudiced. Accordingly, Mullally's ineffective assistance of counsel claims fail.

[9] During the trial, Mullally moved to dismiss defense counsel, arguing that, among other things, that although he had asked counsel to "enhance[]" the video, counsel had failed to do so. 2 VRP at 212. Mullally also suggested that counsel should have found someone to testify about what Kelton had said on the video.

D. Sufficiency

Finally, Mullally argues that the evidence is insufficient to support the second degree robbery conviction because there is no evidence that he used force to obtain or retain possession of the property or prevent or overcome resistance and because he "relinquished the property then took off." SAG. Once again, we disagree.

We review insufficient evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Sufficiency challenges admit the truth of the State's evidence and all reasonable inferences drawn from it. *Yarbrough*, 151 Wn. App. at 96. In determining the sufficiency of the evidence, we do not consider circumstantial evidence any less reliable than direct evidence. *Yarbrough*, 151 Wn. App. at 96.

To prove second degree robbery, the State had to prove beyond a reasonable doubt that Mullally used or threatened the use of force, violence, or fear of injury and that that force or fear was used to obtain or retain possession of the property or to prevent or overcome resistance to the taking; "the degree of force is immaterial." RCW 9A.56.190, .210. Kelton's testimony, taken in the light most favorable to the State, was sufficient to allow the jury to find that Mullally pushed past Kelton and held onto the hand basket despite Kelton's attempts to knock it out of his hand. Because the degree of force is immaterial, this evidence is sufficient to support this element and Mullally's insufficient evidence argument fails.

We affirm the convictions but vacate the third degree assault sentence and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Forbes, J.P.T.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 42939-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Abigail Bartlett, Clark County Prosecuting Attorney [prosecutor@clark.wa.gov]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 11, 2013

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