No. 95834-3

No. 48909-1-II

Pierce County #14-1-05273-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE COOPER,

Petitioner/Appellant.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
PIERCE COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PARTY 1

B. COURT OF APPEALS DECISION 1

C. SUMMARY OF ARGUMENT 1

D ISSUES PRESENTED FOR REVIEW 3

E. OTHER ISSUES PRESENTED FOR REVIEW 3

F. STATEMENT OF THE CASE 4

a. Procedural posture 4

b. Facts relevant to issues on review 4

G. ARGUMENT WHY REVIEW SHOULD BE GRANTED 8

1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS APPLIED THE WRONG STANDARD 8

H. OTHER REASONS SUPPORTING REVIEW 13

2. REVIEW SHOULD ALSO BE GRANTED ON ALL OF THE ISSUES PETITIONER RAISED PRO SE 13

I. CONCLUSION 14

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996) 14

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993). 13

State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002) 10-13

State v. W.R., Jr., 181 Wn.2d 57, 366 P.3d 1134 (2014) 13

State v. Werner, 170 Wn.2d 333, 241 P.3d 410 (2010) 8

WASHINGTON COURT OF APPEALS

State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997) 3, 10, 13

State v. Cooper _ Wn. App. __ (2018 WL 1733464) . . . . . *passim*

State v. George, 161 Wn. App. 86, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011). 8

State v. Koch, 157 Wn. App. 20, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011). 9

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

RAP 10.10 14

RAP 13.4.(b)(2) 1, 3, 13

RAP 13.4.(b)(3) 1, 3

RAP 13.7(b) 14

A. IDENTITY OF PARTY

Michael Cooper, defendant at trial and appellant in the court of appeals, is the Petitioner.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(2) and (3), Petitioner seeks review of a portion of the unpublished decision of the court of appeals, Division Two, in State v. Cooper _ Wn. App. __ (2018 WL 1733464), issued on April 10, 2018.[1] In that decision the court of appeals affirmed the convictions but reversed and remanded for further proceedings on legal financial obligations.

C. SUMMARY OF ARGUMENT

Because it negates an essential element of an offense, the defense of self-defense must be disproven by the state, beyond a reasonable doubt, as a matter of state and federal due process. The established standards for when the state must bear this burden include that the defendant need only provide "some" evidence to support a claim of self-defense. Further, the trial court must consider the evidence in the light most favorable to the defendant - not the state- in deciding whether the minimal requirement of "some" evidence has been met.

Mr. Cooper was accused of, *inter alia*, second-degree assault. The alleged assault occurred after Cooper was physically pushed out of a restaurant by another man, Mr. Nuttall. When Cooper righted himself and

[1]A copy is attached hereto as Appendix A.

went to the restaurant door to go inside, he was waving his cane. A state's witness testified that Nuttall was physically pushing on Cooper to keep him from getting inside when Cooper swung the cane and his Nuttall in the nose.

In deciding whether Mr. Cooper had met his burden of providing "some" evidence to support his claim of self-defense, the trial court did not consider the evidence that Mr. Cooper was being assaulted at the time his alleged criminal act occurred. The trial court refused to allow Cooper to raise the defense and declined to give Cooper's proposed instructions and "to-convict" telling the jury the state had the burden to disprove the defense. On review, the court of appeals declared that the standard was whether any reasonable person in Cooper's situation "would have struck such a blow" and concluded that the standard was not met, because Nuttall had not followed Cooper outside and continued the first assault.

Thus, both the trial court and court of appeals relied on the termination of Nuttall's first assault but ignored the evidence showing that Nuttall was engaging in a *second* assault - pushing Cooper physically - at the time that Cooper struck Nuttall with the cane.

Both the trial court nor the court of appeals failed to apply the requirement of examining the record in the light most favorable to the defendant, as required. As a result, Mr. Cooper was deprived of his fundamental due process rights at trial, denied the right to raise self-defense when he had established "some" evidence to support that defense, if the correct standards had been applied.

This Court should grant review of the court of appeals decision under RAP 13.4(b)(2), because the trial court and court of appeals applied standards in conflict with the explicit holding of State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997), that a trial court deciding this issue must take the evidence in the light most favorable to the defendant, not the state. Further, review should be granted under RAP 13.4(b)(3), because the proper application of the standards for determining when a defendant has sufficiently established the right to raise a defense of self-defense is a critical issue of serious constitutional law, affecting fundamental due process rights of the accused.

D ISSUES PRESENTED FOR REVIEW

1. Was Petitioner deprived of his due process rights and should review be granted when the trial court denied his request for self-defense instructions and held that he could not raise self-defense even though the evidence below, when taken in the light most favorable to the accused, established that the defendant was being assaulted by the alleged victim at the time the defendant struck the other man with the cane?

2. Should this Court grant review under RAP 13.4(b)(2), because the trial court and the court of appeals' decisions failed to apply the proper standard and take the evidence in the light most favorable to the accused as set forth in Callahan?

3. Should review also be granted under RAP 13.4(b)(3), because the improper application of the standards rt for determining when due process mandates that the state bear the burden of disproving self-defense is an issue of significant constitutional law with widespread potential implications?

E. OTHER ISSUES PRESENTED FOR REVIEW

4. Should review be granted on the issues presented in

Petitioner's Statement of Additional Grounds?

F. STATEMENT OF THE CASE

a. Procedural posture

Petitioner Michael Cooper was charged by amended information with 1) second-degree assault with a deadly weapon enhancement, a "clearly too lenient" aggravating factor and a "recent release" aggravating factor, 2) third-degree assault of an officer with the same aggravating factors, 3) a second-degree malicious mischief, with the same aggravating factors, and 4), obstructing a law enforcement officer. CP 9-11. He was convicted of the second-degree assault and the aggravating factor of recent release, the third-degree assault and the malicious mischief but not of obstruction, and the jury did not find that Cooper was "armed" at the time of any offense. CP 152-61; 4RP 422, 431.[2]

After a continuance due to mental health proceedings, a motion for a new trial was denied and Mr. Cooper was ordered to serve a standard-range sentence. CP 275-77, 299-301, 307-361. He Cooper appealed and, on April 10, 2018, Division Two of the court of appeals affirmed in part and reversed in part in an unpublished opinion. See CP 407-22; App. A. This Petition timely follows.

b. Facts relevant to issues on review

The issues whether the lower courts improperly failed to properly apply the relevant standards in examining the record when deciding

[2]The trial transcript was mostly contained in a series of volumes referred to as "4RP" herein. Specific explanation of the citation to the multiple volumes of transcript is contained in the Opening Brief of Appellant ("AOB") at 4 n.1.

whether Michael Cooper had shown "some" evidence to support raising self-defense - and thus shift the burden of disproving self-defense to the state, as a matter of constitutional law. As a result, more detailed discussion of the facts than normal is required.

Mr. Cooper was arrested after an incident at a fast-food restaurant in which Brent Nuttall, a homeless man, was injured on the nose and the main doors to the restaurant had a window smashed out. 4RP 129, 152-55, 162-67. Before Mr. Nuttall was hit in the nose, he had pushed Mr. Cooper out of the restaurant doors so hard that Mr. Cooper almost landed on the ground. 4RP 203-204. Mr. Nuttall had decided to physically remove Cooper from the restaurant with the "significant push" out the door, then another "push" Nuttall admitted was more like a "throw." 4RP 203-204. No one asked Nuttall to physically eject Cooper but Cooper was agitated about someone having taken his bag and Nuttall had a "reaction," "sensed immediate danger" and thought "the chaos and the trouble was going to escalate further." 4RP 204. A teenage employee said she had asked Cooper to leave the lobby because he was shouting and people were getting upset, and described Nuttall as a customer trying to help. 3RP 203.

At the time Nutall shoved him through and then again at the restaurant door, Cooper had not hit or pushed anyone himself, or even touched them. 4RP 234-35. When Cooper got up and tried to come back in the restaurant, Nuttall "jumped up instinctively to face this," saying he was "ready to act" to keep the other man outside. 4RP 207-208, 242. The door was open a little when Nuttall got hit in the face, hard, with Cooper's

cane. 4RP 153, 208, 210, 234, 28.

Mr. Nuttall admitted that he might have pushed the door open himself, not Mr. Cooper. 4RP 234.

A man who was working at the restaurant that day testified that he saw Mr. Cooper come in and talk to people normally, leave for a moment, then come back and seeming frantic when he was looking for a bag. 4RP 321-25. The employee said that Cooper left again and was in the parking lot swinging his cane at "just random people," upset about the bag. 4RP 330-31. The employee also saw Nuttall get to the door just as Cooper was trying to come back in, and that Cooper was still swinging the cane. 4RP 326-27. The employee then testified that he saw Nuttall pushing on Cooper physically at the time the cane hit and broke Nuttall's nose. 4RP 326-27.

At trial, Cooper proposed several instructions consistent with his defense of self-defense for the charged second-degree assault on Nuttall. CP 102-105. One instruction would have provided:

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 102. Another proposed instruction provided:

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 103. The defense also proposed a third instruction, which provided:

> It is lawful for a person who is in a place where that person a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.
>
> The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."

CP 104. Cooper also proposed a "to convict" for the second-degree assault which included as an essential element [t]hat the defendant's use of force was not lawful," as requested by the defense. CP 105.

When the parties initially discussed the jury instructions, the trial court told the parties that it thought Cooper had not proved self-defense was a proper defense, because self-defense required "an affirmative showing from the defendant that he was feeling at risk of being harmed himself," and "[y]ou don't just get a self-defense instruction without that[.]" 4RP 265-66.

The trial judge then relied on the version of the facts which had Nuttall pushing Cooper out the door, walking away and sitting down for some time, then coming back to the door only when Cooper reinitiated - without Nuttall pushing Cooper at the time that Nuttall got hit. 4RP 266.

Later, in arguing on the instructions, counsel pointed out the version of the facts that Nuttall had admitted pushing Cooper with such force he nearly fell, that Cooper got up immediately to go get his bag but Nuttall was again physically aggressive with Cooper, so that Nuttall was

pushing on Cooper at the time Cooper swung and hit him with the cane as the employee had testified. 4RP 348-49.

In refusing to give the proposed instructions and ruling that Mr. Cooper could not raise self-defense for the second-degree assault charge regarding Nuttall, the trial judge at trial said Nuttall was "behind a closed door" when he was hit, apparently rejecting the version of events in which Nuttall was physically pushing on Cooper again when Nuttall was hit. 4RP 350. The judge declared that the case did not involve self-defense because, "it went from being a shove to have him leave and stop being a disruption in the restaurant to then this battle over the door and the lashing out with the cane." 4RP 350.

G. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS APPLIED THE WRONG STANDARD

Under both the state and federal due process clauses, the state bears the burden of proving all the essential elements of a crime, beyond a reasonable doubt. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). Where the defendant is claiming self-defense, the defense negates an essential element of the crime and thus the state must bear the burden of *disproving* self-defense. State v. George, 161 Wn. App. 86, 96, 249 P.3d 202, review denied, 172 Wn.2d 1007 (2011). Further, an additional due process requirement is that juror instructions must make manifestly clear the prosecutions burden of proof, as well as allowing the parties to argue all theories supported by sufficient evidence, informing the jurors of

applicable law and ensuring they have the discretion to decide any questions of fact. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011).

In this case, this Court should grant review, because Mr. Cooper's due process rights were violated when he was prevented from arguing self-defense to the jury and the relevant proposed jury instructions were not given. In ruling to the contrary, the court of appeals, Division Two, applied an incorrect standard of law.

On appeal, Mr. Cooper argued that the trial court had violated Cooper's due process rights to present a defense and erred in refusing to give the self-defense instructions or allow Cooper to even raise the defense. Brief of Appellant ("BOA") at 11-15. In affirming, Division Two held that there was no error, because there was not "some evidence" of self-defense presented below to support a requirement for self-defense instructions, citing this Court's decision in State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). App. A at 6-7.

The court of appeals applied the incorrect standards in reaching this conclusion, however. The court applied what it described as an "objective inquiry" into "what a reasonable person would have done in the defendant's situation" in order to determine, on de novo review, this issue of law. App. A at 7. But Division Two then took the facts as follows: that Nuttall had "ejected Cooper from the restaurant" but "did not follow or give chase to him" and Cooper then returned and "struck a blow to Nuttall, who was barring his reentry." App. A at 8.

In Callahan, supra, the appellate court held that a trial court must examine the record in the light most favorable to the *defendant*, not the state, when deciding whether the defendant has met the minimal burden of "some" evidence to support raising self-defense. 87 Wn. App. at 933. In holding that no reasonable person would have done what Mr. Cooper did, the court of appeals declared that none of the witnesses testified that Nuttall had followed Cooper out the door and thus, "a reasonable person in Cooper's situation would not have struck such a blow[.]" App. A at 8. Division Two then declared that Cooper's "threshold burden of production" thus was not met. Id.

But the state's witness *did* testify that Nuttall was physically assaulting Cooper, pushing him to keep him out of the restaurant, when Nuttall was hit. 4RP 350. Taking the evidence in the light most favorable to Mr. Cooper, Nuttall had assaulted Cooper once and was physically assaulting Cooper, pushing on him, at the time that Cooper then swung the cane and hit Nuttall - the act which resulted in the claim Cooper had committed second-degree assault.

Had the court of appeals applied the proper standard, it would have reversed and remanded for a new trial in which the jury was properly instructed on self-defense and Mr. Cooper was allowed to make that argument and have the state disprove self-defense at trial.

The court of appeals' decision cited Read, supra, as if that case supported Division Two's departure from the accepted standard of taking the facts in the light most favorable to the defendant when deciding if

there was "some" evidence of self-defense. App. A at 7-8. That case, however, does not support that result.

In Read, the defendant was convicted of second-degree murder and claimed self-defense, and witnesses were allowed to give lay opinion testimony on "whether it was reasonable" for him to have used deadly force in self-defense. 147 Wn.2d at 240. The incident had started when the defendant had intruded into a party in a motel room and was asked repeatedly to leave. 147 Wn.2d at 241. When he ignored the person making that request, that person's brother stood up and said, "don't get smart with my brother, man." 147 Wn.2d at 241. The defendant then pulled out a gun and shot and killed the unarmed victim. 147 Wn.2d at 241-42.

At trial, some defense witnesses said the unarmed victim had "jumped" off the bed and stepped towards the defendant but others said he had simply approached the defendant, his arms at his sides. 147 Wn.2d at 240. Every witness except the defendant testified that there was no verbal threat or any physical act making the victim appear threatening at all. Id. Many said there was nothing happening indicating the defendant needed to "defend himself." 147 Wn.2d at 240-42.

On review from the conviction - obtained after a bench trial - the issue was not whether the defendant was deprived of his right to present a defense or due process by being denied the self-defense claim. 148 Wn.2d at 242. Instead, the question was whether the defendant had produced "some evidence to establish the killing occurred in circumstances

amounting to defense of life" and further "some evidence he or she had a reasonable apprehension of great bodily harm and imminent danger." 148 Wn.2d at 242-43.

On review, this Court in Read noted that the standard of review depends on why the trial court refused to instruct on self-defense - "abuse of discretion" if the trial court finds "no evidence supporting the defendant's subjective belief of imminent danger of "great bodily harm," and "de novo" if the trial court refuses to give the instruction because "it found no reasonable person in the defendant's shoes would have acted as the defendant acted[.]" 147 Wn.2d at 243. The Court then noted that, because Read used deadly force, even if he reasonably believed he might be *hurt* by the unarmed man who jumped up, Read had not showed that he "reasonably believed he was in imminent danger of death or great personal injury." 147 Wn.2d at 244. The Read Court did not address the bench trial court's finding regarding the objective element of self-defense. 147 Wn.2d at 244.

Read does not support the court of appeals holding here. It did not involve applying the wrong standard and refusing to construe the facts in the light most favorable to the defendant, as Division Two here did.

This Court should grant review. First, review should be granted under RAP 13.4(b)(2), because the trial court and court of appeals decisions are in conflict with the decision in Callahan, establishing that the record must be reviewed in the light most favorable to the defendant, not the state. Second, the issues presented by this case are of significant

constitutional import. The due process right to have the state disprove self-defense exists because of the fundamental requirement that the state must be held to its constitutional burden of proving its case against the accused, beyond a reasonable doubt. See State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Mr. Cooper met the minimal burden of production and was denied the self-defense claim he was entitled to present to the jury - and to have the state be constitutionally required to disprove, beyond a reasonable doubt.

In State v. W.R., Jr., 181 Wn.2d 57, 366 P.3d 1134 (2014), this Court granted review to address the significant due process questions surrounding having a defendant bear the burden of proving consent, even though that negated an essential element of the state's case. This case presents similar due process concerns. The issues here involve whether the trial court and court of appeals are failing to take the evidence in the light most favorable to the defendant in deciding whether the defendant is constitutionally entitled to have the state disprove self-defense. This Court should grant review.

H. OTHER REASONS SUPPORTING REVIEW

2. REVIEW SHOULD ALSO BE GRANTED ON ALL OF THE ISSUES PETITIONER RAISED PRO SE

Petitioner filed a pro se RAP 10.10 Statement of Additional Grounds for Review ("SAG") in the court of appeals. See App. A. Counsel was not appointed to assist with the SAG. In its decision below, Division Two rejected all of Petitioner's arguments raised pro se. See

App. A at 13-15.

In State v. Brett, 126 Wn.2d 136, 206, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), this Court held that it would not address arguments incorporated by reference from other cases. It did not, however, disapprove of incorporation by reference of arguments or issues raised in the current case. To comply with RAP 13.7(b) and raise all the issues in the Petition without making any representations about their relative merit as required pursuant to the Rules of Professional Conduct, incorporated herein by reference are Mr. Cooper's pro se arguments, contained in his RAP 10.10 SAG. This Court should grant review on those issues as well.

I. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 10th day of May, 2018.

Respectfully submitted,

/s/ Kathryn Russell Selk
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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Clark County Prosecutor's Office via this Court's upload service and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: Michael Cooper, DOC 966297, Airway Heights CC, P.O. Box 2049, Airway Heights, WA. 99001-2049.

DATED this 10th day of May, 2018.

/s/ Kathryn Russell Selk
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Filed
Washington State
Court of Appeals
Division Two

April 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL LEE COOPER, Appellant.	No. 48909-1-II UNPUBLISHED OPINION

JOHANSON, J. — Michael Lee Cooper appeals his jury trial convictions and sentence for second degree assault of a restaurant patron, third degree assault of an officer, and second degree malicious mischief. He argues that (1) the trial court erred by not instructing the jury on self-defense related to the second degree assault, (2) a police officer's statements that Cooper wielded a "weapon" were improper opinion testimony, and (3) the trial court erred when it imposed mandatory legal financial obligations (LFOs) without considering RCW 9.94A.777. He also (4) raises several arguments in a statement of additional grounds (SAG).[1]

We hold that (1) the trial court correctly declined to give self-defense instructions, (2) any improper opinion testimony by the officer was harmless error beyond a reasonable doubt, (3) the trial court should have inquired into Cooper's ability to pay mandatory LFOs in light of evidence of his mental health condition, and (4) Cooper's SAG issues either cannot be considered or fail. Accordingly, we affirm Cooper's convictions and sentence but remand for the trial court to

[1] RAP 10.10.

determine whether to impose the deoxyribonucleic acid (DNA) fee and criminal filing fee after considering evidence of Cooper's mental health condition under RCW 9.94A.777.

FACTS

I. BACKGROUND

During an evening in December 2014, Officer John Moses responded to a report of an assault and broken window at a restaurant. A block from the restaurant, Officer Moses came upon Cooper, who was swinging around his head a "metal cane" that resembled a "walking stick" or "collapsible type baton[]." 2 Verbatim Report of Proceedings (RP) at 133.

Deducing that Cooper had perpetrated the assault and broken the window, Officer Moses ordered Cooper to stop. Instead, Cooper began yelling and walking away from Officer Moses more quickly. Officer Moses drew his stun gun and ordered Cooper to drop the stick, which Cooper did and then began reaching into his pockets, throwing garbage to the ground. Officer Moses then ordered Cooper to the ground and despite some resistance, handcuffed Cooper. At one point while Officer Moses was attempting to handcuff Cooper, Cooper grabbed Moses's wrist, forcing Moses to struggle free in order to place handcuffs on Cooper.

Officer Moses then inspected the restaurant where the assault occurred, in which one door had a broken window. He also contacted Brent Nuttall, the restaurant patron whose nose Cooper had broken.

The State charged Cooper with second degree assault of Nuttall, third degree assault of Officer Moses, second degree malicious mischief, and obstructing a law enforcement officer. The second and third degree assault charges included deadly weapon sentencing enhancements.

II. Pretrial Evidentiary Ruling and Discussion of State's Witnesses

Before trial, Cooper moved to bar Officer Moses from referring to Cooper's cane as a "deadly weapon" on the basis that whether the cane was used as a deadly weapon was "a question of fact for the jury." 2 VRP at 101. The trial court granted his motion.

The prosecutor told Cooper on the first day of trial that the State would not be calling certain witnesses on its witness list. And despite being subpoenaed, one of the State's witnesses, a restaurant employee, did not testify and could not be located. When the State told Cooper's attorney it could not locate the witness, Cooper's attorney at first stated she intended to call that witness. But later in the trial, she decided against calling the witness.

III. Trial

At Cooper's jury trial, the State presented testimony from Nuttall, a cashier and a cook who were working at the restaurant during the incident, a restaurant manager who was not working during the incident,[2] and Officer Moses. Cooper did not present any testimony or evidence.

A. Events Inside the Restaurant

1. Nuttall's Testimony

Nuttall testified that on the evening of the assault, he was inside the restaurant, speaking to some acquaintances. At some point, Cooper approached the group. Cooper showed them a folding walking cane, commenting that it could be used as a "potential weapon." 3 VRP at 202. Cooper, who was searching for a bag, then became agitated and began "circling about" inside the restaurant, screaming. 3 VRP at 199. He was holding the cane, which he brandished while he walked. At

[2] The manager's testimony related to videos of the incident that he had recorded from surveillance cameras.

one point, Cooper approached Nuttall, who feared from Cooper's actions that he would strike Nuttall with the cane. Nuttall described Cooper as "growling" and "angrily engaged" and the restaurant employees as panicked. 3 VRP at 203.

Fearing Cooper would hurt Nuttall or someone else in the restaurant, Nuttall grabbed Cooper by his jacket and forcibly removed him from the restaurant; Nuttall then gave Cooper a strong push away from the restaurant. Nuttall testified that he did not leave the restaurant; instead, he "went back to sit down." 3 VRP at 206. Nuttall then observed Cooper return from the parking lot, "twirling [the cane] around as if to prepare" and reapproaching the restaurant door. 3 VRP at 207. When Nuttall saw Cooper coming back to the restaurant, Nuttall walked to the door, which was open approximately one foot, to stop Cooper from reentering. Cooper and Nuttall arrived at the door simultaneously, and then Cooper swung his cane through the gap and hit Nuttall hard in the face, breaking his nose.

2. EMPLOYEES' TESTIMONY

A restaurant cashier testified that earlier that evening, she told Cooper,[3] who was causing problems with other customers, to leave the restaurant. When Cooper returned and began yelling, Nuttall told him to leave. Cooper then left; according to the cashier, Nuttall never touched Cooper. Once Cooper was outside, people inside attempted to lock the doors to prevent his reentering. Nuttall went to lock one of the open doors, and in doing so, he was struck with the cane. Cooper then broke a restaurant window and fled.

[3] Neither the cashier nor the cook were able to identify Cooper as the man with the cane. However, Nuttall and Officer Moses identified Cooper.

A cook testified that he did not see Nuttall interact with Cooper until Cooper returned to the restaurant. When Cooper came back to the restaurant, he tried to reenter, and Nuttall went to the door while employees called 911. Cooper pushed partway through the front door. Nuttall pushed both on the door and on Cooper to force him out and was struck with the cane.

3. OFFICER MOSES'S TESTIMONY

Consistent with the description of his encounter with and arrest of Cooper set forth above, Officer Moses testified about events after Cooper left the restaurant. Officer Moses explained that when he encountered Cooper, "dispatch had already reported that [Cooper] had assaulted somebody inside [the restaurant] and that he had broken a window utilizing the stick, so therefore I know [sic] that it was being *used as a weapon* at the time." 2 VRP at 137 (emphasis added). Officer Moses ordered Cooper to "drop the weapon," referring to the cane, and Cooper complied. 2 VRP at 137. Officer Moses also explained that he was concerned when Cooper reached into his pockets that he would pull out a "second weapon." 2 VRP at 138. The trial court overruled Cooper's objection to Officer Moses's "use of [the] term right now that was subject to a motion." 2 VRP at 141.

B. SELF-DEFENSE INSTRUCTION RULING

After the State rested, Cooper requested that the trial court instruct the jury on self-defense. The trial court denied the request because under the facts presented, there was no legitimate claim of self-defense where Nuttall was not "doing anything other than to try to keep Mr. Cooper from reentering." 5 VRP at 350.

IV. VERDICT AND SENTENCING

The jury found Cooper guilty of the second degree assault of Nuttall, third degree assault of Officer Moses, and second degree malicious mischief, but not guilty of obstruction of a police officer or any deadly weapon enhancements.

At sentencing, the State discussed Cooper's extensive criminal history, mental health issues, and homelessness at the time of the offense. Cooper also stated that he was on social security because of his mental illness.[4] Before imposing Cooper's sentence, the trial court recognized Cooper's significant mental health issues that contributed to his crime. The trial court sentenced Cooper to 80 months of confinement. It also imposed $800 in mandatory LFOs but did not impose any discretionary LFOs, based upon Cooper's inability to pay. Cooper did not raise any argument that mandatory LFOs should not be imposed under RCW 9.94A.777.

ANALYSIS

I. SELF-DEFENSE

Cooper argues that his right to present a defense was violated when the trial court declined to instruct the jury on self-defense because self-defense was not available under the circumstances. Cooper claims that there was evidence to support that Nuttall was the first aggressor and that Cooper acted in self-defense in the face of Nuttall's allegedly continuing assault. We disagree with these arguments.

[4] Before trial, Cooper had also been involuntarily committed.

A. LEGAL PRINCIPLES

"The standard of review when the trial court has refused to instruct the jury on self-defense depends on why the court refused the instruction," a subjective or objective inquiry by the trial court. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). For the subjective inquiry, "[i]f the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion." *Read*, 147 Wn.2d at 243. For the objective inquiry, "[i]f the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo." *Read*, 147 Wn.2d at 243. When we determine whether some evidence supported a self-defense instruction, we review the entire record in the light most favorable to the defendant. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

There must be "some evidence" of self-defense for a self-defense instruction to be appropriate. *Read*, 147 Wn.2d at 242. The objective inquiry requires a determination of what a reasonable person would have done in the defendant's situation. *Read*, 147 Wn.2d at 243.

B. NO EVIDENCE THAT COOPER WAS ACTING IN SELF-DEFENSE

Here, Cooper failed to provide any evidence that he had a right to self-defense because under the circumstances, a reasonable person in Cooper's situation would not have acted as Cooper acted. *See Read*, 147 Wn.2d at 243. Although the three witnesses to events inside the restaurant gave somewhat different versions of the encounter, none of their testimony supported that a reasonable person in Cooper's position would have struck Nuttall with the cane. *See Read*, 147 Wn.2d at 243.

Nuttall testified that he only returned to the doorway when he saw Cooper returning and because he sought to stop Cooper from reentering. The cook testified that Cooper came in, started a commotion while looking for his bag, went back outside, started yelling and swinging a cane at people outside, and then returned and came partway through the door. It was then that Nuttall pushed Cooper back outside and in doing so, was struck with the cane. The cashier testified that Cooper left the restaurant, then Nuttall attempted to lock the door, and Cooper struck Nuttall with his cane. All three testified that Nuttall did not leave the restaurant during this encounter.

Under these accounts, Nuttall ejected Cooper from the restaurant but did not follow or give chase to him. Cooper then returned and struck a blow to Nuttall, who was barring his reentry. Given the circumstances, a reasonable person in Cooper's situation would not have struck such a blow. *See Read*, 147 Wn.2d at 243. "[W]hile the threshold burden of production for a self-defense instruction is low, it is not nonexistent." *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Cooper failed to meet this burden.

C. First Aggressor Argument

Cooper argues that Nuttall, not Cooper, initiated physical contact and was the first aggressor, so that Cooper was acting in self-defense. We reject this argument.

A first aggressor loses the right to act in self-defense. *State v. Dennison*, 115 Wn.2d 609, 617, 801 P.2d 193 (1990). However, if an aggressor in good faith withdraws "'from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action,'" the right to act in self-defense is revived. *Dennison*, 115 Wn.2d at 617 (quoting *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973)). And where the victim was the aggressor in an earlier encounter that ended because the

victim and defendant have withdrawn, the victim's earlier aggression does not excuse the defendant from provoking a later assault. *State v. Brown*, 3 Wn. App. 401, 403-04, 476 P.2d 124 (1970).

Cooper relies on Nuttall's testimony that he grabbed and pushed Cooper. Cooper's argument overlooks that even if Nuttall provoked the encounter, a reasonable person in Cooper's situation would not have returned to the restaurant and struck Nuttall with the cane. Cooper's first aggressor argument also overlooks Nuttall's testimony that he went to sit down and then returned to the restaurant door only after he saw Cooper returning from the parking lot. Thus, Nuttall's testimony was that the initial encounter that occurred when Nuttall pushed Cooper out of the restaurant had ended and that both parties had withdrawn. Accordingly, even if Nuttall were the first aggressor in the earlier encounter, Cooper was not excused from returning to the restaurant and provoking another encounter, which culminated in Cooper striking Nuttall with the cane. *See Brown*, 3 Wn. App. at 403-04.

We hold that the trial court properly declined to give self-defense instructions.

II. OPINION TESTIMONY

Cooper argues that his rights to a jury trial and to a fair trial were violated when the trial court allowed Officer Moses to testify that the cane was a "'weapon.'"[5] Br. of Appellant at 16. We hold that any error in this regard was harmless beyond a reasonable doubt.

[5] Cooper also appears to argue that this error impacted the jury's verdict on the deadly weapon enhancement for the second degree assault. However, the jury did not find the deadly weapon enhancement. Thus, his argument is relevant only to the conviction for second degree assault of Nuttall.

A. LEGAL PRINCIPLES

Even if a court determines that a claim of unobjected-to, allegedly improper opinion testimony is manifest constitutional error, harmless error analysis applies. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). To be harmless, the State must show that there is no reasonable doubt that any reasonable jury would have still reached the same result absent the error. *State v. Lamar*, 180 Wn.2d 576, 588, 327 P.3d 46 (2014); *State v. Binh Thach*, 126 Wn. App. 297, 313, 106 P.3d 782 (2005). The untainted evidence must be so overwhelming that it necessarily leads to a finding of guilt. *Binh Thach*, 126 Wn. App. at 313.

B. HARMLESS BEYOND A REASONABLE DOUBT

To convict Cooper of second degree assault, the jury had to find that Cooper either assaulted Nuttall "with a deadly weapon" or "intentionally assaulted . . . Nuttall and thereby recklessly inflicted substantial bodily harm." Clerk's Papers (CP) at 128. For the first alternative, a "[d]eadly weapon" was defined as "any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP at 142.

All three witnesses from inside the restaurant—the cook, the cashier, and Nuttall—testified that Cooper used his cane to strike Nuttall in the face, breaking his nose. The cook's, cashier's, and Nuttall's testimony that Cooper used his cane to break Nuttall's nose went to whether the cane was a "[d]eadly weapon" because it showed that "under the circumstances in which it [was] used . . . [was] readily capable of causing"—and in fact did cause—"substantial bodily harm."[6] CP at

[6] A broken nose is "'[s]ubstantial bodily harm.'" RCW 9A.04.110(4)(b).

142. Cooper presented no contrary evidence. The cook's, cashier's, and Nuttall's testimony was distinct from and untainted by Officer Moses's "weapon" testimony, which Cooper claims was improper opinion testimony.

The cook's, cashier's, and Nuttall's testimony that Cooper broke Nuttall's nose with the cane amounted to overwhelming untainted evidence that Cooper's cane was a deadly weapon, such that he committed a second degree assault when he struck Nuttall with the cane. Further, that testimony established that Cooper purposely struck Nuttall, so that it showed that Cooper "intentionally assaulted . . . Nuttall and thereby recklessly inflicted substantial bodily harm." CP at 128. Thus, the evidence also established the alternative for the jury to find a second degree assault that did not involve a deadly weapon.

The overwhelming untainted evidence necessarily led to a finding of guilt of second degree assault, absent Officer Moses's "weapon" testimony. Accordingly, even assuming without deciding that Officer Moses's testimony about the cane being a "weapon" was improper opinion testimony, the error was harmless beyond a reasonable doubt. We reject Cooper's arguments to the contrary.

III. LEGAL FINANCIAL OBLIGATIONS

Cooper argues that the trial court erred when it imposed mandatory LFOs without inquiring into his means to pay as required by RCW 9.94A.777.[7] The State responds that Cooper waived

[7] Cooper also argues that the trial court erred under former RCW 10.01.160 (2010) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), when it entered a boilerplate finding of ability to pay and required Cooper to pay mandatory LFOs. But *Blazina* applies to discretionary LFOs, and former RCW 10.01.160(3) does not give a trial court discretion regarding whether to impose mandatory LFOs. *See State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016). Accordingly, Cooper's argument fails.

his argument related to RCW 9.94A.777. We exercise our discretion to reach Cooper's RCW 9.94A.777 argument and remand on this ground.

> (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.
>
> (2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777.

At sentencing, Cooper did not argue that RCW 9.94A.777 gave the trial court discretion to determine whether to impose mandatory LFOs other than the victim assessment based on Cooper's mental health condition. Accordingly, the trial court imposed the mandatory LFOs for DNA fees and the criminal filing fee. *See* former RCW 43.43.7541 (2011) ($100 mandatory DNA fee); former RCW 36.18.020(2)(h) (2013) ($200 mandatory filing fee).[8]

Although Cooper did not raise RCW 9.94A.777 until his appeal, we exercise our discretion to reach this issue. *See State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016); *see also State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) (exercising its discretion to reach an unpreserved objection to imposition of discretionary LFOs in light of the "[n]ational and local cries for reform of broken LFO systems").

[8] The trial court also imposed the mandatory victim assessment. *See* RCW 7.68.035(1)(a). But RCW 9.94A.777(1) does not provide for the mandatory victim assessment to be waived, and Cooper's arguments accordingly do not affect the imposition of this LFO.

Cooper was involuntarily committed before trial. He also professed to be on social security due to mental illness, and at sentencing the State acknowledged that Cooper was homeless at the time of the incident and had mental health issues and a significant criminal history. Despite the evidence in the record suggesting that Cooper suffered from a mental health condition preventing him from participating in gainful employment, the trial court never fully inquired into Cooper's ability to be gainfully employed. We remand to the trial court to consider whether to impose the DNA fee and criminal filing fee pursuant to RCW 9.94A.777(1) after taking into consideration evidence of Cooper's mental health condition.

IV. SAG ISSUES

A. "NO-SHOW" WITNESS

Cooper appears to argue that it was error for the State not to call a witness who would have testified in his favor. The witness to whom Cooper appears to be referring was subpoenaed by the State but failed to appear at Cooper's trial. Although Cooper's attorney stated at first that she would call this "no-show" witness to testify for Cooper, Cooper's attorney later stated that she had decided not to call the witness. The record shows that the State was not at fault for the "no-show" witness's failure to appear, and we reject this argument.

B. WITNESS CREDIBILITY

Cooper argues that the restaurant manager and employees lied under oath. But a determination of witness credibility is for the trier of fact and not subject to review by this court. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Cooper's argument accordingly fails.

C. MATTERS OUTSIDE THE RECORD

Cooper argues that (1) the restaurant manager tampered with evidence and (2) the State failed to call other witnesses whose favorable testimony was allegedly noted in a police report. We do not consider his arguments, which rest upon matters outside the record.

On direct appeal, we cannot consider arguments that rely on matters outside the record. *State v. Rice*, 159 Wn. App. 545, 575, 246 P.3d 234 (2011), *aff'd*, 174 Wn.2d 884, 279 P.3d 849 (2012).

1. VIDEO

Cooper relies on the State's introduction of footage from only 6 of 18 cameras as evidence that the manager tampered with the cameras. The restaurant manager explained that he did not record footage that did not show who broke the door, such as footage from the kitchen. The manager also explained that some cameras were not functional. Nothing in the record supports that the manager concealed footage that would have exonerated Cooper or otherwise tampered with evidence. Thus, any evidence to support Cooper's argument necessarily is outside the record on direct appeal, and we do not consider his argument further.

2. WITNESSES

Cooper claims a police report supports that the State failed to call favorable witnesses. But contrary to Cooper's arguments, the record does not contain any evidence that the witnesses not called by the State other than the "no-show" witness discussed above would have testified favorably. Accordingly, Cooper's argument rests upon matters outside the record.

D. FAILURE TO IDENTIFY

Cooper argues that two of the State's witnesses could not identify Cooper as the person who struck Nuttall. This argument appears to be a challenge to the sufficiency of the evidence that Cooper was the perpetrator and is rejected.

Although Cooper is correct that the cook and cashier could not identify Cooper as the man with the cane, he overlooks that Nuttall and Officer Moses—the victims of the assaults—identified Cooper. Nuttall's and Officer Moses's identifications were sufficient evidence to prove that Cooper perpetrated the assaults and malicious mischief. *See State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Accordingly, Cooper's failure-to-identify argument lacks merit.

We affirm Cooper's convictions but remand for the trial court to consider whether to impose the DNA fee and criminal filing fee under RCW 9.94A.777.

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, J.
JOHANSON, J.

We concur:

Maxa, C.J.
MAXA, C.J.

Melnick, J.
MELNICK, J.

RUSSELL SELK LAW OFFICE

May 10, 2018 - 1:14 PM

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