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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEE ALLEN COMENOUT, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 16-1-02472-8

Brief of Respondent

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

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16. After carefully evaluating appellant's and respondent's arguments pertaining to bail fixed in this case without objection, should this court consider the issue moot?
17. Is petitioner's claim that dismissal is the remedy for an unduly long competency determination process foreclosed by Washington Supreme Court precedent?
18. Should this court accept respondent's two concessions of error relating to legal financial obligations?

B. STATEMENT OF THE CASE.

1. TIMELINE RELATING TO COMPETENCY.

- 6/17/16 Defendant¹ first appeared in court. The trial court considered the declaration of probable cause. CP 1-2; 6/17/16 VRP 5.
- 7/29/16 The trial court enters an order directing defendant to be examined for competency to stand trial by a qualified expert at Western State Hospital. CP 9-14.
- 8/17/16 Dr. Kirkeby's competency evaluation completed. CP 20-28. Dr. Kirkeby opined that defendant was incompetent and recommended restoration services. *Id.*
- The trial court entered an order authorizing restorative services on that day. CP 17-19.
- 9/23/15 Restorative services commence. CP 31.
- 12/15/16 Opinion rendered by professionals that defendant is now competent. CP 29-41.
- 12/21/16 Competency issue resolved. After considering the evaluation of Dr. Henderson at Western State Hospital, the parties agree that defendant is competent to stand trial. The trial court enters the order establishing competency. 12/21/16 VRP 8-10; CP 44-45.

2. TIMELINE RELATING TO BAIL.

- 6/17/16 First court appearance. 6/17/16 VRP. Bail set at \$1,500,000. CP 6-7. No objection by defense counsel. Defense counsel reserves argument. 6/17 VRP 6. Facts relating to the fixing of bail are addressed *infra*.
- 7/29/16 Defendant ordered held without bail. CP 15-16. "10.77" is noted on the order. *Id.* This was executed on the same day as the order directing defendant to be examined for competency. CP 20-28.

¹ Respondent will refer to the appellant in this case as "defendant."

12/21/16 Bail re-established at \$1,500,000 after the competency restoration process was completed. CP 42-43. When the trial court inquired as to the bail amount, defense counsel stated: "I don't have a basis at this point." 12/21/16 VRP 9.

8/2/17 Defendant (now found guilty after trial) is held without bail. CP 211-19; CP 220-21.

3. FACTS RELATING TO DOUBLE JEOPARDY CLAIM.

On June 15, 2016, at around 5:30 p.m., Oscar Corro-Garcia came home from work. 2 VRP 229. Consistent with his normal routine he took down the tools that he had in the back of his open bed pickup truck. 2 VRP 230. He heard "a voice that was asking me to give him the keys." 2 VRP 231. He saw two people. *Id.* Mr. Corro-Garcia told them that he did not have the keys to the truck. 2 VRP 236. The man demanded the keys a second time. 2 VRP 240-41. As Mr. Corro-Garcia stepped back, the man put his gun up to him. *Id.* Mr. Corro-Garcia held his hands up with the keys in them. 2 VRP 243. The man with the gun tried to reach for them. *Id.* Mr. Corro-Garcia threw the keys and ran to the house. *Id.* He had his son call the police.² 2 VRP 245. The other man was standing by the passenger door of the pickup truck when Mr. Corro-Garcia ran. 2 VRP 246-47.

² Mr. Corro-Garcia testified through an interpreter. 2 VRP 226.

Mr. Corro-Garcia testified that the man who pointed the gun was wearing a white sweater with a hood on it. 2 VRP 247. The other man was wearing jeans and a sweater with spots on it. 2 VRP 247-48. That sweater was also a “hood or hoody.” 2 VRP 248. The two men’s faces were covered—only the top of the nose and the eyes were visible. 2 VRP 248-49. Both men had their hoods up. 2 VRP 249.

Mr. Corro-Garcia testified that Exhibit 11 was a photograph of his F-140³ pickup truck. 2 VRP 251. He testified that he saw his pickup again, but it was all smashed up. *Id.* Mr. Corro testified regarding photographs of his smashed up pickup truck (Exhibit 99). 2 VRP 255-258. Mr. Corro testified that the cigarette boxes,⁴ boxes,⁵ lottery tickets,⁶ and bags⁷ that were depicted in the photographs were items that he had not seen before. *Id.*

Leonardo Corro-Estrada, Mr. Corro-Garcia’s son,⁸ chased after his father’s truck.⁹ 4 VRP 372-380. *See* Exhibit 13. He caught up with the truck and followed it down East “G” Street. 4 VRP 379. The truck turned right on Wright Street and stopped in some apartments at the corner of

³ 2 VRP 258.

⁴ 2 VRP 256-57.

⁵ 2 VRP 256.

⁶ 2 VRP 257.

⁷ 2 VRP 259.

⁸ 4 VRP 365.

⁹ 4 VRP 369.

McKinley Way and E. Wright. 4 VRP 479. The driver and the passenger got out of the truck. 4 VRP 380. The driver pointed a gun towards the car Mr. Corro was in. 4 VRP 380-81. Mr. Corro then headed back home. 4 VRP 381-82.

Connie Vincenzi almost got into a collision with a powder blue pickup truck at the intersection of Wright Street and “I” Street. 5 VRP 447, 452-54. She followed behind the truck that almost collided with her from a distance of about 50 yards. 5 VRP 458. The pickup truck stopped and the driver of the pickup truck stuck his head outside the driver’s side door and pointed a gun at her. 5 VRP 458. Ms. Vincenzi could not distinguish whether the gun was a real gun or a toy gun. 5 VRP 476. Ms. Vincenzi was about “a car, a car and a half length” away from the truck when this happened. 5 VRP 459. Ms. Vincenzi observed two people in the truck. 5 VRP 459. About two and a half minutes later, Ms. Vincenzi got home and called 911. 5 VRP 477-78. Ms. Vincenzi’s “number one” concern was “why is he pointing a gun at me?” 5 VRP 478.

Myoung Namkung testified that he owned Olympic Grocery with his wife, Chong Namkung. 6 VRP 774. His son June Namkung helped out with the store. 6 VRP 774-75. Mr. Namkung recalled the events of June 15, 2016. 6 VRP 675-708. Mr. Namkung authenticated photographs of the robbers who entered his store. 6 VRP 676-77; Exhibit 63. The

robber who wore the white shirt and the red bandanna on his face (not defendant¹⁰) flashed a gun and told him to open the cash register. 6 VRP 677-78. The robbers grabbed a box and put the money in their pockets, then they started emptying the scratch Lotto tickets into the box. 6 VRP 678. The person in the patterned jacket grabbed the Lotto tickets. 6 VRP 679. Other items of store property were taken in the robbery. 6 VRP 679-680. The robber with the black bandanna also reached into Mr. Namkung's back pocket and took about a thousand dollars. 6 VRP 681-82. Exhibit 94 depicted the store in some disarray after the robbery. 6 VRP 685-93. Mr. Namkung also testified that Exhibit 82 depicted the robbers stealing store property. 6 VRP 894-96.

Mr. Namkung identified exhibit 100 as the same bag that the person with the red bandanna was carrying as he left Mr. Namkung's store. 6 VRP 697. Officer Lofland later identified Exhibit 100 as his patrol vehicle after he ran over one of the robbery suspects, with "a bag with the word Harbor something grocery on it, still impregnated into the grill." 7 VRP 795-96.

Mr. Namkung identified Exhibit 98 as depicting his box and "[t]wo cartons of Newport's and a box of cigars and some scratch tickets and

¹⁰ Defendant wore a camouflage hoody that day. 6 VRP 667.

money” as belonging to his store. 6 VRP 693. Exhibit 98 was a depiction of Mr. Corro-Garcia’s truck and its contents at the crash scene after the robbers crashed the stolen pickup truck. 7 VRP 885-91.

Mr. Namkung identified Exhibit 107 as a bag belonging to Mr. and Ms. Namkung and the store. 6 VRP 699. The bag contained money, a torch lighter, and \$510.00. 6 VRP 700-01. Mr. Namkung testified that the money was stored in the manner he kept some of his money. 6 VRP 702. Mr. Namkung identified Exhibit 108 as the bag that his wife usually carries around and one which was seen on the video. 6 VRP 703. The bag contained a coin purse which was last seen on the day of the robbery. 6 VRP 704. Mr. Namkung identified Exhibit 109 as a money bag and a small coin purse belonging to him, which he had last seen on June 15, 2016. 6 VRP 705-06. Mr. Namkung identified Exhibit 11 as a photograph of the robbery getaway vehicle. 6 VRP 708.

Chong Namkung also testified to the circumstances of the robbery. 3 VRP 311-41. Chong Namkung testified that one of the robbers took her cell phone. 3 VRP 335. That cell phone was a white Samsung cell phone with a white case. 3 VRP 336. Ms. Namkung testified that she got her cell phone back. *Id.*

June Namkung also testified to the circumstances of the robbery as he watched from inside the cooler. 6 VRP 599. He testified to the

circumstances of the robbery. 6 VRP 598-615. June testified “So the guy in the gray camo hoodie, he had his hands in his pockets and it looked like he was trying to make a silhouette of a gun with his hands in there. So I just kind of assumed that he had one, also.” 6 VRP 612. June testified that he heard one of the robbers asking for phones. 6 VRP 613. His phone was behind the store counter. 6 VRP 614. After the robbery, he went to look for his phone, and it was gone. 6 VRP 617. He later got it back from a detective with the Lakewood Police Department. 6 VRP 618. June ran out of the store and called 911 as the robbery was happening. 6 VRP 609-10. June identified the getaway vehicle as the vehicle depicted in Exhibit 11. 6 VRP 616.

On June 15, 2016 Ashley Harpel was working as a barista at an espresso stand on Bridgeport Way. 5 VRP 428-29, 32. From her position inside the stand she could see the Olympic Grocery Store. 5 VRP 432. She was talking on her phone when a vehicle alarm went off. *Id.* She looked over and saw “two gentlemen in front of a truck fidgeting around with bandannas on their face from [the nose to the chin] down.” 5 VRP 433. She watched as one of them jumped the counter at the Olympic Grocery. 5 VRP 436-37. Ms. Harpel testified that the person she was talking to called the police. 5 VRP 438. Ms. Harpel hid. 5 VRP 439. At the request of the 911 operator, she crawled to the front door and looked

out the window. 5 VRP 440. Ms. Harpel described the masked men's truck. 5 VRP 441-42. She saw one of the men carrying what looked like a safe to the truck. 5 VRP 441-42. Ms. Harpel identified the robbers as pictured in the first two pages of Exhibit 63.

On June 15, 2016 Christina Barnett went to the Olympic Grocery store with her fourteen year old daughter Kaitlynn. 5 VRP 494-95. She arrived in the middle of a robbery. 5 VRP 495. She testified: "When I walked in, the owners had their arms up in the air. I thought maybe they were praying. . . . And then we looked over and there were these two men with bandannas and hoodies on and we just froze." 5 VRP 498. Ms. Barnett identified herself and the masked men in the video of the robbery. 5 VRP 499, 504-05; Exhibit 82. She saw the masked men stuffing things into a box and a bag. 5 VRP 500. One of the men was wearing a white hoodie and the other was wearing a camo hoodie. *Id.* The masked men were saying "Hurry up, hurry up." 5 VRP 502. Ms. Barnett said that the man with the camo hoodie had what she believed to be a gun in his pocket. 5 VRP 503. She saw the hand in the pocket of the hoodie and something black in the hand. 5 VRP 503. Ms. Barnett left the store and waited outside for about 30 minutes for police to arrive. 5 VRP 505-06. Ms. Barnett provided a vehicle license number to 911. 5 VRP 478. Ms. Barnett testified that the cops "were busy chasing the men down

Bridgeport.” 5 VRP 506; *see also* 5 VRP 509-10. Ms. Barnett identified the truck used by the robbers. 5 VRP 506-7; Exhibit 11. Ms. Barnett testified that the person in the white hoodie left with a plastic bag and cash that she could see and that the person in the camo hoodie left with a box that had like lottery tickets. 5 VRP 509.

Kaitlynn Barnett testified about going to the Olympic Grocery with her mother that day. 5 VRP 519-28. She corroborated her mother’s testimony. *Id.* Kaitlynn identified the robbers in Exhibit 63. 5 VRP 522. Kaitlynn testified that the person in the camo told the person in the white hoodie to “hurry up.” 5 VRP 524. Kaitlynn saw the taking of lottery tickets and money and did not know if other stuff was taken. *Id.* Kaitlynn testified that the guy in the white hoodie was holding something in his pocket. 5 VRP 525. She thought it was a gun. 5 VRP 526. She saw the robbers drive away in the blue truck.

Tacoma Police Officer Andrew Hall was on patrol on June 15, 2016. 6 VRP 640-42. He was advised by dispatch of the Olympic Grocery store robbery. 6 VRP 643-44. He wasn’t too far away. 6 VRP 643. He was advised of the suspect vehicle. 6 VRP 644. While heading south on Bridgeport Way toward the Olympic Grocery store, Officer Hall saw a “blue, light blue” Ford F150 approaching him. *Id.* He watched it go past. 6 VRP 646-48. He then turned and followed the pickup until the

pursuit became too dangerous. 6 VRP 648-49. He then came upon the collision. 6 VRP 650-51. He saw the truck he had been chasing in the intersection of 108th and Bridgeport Way. 6 VRP 650.

Maria Lopez was driving the KIA Soul automobile struck in the collision. 7 VRP 760. Ms. Lopez testified about the collision. 7 VRP 763-72. She identified the truck which struck her. 7 VRP 767-68; Exhibit 11. She saw the driver run from the truck which hit her car. 7 VRP 773-74.

Lakewood Police Officer Keith Czuleger was working on June 15, 2016. 6 VRP 654. Five minutes before seven, he received a report of an armed robbery in progress at the Olympic Grocery store. 6 VRP 656-57. He headed towards the store. 6 VRP 657. He was stopped at the intersection of Bridgeport Way and Pacific Highway as he learned the suspect vehicle was heading toward him. 6 VRP 658-59. He saw the suspect vehicle, driven by a male with a red bandanna and a light colored sweatshirt or light colored top. 6 VRP 662. He activated his emergency lights and sirens and pursued the suspect vehicle. *Id.* The suspect vehicle was weaving in and out of traffic at speeds of approximately 60 miles per hour. 6 VRP 661-62. Officer Czuleger identified Exhibit 11 as the suspect vehicle. 6 VRP 663. He witnessed the collision:

There was—the driver tried—was attempting to get to the right then he immediately cut back to the left, putting him up and over the concrete median and spin his vehicle out prior to him striking another car in the intersection.

6 VRP 664.

Officer Czuleger had Ranger the police dog with him. 6 VRP 665.

Officer Czuleger saw the passenger flee westbound on 108th Street Southwest. *Id.* Officer Czuleger gave Ranger the command to apprehend the suspect (he was about 50 feet away). *Id.* Ranger apprehended the suspect. 6 VRP 666. The person apprehended was defendant. *Id.* “At that time, he was wearing a camouflage pattern sweatshirt, blue jeans and he had a scarf around his neck.” 6 VRP 667. Defendant had cash in his hands. 6 VRP 668. Around his neck he was wearing a type of a mask that could be put up over your face quickly and then pulled down around your neck. 6 VRP 670.

Sheila MacPherson worked at the Mobil gas station on Bridgeport Way on June 15, 2016 from the 2:00 p.m. to 8:00 p.m. shift. 5 VRP 534. Ms. MacPherson saw several police cars heading down Bridgeport towards the McChord Main gate. 5 VRP 535. Ms. MacPherson didn't see anything for awhile, then she heard a crash that made her jump. 5 VRP 536. She saw a car that looked like a KIA Soul that had been hit in the center of the intersection along with a light blue Ford F150. 5 VRP 536-37. The truck was still rolling. 5 VRP 537. Ms. MacPherson

authenticated photographs of the scene of the crash. 5 VRP 537-38. The light blue Ford F150 truck ended up in front of the Mobil station. 5 VRP 541-42; Exhibit 96(C). There was a wheelbarrow in the back of the pickup truck. 5 VRP 544-45; Exhibit 11.

Ms. MacPherson went outside and saw the two occupants of the pickup truck. 5 VRP 545. The passenger ran away down the street. 5 VRP 545. Ms MacPherson, from a distance of about four car lengths, watched as the driver fumbled around in front of or under the front seat in a frenzied manner. 5 VRP 548-49. The driver ran into the Mobil parking lot. 5 VRP 546. He pulled out a gun. 5 VRP 449-50. Exhibit 84 shows an attempted robbery of a customer's car. 5 VRP 549-555. The robbery ended with the police officer pinning the driver up against the air machine and capturing him. 5 VRP 555.

Michel Fisher was working as the manager of the Chevron Station catty-corner from the Mobil gas station. 6 VRP 577-78, 581. He heard an accident at the intersection and then a big police response. 6 VRP 581. He saw a car in the intersection that had been "crumbled" from the rear. 6 VRP 582. Exhibit 83 was camera footage from that day that Mr. Fisher copied for the police. 6 VRP 583. Mr. Fisher described the multiple camera angles. 6 VRP 587-95.

Lakewood Police Sergeant Kenneth Devaney was following Officer Czuleger in the pursuit. 6 VRP 719. He responded to the area of the gas station and found a male pinned under a police car, with a revolver off to the right side. 6 VRP 723-24. Money, in multiple bills, was visible. 6 VRP 724. The revolver was potentially within reach of the male. 6 VRP 724-25.

Lakewood Police Sergeant Brian Market arrived at the scene of the crash to see Officer Czuleger chasing one of the suspects. 6 VRP 738. He lost track of the driver (the second person he saw) for a few moments behind the gas station sign. 6 VRP 739. He drove into the north lot and watched as that person continued to “basically run northbound through the parking lot.” 6 VRP 739. The driver was running with a firearm through the lot. 6 VRP 740. Sergeant Market saw the driver point the firearm at other officers. 6 VRP 742. Sergeant Market watched as Officer Lofland (one of the officers defendant pointed the firearm at) drove forward, hit the suspect with his automobile, ran the suspect into the courtesy air station, and stopped his vehicle. 6 VRP 742. Sergeant Market contacted the suspect. 6 VRP 743. He still had the pistol in his hand. *Id.* He commanded the suspect to drop the gun. *Id.* The gun rolled out of the suspect’s hand. *Id.*

Officer James Lofland testified that he saw a suspect flee into the parking lot of the Mobil gas station. 7 VRP 786. He saw the driver with a gun in his hand trying to commandeer a vehicle. 7 VRP 792-93. Officer Lofland then saw the driver point a gun at him. 7 VRP 793. Officer Lofland then ran defendant over with his vehicle. *Id.* The firearm was admitted into evidence. 7 VRP 794; Exhibit 119.

Officer Bucat testified that he observed a bank bag next to the gun and the man who had been hit by Officer Lofland's car. 7 VRP 801. A photograph of that bank bag was admitted as Exhibit 132. 7 VRP 802-03.

Lakewood Police Officer Denis Harvy was tasked with following defendant to the hospital. 6 VRP 747. Defendant had a dog bite and a possible shoulder injury. 6 VRP 747-48. He collected a bag of clothes taken from defendant's person at the hospital. 6 VRP 748. Detective Johnson later testified that the bag contained a camouflage pattern hoodie with a white logo on the front that was visually similar to the hoodie that he saw one of the subjects wearing in the Olympic Grocery video. 7 VRP 840. A photograph of that clothing was admitted into evidence as exhibit 104, so it can be compared with the clothing worn on a robber in the Olympic Grocery video. 7 VRP 845. A switchblade knife was also located among defendant's items. 7 VRP 847-52.

Sergeant Fraser responded to the collision. 7 VRP 805. He acted to preserve the F150 truck and its contents. 7 VRP 806.

Detective Bryan Johnson testified that he was working as a forensic manager on June 15, 2016 when he and his team responded to the collision at 108th St. and Bridgeport Way Southwest. 7 VRP 814-16.

Detective Johnson testified to the contents of the F150 pickup truck later searched. 7 VRP 831.

There was a black backpack with miscellaneous items and drug paraphernalia. U.S. currency from the passenger's side of the vehicle that totaled, in that particular group, denominations totaled \$25. U.S. currency, another that was in the front of the cub, totaled \$6.00. Another area had coins of .21. And then \$12.01. There was several lottery tickets. I believe 50 in one particular batch: Two, ten and four, and ten, different batches of types of lottery tickets, by their title. There was a red Powerball logo, a stocking cap, an LG Mobile phone, an empty Raw brand tobacco box, a cardboard box with multiple cigarette cartons and tobacco products and lighters in it.

Id. Detective Johnson testified that the cardboard box appeared to be the same box seen in the Olympic Grocery robbery video. *Id.*; Exhibit 99.

Detective Johnson testified that Exhibit 113, the revolver, functioned normally when test fired. 7 VRP 836-38.

Exhibit 106 was a lift of shoe impressions taken by Detective Johnson from the Olympic Grocery store counter. 7 VRP 822-24. Exhibit 104D is a photograph of the soles of shoes taken from defendant. 7 VRP

846; 6 VRP 748. The jury had the opportunity to compare those two exhibits. 7 VRP 846.

Detective Bunton returned June Namkung's cell phone to him. 7 VRP 871-72. This cell phone was given to Detective Bunton by Officer Keisler. 7 VRP 872.

Officer Keisler testified that he responded to the Olympic Grocery store robbery dispatch on June 15, 2016 at 108th St. and Bridgeport Way, SW. 7 VRP 874-75. He arrived at the collision scene at 108th and Bridgeport. 7 VRP 875-76. He was present when Officer Czuleger apprehended defendant. 7 VRP 876-77. He searched defendant incident to arrest and found a switchblade knife. 7 VRP 879. He also found approximately \$1,500.00 on defendant. 7 VRP 880. He also found a cell phone. 7 VRP 881. Officer Keisler gave that cell phone to Detective Bunton. 7 VRP 882. Officer Keisler also testified that defendant had "either a mask or a bandanna. I believe it was a mask, black, pulled down around his neck. It was kind of inside the hood of his sweatshirt." 7 VRP 882.

Detective Kenyon took pictures of the robbery proceeds inside the F150. 7 VRP 885-91; Exhibit 98. He also photographed the scene of the driver's capture. 7 VRP 891-96; Exhibit 97.

Bridget Russell, a communications analyst with South Sound 911, testified to the time certain 911 calls were received on June 15, 2016. 5 VRP 557-58.

- 5:42 p.m. Oscar Corro calls 911. 5 VRP 562. License plate information for the stolen vehicle obtained—WVO3940. 5 VRP 561.
- 6:00 p.m. Connie Vicenzi calls 911. 5 VRP 563-64.
- 6:51 p.m. Ashley Harpel calling to report what she was witnessing at the expresso stand. 5 VRP 565-66.
- 6:52 p.m. Paul Jerome's call from his friend Ashley who said that she was being robbed at the expresso stand where she was working. 5 VRP 565.
- 6:58 p.m. Christina Barnett's call that she witnessed a robbery at the Olympic Grocery Store. 5 VRP 566.
- 7:06 p.m. Citizen calls to report an accident involving a white KIA Soul. 5 VRP 567-68.

Defendant was charged with robbery in the first degree for robbing Mr. Corro-Garcia, assault in the second degree for assaulting Mr. Garcia's son, Leonardo Corro, assault in the second degree for assaulting Connie Vicenzi, robbery in the first degree of Myoung Namkung, robbery in the first degree of Chong Namkung, theft in the third degree of June Namkung's cell phone, and unlawful possession of a firearm in the second degree. CP 64-69.

Defendant was convicted of the robbery of Mr. Corro-Garcia, the assault of Leonardo Corro, the robbery of Mr. Namkung, the robbery of

Ms. Namkung, and the theft of June Namkung's phone. CP 275-89, CP 290-91. Each offense bore a firearm sentencing enhancement. *Id.*

Evidence of the assault of Ms. Vicenzi and the unlawful possession of a firearm was insufficient to go to the jury. 8 VRP 930-31.

C. ARGUMENT.

1. THE DOUBLE JEOPARDY UNIT OF PROSECUTION STANDARD OF REVIEW.

Respondent presents the double jeopardy unit of prosecution standard of review first because it provides the background necessary to evaluate respondent's assertion that defendant invited error in this case.

Double jeopardy unit of prosecution claims may be raised for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803, 814 (2011). Flawed jury instructions are the starting point of appellate review:

However, flawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense. In order to violate federal and state double jeopardy standards, there must be multiple punishments for the same offense.

State v. Mutch, 171 Wn.2d at 663–64. The reviewing court then looks to the “entire trial record” when considering the double jeopardy claim. *Id.*

at 664. The standard of review is “rigorous and is among the strictest.”

Id.

Considering the evidence, arguments, and instructions, if it is not clear that it was “*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense” and that each count was based on a separate act, there is a double jeopardy violation.

Id.

2. PETITIONER’S DOUBLE JEOPARDY CLAIM IS INVITED ERROR.

The prosecutor in this case asked the judge to give special interrogatory instructions so that the unit of prosecution issue—the issue that appellant now presents on appeal—could be avoided. 8 VRP 954-57, Supp. CP 376-79. The trial court expressed concern about jury confusion. 8 VRP 960-61. Defense counsel argued that the special interrogatory instructions should not be given:

Your Honor, I don't think these special interrogatories are necessary. I think this is a solution looking for a problem, if you will. State vs. Tvedt, T-v-e-d-t, Washington State Supreme Court, I think, addresses this exact issue. I'm going to have a hard time at sentencing, in light of that holding, trying to convince you that this is all one unit of prosecution that should be just one, referring to the Namkungs. Because what was just pointed out is that they each have a possessory interest, at minimum the items that were taken from the store, and as you point out probably even the items taken from their person. And so they are each jointly entitled to possession of those items. They were each parent, of course, and each threatened and these properties were taken in their presence. I would love to be able to convince you at sentencing that this is either the same

criminal conduct or should be one single unit of prosecution, but I'm not going to be able to do that, given our case law.

. . .

I don't think this is a concern. I mean, I would like for it to be a concern and, who knows. But, again, I'm going to have a hard time convincing you, given Tvedt and other cases like it that deal with this exact scenario: Two people in a convenience store present are robbed and each are co-owners. That's what the situation was in Tvedt. I think Tvedt wasn't quite as strong. One person was an employee and another person was the owner. This is even better, if you will, because you have two owners. I don't think this is necessary. I think this is confusing to the jury. They are going to spend extra time, which isn't the issue maybe, but I just don't think it's necessary. I would ask that you not give it.

8 VRP 964-65. The trial court did not give the special interrogatory instructions requested by the prosecutor. CP 173-210.

“The goal of the invited error doctrine is to prevent a party from setting up an error at trial and then complaining of it on appeal.” *In re Coggin*, 182 Wn.2d 115, 124, 340 P.3d 810, 815 (2014)¹¹ (lead opinion of four justices quoting *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002)). The rule has also been stated “that in assessing invited error, the court looks to the totality of the circumstances, considering whether the party engaged in *affirmative and voluntary action to induce or contribute to the error* and whether he or she benefited from the trial

¹¹ Internal quotation omitted.

court's action.” (internal quotation omitted) *Matter of Salinas*, 189 Wn.2d 747, 755, 408 P.3d 344, 348 (2018) (quoting concurrence in *In Re Coggin*, 182 Wn.2d at 124).

Defendant, at trial, affirmatively asked the trial court not to give special interrogatory forms to the jury. This provided defendant a great benefit: Instead of interrogatories which would have simply and plainly avoided a potential double jeopardy problem, defendant preserved the opportunity to raise a double jeopardy issue *de novo*¹² on appeal, where the appellate court is directed to apply a standard of review that is “rigorous and among the strictest.” *State v. Mutch*, 171 Wn.2d at 664. Invited error should foreclose that opportunity.

“Even where constitutional rights are involved, invited error precludes appellate review.” *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514, 516 (1990) (citing *State v. Alger*, 31 Wn.App. 244, 249, 640 P.2d 44, *review denied*, 97 Wn.2d 1018 (1982)).

The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request. To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage.

¹² *State v. Mutch*, 171 Wn.2d at 661-62.

State v. Henderson, 114 Wn.2d at 868.¹³ This case is analogous to the facts of *Henderson*. In *Henderson*, the defendant challenged a jury instruction he had requested at trial. In this case, defendant successfully resisted a jury instruction which would have prevented a potential¹⁴ double jeopardy claim. On appeal, defendant asserts that once-preventable double jeopardy claim. In this case, double jeopardy was waived by invited error.

3. ALTERNATIVELY, DEFENDANT HAS FAILED TO SHOW MANIFEST CONSTITUTIONAL ERROR.

This case presents no double jeopardy problem. It is “manifestly apparent” that defendant robbed both Ms. Namkung and Mr. Namkung. *State v. Mutch*, 171 Wn.2d at 665. Defendant was charged with two counts of robbery for the robberies inside the Olympic Grocery. CP 55-59. This is the “exact number” of “to convict” instructions that were given for the robberies in this case. CP 91-94, *Id.* During his cross examination

¹³ See also, *King v. Brewer*, 577 F.2d 435, 441 (8th Cir. 1978) (defendant opened door to rebuttal evidence which defendant later claimed violated double jeopardy (alternative holding)).

¹⁴ The potentiality of the double jeopardy claim, as opposed to its actuality, is not fairly debatable after *State v. Mutch*, 171 Wn.2d 646, 665, 254 P.3d 803, 814 (2011).

of Mr. Namkung,¹⁵ Ms. Namkung,¹⁶ and their son June Namkung,¹⁷ defense counsel did not “focus on” challenging anything about the items taken on the robbery—he completely avoided the issue. *Id.* Mr. Namkung testified that one robber took money out of his pocket. 6 VRP 681-83. Ms. Namkung testified that defendant took her cell phone. 3 VRP 336. Both Mr. and Ms. Namkung testified that defendant store property which belonged to both of them. 3 VRP 323-28, 334-35; 6 VRP 678-84, 691-92. The prosecutor’s closing argument was straightforward. He argued that Ms. Namkung was robbed of both her property (her telephone) and also property held “at large” with Mr. Namkung. 8 VRP 998-99. He argued that Mr. Namkung was robbed of cash taken right from his pocket and also property held at large with Ms. Namkung. 8 VRP 997-98. Nowhere in defense counsel’s closing argument did he argue the insufficiency of the evidence or challenge the victim’s credibility about the items taken in the robbery.¹⁸ 8 VRP 1009-20.

¹⁵ Defense counsel did not cross examine Myong Namkung. 6 VRP 708.

¹⁶ Defense counsel’s cross examination of Chong Namkung focused on the gun used in the robbery and did not address any items taken in the robbery. 4 VRP 351-57.

¹⁷ Defense counsel’s cross examination of June Namkung focused on guns and what he saw. On cross-examination there was no mention of items taken in the robbery. 6 VRP 620-27, 637-39.

¹⁸ Much of the robbery was recorded on video. *See* Exhibit 82.

Robbery is “an offense which is dual in nature—robbery is a property crime and a crime against the person.” *Tvedt*, 153 Wn.2d 711. Its unit of prosecution includes both characteristics. *Id.* “Accordingly, the unit of prosecution for robbery is each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against that person's will.” *Id.* at 714–15. In *Tvedt*, a service station robber took a deposit bag containing money in the presence of the station’s owner and its cashier. *Id.* at 708. That was one “separate forcible taking” “from or in the presence of a person.” *Id.* at 719. The robber also took the owner’s car keys from him. That was another “separate forcible taking” “from or in the presence” of a different person.¹⁹ *Id.*

Mr. Quigley, defense counsel, was correct when he told the trial court that this case was stronger for the State than *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728, 730 (2005). 8 VRP 964. In this case, the robbers took the “at large” Olympic Grocery store property in the presence of both Mr. and Ms. Namkung. VRP 323-28, 334-35; 6 VRP 678-84, 691-92. This is analogous to the deposit bag taken in the presence of the owner and cashier in *Tvedt*. *Id.* at 708. In this case, the robbers took cash

¹⁹ *Tvedt* was decided on stipulated facts. 153 Wn.2d at 708.

money out of Mr. Namkung's pocket. 8 VRP 997-98. This is analogous to the car keys taken from or in the presence of the service station owner in *Tvedt*. *Id.* at 708. This case has one further distinct taking, not present in *Tvedt*: the taking of Ms. Namkung's cell phone in her presence.

Even if defense counsel is permitted to set up *de novo* rigorous and strict appellate review in this case, this Court should be satisfied beyond any reasonable doubt that defendant in this case committed two robberies. Defense counsel never made any issue of this plain fact at trial because it never was an issue.

4. THE DOUBLE JEOPARDY CLAIM DOES NOT SUPPORT AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

a. Mr. Quigley's performance was not deficient.

As defense counsel told the trial court, "I'm not going to spend much time saying that he wasn't there." 8 VRP 969. In closing, defense counsel never challenged the fact of the robbery, or defendant's presence and participation during the robbery. 8 VRP 1017-18. The facts demonstrate that defendant's conviction is supported by a mountain of evidence. From counsel's point of view, this case was about damage control.

Defense counsel's sole focus was upon defendant's relationship with the firearm used in the case. 8 VRP 1009-1020. Defense counsel's

strategy is not challenged on appeal. Defense counsel had nothing to gain by a special interrogatory jury instruction which further clarified the units of prosecution in the Olympic Grocery robbery. If there were a special interrogatory in this case, no double jeopardy issue could be presented today. This Court should not find defense counsel's performance deficient.

- b. Defendant has not demonstrated the actual prejudice necessary to establish an ineffective assistance of counsel claim.

Defendant fuses an ineffective assistance of counsel argument with a double jeopardy argument. Appellant's Brief at 11-22. That approach is inappropriate. The double jeopardy standard of review is strict and the State has a very heavy burden. *State v. Mutch*, 171 Wn.2d at 664. The ineffective assistance of counsel standard requires the appellant to establish "actual prejudice." *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251, 1258 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). In this case, defendant cannot get past potential prejudice:

However, flawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense. In order to violate federal and state double jeopardy standards, there must be multiple punishments for the same offense.

State v. Mutch, 171 Wn.2d at 663–64. As addressed in the double jeopardy argument, *supra*, there is ample ground in this case to conclude that double jeopardy did not occur in this case. Petitioner’s ineffective assistance of counsel claim should fail because petitioner cannot meet the burden of proving that the outcome of the proceeding would have been any different had the special interrogatory jury instructions been given.

5. DEFENDANT’S BAIL ARGUMENT IS MERITLESS AND MOOT.

- a. The initial bail setting in this case was within the trial court’s discretion.

Defendant was initially charged with two counts of robbery in the first degree while armed with a firearm, and one count of attempted robbery in the first degree while armed with a firearm. CP 3-5. Defendant had his first court appearance on June 17, 2016. 6/17/16 VRP. The trial court reviewed the declaration of probable cause. 6/17/16 VRP 5. The declaration of probable cause outlines a very violent one-day crime spree. CP 1-2. The declaration of probable cause also outlines an ultrahazardous flight to avoid capture by law enforcement. *Id.* The prosecuting attorney pointed out, un rebutted, that defendant had a substantial criminal history, along with a prior conviction for escape in the second degree, nine prior bench warrants, and three open bench warrants at the time of his arrest. 6/17/16 VRP 5-6. Defense counsel reserved argument on bail or

conditions of release and presented no argument. 6/17/16 VRP 6.

Defendant advised the trial court that he was homeless. 6/17/16 VRP 7.

The trial court ordered bail in the amount of 1.5 million dollars as requested by the State. CP 6-7.

The very high bail imposed in this case is warranted by defendant's flight risk. It cannot fairly be said, given these un rebutted facts, that the trial court abused its discretion when it held defendant on 1.5 million dollars bail. The crimes charged were extremely serious, defendant's past history—and this crime—demonstrated that he was a very substantial flight risk, and the homeless defendant showed no ties to the community.

Defendant correctly points out that the trial court did not articulate the basis for the bail amount on the record, but that was almost surely because defense counsel reserved argument on bail. 6/17/16 VRP 6. Defendant points out the laundry list of things which the trial court should consider pursuant to CrR 3.2(c). Appellant's Brief at 28. Three of those factors weighed heavily against defendant.²⁰ Defendant presented no evidence as to the remaining factors (where the defendant surely possessed superior knowledge). Had there been argument over bail, the trial court

²⁰ "The accused history of response to legal process, particularly court orders to personally appear" "the accused's criminal record," and "the nature of the charge, if relevant to the risk of nonappearance" all weighed heavily against defendant.

could be expected to articulate the bases for its conclusions pursuant to CrR 3.2. However in the absence of contrary evidence or argument made to the trial court, this Court should not find error. The record on appeal suggests nothing that would mitigate defendant's flight risk.

Manifest abuse of discretion requires a finding that no reasonable judge would have ruled the way the trial court did. *State v. Gregory*, 427 P.3d 621, 638 (fn. 13) (Wn. 2018) (citing *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007)). "The determination of whether the defendant is likely to flee the state or pose a substantial danger to the community is a factual determination involving the exercise of sound discretion of the trial judge. We have repeatedly stated that we will not substitute our judgment for that of the trial judge when there is substantial evidence to support his findings." *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674, 679 (1974). The record in this case does not support a finding of an abuse of discretion.

A trial court has the inherent authority to fix bail. *State v. Smith*, 84 Wn.2d 498, 502, 527 P.2d 674, 677 (1974). A trial court acting within its discretion in the fixing of bail necessarily has a rational basis for the fixed bail amount. Defendant's Due Process claim should fail because the bail amount was within the trial court's discretion.

Defendant's Equal Protection claim fails because defendant fails to demonstrate that he was detained on higher bail than defendants presenting similar flight risks charged also with similar violent crimes. See *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004).

- b. Defendant has not demonstrated that his defense lawyer's performance was deficient at his initial bail hearing.

Defendant challenges defense counsel's competence at defendant's initial bail hearing. Appellant's Brief at 23. Defendant asserts that his lawyer at that first hearing "was just standing in and had no familiarity with the case." Appellant's Brief at 25. It should be noted that less than 48 hours prior to his first court appearance, defendant was out in the community, robbing people. CP 1-2. Charges were not filed against defendant until the day of his first court appearance. 6/17/16 VRP; CP 3-5. Defendant cannot establish deficient performance on the record before this court. *Strickland, supra*.

Defendant does not claim that his attorney failed to present evidence warranting lesser bail or release. There is no suggestion in the record that such evidence exists. Respondent presents no such evidence to this Court on appeal.

- c. Alternatively, defendant has not demonstrated actual prejudice resulting from his defense lawyer's performance at his bail hearing.

“Prejudice exists if there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different.” (internal quotation omitted) *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117, 1123 (2018). In this case, defendant cannot establish that the outcome of the proceedings would have been different had he been out of custody pretrial, because he was found guilty, sentenced to 345 months in prison, and is entitled to credit for every day spent in pretrial detention because of this case.²¹

Defendant's argument necessarily implies that the first discretionary pretrial detention decision made in this case is either an “outcome of the proceedings” or an event which dictates “the outcome of the proceedings” within the meaning of *Strickland v. Washington*. This makes no sense. If a defense lawyer messes up a bail argument, the remedy cannot be dismissal of the case. As noted *supra*, defendant has identified neither evidence nor argument that would have made a difference in this case.

²¹ See *State v. Lewis*, 184 Wn.2d 201, 355 P.3d 1148, 1150 (2015), and RCW 9.94A.505(6).

d. Defendant's bail arguments are moot.

Defendant cites *State v. Huckins*, 426 P.3d 797 (Wn.App. 2018) for the proposition that bail should be addressed for the first time on appeal in this case. *Huckins* is a case where bail where the defense lawyer did not reserve bail argument and did present a record sufficient for review. *State v. Huckins*, 426 P.3d at 799. It was a contested bail hearing. *Id.* The Court of Appeals was able to look at the record presented and render an opinion. *Id.* at 801-04. In this case, since bail was not contested, this Court is asked to render an advisory opinion in the purest sense. This Court should decline the invitation and follow *State v. Jelle*, 21 Wn. App. 872, 878, 587 P.2d 595, 598 (1978) because the issue of bail in this case is moot.

Huckins was solely a CrR 3.2(d) case where the amount of bail depended solely upon the danger presented to the community.²² Such a danger-to-the-community-based bail decision requires a “determination” which the trial court in *Huckins* did not make. *State v. Huckins*, 426 P.3d at 804. This case is very much a CrR 3.2(b) case because the most salient consideration in this case is defendant’s extreme flight risk, albeit coupled

²² “The State argued that it was not requesting bail out of concern for Huckins failing to appear, but based on his recent assault conviction and the nature of the allegations.” *State v. Huckins*, 426 P.3d 797, 800 (Wn.App. 2018).

with an extremely dangerous alleged offense.²³ It is palpably obvious from the record below that “the accused was not likely to appear if released upon personal recognizance.” CrR 3.2(b). This was not a close case, like *Huckins*. This court should decline reweigh the bail conditions set in this case. See *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674, 679 (1974).

e. Defendant’s equal protection and due process claims bail do not warrant dismissal.

Defendant raises equal protection and due process arguments for the first time on appeal. RAP 2.5(a). Defendant cannot demonstrate the prejudice necessary to establish a constitutional violation relating to his pretrial detention. *Id.* If a claim of improper pretrial detention cannot support a new trial, it should not support dismissal. See *State v. Jelle*, 21 Wn. App. 872, 878, 587 P.2d 595, 598 (1978). Defendant received credit for pretrial detention when he was sentenced. CP 282. Defendant has presented no facts that demonstrate that his ability to present a case was hampered by his pretrial detention. The absence of prejudice should preclude relief in this case.

²³ Defendant had nine prior bench warrants. 6/17/16 VRP 5-6. One of those priors was for escape in the second degree. *Id.* Defendant had three active bench warrants while he was out robbing people with a firearm in this case. *Id.* CP 1-2. Defendant then participated in an ultrahazardous attempt to avoid arrest. *Id.*

6. NEITHER THE DELAY IN COMPETENCY EVALUATION NOR THE DELAY IN THE COMMENCEMENT OF RESTORATION SERVICE WARRANT DISMISSAL IN THIS CASE.

On July 29, 2016,²⁴ the trial court entered the “Order for Examination by Western State Hospital or Qualified Expert.” CP 9-14. On August 17, 2017, Dr. Judith Kirkeby’s forensic examination was completed. CP 20-28. Dr. Kirkeby concluded that defendant was not competent to stand trial and recommended competency restoration treatment. CP 27. An order authorizing restorative treatment was entered on August 17, 2017. CP 17-19. Restorative services commenced on September 23, 2016. CP 31. On December 15, 2016, Dr. Hendrickson, Dr. McIntyre, and Achely Estoup, M.A. prepared an opinion that defendant, after restorative services, was at that time competent to stand trial. CP 29-41. That order was filed with the Superior Court on December 16, 2016. *Id.*

Twenty-eight days elapsed between the Order for Examination and when the State provided the competency evaluation to the trial court. CP 20-28. CP 9-14; CP 31. Thirty-seven days elapsed between the order calling for treatment and the commencement of restoration services. CP

²⁴ Defendant asserts that the order was dated July 19, 2016 (Appellant’s Brief at 44), but that date (recited in Dr. Kirkeby’s report at CP 11) is incorrect. *See* CP 9-14.

17-19; CP 29-41. The State agrees with defendant with defendant that both of these delays were unduly long under *Trueblood v. Washington State Dep't of Social & Health Services.*, 101 F. Supp. 3d 1010 (W.D. Wash. 2015); *State v. Hand*, 429 P.3d 502, 508 (Wash. 2018).

The delays in this case are significantly less than the delay in *Hand*, where seventy-six days elapsed between the order of commitment and the commencement of restorative services. *State v. Hand*, 429 P.3d at 504. In this case, that delay was 39 days shorter. CP 17-19; CP 29-41. The total delay between the initial order for evaluation and the commencement of restorative services in this case was 56 days.

The State concedes that defendant should have had a more prompt evaluation, that restorative services should have commenced sooner, and that those two delays violated *Trueblood*. However, dismissal of these very serious charges is not an available remedy. *State v. Hand*, 429 P.3d at 507-08.

7. THE STATE CONCEDES THAT THE TWO HUNDRED DOLLAR FILING FEE SHOULD BE STRUCK FROM THE JUDGMENT AND SENTENCE.

Defendant is plainly indigent. The \$200 filing fee should be struck pursuant to *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) and the recent amendments to the statutes governing legal financial obligations.

8. THE STATE CONCEDES THAT THE ONE HUNDRED DOLLAR DNA DATABASE FEE IMPOSED IN THIS CASE SHOULD BE STRUCK FROM THE JUDGMENT AND SENTENCE.

The State concedes that the One Hundred dollar DNA database fee imposed in this case should be struck from the judgment and sentence.

D. CONCLUSION.

Defendant's trial counsel expressed on the record that he could not use the Double Jeopardy Clause to inflict damage upon the State's case. Defendant has failed to meet the ineffective assistance of counsel burden of proving that assessment was wrong. Invited error should preclude this Court from reviewing the Double Jeopardy claim under the strict review of *State v. Mutch*.

Defendant's bail arguments should be rejected as insubstantial and moot. Defendant identifies due process error in the delay in securing defendant's competency evaluation and the delay in commencing competency restoration proceedings. However dismissal, the relief defendant seeks, is foreclosed by *State v. Hand*.

Defendant's legal financial obligation arguments are well taken.
This court should direct the Superior Court to strike the filing fee and the
DNA fee from the judgment and sentence in this case.

DATED: January 8, 2019.

MARY ROBNETT
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or
ABC-LMI delivery to the attorney of record for the ~~appellant~~ and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

1.8.18 

Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 08, 2019 - 1:17 PM

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