NO. 42939-0-II

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

STATE OF WASHINGTON, Respondent

v.

RONNIE JOHN MULLALLY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-013898

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. This Court should decline review of the Mr. Mullally's first assignment of error.

a. *Mr. Mullally failed to preserve this issue for review.*

b. *In the alternative, no error occurred because the evidence did not support a lesser-included offense instruction on Attempted Robbery in the Second Degree.*

II. Regarding Mr. Mullally's second assignment of error, this Court should find Instruction No. 13 did not constitute an improper comment on the evidence because it was an accurate statement of the law.

III. This Court should decline review of Mr. Mullally's third assignment of error because he failed to preserve this issue for review.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, "the defendant") was charged by Amended Information with Count One: Robbery in the Second Degree and Count Two: Assault in the Third Degree. (CP 6). Following a trial by jury, the defendant was found guilty of both counts. (CP 37-38). Sentencing was held on December 19, 2011. (CP 39). With an offender score of 9 points, the trial court sentenced the defendant to a total sentence of 63 months confinement. (CP 41-42). This timely appeal followed. (CP 53).

II. Summary of Facts

On April 5, 2011, the defendant entered the Target store in Hazel Dell, Washington and headed to the electronics section.[1] (RP 93, 95). Seth Kelton is an investigator for Target who was also working at the Hazel Dell Target on that day. (RP 91, 95). As an investigator for Target, Kelton is responsible for identifying and apprehending shoplifters. (RP 91). Kelton has worked in loss prevention for nine and one-half years. (RP 92). In his professional capacity, Kelton has identified and apprehended between 700 and 800 shoplifters. (RP 92).

The Hazel Dell Target has multiple recording-surveillance cameras. (RP 94). The cameras surveil all sections of the store, including the electronics section, the cash registers, and the entrance/exit to the store. (RP 94). At approximately 4:30 p.m., via the surveillance cameras, Kelton observed the defendant selecting DVD box sets in the electronics section. (RP 95). Kelton observed the defendant select three "high dollar" DVD box sets and place them into his hand basket. (RP 95-96). Kelton went to the sales floor to continue observing the defendant. (RP 96). From the sales floor, Kelton observed the defendant select a fourth DVD box set as well as two "Xbox Kinects" gaming systems. (RP 96-97). The defendant placed all afore-mentioned items in the hand basket that he was

[1] Hazel Dell is in Clark County, Washington. (RP 126).

carrying. (RP 97). Kelton followed the defendant as he walked to the front of the store, towards the entrance exit, with his hand basket. (RP 97-98). The entrance/exit is located at the front of the store. (RP 98). In order to get to the front of the store, the defendant had to pass between twelve and fifteen cash registers as well as the guest services area, which contained between three and four cash registers. (RP 99, 102). The defendant did not stop at any of these cash registers to pay for his merchandise. (RP 98, 101). Kelton observed the defendant make a call on his cell phone as he approached the front of the store. (RP 97).

As the defendant approached the entrance/exit doors, Kelton went ahead of the defendant and waited for him outside the store. (RP 99). After the defendant exited through the first set of double doors, Kelton approached him, identifying himself as "Target Security." (RP 100-01). The defendant did not say anything to Kelton in response. (RP 103). Instead, the defendant tried to walk directly past Kelton. (RP 101). Kelton said "Target security, please get against - - get against the wall." (RP 141). Kelton was able to briefly detain the defendant against the wall; however, the defendant was able to push off of the wall. (RP 103). The defendant then pushed Kelton with his body, on Kelton's right-hand side, and continued walking past him. (RP 104). The defendant was still holding onto his shopping basket when he pushed Kelton. (RP 103).

After the defendant pushed past Kelton, Kelton again tried to get the shopping basket out of the defendant's hand. (RP 104). It took Kelton "roughly two to three times" to get the basket out of the defendant's hand. (RP 144). The defendant finally dropped the basket; after which, the defendant punched Kelton in the right shoulder with his left hand. (RP 104). The defendant then moved his arm back in a motion like he was going to punch Kelton again. (RP 105). At that point, Kelton disengaged the defendant and let the defendant run.[2] (RP 105).

The defendant ran to a car that was awaiting him in the parking lot. (RP 105). The car sped away. (RP 105). Kelton wrote down the license plate for the fleeing vehicle and called the police. (RP 105-06). The total value of the items recovered from the defendant's shopping basket was approximately $540.00. (RP 108).

On the second morning of trial, following a recess, defense counsel advised the court that the State had proposed an offer of settlement to his client. (RP 222). The State's offer was to plead to one count of Theft in the First Degree and one count of Assault in the Fourth Degree. (RP 222). With the State's offer, the defendant would be eligible to screen for the Drug Offender Sentencing Alternative ("DOSA"). (RP 222). The

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[2] Video surveillance captured each of these events. A copy of the surveillance tapes were played for the jury and admitted into evidence. (RP 114).

defendant advised the court that he was not interested in accepting the State's settlement offer. (RP 222). When the court noticed that the defendant was being quiet in court (for the first time) the court asked the defendant whether he wanted more time to consider the State's offer.[3] (RP 225). The court explained to the defendant that, if he qualified for DOSA, his sentence would be reduced to one-half of the midpoint of the standard range: approximately twenty-five months confinement. (RP 227). The court also explained to the defendant that, under the statute, he would not be eligible for DOSA if he pled guilty or was found guilty of robbery. (RP 228). The court told the defendant it was his decision on how to proceed, but a decision needed to be made. (RP 231). The court told the defendant he would give him more time to talk to his attorney. (RP 231).

Before the court left the bench, the defendant said "I have one question, is if I did get convicted of attempted rob two, would I still be eligible for DOSA?" (RP 232). The court told the defendant "no," because the charge was still considered a violent offense. (RP 232). The court went on to state:

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[3] The defendant frequently asked questions and made comments directly to the court, despite the fact that he was represented by counsel. (RP 1, 18, 40, 203).

> I don't know if there's a basis to give the attempted robbery instruction, though, just so you know. But I'm not going to get into that.

(RP 233). In response, the defendant said "I think it is – it is a lesser-included offense of robbery two." (RP 233). The court explained to the defendant that there must be a factual basis to provide a lesser-included instruction. (RP 233). The court went on to opine that *if* a lesser-included instruction for Attempted Robbery in the Second Degree had been requested, the court might not have been inclined to provide the instruction because the evidence tended to show that the defendant intended to commit theft and then completed a robbery; it did not tend to show that he intended to commit a robbery. (RP 235). Defense counsel agreed with the court's interpretation, stating "I agree with you." (RP 237).

The defendant said he wanted to "take his chances" and let his case go to the jury. (RP 234). At no point did the defendant (or his attorney) request a lesser-included instruction for attempted robbery in the second degree. The defendant proposed only two jury instructions, which were both rejected by the court: WPIC 17.04 (lawful force – actual danger not necessary) and WPIC 5.20 (missing witness instruction). (CP 14-16; RP 239-42, 253). When the court asked the defendant whether he would "like

to take exception to [the court's] failure to give any instructions" the defendant responded: "I will just take exception to the two proposed by the defense." (RP 253).

C. ARGUMENT

I. The Court should decline review of the defendant's first assignment of error.

a. *The defendant failed to preserve this issue for review.*

In his first assignment of error, the defendant claims, "over [his] objection, the court refused to instruct the jury on the lesser-included offense of attempted robbery in the second degree." *See* Brief of Appellant ("Brief") at p. 4. However, the record makes it clear that the defendant did not propose a lesser-included offense instruction and he did not take exception to the fact that a lesser-included offense instruction was not provided. Consequently, the defendant waived any challenge to the trial court's failure to provide a lesser-included offense instruction and the Court should decline review of this issue.

Courts review claimed instructional errors de novo. *State v. Tamalini*, 134 Wn.2d 725, 729, 953 P.2d 450 (1998). However, a claimed instructional error must be raised in the trial court in order to preserve the issue for appellate review. Washington Rule of Appellate Procedure ("RAP") 2.5(a). Washington Superior Court Criminal Rule ("CrR")

6.15(a) provides that, in order to "propose" a jury instruction, a party must serve a copy of the proposed instruction on the opposing party and file a copy of the proposed instruction with the clerk of the court when a case is called for trial or at any time before the court has instructed the jury. CrR 6.15(b) provides that, in order to "object" to a proposed instruction, a party must state a reasoned objection to the proposed instruction on the record, before the instruction is submitted to the jury. RAP 2.5(a) provides that the appellate court may refuse to review a claim of error that was not raised in the trial court. The policy underlying the issue preservation rule is to promote the "efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Consequently, "[t]he appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *Scott*, 110 Wn.2d at 685 (citation omitted).

An exception to the rule requiring issue preservation applies only if the defendant can demonstrate manifest error affecting a constitutional right. RAP 2.5(a)(3); *Scott*, at 687. The burden shifts to the State to demonstrate the error was harmless only if the defendant can successfully make the threshold showing that manifest constitutional error, in fact,

occurred. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The right to a lesser-included offense instruction is a statutory right, not a constitutional right. *Tamalini*, 134 Wn.2d at 728; *Scott*, at 688 n.5, *citing State v. Mak*, 105 Wn.2d 692, 745-49, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986). This right arises from RCW 10.61.006, which provides, "[i]n all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." Consequently, the trial court's failure to instruct on a lesser-included offense is not constitutional error, which may be raised for the first time on appeal. *Scott*, at 688 n.5, *citing Mak*, 105 Wn.2d at 745-49, (stating "instructional errors that do not fall within the scope of RAP 2.5(a)(3) include failure to instruct on a lesser included offense"). In the absence of a proper request, a trial court is not required to instruct on a lesser-included offense. *State v. Mayner*, 4 Wn. App. 549, 552, 483 P.2d 151 (1971), *review denied*, 79 Wn.2d 1008 (1971).

Here, the defendant never requested a lesser-included offense instruction for Attempted Robbery in the Second Degree. Rather, after rejecting an offer of settlement that would have qualified him to screen for DOSA, the defendant asked the court if would still be eligible for DOSA if

the jury found him guilty of "attempted" Robbery in the Second Degree. Although the defendant expressed interest in whether he would be eligible for DOSA if he was found guilty of Attempted Robbery in the Second Degree, the defendant never asked the court to provide a lesser-included offense instruction on that charge. Further, the defendant did not propose an instruction for Attempted Robbery in the Second Degree when he served opposing counsel and filed with the court his packet of proposed jury instructions.

Next, the court never denied a request for a lesser-included offense instruction on Attempted Robbery in the Second Degree. Rather, the court responded to the defendant's inquiry on DOSA-eligible offenses; after which, the court took the opportunity to pontificate as to why it likely would not provide a lesser-included instruction for Attempted Robbery in the Second Degree, if such an instruction was requested. The court was never asked to rule on a request for a lesser-included instruction and it never ruled against such a request.

Further, the defendant never objected to the court's reasoning as to why it might not provide a lesser-included offense instruction, if such an instruction was requested. Rather, the defendant responded to the court's reasoning by stating "I agree with you." (RP 237).

Lastly, the defendant never took exception to the court's final instructions to the jury. The defendant only took exception to the fact that the court denied his two proposed written instructions (lawful force – actual danger not necessary and missing witness instruction).

Given that the defendant never requested a lesser-included offense instruction, the trial court was under no obligation to, *sua sponte*, provide one. In addition, the absence of a lesser-included offense instruction is not an error that may be raised for the first time on appeal because it is not an error of constitutional magnitude. The defendant argues that the trial court's failure to provide a lesser-included offense instruction deprived him of the constitutional right to present a defense; however, this argument is not persuasive because it presupposes that the defendant actually requested a lesser-included instruction and that the trial court actually refused his request. *See*, Brief at p.5. For example, in *State v. Williams*, the case to which the defendant cites for authority, the defendant proposed a jury instruction on duress (in support of her affirmative defense) and the trial court declined to give the proposed instruction. *See Brief* at p. 6 *citing* 132 Wn.2d 248, 253, 937 P.2d 1052 (1997). Here, a lesser-included instruction was never requested or declined.

For each of these reasons, no error occurred and no issue was preserved for review. The defendant's conviction for Robbery in the Second Degree should be affirmed.

b. *In the alternative, no error occurred because the evidence did not support a lesser-included instruction on Attempted Robbery in the Second Degree.*

Assuming, *arguendo*, the defendant actually proposed a lesser-included instruction for Attempted Robbery in the Second Degree and assuming the trial court actually rejected his proposal, the trial court's rejection of a lesser-included offense instruction would not have been erroneous. A party is entitled to an instruction on a lesser-included offense where (1) each element of the lesser offense is a necessary element of the greater offense charged (the legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). A defendant may only be convicted of a lesser degree when there is evidence that the lesser crime alone has been committed, to the exclusion of the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). "It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included

offense before an instruction will be given." *State v. Fowler*, 114 Wash. 2d 59, 67, 785 P.2d 808 (1990), *disapproved on other grounds in State v. Blair*, 117 Wash. 2d 479, 487, 816 P.2d 718 (1991).

> A person commits robbery in the second degree when he [or she]:
>
> > unlawfully takes personal property from the person of another or in his presence against his will *by the use or threatened use of immediate force*, violence, or fear of injury to that person or his property or the person or property of anyone. *Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking...*

RCW 9A.56.190; 9A.56.210 (emphasis added). Meanwhile, a person "attempts" to commit Robbery in the Second Degree if, with intent to commit Robbery in the Second Degree, "he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

Here, even if the "legal" prong of the *Workman* test was satisfied, the "factual" prong was not because the undisputed evidence proved that the defendant completed a robbery. Specifically, the evidence showed that the defendant unlawfully took property belonging to another when he exited the Target store with a hand-basket full of items for which he had not paid. Further, the evidence showed that the defendant used force to retain possession of the property, or to prevent or overcome resistance to the taking, when he pushed the loss prevention officer with his body and

then proceeded to walk towards the parking lot with the shopping basket still in his hand. Because the undisputed evidence proved a completed robbery, it could not also support a finding that only an "attempted" robbery occurred. Therefore, the defendant would not have been entitled to a lesser-included offense instruction, had one been requested.[4]

The defendant does not dispute that the facts proved a completed robbery occurred. *See* Brief, at p. 10 (stating "[f]or purposes of the analysis here, therefore, Mullally intentionally used force to 'retain possession of the property' or 'overcome resistance to the taking'"). However, the defendant seems to argue that an "attempt" instruction should be given any time there is evidence of a completed crime because, at some point during the commission of the crime, the defendant manifested his "intent" to commit it. This reasoning, however, is inconsistent with the factual prong of the *Workman* test, which requires proof of the lesser-included offense "to the exclusion" of the greater offense.

In addition, contrary to the defendant's assertion, the trial court's failure to give a lesser-included instruction does not warrant reversal of his

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[4] For these same reasons, assuming, *arguendo*, the trial court actually made a ruling on a request for a lesser-included offense instruction, the trial court's basis for denying the instruction (that the evidence tended to show that the defendant intended to commit a theft and then completed a robbery) would not have been erroneous.

conviction. *See* Brief, at p. 11, citing *Williams*, 132 Wn.2d at 260. Again, *Williams* is not on point because that case addressed the trial court's failure to provide an instruction on an affirmative defense, when the instruction was expressly requested by the defendant. Notwithstanding these differences, the *Williams* Court held reversal was required when the trial court refused to give a proposed instruction only if the proposed instruction was supported by the evidence. *Williams*, at 259-60. Here, the evidence did not support an attempted robbery – it supported a completed robbery. Also, the defendant did not argue that only an attempted robbery occurred; rather the defendant argued that any contact was "incidental, unintentional, and surely not offensive to an individual in Mr. Kelton's primary position." (RP 294).

For each of these reasons, the defendant's conviction for Count One: Robbery in the Second Degree should be affirmed.

II. Instruction No. 13 did not constitute an improper comment on the evidence because it was an accurate statement of the law.

For Count Two: Assault in the Third Degree, the State proposed the following jury instruction:

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

(RP 249). The State's proposed instruction was based on *State v. Miller*, 103 Wn.2d 792, 698 P.2d 554 (1985). The defendant objected to the State's proposed instruction, stating:

> I think there are instructions that are proposed that are the state of the law. The [c]ourt has chose not - - self-defense is not the issues, has taken it out of the case, so I don't see - -

(RP 249). Further, the defendant took exception to the instruction because "I typically see pattern instructions as opposed to instructions from case law. I object to the 'apprehend.' I believe that creates issues." (RP 253). Finding the State's proposed instruction was an "accurate statement of the law," the court accepted the State's proposed instruction and marked it as instruction no. 13. (RP 250).

In his second assignment of error, the defendant claims the trial court erred in providing instruction no. 13. Specifically, the defendant claims the trial court automatically commented on the evidence with this instruction because it was a non-pattern instruction. *See* Brief, at p.15. The defendant also claims the instruction was not relevant because the trial court did not instruct the jury on any self-defense claim. *See* Brief, at p. 14. The defendant's claim is without merit.

Jury instructions are reviewed de novo, within the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d

315 (2009). Under article IV, section 16 of the Washington Constitution, a judge is prohibited from conveying his or her personal attitudes toward the merits of a case. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Whether a comment is improper depends on the facts and circumstances of each case. *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). A jury instruction constitutes an improper comment on the evidence when it evinces the court's personal opinion regarding the credibility, weight, or sufficiency of evidence or when it implies that "matters of fact have been established as a matter of law." *Becker*, 132 Wn.2d at 64. In contrast, a jury instruction does not constitute an improper comment on the evidence when it is supported by sufficient evidence in the record and when it is "an accurate statement of the law." *State v. Stearns*, 61 Wn. App. 224, 231, 810 P.2d 41 (1991), *review denied*, 117 Wn.2d 1012, 816 P.2d 1225 (1991).

Under RCW 9A.36.031(1)(a), a person is guilty of Assault in the Third Degree if he or she assaults another with intent to prevent or resist the *lawful apprehension or detention* of himself, herself, or another person. *State v. Johnston*, 85 Wn.App. 549, 553, 933 P.2d 448 (1997) (emphasis added). Therefore, in order to prove Assault in the Third Degree, the State must prove that the defendant was being "lawfully apprehended or detained."

Pursuant to common law, detention by store personnel is lawful if the store personnel have reasonable grounds to believe the person detained was committing or attempting to commit theft. *State v. Jones*, 63 Wn. App. 703, 705-06, 821 P.2d 543 (1992), *review denied at* 118 Wn.2d 1028 (1992), *citing Miller*, 103 Wn.2d at 794-96 and RCW 9A.16.080. Although there is not a standard WPIC that defines the common law regarding lawful detention by store personnel, the reviewing courts have repeatedly approved of the trial courts crafting jury instructions that define the common law on "lawful detention." For example, in *Jones*, the Court of Appeals found the trial court's instruction to the jury was not erroneous and was a correct statement of the law when the instruction provided:

> [d]etention or apprehension by store personnel of a person is lawful if the store personnel have reasonable grounds to believe the person so detained was committing or attempting to commit theft or shoplifting on the store premises of store merchandise.

63 Wn. App. at 705. *See also State v. Johnston*, 85 Wn.App. 549, 933 P.2d 448 (1997) (approving, without quoting, an instruction defining lawful detention by a security guard based on RCW 4.24.220 and RCW 9A.16.080). In fact, the annotations to WPIC 35.21 (Assault—Third Degree-- Court Process or Arrest-- Elements) contemplate that the trial court will need to craft an additional instruction defining "lawful detention." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.21 (3d Ed)

(2008) (stating "[t]he court will need to craft an instruction defining the elements of a lawful arrest or detention based on the particular factual situation").

Here, instruction no. 13 stated "A merchant, or employee of a merchant, has a lawful right to apprehend or detain a person they have probable cause to believe has committed theft." The instruction was an accurate statement of the law because it tracked the common law regarding lawful detention. Also, the instruction mirrored that which the *Jones* court found to be a correct recitation of the law. In addition, instruction no. 13 was supported by the evidence because the evidence established that Seth Kelton, the person who apprehended the defendant, was a loss prevention officer for Target. Also, the evidence established that Kelton apprehended the defendant based on a reasonable belief (or probable cause) that the defendant had committed theft. Because instruction no. 13 was an accurate statement of the law and because it was supported by the evidence, instruction no. 13 was not an improper comment on the evidence. *Stearns*, 61 Wn. App. at 231.

Furthermore, instruction no. 13 was not an improper comment on the evidence because it did not evince the court's personal opinion regarding the credibility, weight, or sufficiency of evidence. The instruction merely explained (pursuant to the law) that a merchant or an

employee of a merchant *can* lawfully apprehend or detain a person if he/she has probable cause to believe the person has committed theft. The instruction did not state that, in this case, Kelton's apprehension of the defendant was lawful and it did not state that, in this case, Kelton had probable cause to believe the defendant committed theft. With this instruction, the court did not improperly suggest that any matters of fact had been established as a matter of law.

In addition, whether the trial court instructed the jury on self-defense is irrelevant to whether instruction no. 13 was proper. In order to prove Assault in the Third Degree, the State was obligated to prove all elements of the offense. These elements included proof that the apprehension of the defendant was lawful. Consequently, the State was obligated to prove lawful apprehension irrespective of a self-defense claim. It is worth noting that, in *Jones*, when the Court provided an instruction on lawful apprehension by store personnel, pursuant to the Court's reading of *Miller* and pursuant to its interpretation of the common law, the defendant did not assert self-defense as an affirmative defense. *Jones*, 63 Wn. App. 703. Similarly, in *Miller* and in *Johnston*, the defendants did not raise claims of self-defense. *Miller*, 103 Wn.2d 792; *Johnston*, 85 Wn.App. 549.

This Court should find no error occurred: however, assuming, *arguendo*, this Court finds the trial court erred when it provided instruction no. 13, the Court should find any error was harmless because the defendant cannot show prejudice. That the defendant committed Assault in the Third Degree was proven by Seth Kelton, who testified that the defendant punched him in the shoulder, after the defendant dropped his shopping basket and while Kelton was acting in his official capacity as a loss prevention officer. That the defendant committed this crime was also proven by the video surveillance, which captured the assault and which was played for the jury and admitted into evidence. In addition, the defendant's defense was *not* that Kelton did not have the capacity to "lawfully apprehend him." Rather, the defendant's defense was that (1) the State failed to prove intent because the punch was simply a "startle reflex" or (2) the State failed to prove that an assault occurred at all because the video was inconclusive. (RP 287-88). Because the evidence of Assault in the Third Degree was overwhelming and because instruction no. 13 had no bearing on the defendant's defense, the defendant cannot show that the result of his case would have been different "but for" instruction no. 13.

For each of these reasons, the defendant's conviction for Count Two: Assault in the Third Degree should be affirmed.

III. The Court should decline review of the defendant's third assignment of error because the defendant failed to preserve this issue for review.

The defendant was sentenced on December 19, 2011. (RP 316). At the sentencing hearing, the trial court imposed costs, fines, and fees, including: a victim assessment fee, court costs (which included a criminal filing fee and a jury demand fee), a court appointed attorney fee, trial per diem, costs for court appoint defense expert or other defense costs, a criminal fine, and a DNA collection fee. (CP 43-44). The trial court did not check a box next to a pre-printed statement, which read: "[t]hat the defendant has the ability or the likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753." (CP 41, sec. 2.5).

The defendant was present for all portions of the sentencing hearing. (RP 316-336). The defendant signed the judgment and sentence after it was completed. (CP 46). The defendant did not object to the trial court's imposition of costs, fines, or fees. (RP 316-336). Further, the defendant did not object to the trial court not checking a box next to a finding regarding the defendant's present or future ability to pay. (RP 316-336). The defendant was sentenced to 63 months confinement. (CP 41). There is no indication that the State has attempted to collect on the defendant's legal and financial obligations ("LFO's").

In his third assignment of error, the defendant claims the trial court erred at sentencing because it failed to make findings in support of its imposition of a trial per diem fee, court appointed counsel fee, or other defense costs. *See* Brief, at p. 19-21. In addition, the defendant claims the trial court erred because it did not make findings that the defendant had a present or future ability to pay his LFO's. *See* Brief, at p. 16. The defendant claims, as a remedy, this Court must vacate the trial court's order imposing costs. *See* Brief, at p. 23. The defendant's claims are without merit.

The trial court has broad discretion to impose costs, fines, and fees. *See State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (stating trial court's imposition of LFO's is reviewed for abuse of discretion). RCW 9.94A.760 entitled "Legal financial obligations") allows the superior court to order a person who is convicted of a crime to pay a legal financial obligation as part of his or her sentence. RCW 9.94A.760(1). Pursuant to RCW 9.94A.030(30), "legal financial obligation" means

> a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, *court-appointed attorneys' fees*, and *costs of defense, fines*, and any *other financial obligation that is assessed to the offender as a result of a felony conviction.*

RCW 9.94A.030(30)(emphasis added). In addition, the trial court is not required to enter factual findings on a defendant's ability to pay LFO's. *Curry*, 118 Wn.2d at 916.

The imposition of LFO's is a product of statute and is not an issue of constitutional magnitude. *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992). Consequently, RAP 2.5(a)(3) does not apply to issues regarding the imposition of LFO's. *Phillips*, 65 Wn. App. at 243-44. Therefore, a defendant waives any challenges to the imposition of LFO's on appeal if he does not object to their imposition at the time of sentencing. *Id.*

In addition, the trial court's failure to enter findings regarding a defendant's ability to pay (pursuant to RCW 10.01.160) is not a constitutional error that requires resentencing. *Phillips,* at 243, *citing Curry*, at 680-81; *State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55, 817 P.2d 867 (1991). Therefore, a defendant waives any challenge to the trial court's failure to make findings regarding his or her ability to pay if he does not object at the time of sentencing. *Id.*, at 243-44.

Constitutional principles will be implicated only if and when the government seeks to enforce collection of the assessments "'at a time when [the defendant is] unable, through no fault of his own, to comply.'" *Phillips*, at 244 *citing see United States v. Hutchings*, 757 F.2d 11, 14-15.

(2d Cir.), *cert. denied*, [472] U.S. [1031], 105 S.Ct. 3511, 87 L.Ed.2d 640 (1985) (quoting *United States v. Brown*, 744 F.2d 905, 911 (2d Cir.), *cert. denied*, [469] U.S. [1089], 105 S.Ct. 599, 83 L.Ed.2d 708 (1984)). "It is at the point of enforced collection of the principal or additional amounts, where an indigent may be faced with the alternatives of payment or imprisonment, that he 'may assert a constitutional objection on the ground of his indigency.'" *Id.* (quoting *Hutchings*, 757 F.2d at 14-15). Consequently, whether the trial court made sufficient findings regarding the defendant's ability to pay will become ripe for review only if and when the State attempts to collect LFO's. *Id.*, at 244 *citing Curry*, at 682 (noting "the various statutory safeguards already in place in Washington that might well eliminate any risk of a constitutional violation occurring at the time of collection").

Here, the trial court's imposition of costs, fines, and fees was authorized by statute. In addition, the trial court was not required to enter findings regarding the defendant's present or future ability to pay.[5] Consequently, the trial court did not abuse its discretion when it imposed

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[5] The case cited to by the defendant is inapposite. *See* Brief, at 17, *citing State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). In *Bertrand*, the trial court affirmatively found the defendant had the present and future ability to pay; however, there was no evidence from the record to support the trial court's finding. *Bertrand*, 165 Wn. App. at 404 (stating, in order to make this finding, the record must show whether the trial court took into account the financial resources of the defendant and the nature of the burden). Here, no such finding was made.

LFO's and when it did not check a box regarding the defendant's ability to pay.

However, this Court need not, and should not, address the merits of the defendant's claim because the defendant failed to preserve this assignment of error for review. The defendant waived any challenge to the trial court's imposition of LFO's when he did not object to their imposition at the time of sentencing. RAP 2.5(a). Further, the defendant waived any challenge to the trial court's failure to check a box regarding his present or future ability to pay when he did not object at the time of sentencing. *Id.* In addition, whether the defendant has the present or future ability to pay is not yet ripe for review because there is no evidence that the State has attempted to collect on the defendant's LFO's.

No error occurred and no assignment of error was preserved for review. Therefore, the defendant's judgment and sentence should be affirmed. The trial court's order imposing costs should also be affirmed. Assuming, *arguendo*, this Court finds any error occurred (and that it was preserved for review), the limited remedy to which the defendant would be entitled would be remand to the sentencing court for an entry of findings in support of the court's order.

D. CONCLUSION

The defendant's conviction for Robbery in the Second Degree and Assault in the Third Degree should be affirmed. The defendant's judgment and sentence should also be affirmed.

DATED this _____ day of _____, 2012.

Respectfully submitted:

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