No. 89518-0

(Court of Appeals No. 67627-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD L. CALVIN,

Petitioner.

PETITION FOR REVIEW
OF COURT OF APPEALS DECISION TERMINATING REVIEW

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A. IDENTITY OF PETITIONER

Donald L. Calvin, defendant and appellate below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Calvin seeks review of the Court of Appeals decision affirming his convictions for assault in the third degree and resisting arrest. State v. Donald Calvin, __ Wn. App. ___, 302 P.3d 509 (2013).

A copy of the Court of Appeals decision, dated May 28, 2013, is attached as Appendix A. A copy of the order denying the State's motion for reconsideration, dated September 20, 2013, is Appendix B.[1]

C. ISSUES PRESENTED FOR REVIEW

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV. Donald Calvin was convicted of third degree assault of a law enforcement officer, RCW 9A.36.031. A state park ranger testified he was afraid because Donald Calvin walked towards him during a conversation, raised his hand when the ranger shined a flashlight in his face, and had his fists near his head. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt

[1] Although the order states that Mr. Calvin filed the motion for reconsideration, it was actually filed by the State. Motion for Reconsideration filed Jun 17, 2013.

that the park ranger's fear of imminent bodily injury was reasonable and that Mr. Calvin intended to place the armed ranger in fear of imminent bodily injury?

2. A trial court may provide the jury with substitute instructions during deliberations if the original instruction is not a correct statement of the law. Instruction 5 correctly defined assault as charged in Mr. Calvin's case. When the jury asked the court to define the phrase "unlawful force," the trial court told the jury Instruction 5 was incorrect and replaced it with a substitute instruction defining assault that omitted the "unlawful force" language and thus reduced the State's burden of proof

a. Was Mr. Calvin prejudiced by the reduction of the State's burden of proof in violation of the law of the case doctrine?

b. Did the trial court comment on the evidence in violation of article IV, section 16 of the Washington Constitution?

c. Did the substitution of the instruction defining assault violate the appearance of fairness doctrine?

3. In order to convict Mr. Calvin of resisting arrest, the State was required to prove beyond a reasonable doubt that he intentionally attempted to prevent a peace officer from lawfully arresting him. U.S. Const. amends. VI, XIV; RCW 9A.76.040(1). The state park ranger did not immediately identify himself as a police officer and never informed

Mr. Calvin that he was under arrest. Viewing the evidence in the light most favorable to the State, must Mr. Calvin's conviction for resisting arrest be dismissed?

4. The prosecutor is a representative of the State, and prosecutorial misconduct may deny the defendant a fair trial. U.S. Const. amends. XIV; Const. art. I, § 22. It is misconduct for the prosecutor to express a personal opinion as to the defendant's veracity or to argue in a manner that denigrates defense counsel or his role.

a. The prosecutor told the jury that Mr. Calvin was telling a story and "trying to pull the wool" over their eyes. Where the case hinged on the jury's evaluation of the credibility of the State's key witness and Mr. Calvin, is there a substantial likelihood that this misconduct affected the jury verdict?

b. The prosecutor argued that defense counsel was lying, his argument was untrustworthy, and he was unfairly calling the complaining witness a liar. Where the case hinged on the jury's evaluation of the credibility of the complaining witness and Mr. Calvin, is there a substantial likelihood that this misconduct affected the jury verdict?

5. The accused has the constitutional right to the effective assistance of counsel at trial. U.S. Const. amends. VI, XIV. Mr. Calvin

was charged with assault in the third degree and resisting arrest, and he testified that he was frightened and confused by the park ranger's use of force and reacted to protect himself. Was Mr. Calvin's constitutional right to effective counsel violated when defense counsel did not propose a self-defense instruction?

D. STATEMENT OF THE CASE

Donald Calvin was living in an old mobile home near Lynden that lacked running water. RP 112. One spring evening, he drove to Larrabee State Park to use the shower, arriving after the gate was closed but overnight campers could still enter. RP 16, 113-14. State Park Ranger Alexander Moularas called out to Mr. Calvin, informing him that the park was closed. RP 17-19, 35, 114. The ranger as armed with a firearm, a collapsible baton made of steel and plastic, oleoresin capsicum (OC or pepper spray), and a flashlight. RP 13-14, 48-49.

Mr. Calvin walked closer to the ranger's vehicle in order to hear him and to explain that he wanted to use the shower. RP 115. The ranger told Mr. Calvin he had to leave unless he paid $14 to camp. RP 19-20, 36, 115. Ranger Moularas shined his flashlight in Mr. Calvin's face. RP 118. Mr. Calvin suffers from migraine headaches, and he told the ranger to get the light out of his eyes and raised his hands to shield his face. RP 118. Ranger

Moularas sprayed Mr. Calvin two times with pepper spray because Mr. Calvin was moving in his directions with his hands forward. RP 13, 24.

The ranger then struck Mr. Calvin several times with a baton. RP 119. Mr. Calvin did not understand why the ranger was attacking him; he was afraid and tried to get away. RP 120. The park ranger then wrestled Mr. Calvin to the ground and forced handcuffs on him. RP 26, 120.

As a result of the incident, Mr. Calvin was charged and convicted of assault in the third degree by assaulting a law enforcement officer performing his official duties, RCW 9A.36.031(1)(g), and resisting arrest, RCW 9A.76.040. CP 49, 93-94. The Court of Appeals affirmed Mr. Calvin's convictions, and he now seeks review in this Court.[2]

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The State did not prove beyond a reasonable doubt that Mr. Calvin assaulted a park ranger.**

Mr. Calvin was convicted of third degree assault for placing a park ranger in reasonable fear of imminent bodily harm while the ranger was performing his official duties. CP 49, 59, 61; RCW 9A.36.031(1)(g). On appeal, Mr. Calvin argued that the convicted should be reversed because the State did not prove beyond a reasonable doubt (1) that Ranger

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[2] Mr. Calvin does not seek review of the portion of the Court of Appeals opinion addressing his ability to pay the court costs ordered as part of his sentence. Calvin, 302 P.3d at 521-22.

Moularas was placed in reasonable apprehension and immediate fear of bodily injury or (2) that Mr. Calvin intended to place the ranger in fear of injury, both elements of the crime. Brief of Appellant (hereafter AOB) at 9-19; Reply Brief of Appellant (hereafter ARB) at 14. The Court of Appeals upheld the conviction, concluding that the ranger's fear of Mr. Calvin was reasonable and Mr. Calvin's admission that he was angry provided the necessary proof of his intent. Calvin, 302 P.3d at 514-15.

Assault is not defined in the criminal code, but Washington courts have adopted the common law definition which includes three alternatives. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). An assault may be (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury that is not accomplished (attempted battery); or (3) putting another person in fear of harm with creates a reasonable apprehension of harm. Id. at 215-16. In this case, the State was required to prove beyond a reasonable doubt that (1) Mr. Calvin intentionally placed Ranger Moularas in fear of injury by his actions, (2) Mr. Calvin's acts in fact created a reasonable apprehension and imminent fear of imminent bodily injury, (3) the park ranger was a law enforcement officer who was performing his official duties at the time, and (4) the acts occurred in Washington. Calvin, 302 P.3d at 514. The evidence, however,

shows that the ranger's fear was not reasonable and that Mr. Calvin did not act with the intent to frighten the ranger.

Appellate counsel could not locate any reported Washington cases addressing the sufficiency of the evidence for a third degree assault on a law enforcement officer based upon assault by means of intentionally placing the officer in reasonable fear of harm other than Mr. Calvin's. In Brown, this Court held that knowledge that the person frightened was a law enforcement officer is not an element of third degree assault. State v. Brown, 140 Wn.2d 456, 467, 998 P.2d 321 (2000). While this Court did not address the sufficiency of the evidence, the prosecution was based upon the defendant's actions in displaying what appeared to be a handgun in this clothing, walking slowing towards an undercover police officer, and pulling out the apparent weapon and pointing it at the officer. Brown, 140 Wn.2d at 461-62. The officer was afraid, and it was not until later he learned the defendant had a cigarette lighter designed to look like a handgun. Id. at 462.

Division Three also addressed a third degree assault by means of causing apprehension of fear of imminent bodily harm in State v. Godsey, 131 Wn. App. 278, 288, 127 P.3d 11, rev. denied, 158 Wn.2d 1022 (2006), but did not address the sufficiency of the evidence. The defendant in that case initially ran from police officers. Godsey, 131 Wn. App. at 283.

When he complied with the order to stop, the defendant turned to face the officer with his fists up, said "Come on," and took a step towards the officer. Id.

When Mr. Calvin approached Ranger Moularas to speak with him, Ranger Moularas shined a powerful flashlight in Mr. Calvin's face. RP 21, 23. Mr. Calvin put his hand up and asked the officer to "Get that F-ing light out of my face," and the park ranger attacked Mr. Calvin with pepper spray and then hit him several times with a baton. RP 22-25, 45. According to the Court of Appeals, the park ranger's fear was reasonable because Mr. Calvin was angry, appeared unbalanced or under the influence, swore at the ranger and "reached his hand towards him," forcing the ranger to back up. Calvin, 302 P.3d at 514. In Brown and Godsey, however, the defendant did more than raise their hands to create fear – one pointed an apparent gun at the officer and the other took a fighting stance, stepped towards the officer, and verbally invited him to fight.

A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI, XIV; Const., art. I, § 22. Police officers must accept a "significant amount of verbal criticism and challenge" from members of the public. City of Houston v. Hill, 482 U.S. 451, 461, 107 S.

Ct. 2502, 96 L. Ed. 2d 398 (1987) (addressing U.S. Const. amend. I). Whether raising your hands in response to a strong light or pepper spray constitutes a third degree assault is a significant question of law that should be addressed by this Court, and an opinion will provide guidance to the lower courts in analyzing this form of assault. This Court should accept review. RAP 13.4(b)(3), (4).

2. **The trial court's substitution of the instruction defining assault with a new instruction while the jury was deliberating violated the law of the case doctrine, the appearance of fairness doctrine, and the constitutional provision prohibiting judges from commenting on the evidence.**

In response to a jury question during deliberations, the trial court replaced one correct definition of assault with another, explaining that the first instruction was incorrect. Mr. Calvin argued that the giving of an unnecessary substitute instruction defining assault (1) relieved the State of its burden of proving Mr. Calvin's force was unlawful in violation of "law of the case" doctrine, (2) violated the appearance of fairness doctrine, and (3) constituted an unconstitutional comment on the evidence. AOB at 31-41; ARB at 10-13; Statement of Additional Grounds at 1-2.

The jury was initially given the State's proposed instruction defining assault that explained an assault is an act done with unlawful

force.[3] CP 77; RP 134. Under the law of the case doctrine, the State thus undertook the burden of proving Mr. Calvin committed as assault as defined in the instruction. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); Calvin, 302 P.3d at 519-20. When a jury question revealed the jury was struggling with the concept of what force was unlawful, however, the trial court replaced Instruction 5 with a substitute instruction that eliminated the lawful force language.[4] CP 59. Mr. Calvin objected to the substitute instruction. RP 172-74, 176-77. The jury returned a verdict less than an hour later. CP 102-02.

The trial court has the discretion to provide the jury with supplemental instructions after deliberation has begun. State v. Aguirre,

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[3] The Instruction, based upon WPIC 35.50, read:

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily harm, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury.
>
> An act is not an assault, if done with the consent of the person alleged to be assaulted.

CP 58.

[4] The substitute instruction read:

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 59.

168 Wn.2d 350, 364, 229 P.3d 669 (2010); CrR 6.15(f)(1). The supplemental instruction, however, must not emphasize certain evidence or address an area of the law not addressed by the parties. Id. The Court of Appeals determined that Mr. Calvin was not prejudiced by the trial court's substitution of the assault instruction for one that lessened the State's burden of proof. Calvin, 302 P.2d at 520 (after reviewing State v. Hobbs, 71 Wn. App. 419, 421, 859 P.2d 73 (1993) and State v. Ransom, 56 Wn. App. 712, 712-13, 785 P.2d 469 (1990)).

In Hobbs, the trial court amended the "to convict" instruction during jury deliberations to omit the requirement that the crime occur in King County and substitute the requirement that it occur in the State of Washington. Hobbs, 71 Wn. App. at 421, 859 P.2d 73 (1993). Although venue is not an element of the crime, the Hobbs Court agreed with the defense that the State had undertaken to prove venue by including it in the information and its proposed "to convict" instruction. Id. at 422-23. The court therefore reversed the conviction because of the improper supplemental instruction. Id. at 424-25. While the trial court had permitted the parties to reargue the case after altering the instruction, defense counsel lacked the ability to "re-think its cross-examination strategy, which had been based upon the State's error." Id. at 425. "We

believe the trial court had two permissible remedies here: (1) to hold the State to its own election or (2) to declare a mistrial." Id.

The Court of Appeals decision here conflicts with Hobbs. A critical definitional instruction was changed to eliminate the requirement that force be unlawful. The new instruction lessened the State's burden of proof. While defense counsel was given the opportunity to reargue the case, he determined re-argument would unduly emphasize one instruction over the others. RP 174. The opportunity to re-argue did not provide a real remedy to the defendant, who could not change his trial strategy after both sides have rested. This Court should accept review to address this conflict. RAP 13.4(b)(2).

In addition, the Court of Appeals addressed Mr. Calvin's arguments that giving the substitute instruction violated the constitutional provision forbidding judges from commenting on the evidence and violated the appearance of fairness doctrine in a footnote. Calvin, 302 P.3d at 521 n.1. The Washington Constitution forbids judges from commenting on the evidence. Const. art. I, § 16. Thus, judges may not do anything to influence the jury's evaluation of the evidence. State v. Lang, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The constitutional right to a due process also requires that judges be fair and impartial. Const. art. I, §§ 3, 22; State v. Madry, 8 Wn. App. 61, 68-69, 504 P.2d 1156 (1972). "The

law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (quoting Madry, 8 Wn. App. at 70).

Both constitutional provisions were violated when the trial court substituted the assault definition for another to remove language that troubled the jury and decreased the State's burden of proof. An average juror could view the court's substitution of instruction as a signal that their deliberations were off point. In addition, a disinterested observer would not conclude that Mr. Calvin did not receive a fair trial. This Court should also accept review of to address Mr. Calvin's constitutional arguments that the trial court commented on the evidence and violated the appearance of fairness doctrine. RAP 13.4(b)(3).

3. **The State did not prove beyond a reasonable doubt that Mr. Calvin resisted arrest**

Mr. Calvin was convicted of resisting arrest, RCW 9A.76.040, for trying to prevent Ranger Moularas from handcuffing him. RP 142; CP 49. On appeal he argued the State did not prove beyond a reasonable doubt that he knew he was being placed under arrest. AOB at 19-22; ARB at 4-7. The Court of Appeals, however, held there was sufficient evidence to support the conclusion that Mr. Calvin knew that Ranger Moularas was a law enforcement officer. Calvin, 302 P.3d at 515-16.

"A person is guilty of resisting arrest if he intentionally prevents to attempts to prevent a peace officer from lawfully arresting him." RCW 9A.76.040. It was dark when Mr. Calvin encountered Ranger Moularas outside Larrabee State Park. BOR at 8; RP21, 116. While the ranger was in a park vehicle and in uniform, he did not identify himself as a law enforcement officer until after he had pepper sprayed Mr. Calvin and hit him with a baton. RP 24, 25, 41. He did so by using the word "police" when he ordered Mr. Calvin to the ground. RP 24, 54. Ranger Moularas never informed Mr. Calvin he was under arrest. RP 26-27.

Simply because Mr. Calvin knew Moularas was a park ranger does not mean he knew the ranger was a law enforcement officer, armed with weapons and the power to arrest. The sufficiency of the evidence to convict an individual of a crime is a constitutional issue. Apprendi, 530 U.S. 476-77 (government must prove every element of the crime beyond a reasonable doubt); U.S. Const. amends. VI, XIV; Const., art. I, § 22. This Court should accept review.

4. **Prosecutorial misconduct in closing argument denied Mr. Calvin a fair trial.**

During his closing argument, the prosecuting attorney committed misconduct by accusing Mr. Calvin of lying and by belittling the argument of Mr. Calvin's attorney. RP 138-40, 162-64, 166. The Court

of Appeals concluded that the prosecutor's statements concerning Mr. Calvin's credibility were not a "clear and unmistakable" personal opinion. Id. at 518-19 (quoting State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996)). The court also determined that the prosecutor's derogatory comments about defense counsel did not raise to the level of flagrant and ill-intentioned misconduct in the absence of an objection. Calvin, 302 P.3d at 517-18.

A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L Ed. 2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for decorum in closing argument. Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Charlton, 90 Wn.2d at 664-65.

A prosecutor may not ethically "comment on the credibility of the witnesses or the guilt and veracity of the accused." Monday, 171 Wn.2d at 676-77; Reed, 102 Wn.2d at 145; RPC 3.4(e). Thus, the Monday Court found the prosecutor committed misconduct when he assured the jury that all prosecutors know that "the word of a criminal defendant is inherently unreliable." Monday, 171 Wn.2d at 673.

In this case, the deputy prosecuting attorney was more direct. After mocking Mr. Calvin's testimony and accusing him of telling a "story," the prosecutor told the jury that Mr. Calvin was trying to deceive them. RP 138-40. "He's just trying to pull the wool over your eyes." RP 140. Defense counsel's objection was overruled. RP 140. Any reasonable juror would interpret these remarks as an expression of the prosecutor's personal belief that Mr. Calvin was lying. This Court should accept review of this troubling issue. RAP 13.4(b)(3), (4).

Prosecutors are also forbidden to argue in a manner that disparages defense counsel or counsel's legitimate function. State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (misconduct to refer to defense counsel's argument as "bogus" and a "sleight of hand"); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (complaining of "misrepresentations" in defense counsel's argument as an example of "what people have to go through in the criminal justice system when they

deal with defense attorneys"), cert. denied, 129 S. Ct. 2007 (2009); Reed, 102 Wn.2d at 146-47 (disparaging defendant's counsel and witnesses as outsiders with fancy cars); United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005) (improper to argue defense counsel using "smoke and mirrors" and colluding with defendant to present a "story" to jurors).

In his rebuttal closing argument, the prosecutor attacked Mr. Calvin's attorney, William Johnston, by belittling his argument and accusing defense counsel of calling Ranger Moularas a liar. The deputy prosecutor began:

> I hate to sound too facetious but that was quite a story. You know, I think the defense counsel here is talking to you and he is telling you that Ranger Moularas is a fine person yet he is calling him a liar. That's what he's doing. This is just outrageous, he's calling him a liar.

RP 162. The court sustained defense counsel's objection, but only by suggesting that the prosecutor "alter the word, if you would, please." RP 162. The prosecutor then continued to accuse defense counsel of calling the State's witness "untruthful." RP 162-63.

The deputy prosecutor later returned to attacking defense counsel, stating, "You know, another thing for you to consider is whether or not to trust Mr. Johnston?" RP 164. Defense counsel's objection was sustained, but the prosecutor merely rephrased his argument, telling the jury to "consider his argument and decide if it's trustworthy." RP 164.

The prosecutor's argument was misconduct because it disparaged Mr. Johnston, suggesting that he was a liar and the jury could not trust him. In addition, by suggesting that defense counsel was arguing that Ranger Moularas was lying, the prosecutor improperly suggested to the jury that it had to conclude the park ranger was lying in order to find Mr. Calvin not guilty. This attack on defense counsel was misconduct.

The Court of Appeals found the misconduct in this case was not so flagrant and ill-intentioned that it could not have been cured by further objections or curative instructions. Calvin, 302 P.3d at 518. The prosecutor's misconduct by disparaging Mr. Calvin's attorney, however, undermined defense counsel's critical role and thus rendered the trial unfair. This Court should accept review of this constitutional issue. RAP 13.4(b)(3).

5. **Mr. Calvin constitutional right effective assistance of counsel was violated.**

Mr. Calvin suffered arthritis and migraine headaches, and he was frightened and hurt when Ranger Moularas shined a powerful flashlight in his face, sprayed him with pepper spray, and hit him with a baton. RP 118-21, 127. Mr. Calvin therefore tried to protect himself and avoid the ranger's blows. RP 129-30. Mr. Calvin's attorney, however, did not propose that the jury be instructed on the limited self-defense available

when force is used against a law enforcement officer attempting to detain a suspect.[5] Mr. Calvin argued on appeal that he was denied effective assistance of counsel. AOB at 23-31; ARB at 7-10. The Court of Appeals rejected this argument on the grounds that counsel had a "clear strategic reason" not to request the instruction and that Mr. Calvin was not entitled to act in self-defense. Calvin, 302 P.3d at 516.

The federal and state constitutions guarantee the accused the right to counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The right to counsel necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); A.N.J., 168 Wn.2d at 98.

Defense counsel is ineffective if he fails to propose an instruction that assists the jury in understanding a critical component of the defense. State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987); State v

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[5] See Washington Supreme Court Committee on Jury Instruction, 11 Washington Practice: Pattern Jury Instructions Criminal, WPIC 17.02.01 (2011).

Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009). In Thomas, defense counsel in a prosecution for attempting to elude a pursuing police vehicle raised a diminished capacity defense but did not propose an instruction that explained the subjective elements of the crime. Thomas, 109 Wn.2d at 226-27. This Court held that counsel was ineffective because the defendant was entitled to jury instructions that correctly state the law and "a reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him to propose an instruction based on pertinent cases." Id. at 229.

In rejecting Mr. Calvin's argument that trial counsel was ineffective, the Court of Appeals reasoned that Mr. Calvin was not entitled to act in self-defense because he was not in actual, imminent danger of serious harm. Calvin, 302 P.3d at 516. The absence of self-defense, however, is an element of Washington assault crimes, and the defendant is therefore entitled to a self-defense instruction if, viewing the evidence in the light most favorable to the defense, there is some evidence to support the instruction. State v. Janes, 121 Wn.2d 220, 237, 850 P.3d 495 (1993); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). When the victim is a police officer, there must be some evidence that a reasonable person in the shoes of the defendant would believe he was in actual,

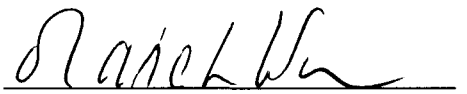
imminent danger of serious injury. State v. Bradley, 141 Wn.2d 731, 738, 10 P.3d 358 (2000).

Mr. Calvin had been pepper sprayed twice, struck at least six times, and then forced to the ground because he approached a park ranger to discuss use of the shower. A rational trier of fact could conclude that Mr. Calvin appeared to be in danger of serious injury from the park ranger, who was armed with a gun in addition to his baton, pepper spray, and flashlight. RP 13-14, 48-49. Mr. Calvin was entitled to an instruction, and there was no strategic reason for his attorney to omit this important defense. This Court should accept review of this constitutional issue. RAP 13.4(b)(3).

F. CONCLUSION

Donald Calvin respectfully asks this Court to accept review of the portions of the Court of Appeals upholding his convictions for third degree assault and resisting arrest.

Respectfully submitted this 21st day of October 2013.



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APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

May 28, 2013

Westlaw

302 P.3d 509
(Cite as: 302 P.3d 509)

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Donald L. CALVIN, Appellant.

No. 67627–0–I.
May 28, 2013.

Background: Defendant was convicted in the Superior Court, Whatcom County, Steven J. Mura, J., of assault in the third degree and resisting arrest in connection with altercation with park ranger. Defendant appealed.

Holdings: The Court of Appeals, Appelwick, J., held that:
(1) evidence supported convictions;
(2) trial counsel's failure to request a self-defense instruction was not deficient, as element of ineffective assistance;
(3) prosecutor was entitled to respond to defense counsel's argument that ranger was untruthful in his version of events;
(4) prosecution's unobjected-to advisement to jury to consider whether defense counsel's argument was trustworthy, and prosecutor's unobjected-to statement that defense counsel was "blaming the victim," were not so flagrant and ill-intentioned as to irreparably prejudice defendant;
(5) prosecutor did not make not an improper expression of personal opinion as to credibility of witnesses or defendant's guilt or innocence; and
(6) trial court did not abuse its discretion, after including "unlawful force" in original jury instruction defining assault despite lack of a specific defense argument that use of force was somehow lawful, in responding to jury's question during deliberations as to how the law defined "unlawful force" by giving a new definition that omitted the "unlawful force" language; but
(7) record did not support trial court's finding that defendant had ability to pay court costs and did not otherwise show that trial court took defendant's financial resources into account.

Convictions affirmed and case remanded.

West Headnotes

[1] Assault and Battery 37 ⚿91.5(3)

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k91.1 Weight and Sufficiency of Evidence
37k91.5 Degrees of Assault
37k91.5(3) k. Second or lesser degree. Most Cited Cases

Finding that park ranger had reasonable apprehension and fear of bodily injury was supported, in prosecution for assault in the third degree, by evidence that charged incident occurred in a dark, isolated area and by ranger's testimony that defendant was aggravated and appeared unbalanced or under the influence, and that defendant reached his hand toward ranger, swore at him multiple times, and eventually forced him to back up about ten feet. West's RCWA 9A.36.031(1)(a).

[2] Assault and Battery 37 ⚿60

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k60 k. Degrees. Most Cited Cases

Proof that defendant made a true threat is not an element of assault in the third degree. West's RCWA 9A.36.031(1)(a).

[3] Assault and Battery 37 ⚿91.5(3)

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k91.1 Weight and Sufficiency of Evid-

ence
37k91.5 Degrees of Assault
37k91.5(3) k. Second or lesser degree. Most Cited Cases

Finding that defendant intended to create fear of bodily injury was supported, in prosecution for assault in the third degree, by defendant's acknowledgment that he was angry when park ranger shined flashlight on him and may have told ranger to get "that fucking flashlight out of my face," and by ranger's testimony that defendant put his hand up and moved toward ranger as he made that statement and that, after ranger sprayed defendant with pepper spray, defendant kept his fists up toward his face and continued to come toward ranger such that ranger had to back up approximately ten feet. West's RCWA 9A.36.031(1)(a).

[4] Obstructing Justice 282 ⚿170(5)

282 Obstructing Justice
282k166 Evidence
282k170 Weight and Sufficiency
282k170(5) k. Resisting arrest. Most Cited Cases

Finding that defendant had knowledge that park ranger was a law enforcement officer was supported, in prosecution for resisting arrest, by evidence that ranger was wearing his uniform and driving a marked car at time of incident, that ranger identified himself as such when he first approached defendant, and that he identified himself as "police" when he took defendant to the ground.

[5] Obstructing Justice 282 ⚿170(5)

282 Obstructing Justice
282k166 Evidence
282k170 Weight and Sufficiency
282k170(5) k. Resisting arrest. Most Cited Cases

Finding that defendant knew he was under arrest was supported, in prosecution for resisting arrest, by evidence that law enforcement officer identified himself as "police," told defendant to get on the ground, and started to place handcuffs on him, even if defendant was not explicitly informed that he was under arrest.

[6] Obstructing Justice 282 ⚿170(5)

282 Obstructing Justice
282k166 Evidence
282k170 Weight and Sufficiency
282k170(5) k. Resisting arrest. Most Cited Cases

Finding that defendant attempted to prevent his arrest was supported, on charge of resisting arrest, by evidence that park ranger advised defendant to stop resisting while defendant was on the ground, that ranger struggled with defendant for approximately one minute before he was able to handcuff defendant's second hand, and that ranger did not have defendant fully under control during that time.

[7] Obstructing Justice 282 ⚿126(3)

282 Obstructing Justice
282k117 Interfering with Performance of Official Duties
282k126 Resisting Arrest or Detention
282k126(3) k. What constitutes resistance; force or violence. Most Cited Cases

"Force" is not an element of the crime of resisting arrest.

[8] Criminal Law 110 ⚿1947

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1945 Instructions
110k1947 k. Offering instructions. Most Cited Cases

To determine whether counsel was deficient, as element of ineffective assistance, by failing to propose a jury instruction, the court considers whether the defendant was entitled to the instruction and whether there was a strategic or tactical reason not to request the instruction. U.S.C.A. Const.Amend. 6 .

[9] Criminal Law 110 ⚿1947

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1945 Instructions
110k1947 k. Offering instructions. Most Cited Cases

Trial counsel's failure to request a self-defense instruction was not deficient, as element of ineffective assistance in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger, but was supported by a clear strategic reason; defendant argued that he did not assault ranger and did not resist arrest, and to also argue that he used force against ranger only in self-defense would have been completely contradictory. U.S.C.A. Const.Amend. 6; West's RCWA 9A.36.031(1)(a).

[10] Assault and Battery 37 ⚿67

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-defense. Most Cited

In general, reasonable force in self-defense is justified if there is an appearance of imminent danger.

[11] Assault and Battery 37 ⚿67

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 k. Self-defense. Most Cited

The use of force in self-defense against an arresting law enforcement officer is permissible only when the arrestee actually faces an imminent danger of serious injury or death.

[12] Criminal Law 110 ⚿1171.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(1) k. Conduct of counsel in general. Most Cited Cases

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial.

[13] Criminal Law 110 ⚿1134.16

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.16 k. Arguments and conduct of counsel. Most Cited Cases

Appellate court reviews a prosecutor's conduct in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions.

[14] Criminal Law 110 ⚿2103

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2103 k. In general. Most Cited Cases

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.

[15] Criminal Law 110 ⚿1037.1(1)

110 Criminal Law
110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(1) k. Arguments and conduct in general. Most Cited Cases

Absent a timely objection, reversal based on prosecutorial misconduct is required only if the conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.

[16] Criminal Law 110 ⚿2175

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2164 Rebuttal Argument; Responsive Statements and Remarks
110k2175 k. Inferences from and effect of evidence. Most Cited Cases

Prosecutor was entitled to respond, in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger, to defense counsel's argument that ranger was untruthful in his version of events.

[17] Criminal Law 110 ⚿2153

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2153 k. Attacks on opposing counsel. Most Cited Cases

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity.

[18] Criminal Law 110 ⚿1037.1(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular statements, arguments, and comments. Most Cited Cases

Prosecution's unobjected-to advisement to jury to consider whether defense counsel's argument was trustworthy, and prosecutor's unobjected-to statement that defense counsel was "blaming the victim," were not so flagrant and ill-intentioned as to irreparably prejudice defendant in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger.

[19] Criminal Law 110 ⚿2098(1)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿2139

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2139 k. Expression of opinion as to guilt of accused. Most Cited Cases

A prosecutor may not express his personal opinion of the credibility of witnesses or the guilt or innocence of the accused.

[20] Criminal Law 110 ⚿2098(2)

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(2) k. Credibility of accused. Most Cited Cases

Criminal Law 110 ⚿2106

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2106 k. Assault and battery. Most Cited Cases

Criminal Law 110 ⚿2124

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2124 k. Obstructing justice, bribery, and perjury. Most Cited Cases

Prosecutor's recitation of things that did not make sense in defendant's testimony, followed by statement that defendant was "just trying to pull the wool over your eyes," was not an improper expression of personal opinion as to credibility of witnesses or defendant's guilt or innocence, but a permissible explanation of the evidence, in prosecution for assault in the third degree and resisting arrest arising from altercation with park ranger.

[21] Criminal Law 110 ⚿847

110 Criminal Law
110XX Trial
110XX(I) Instructions: Objections and Exceptions
110k847 k. Effect of failure to object or except. Most Cited Cases

Jury instructions not objected to become the law of the case; thus, when the State adds an unnecessary element to a to-convict instruction and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence.

[22] Criminal Law 110 ⚿863(2)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) k. Requisites and sufficiency. Most Cited Cases

Trial court did not abuse its discretion, after including "unlawful force" in original jury instruction defining assault despite lack of a specific defense argument that use of force was somehow lawful, in responding to jury's question during deliberations as to how the law defined "unlawful force" by giving a new definition of assault that omitted the "unlawful force" language; trial court identified and corrected a problem in original instruction, there was no suggestion that defendant adapted his trial strategy to inclusion of "unlawful force" language, defense counsel was given opportunity to reargue case but declined, and supplemental instruction correctly stated the law.

[23] Criminal Law 110 ⚿755.5

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k754 Instructions Invading Province of Jury
110k755.5 k. Comments on facts or evidence in general. Most Cited Cases

A jury instruction that states the law correctly and concisely and is pertinent to the issues of the

case does not constitute a comment on the evid- ence.

[24] Criminal Law 110 ⚿1042.3(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.3 Sentencing and Punishment
110k1042.3(1) k. In general. Most Cited Cases

Illegal or erroneous sentences may be challenged for the first time on appeal.

[25] Criminal Law 110 ⚿1134.32

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.32 k. Particular issues in general. Most Cited Cases

Appellate court reviews under the clearly-erroneous standard the trial court's decision to impose discretionary legal financial obligations (LFOs) on a criminal defendant.

[26] Costs 102 ⚿292

102 Costs
102XIV In Criminal Prosecutions
102k292 k. Liabilities of defendant. Most Cited Cases

Different components of the legal financial obligations (LFOs) imposed on a defendant require separate analysis.

[27] Costs 102 ⚿314

102 Costs
102XIV In Criminal Prosecutions
102k313 Taxation or Allowance of Bill
102k314 k. In general. Most Cited Cases

Statutory provision that bars a trial court from ordering a defendant to pay court costs unless defendant is or will be able to pay them does not require the trial court to enter formal, specific findings; rather, it is only necessary that the record is sufficient for appellate court to review whether the trial court took the defendant's financial resources into account. West's RCWA 10.01.160(3).

[28] Costs 102 ⚿314

102 Costs
102XIV In Criminal Prosecutions
102k313 Taxation or Allowance of Bill
102k314 k. In general. Most Cited Cases

Record did not support trial court's finding that defendant had ability to pay court costs and did not otherwise show that trial court took defendant's financial resources into account, as required before ordering him to pay costs; the only evidence of past employment was defendant's testimony at trial that he used to be a carpenter, there was no evidence of present or future employment, the only evidence of his financial resources was his testimony that he lived in a mobile home that did not have running water, and trial court made no inquiry at sentencing into defendant's resources or employability. West's RCWA 10.01.160(3).

[29] Fines 174 ⚿1.5

174 Fines
174k1.5 k. Imposition and liability in general. Most Cited Cases

Trial court was not required, under statute enumerating maximum sentence for defendant's convictions of assault in the third degree and resisting arrest, to enter findings or even take into account defendant's financial resources before imposing fine of $250. West's RCWA 9A.20.021.

[30] Criminal Law 110 ⚿1838

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel

110k1834 Appearing Both Pro Se and by Counsel; Hybrid Representation
110k1838 k. Defendant filing pro se motions while represented by counsel. Most Cited Cases

Appellate court only considers issues raised in a pro se statement of additional grounds for review if those issues adequately inform appellate court of the nature and occurrence of the alleged errors. RAP 10.10.

[31] Criminal Law 110 ⚿1838

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1834 Appearing Both Pro Se and by Counsel; Hybrid Representation
110k1838 k. Defendant filing pro se motions while represented by counsel. Most Cited Cases

Habeas Corpus 197 ⚿290.1

197 Habeas Corpus
197I In General
197I(C) Existence and Exhaustion of Other Remedies
197k290 Appeal, Error, or Other Direct Review of Conviction
197k290.1 k. In general. Most Cited Cases

Issues that involve facts or evidence not in the record are properly raised through a personal restraint petition, not a pro se statement of additional grounds for review. RAP 10.10.

***512** Elaine L. Winters, Washington Appellate Project, Attorney at Law, Seattle, WA, for Appellant.

Donald Lee Calvin, Bellingham, WA, pro se.

***513** Kimberly Anne Thulin, Whatcom Cty. Pros. Atty's Office, Whatcom County Prosecutor's Office, Attorney at Law, Bellingham, WA, for Respondent.

APPELWICK, J.

¶ 1 After an altercation with a park ranger, Calvin was convicted of assault in the third degree and resisting arrest. He argues that his convictions are not supported by substantial evidence, that he was entitled to a self-defense instruction, that he was prejudiced by prosecutorial misconduct, that the trial court erred by correcting and replacing an instruction during jury deliberations, and that there is no evidence to support a finding that he has the ability to pay legal financial obligations. We affirm his convictions. Because there is no evidence to support the trial court's finding that Calvin has the ability to pay court costs and the record does not otherwise show that the trial court considered Calvin's financial resources, we remand for the trial court to strike the finding and the imposition of court costs.

FACTS

¶ 2 In April 2010, Alexander Moularas was a park ranger at Larrabee State Park in Bellingham. The park closes to day users half an hour after sunset. On April 10, Ranger Moularas closed the gate at 8:30 p.m. At around 9:15 p.m., he discovered a car idling in front of the closed gate. Ranger Moularas was driving a dark blue truck with a white stripe across it, a park shield on the door, and a law enforcement light bar on top. He was wearing his uniform

¶ 3 When he pulled up, Ranger Moularas saw Donald Calvin standing outside of his idling vehicle. Ranger Moularas rolled his window down, shut off the ignition, and announced himself as a ranger. Calvin was aggravated, said that he just wanted to take a shower, and asked if Ranger Moularas was going to let him in. Ranger Moularas informed Calvin that the facilities were closed at that point and only available to campers. In a strained tone, Calvin asked how much it was going to cost him to get in. Ranger Moularas responded that the price for camping was $14.

¶ 4 Calvin approached the park vehicle and came within two feet of the open window. Ranger

Moularas was trained not to be approached in his vehicle. He became apprehensive because of Calvin's proximity to his window and the minimal lighting in the area. He exited his vehicle and repeated that Calvin could enter as a camper, but needed to leave if he had no intention of camping. Calvin asked for Ranger Moularas's name. Ranger Moularas responded by giving his first and last name, and Calvin shouted, "Well, at least you know your damn name." At that point, Ranger Moularas thought Calvin might have been under the influence of intoxicants. He took out his flashlight and pointed it at Calvin's chest. Calvin said, "Get that F-ing light out of my face," put his hand up, and reached toward Ranger Moularas. They were standing approximately five feet apart.

¶ 5 Ranger Moularas told Calvin to get back. When Calvin did not retreat, he sprayed him with a quick burst of pepper spray. Calvin advanced such that Ranger Moularas had to back up approximately 10 feet. He yelled at Calvin to get back and get on the ground. When Calvin kept coming with his hands toward his face in an aggressive posture, Ranger Moularas struck him with his baton approximately six times.

¶ 6 Calvin began walking away. Ranger Moularas holstered his baton and went after Calvin to arrest him for assault. He yelled, "Police, get on the ground," grabbed Calvin's left arm, and took him to the ground. He was able to cuff Calvin's left wrist, but Calvin would not yield his right arm. Ranger Moularas told Calvin to quit resisting and give his arm, but Calvin struggled for approximately a minute before Ranger Moularas could get the second cuff on. Ranger Moularas read Calvin his rights and Whatcom County sheriffs took him from the scene. Calvin referred to Ranger Moularas as "ranger dick."

¶ 7 The State charged Calvin with assault in the third degree and resisting arrest. Calvin offered a different version of events at trial. He testified that he initially approached Ranger Moularas's vehicle because he could not understand what he was saying. ***514** When Ranger Moularas asked him to leave, he returned to his vehicle. According to Calvin, only then did Ranger Moularas get out of his vehicle. He walked over toward Calvin, who was by then sitting in his car, shined his flashlight in, and told Calvin to get out. When Calvin got out, Ranger Moularas shined a flashlight in his eyes. Calvin put his hands up to block the light and Ranger Moularas immediately sprayed him with pepper spray. Calvin testified that he had no intent to harm Ranger Moularas, and did not move toward Ranger Moularas before Ranger Moularas started to beat him. But, Calvin acknowledged that he was angry. Calvin knew Ranger Moularas was associated with the park, but denied knowing he was a ranger. Calvin denied resisting arrest, but stated he rolled and twisted to avoid being hit by Ranger Moularas's baton.

¶ 8 The jury found Calvin guilty on both charges. He appeals.

DISCUSSION

I. *Sufficiency of the Evidence*

¶ 9 Calvin argues that neither his conviction for assault in the third degree nor his conviction for resisting arrest is supported by sufficient evidence. Evidence is sufficient to support a conviction if, after the evidence and all reasonable inferences from it is viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *State v. Green,* 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

A. *Assault in the Third Degree*

¶ 10 As instructed in this case, the elements of assault in the third degree are that (1) Calvin committed an act with the intention of placing Ranger Moularas in apprehension and fear of bodily injury, (2) the act in fact created a reasonable apprehension and imminent fear of bodily injury, (3) Ranger Moularas was a law enforcement officer who was performing his official duties, and (4) the acts occurred in the State of Washington. Whether Calvin intended to actually inflict bodily injury is immater-

ial under the jury instructions. Calvin argues that there was insufficient evidence to prove that Ranger Moularas's fear of bodily injury was reasonable or that he intended to place Ranger Moularas in fear of bodily injury.

1. *Reasonable Apprehension and Fear*

[1] ¶ 11 The incident occurred in a dark, isolated area. Ranger Moularas testified that Calvin was aggravated and appeared unbalanced or under the influence. He testified that Calvin reached his hand toward him, swore at him multiple times, and eventually forced him to back up about 10 feet. Those facts are sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Ranger Moularas's apprehension and fear were reasonable.

¶ 12 Calvin's arguments to the contrary are unavailing. He first offers other reasonable interpretations of the evidence. For instance, he claims he has trouble hearing and it is normal to approach someone when you are talking. He also argues he raised his hands to his face only after Ranger Moularas aimed a flashlight at him, and put his fists towards his face only when Ranger Moularas sprayed him with pepper spray. But, in a sufficiency inquiry the court views the evidence in the light most favorable to the State. Calvin's alternative interpretations are irrelevant.

¶ 13 Calvin next compares the State's evidence to other cases in which there was more evidence that apprehension and fear were reasonable. In *State v. Brown,* a police officer was placed in reasonable fear when the defendant spun around, unzipped his jacket, removed a cigarette lighter that looked like a handgun, and pointed the lighter at the officer. 140 Wash.2d 456, 461–62, 998 P.2d 321 (2000). In *State v. Godsey,* a police officer was placed in reasonable fear when the defendant approached him with fists up, invited him to " '[c]ome on,' and took a step toward him." 131 Wash.App. 278, 288, 127 P.3d 11 (2006) (alteration in original). But, those were not sufficiency cases. The mere fact that Calvin's actions in this case were not as overt as the defendants' acts in those cases does not mean there was insufficient evidence here.

***515** [2] ¶ 14 Finally, Calvin argues that he did not make a true threat and the use of a strained or sarcastic tone of voice does not create a reasonable fear of assault. But, Calvin's tone was not the only evidence that Ranger Moularas's fear was reasonable. And, the State was not required to prove that Calvin made a true threat because that is not an element of assault. *See* RCW 9A.36.031(1)(a).

2. *Intent*

[3] ¶ 15 In arguing that he did not have the requisite intent, Calvin points to his own testimony and compares this case to another case with more egregious facts to demonstrate that he had no intent to place Ranger Moularas in fear of bodily injury. Neither of those tactics establishes the absence of facts sufficient to find that Calvin intended to create a fear of bodily injury. Calvin acknowledged that he was angry when Ranger Moularas shined the flashlight on him and conceded that he may have told Ranger Moularas to get "that fucking flashlight out of my face." Ranger Moularas testified that as Calvin said that, he put his hand up and moved toward him. After Ranger Moularas sprayed Calvin with pepper spray, Calvin kept his fists up toward his face and continued to come toward him such that he had to back up approximately 10 feet. Calvin's acknowledged anger, combined with his movement toward Ranger Moularas, provide sufficient evidence for a rational trier of fact to find that Calvin intended to create a fear of bodily injury.

B. *Resisting Arrest*

[4] ¶ 16 The jury was instructed that, to convict Calvin of resisting arrest, the State had to prove that he intentionally prevented or attempted to prevent a peace officer from lawfully arresting him. Calvin argues that he could not have committed the crime of resisting arrest, because he did not know that Ranger Moularas was a law enforcement officer, did not know that he was under arrest, and did not use force.

¶ 17 Calvin relies on *State v. Bandy* for the pro-

position that, "it is essential that [the] accused have knowledge that the person obstructed is an officer" and "it is incumbent on an officer, seeking to make an arrest, to disclose his official character, if not known to the offender." 164 Wash. 216, 219, 2 P.2d 748 (1931). In *Bandy,* a woman was convicted of interfering with a public officer in the performance of his duties after interfering with the arrest of her father. *Id.* at 217–19, 2 P.2d 748. There was insufficient evidence to support her conviction, because there was no evidence that arresting officers displayed badges and there was no other reason for anyone in the area to understand that her father was being arrested. *Id.* at 219–21, 2 P.2d 748. In contrast, in this case Ranger Moularas was wearing his uniform and driving a marked car at the time of the incident. When he first approached Calvin, he identified himself as a ranger. When he took Calvin to the ground, he identified himself as "police." At trial, Calvin acknowledged that he knew Ranger Moularas was in a marked vehicle, knew he was associated with the park, and recognized that he was enforcing park rules. That evidence was sufficient for a rational trier of fact to determine that Calvin knew Ranger Moularas was a law enforcement officer.

[5] ¶ 18 Calvin next asserts that Ranger Moularas never said he was under arrest. He relies on cases in which the defendants were explicitly informed they were under arrest before they resisted. *See State v. Ware,* 111 Wash.App. 738, 740–41, 46 P.3d 280 (2002); *State v. Simmons,* 35 Wash.App. 421, 422, 667 P.2d 133 (1983). But, neither of those cases holds that an arresting officer must formally state that a person is under arrest for that person to be aware they are under arrest. A rational trier of fact could find that when a law enforcement officer identified himself as "police," told Calvin to get on the ground, and started to place handcuffs on him, Calvin knew he was under arrest.

[6][7] ¶ 19 Calvin also argues that he did not use the force necessary to be convicted of resisting arrest, because he was merely recalcitrant. His argument is based on a single sentence in *State v. Hornaday,* 105 Wash.2d 120, 131, 713 P.2d 71 (1986). In that case, the evidence showed that, after the ***516** defendant was arrested, he refused to voluntarily enter the backseat of the police and had to be forcibly placed there. *Id.* at 122, 713 P.2d 71. Counsel commented at trial that the defendant swung his elbow at a police officer, but there was no testimony that supported that assertion. *Id.* at 131, 713 P.2d 71. Thus, the court came to the sensible conclusion that a defendant, already detained, is merely "recalcitrant" and does not commit resisting arrest by refusing to voluntarily enter a police car. *Id.* at 131, 713 P.2d 71. Despite Calvin's persistent argument that he did not use sufficient force to be convicted of resisting arrest, "force" is not an element of the crime. The State bore the burden to prove that Calvin prevented or attempted to prevent his arrest. While Calvin was on the ground, Ranger Moularas advised him to stop resisting. Ranger Moularas testified that he struggled with Calvin for approximately one minute before he was able to handcuff Calvin's second hand. During that time, Ranger Moularas did not have Calvin fully under his control.

¶ 20 There was sufficient evidence to establish that Calvin knew Ranger Moularas was a law enforcement officer, knew he was being placed under arrest, and attempted to prevent his arrest.

II. *Self–Defense Instruction*

[8] ¶ 21 Calvin argues that defense counsel was ineffective in failing to request a self-defense instruction. To prevail on a claim of ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The reasonableness inquiry presumes effective representation. *State v. McFarland,* 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). To determine whether counsel was deficient by failing to

propose a jury instruction, the court considers whether the defendant was entitled to the instruction and whether there was a strategic or tactical reason not to request the instruction. *Id.; State v. Powell,* 150 Wash.App. 139, 154–55, 206 P.3d 703 (2009).

[9] ¶ 22 Here, there was a clear strategic reason not to request a self-defense instruction, and even if one had been proposed, Calvin was not entitled to it. Calvin argued that he did not assault Ranger Moularas and did not resist arrest. To also argue that he used force against Ranger Moularas only in self-defense would have been completely contradictory.

[10][11] ¶ 23 Further, Calvin did not present evidence that would have supported a self-defense instruction. In general, reasonable force in self-defense is justified if there is an appearance of imminent danger. *State v. Bradley,* 141 Wash.2d 731, 737, 10 P.3d 358 (2000). But, the use of force in self-defense against an arresting law enforcement officer is permissible only when the arrestee actually faces an imminent danger of serious injury or death. *Id.* at 737–38, 10 P.3d 358. Calvin merely asserts that "a person in Mr. Calvin's position would have been afraid that he was facing imminent and serious bodily harm." That argument goes to the appearance of danger, not the existence of actual danger. Calvin has not shown that he would he have been entitled to a self-defense instruction had one been proposed. He has not established that he received ineffective assistance of counsel.

III. *Prosecutorial Misconduct*

[12][13][14][15] ¶ 24 Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *State v. Monday,* 171 Wash.2d 667, 675, 257 P.3d 551 (2011). The court reviews a prosecutor's conduct in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions. *Id.* A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Boehning,* 127 Wash.App. 511, 519, 111 P.3d 899 (2005). Absent a timely objection, reversal is required only if the conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could ***517** not have been neutralized by a curative instruction to the jury. *State v. Warren,* 165 Wash.2d 17, 43, 195 P.3d 940 (2008). Calvin argues the prosecutor committed misconduct by misstating the law, disparaging defense counsel, commenting on Calvin's constitutional rights, and commenting on Calvin's credibility.

A. *Misstating the Law*

¶ 25 In rebuttal closing argument, the prosecutor argued:

> I hate to sound too facetious but that was quite a story. You know, I think the defense counsel here is talking to you and he is telling you that Ranger Moularas is a fine person yet he is calling him a liar. That's what he's doing. This is just outrageous, he's calling him a liar.

¶ 26 The trial court sustained defense counsel's objection and asked the prosecutor to "alter the word." The prosecutor continued:

> I understand, Your Honor. He is saying he is untruthful. He is saying that he is not coming here and telling you the truth. He is saying that Ranger Moularas didn't tell the truth from the beginning. Well, actually maybe told the truth right to Deputy Osborn but after that no. For what reason? Why? I mean, what motive would Ranger Moularas have to not tell you the truth? To change his report about what had actually happened? Why would he call him a fine person but also say he is not telling the truth? That's a big problem. If he is not telling the truth that's a big problem. Big, big, big problem. You know, that's his theory, that Ranger Moularas is just coming in here with these terrible untruths.

Defense counsel did not object to the prosec-

utor's revision.

¶ 27 Calvin argues that the prosecutor's arguments suggested that the jury had to find that Ranger Moularas was lying in order to acquit Calvin. Such an argument misstates the law, the role of the jury, and the appropriate burden of proof. *State v. Fleming,* 83 Wash.App. 209, 213, 921 P.2d 1076 (1996).

[16] ¶ 28 But, the prosecutor is entitled to respond to defense counsel's arguments. Defense counsel argued in closing that Calvin and Ranger Moularas offered different versions of events and that the jury had to find that Ranger Moularas's version was correct to find Calvin guilty. Defense counsel argued that Calvin's version of events was corroborated by an initial statement of probable cause prepared by a responding officer, and Ranger Moularas's version was contradicted by the statement. The prosecutor was entitled to respond to defense counsel's argument that Ranger Moularas was untruthful.

B. *Disparaging Counsel and Commenting on Constitutional Rights*

¶ 29 The prosecutor stated, "You know, another thing for you to consider is whether or not to trust [defense counsel]?" The trial court sustained defense counsel's objection. The prosecutor then advised the jury to, "consider [defense counsel's] argument and decide if it's trustworthy." Defense counsel did not object to the prosecutor's revised statement. The prosecutor also argued:

> He is blaming the victim. He is blaming Ranger Moularas for being in a position and then getting assaulted. Gee, if Ranger Moularas didn't contact him nothing would have happened, right? There would be no crime. Blaming the victim, that's not fair. Nobody wants to see that. It's not right.
>
> Defense counsel did not object.

¶ 30 Calvin argues that these statements were misconduct, because the prosecutor disparaged defense counsel and because a complaint that defense counsel is blaming the victim is a comment on the defendant's right to cross-examine the State's witnesses.

[17] ¶ 31 It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. *State v. Thorgerson,* 172 Wash.2d 438, 451, 258 P.3d 43 (2011). Thus, in *Thorgerson,* it was improper for the prosecutor to refer to the defense counsel's presentation of the case as " 'bogus' " and " 'sleight of hand.' " *Id.* at 451–52, 258 P.3d 43. But, defense counsel did not object and the court ***518** concluded that a curative instruction would have alleviated any prejudicial effect of the attack on defense counsel's strategy. *Id.* at 452, 258 P.3d 43. In *Warren,* it was improper for the prosecutor to tell the jury that the " 'number of mischaracterizations' " in defense counsel's argument was " 'an example of what people go through in a criminal justice system when they deal with defense attorneys.' " 165 Wash.2d at 29, 195 P.3d 940. But, defense counsel did not object and the court concluded that the comments were not so flagrant and ill-intentioned that no instruction could have cured them. *Id.* at 30, 195 P.3d 940. In *State v. Negrete,* the prosecutor told the jury he had " 'never heard so much speculation' " in his life, and that defense counsel " 'is being paid to twist the words of the witnesses.' " 72 Wash.App. 62, 66, 863 P.2d 137 (1993) (emphasis omitted). Defense counsel objected and the trial court sustained the objection, but defense counsel did not request a mistrial or a curative instruction. *Id.* at 66, 863 P.2d 137. The court determined that the remark was improper, but not irreparably prejudicial. *Id.* at 67, 863 P.2d 137. It noted that defense counsel's failure to move for a curative instruction or mistrial strongly suggested the argument did not appear particularly prejudicial in the context of the trial. *Id.* at 67, 863 P.2d 137.

[18] ¶ 32 In this case, the prosecutor advised the jury to consider whether defense counsel's argument was trustworthy and stated that defense coun-

sel was "blaming the victim." Those statements are not as inflammatory as the prosecutors' statements in *Thorgerson, Warren,* or *Negrete.* Although defense counsel initially objected to one of the statements, the objection was sustained and defense counsel did not object to the prosecutor's altered argument. Calvin has failed to show, and the record does not demonstrate, that further objection would have been futile. Thus, he must establish that the prosecutor's comments were so flagrant and ill-intentioned that he was irreparably prejudiced. The fact that defense counsel did not make further objections, or request a mistrial or curative instruction, strongly suggests that the comments did not appear unduly prejudicial in the context of trial. Calvin has failed to establish that any prejudice could not have been eliminated by a curative instruction.

¶ 33 Calvin also urges that the prosecutor's comment that defense counsel was "blaming the victim" was a comment on Calvin's rights to cross-examine the State's witnesses, to testify on his own behalf, and to be represented by counsel. His argument is limited to a bare assertion that his rights were violated, together with citation to the United States Constitution and a case in which the prosecutor argued that the defendant only represented himself because he had a strong desire to have power and be in control. *See State v. Moreno,* 132 Wash.App. 663, 672, 132 P.3d 1137 (2006). Calvin has failed to articulate how his rights were violated by the prosecutor's comments.

C. *Commenting on Calvin's Credibility*

[19] ¶ 34 A prosecutor may not express his personal opinion of the credibility of witnesses or the guilt or innocence of the accused. *State v. Reed,* 102 Wash.2d 140, 145, 684 P.2d 699 (1984). But, prosecutors are entitled to argue inferences from the evidence, and there is no prejudicial error unless it is " 'clear and unmistakable' " that counsel is expressing a personal opinion. *State v. Brett,* 126 Wash.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Sargent,* 40 Wash.App. 340, 344, 698 P.2d 598 (1985)). Thus, it was not improper for the prosecutor to argue, "I would suggest that one reason you might want to believe Pat Milosevich on that issue is that she at the time those events were occurring was watching her husband of 33 years being blown away by a .410 shotgun." *Id.* at 175, 892 P.2d 29. In contrast, it was improper for a prosecutor to state, "I believe Jerry Lee Brown, I believe him," *State v. Sargent,* 40 Wash.App. 340, 343–44, 698 P.2d 598 (1985) (emphasis omitted).

[20] ¶ 35 In this case, the prosecutor recited a long list of things that did not make sense in Calvin's testimony when compared to other evidence and his own inconsistent testimony. Then, the prosecutor told the jury that Calvin was "just trying to pull the wool over your eyes." The trial court overruled defense counsel's objection. The prosecutor's ***519** remarks more closely align with the statements in *Brett* than with the statements in *Sargent.* In context, the comments reflect an explanation of the evidence, not a clear and unmistakable expression of personal opinion.

IV. *Law of the Case Doctrine*

¶ 36 Pursuant to CrR 6.15, it is within the province of the trial court to instruct the jury. Prior to giving the instructions, the parties are afforded an opportunity to object to the giving of any instruction or the refusal to give a requested instruction. CrR 6.15(c). Thus, any problems with jury instructions should generally be resolved before deliberations begin. But, the trial court also has discretion to give supplemental instructions. *See, e.g., State v. Ng,* 110 Wash.2d 32, 42, 750 P.2d 632 (1988); *State v. Frandsen,* 176 Wash. 558, 563–64, 30 P.2d 371 (1934); *State v. Miller,* 78 Wash. 268, 275–76, 138 P. 896 (1914); *State v. Frederick,* 32 Wash.App. 624, 626, 648 P.2d 925 (1982). CrR 6.15(f) expressly contemplates that the trial court may provide additional instructions after deliberations begin, so long as the instructions do not "suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." Calvin nevertheless argues

the trial court erred by correcting and replacing an instruction during jury deliberations.

¶ 37 The trial court originally gave an assault definition based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.50, at 547 (3d ed. 2008) (WPIC) that included the term "unlawful force:"

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.
>
> An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

¶ 38 During deliberations, the jury asked the trial court, "How does the law define 'unlawful force?' " The trial court correctly reasoned that the instruction misstated the posture and facts of the case. The term "unlawful force" is only necessary in the definition of assault when there is a specific argument from the defense that the use of force was somehow lawful. *See* WPIC 35.50, at 548. Without any specific lawful force argument, self-defense or otherwise, the trial court was faced with a dilemma. It could issue a response such as, "unlawful force is force that is not lawful." But, that response would be unhelpful. Alternatively, it could give a supplemental instruction that enumerated each type of lawful force. But, that option would give Calvin the benefit of arguments that he did not make. Instead, the trial court drafted a new definition of assault that omitted the "unlawful force" language. Defense counsel objected on the grounds that the State made a mistake and had to live with that mistake, because the instructions had already been submitted. The trial court elected to give the new instruction:

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

The trial court gave defense counsel an opportunity to reargue all or portions of the case. Counsel declined and asked for a mistrial. But, in doing so, defense counsel expressed that Calvin would not be waiving a claim of double jeopardy.

[21] ¶ 39 Under the law of the case doctrine jury instructions not objected to become the law of the case. *State v. Hickman,* 135 Wash.2d 97, 101–02, 954 P.2d 900 (1998). Thus, when the State adds an unnecessary element to a to-convict instruction and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence. *Id.* at 105, 954 P.2d 900. Here, Calvin contends that the State undertook to prove "unlawful force."

¶ 40 Although the State argues that the law of the case doctrine applies only when an element is added to a to-convict instruction, the doctrine is not limited to that application. ***520** It is a broad doctrine that has been applied to to-convict instructions and definitional instructions. *See, e.g., City of Spokane v. White,* 102 Wash.App. 955, 964–65, 10 P.3d 1095 (2000); *State v. Price,* 33 Wash.App. 472, 474–75, 655 P.2d 1191 (1982); *Englehart v. Gen. Elec. Co.,* 11 Wash.App. 922, 923, 527 P.2d 685 (1974). It has been applied in both criminal and civil cases. *See, e.g., Hickman,* 135 Wash.2d at 102, 954 P.2d 900; *Crippen v. Pulliam,* 61 Wash.2d 725, 732, 380 P.2d 475 (1963).

¶ 41 The doctrine is based on the premise that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury. *Hickman,* 135 Wash.2d at 101 n. 2, 954 P.2d 900. Thus, a party cannot challenge unobjected to jury instructions for the first time on appeal, or conversely disavow jury instructions on appeal that were acquiesced to below. That basic function serves to avoid prejudice to the parties and ensure that the appellate courts review a case under

the same law considered by the jury.

¶ 42 Here, an objection preserved the issue for review and the jury reached a verdict based on the supplemental instruction. Because the trial court has discretion to give supplemental instructions, the issue is not whether the law of the case doctrine bound the State to the "unlawful force" language at the time the jury was given instructions. Rather, our inquiry is whether the trial court abused its discretion when the jury sought further clarification and the trial court identified and corrected a problem. In *State v. Ransom,* the State charged the defendant with possession of cocaine with intent to deliver. 56 Wash.App. 712, 712–13, 785 P.2d 469. The State did not pursue an accomplice theory against the defendant. Jd. at 713. But, during deliberations the jury asked the trial court:

> "If someone is an accessory to the actual or constructive or attempted transfer of a controlled substance from one person to another are they both guilty of the same?"

Id. The trial court then gave an accomplice instruction over defense counsel's objection. *Id.* The Court of Appeals reversed. *Id.* at 715, 785 P.2d 469. It concluded that, although the trial court has discretion to give further instructions after deliberations begin, those instructions may not go beyond matters that had been, or could have been, argued to the jury. *Id.* at 714, 785 P.2d 469. The defendant was entitled to rely on the fact that the State chose not to pursue accomplice liability, which is a distinct theory of criminal culpability. *Id.* Accordingly, the trial court erred and a new trial was granted. *Id.* at 715, 785 P.2d 469.

¶ 43 In *State v. Hobbs,* the State acquiesced to an unnecessarily narrow venue element that required the jury to find that the defendant committed the crime in King County. 71 Wash.App. 419, 420–21, 859 P.2d 73 (1993). During jury deliberations, the trial court granted the State's motion to amend the instruction by deleting "King County" and inserting "State of Washington." *Id.* at 421, 859 P.2d 73. Defense counsel explained both below and on appeal that she was aware during trial that the State was not going to be able to prove venue and made strategic trial decisions based on that knowledge. *Id.* at 424, 859 P.2d 73. On appeal, we recognized that the trial court can give supplemental instructions so long as they do not go beyond matters that had been, or could have been, argued to the jury. *Id.* at 424, 859 P.2d 73. But, because defense counsel had adapted her trial strategy to the State's additional undertaking, we found that there was actual prejudice. *Id.* at 420, 425, 859 P.2d 73. We held that when presented with the State's motion to amend, the trial court's only viable options were to hold the State to its election or declare a mistrial. *Id.* at 425, 859 P.2d 73. We remanded for a new trial where the jury could be properly instructed from the outset. *Id.* at 425, 859 P.2d 73.

[22][23] ¶ 44 Unlike in those cases, there was no prejudice here. There is no evidence, or even any suggestion, that Calvin adapted his trial strategy to the inclusion of the "unlawful force" language. Defense counsel was given the opportunity to reargue the case but declined. Calvin does not articulate why that remedy was inadequate. Further, there is no dispute that the trial court's supplemental instruction was a correct statement of the ***521** law. Calvin did not argue lawful force and was not entitled to any lawful force instructions or the inclusion of unlawful force in the definition of assault. The trial court did not abuse its discretion. [FN1]

> FN1. Calvin also argues that the trial court's substitution violated the appearance of fairness doctrine and constituted an impermissible comment on the evidence. It is unclear how those doctrines are violated when the trial court deliberated in response to an inquiry from the jury, discussed the issue with both parties, gave a legally correct substitute instruction, and gave the parties an opportunity to reargue their cases. A jury instruction that states the law

> correctly and concisely and is pertinent to the issues of the case does not constitute a comment on the evidence. *State v. Johnson,* 29 Wash.App. 807, 811, 631 P.2d 413 (1981). Calvin's claims have no merit.

V. *Legal Financial Obligations*

[24] ¶ 45 The trial court ordered Calvin to pay a total of $1,300 in mandatory and discretionary legal financial obligations (LFOs). It is also entered a boilerplate finding stating that Calvin had the ability to pay LFOs:

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

Calvin argues that the finding is not supported by evidence, and that the trial court was required to determine whether Calvin had the ability to pay before ordering the payment of costs.[FN2]

> FN2. Calvin did not make these arguments below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wash.2d 472, 477, 973 P.2d 452 (1999).

[25][26] ¶ 46 We review the trial court's decision to impose discretionary LFOs under the clearly erroneous standard. *State v. Baldwin,* 63 Wash.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). Different components of the LFOs imposed on a defendant require separate analysis. *Id.* Here, Calvin challenges the imposition of $450 for court costs and a $250 fine.

A. *Court Costs*

[27] ¶ 47 The trial court may order a defendant to pay court costs pursuant to RCW 10.01.160. But,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. *See State v. Curry,* 118 Wash.2d 911, 916, 829 P.2d 166 (1992). Rather, it is only necessary that the record is sufficient for us to review whether the trial court took the defendant's financial resources into account. *State v. Bertrand,* 165 Wash.App. 393, 404, 267 P.3d 511 (2011), *review denied,* 175 Wash.2d 1014, 287 P.3d 10 (2012). But, where the trial court does enter a finding, it must be supported by evidence.

[28] ¶ 48 In this case, the only evidence of past employment was Calvin's testimony at trial that he used to be a carpenter. There was no evidence at all of present or future employment. And, the only evidence of Calvin's financial resources was his testimony that he lived in a mobile home that did not have running water.[FN3] At sentencing, the trial court did not make any inquiry into Calvin's resources or employability. Indeed, the State does not even argue that there is evidence to support the finding. Rather, it argues that "there is nothing in the record to show that Calvin will not have the ability to pay his legal financial obligations *in the future.* " (Emphasis in original.) But, the inquiry is simply whether there is evidence to support the finding actually entered.[FN4] The ***522** trial court's finding is not supported. And, the record does not show that the trial court took Calvin's financial resources and ability to pay into account.

> FN3. Calvin did not have court-appointed defense counsel, but the record does not establish who paid for his attorney.

> FN4. In the absence of a finding, our inquiry would be whether the record revealed that the trial court took Calvin's fin-

> ancial resources into account and considered the burden it would impose on him as required by RCW 10.01.160.

¶ 49 We remand for the trial court to strike the finding and the imposition of court costs.

B. *Fine*

[29] ¶ 50 Calvin also challenges the imposition of a $250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the trial court enter findings or even take into account a defendant's financial resources before imposing a fine. Calvin has not articulated any basis for striking the fine.

VI. *Statement of Additional Grounds*

[30][31] ¶ 51 A defendant may submit a pro se statement of additional grounds for review pursuant to RAP 10.10. Our review of such statements, however, is subject to several practical limitations. For instance, we only consider issues raised in a statement of additional grounds that adequately inform us of the nature and occurrence of the alleged errors. *State v. Alvarado,* 164 Wash.2d 556, 569, 192 P.3d 345 (2008). Further, we only consider arguments that are not repetitive of briefing. RAP 10.10(a). Finally, issues that involve facts or evidence not in the record are properly raised through a personal restraint petition, not a statement of additional grounds. *Alvarado,* 164 Wash.2d at 569, 192 P.3d 345.

¶ 52 In an impassioned statement of additional grounds, in which Calvin asks that we reverse on a moral basis, Calvin lists 29 assignments of error. Six of those assignments of error, concerning the trial court's substitution of a jury instruction, defense counsel's failure to request a self-defense instruction, and the sufficiency of the evidence, are repetitive of appellant counsel's briefing. Another 17 of his assignments of error concern the effectiveness of defense counsel, and particularly whether defense counsel adequately emphasized certain evidence or legal arguments. But, " '[d]eficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Studd,* 137 Wash.2d 533, 551, 973 P.2d 1049 (1999) (emphasis omitted) (alteration in original). Further, those arguments largely rely on facts or evidence outside the record. Calvin's remaining six arguments concern juror misconduct. But, there is no evidence of juror misconduct in the record. To the extent that Calvin's arguments concern facts and evidence not in the record, his concerns should be raised in a personal restraint petition.[FN5]

> FN5. At our direction, the court clerk denied Calvin's motion to continue oral argument for 120 days, for leave to submit a pro se supplemental brief, for leave to file a personal restraint petition, and to have his pro se supplemental brief and personal restraint petition heard simultaneously with his direct appeal. In the week before oral argument, Calvin filed two additional motions. He first filed a motion to modify the clerk's ruling. Calvin miscomprehends the original denial. He does not need leave to file a personal restraint petition. However, we deny his request to continue this case so that he may file an additional brief and a personal restraint petition to be heard together with his direct appeal. In a second motion, filed only one court day before oral argument, Calvin asked to withdraw ten arguments from his statement of additional grounds and partially withdraw another eight. We deny his request.

¶ 53 We affirm Calvin's convictions and remand for the trial court to strike the finding that Calvin has the present or future ability to pay LFOs and the imposition of $450 in court costs.

WE CONCUR: SPEARMAN, A.C.J., and GROSSE , J.

Wash.App. Div. 1,2013.
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(Cite as: 302 P.3d 509)

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APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

September 20, 2013

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

STATE OF WASHINGTON, Respondent, v. DONALD L. CALVIN Appellant.	No. 67627-0-I ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

The appellant, Donald Calvin, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 20th day of September, 2013.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 67627-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Kimberly Thulin, DPA
Whatcom County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 21, 2013