Supreme Court No.____
(COA No. 85922-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NORVELL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Norvell asks this Court to accept review of the Court of Appeals' decision terminating review. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Norvell seeks review of the Court of Appeals decision affirming his conviction. *State v. Norvell*, No. 85922-6-I, 2024 WL 1050003 (Wash. Ct. App. Mar. 11, 2024) (attached in appendix).

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State to prove every element of the crime beyond a reasonable doubt. The Court of Appeals affirmed Mr. Norvell's second degree robbery conviction even though the State presented only patently equivocal, speculative evidence that Mr. Norvell took any items from the store. This Court should accept review because this decision runs afoul of *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013), dilutes the

State's constitutional burden of proof, and implicates substantial public interests.

2. A person charged with a crime has the right to be convicted of the least serious offense proved by the State, and the court must instruct the jury on the lesser offense that is legally and factually included in the charged offense. Here, the State charged Mr. Norvell with second degree robbery but the trial court refused to instruct the jury on the lesser-included offense of fourth degree assault. The Court of Appeals erroneously affirmed despite the risk the jury convicted Mr. Norvell despite doubts he committed the greater offense. This Court should accept review to reiterate its ruling in *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) and clarify the legal prong of the test in *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

3. The court's authority to impose conditions of community custody is delineated by statute. A court may impose a prohibition only if it is related to the offense or public

safety. Here, there was no evidence Mr. Norvell had an anger management problem that contributed to the offense or threatened public safety. Nevertheless, the Court of Appeals affirmed the decision to require Mr. Norvell to complete an anger management evaluation. Review is warranted because this decision conflicts with decisions from this Court and the Courts of Appeals holding the trial court's authority to impose community custody conditions is limited by statute.

D. STATEMENT OF THE CASE

Christina and James Gochmansky owned a Grocery Outlet in Silverdale. RP 495. July 30, 2022 was a busy day. In addition to regular weekend business, Silverdale was hosting a festival across the street, which increased business and traffic in the store. RP 518–19, 548, 591.

The Gochmanskys watched the store's surveillance cameras from the in-store office. RP 522, 593. On the monitors, they saw a man walk into the store carrying a personal bag that

contained his own items. RP 519, 611. The man, Mr. Norvell, walked up and down the aisles, perusing the merchandise.

The Gochmanskys testified Mr. Norvell caught their attention because he was shopping in aisles that they considered high theft areas. RP 515, 519, 525. They also felt that his behavior—looking around and meandering without a clear direction—indicated he was stealing. RP 599–600.

The Gochmanskys testified they saw Mr. Norvell walk into aisle 1 and pick up two items—one large and one small. RP 521–23. Through the surveillance cameras, they said they saw him put the two items in his bag and continue walking through the aisles. RP 522–23. The Gochmanskys believed the items were an easel and a pack of pens. RP 523. Mrs. Gochmansky testified the "easel" was too large to fit fully in the bag, so it stuck out of the bag. RP 522.

Mr. Norvell continued to peruse several other aisles. RP 524–25. Mr. and Mrs. Gochmansky exited the office and returned to the store floor. RP 523, 601. They were unable to

see Mr. Norvell's every move as he walked up and down a few other aisles. RP 524, 599. Then, Mr. Norvell headed back to the main entrance to leave. RP 524, 599. He was no longer holding the large item, which was actually a car window shade, not an easel. RP 736. Employees found it in the store before Mr. Norvell left. RP 603–04.

As Mr. Norvell walked past the store registers, Mrs. Gochmansky approached him and demanded he open his bag. RP 546. Mr. Norvell refused and walked past her towards the exit. RP 546–47.

Outside the main entrance, Mr. Gochmansky approached Mr. Norvell and also demanded he open his bag. RP 608. Mr. Gochmansky was wearing a shirt associated with the local event instead of a Grocery Outlet uniform. RP 548. Mr. Norvell shoved him aside and continued walking. RP 610. When Mr. Gochmansky approached him again, Mr. Norvell swung his bag at him and continued to walk away. RP 613.

The police identified Mr. Norvell several days later. RP 635. He did not have the bag he was seen carrying in the Grocery Outlet or the pack of pens.

The State charged Mr. Norvell with robbery in the second degree. CP 7–9. At trial, the State admitted into evidence video clips of Mrs. Gochmansky's interaction with Mr. Norvell near the registers as well as Mr. Gochmansky's interaction with Mr. Norvell outside the front entrance. RP 547, 552. The State also admitted a photo of Mr. Norvell standing in aisle 7, looking at pens and holding a car window shade under his arm. RP 519; Ex. 6.

After the State rested, Mr. Norvell requested the court instruct the jury on the crime of assault in the fourth degree, arguing it was a lesser included offense to second degree robbery. RP 686; CP 58–60. The court denied the request. RP 694. The jury convicted Mr. Norvell of second degree robbery. RP 751; CP 77.

At sentencing, the court imposed a 24-month standard range sentence and 18 months' community custody. CP 86–87. As a condition of community custody, the court required him to complete an anger management evaluation and class. CP 89.

E. ARGUMENT

1. This Court should accept review of the Court of Appeals' decision affirming Mr. Norvell's second degree robbery conviction in the absence of proof beyond a reasonable doubt because it runs afoul of this Court's holding in *Vasquez*, implicates constitutional issues, and substantial public interests.

Due process requires the State to prove every element of a crime "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. A conviction can stand only if, viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

While circumstantial and direct evidence are equally reliable, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A conviction cannot stand based on evidence that is "patently equivocal." *Id.* at 8 (citations omitted).

To find a person guilty of second degree robbery, the State must prove beyond a reasonable doubt the person "unlawfully [took] 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," and that "such force or fear must be used to obtain or retain possession of the property." RCW 9A.56.190 (defining robbery); *see* RCW 9A.56.210 (defining second degree robbery as when a person "commits robbery").

In this case, the Court of Appeals affirmed a conviction even though the State presented insufficient evidence that Mr. Norvell took any property. Rather, the evidence demonstrated

he never put any merchandise in his bag before walking out of the store. Mrs. Gochmansky testified she saw Mr. Norvell put an "easel" in his bag, but photo evidence clearly showed Mr. Norvell holding a large item under his arm—not in any way concealed in his bag. Ex. 6. Moreover, the "easel" was not an easel at all—it was a car window shade. RP 736; Ex. 6. Most importantly, Mr. Norvell left this item in the store before leaving. RP 603–04. The evidence unequivocally indicates he never stole this item.

The remaining allegation in support of his second degree robbery conviction was that he took a pack of pens. The circumstantial evidence to support this claim was patently equivocal and does not support his conviction. The Gochmanskys testified they saw Mr. Norvell put a pack of pens in his bag while shopping in aisle 1, but photo evidence clearly showed Mr. Norvell looking at pens in aisle 7 and not putting them in his bag. Ex. 6. In addition, the Gochmanskys did not

follow Mr. Norvell's every move while he was in the store. RP 524, 599.

Still, the Gochmanskys believed Mr. Norvell was a thief based on broad generalizations and speculation about certain individuals who shopped in their store. They suspected Mr. Norvell took merchandise because he was shopping in aisles that had a higher occurrence of theft. RP 513 ("We – we pay attention to aisle 1. That's where most product is removed from the store."), 592 ("[A]isle 1, which is a common aisle for – for theft."), 524 ("Aisle 7 is generally an area where we see people put stuff into their pants, usually, or into a bag."). They also alleged he was stealing because they believe people who steal tend to look around while meandering through the store. RP 599–600.

Even though Mr. Norvell's bag contained his belongings when he entered the store, Mrs. Gochmansky also claimed Mr. Norvell "obviously" stole store merchandise because Mr. Norvell's bag was not empty when he left. RP 519 ("obviously,

there's product in the bag because the bag is heavy"). These broad generalizations and speculations based on Mr. Norvell's behavior and location in the store are insufficient to support the conviction. Under this Court's decision in *Vasquez*, Mr. Norvell's conviction cannot stand based on this patently equivocal evidence. 178 Wn.2d at 16.

Mr. Norvell's response to being confronted as a thief and followed outside the store is not sufficient evidence that he stole property. When Mrs. Gochmansky threatened to call the police, he said "go ahead. They won't F-ing do anything." RP 550. Mr. Norvell knew law enforcement would not do anything because he knew he did not steal anything. And when Mr. Gochmansky followed him outside the store and approached him, he was not wearing a Grocery Outlet uniform; instead, he was wearing a shirt for the event across the street. RP 548. Mr. Norvell's reaction to being approached by a combative and apparently uninvolved stranger for no reason does not support the element that he stole property.

The pack of pens was never recovered from Mr. Norvell. Even in the light most favorable to the State, the evidence is, at best, equivocal and speculative. And a conviction cannot stand on equivocal, speculative evidence. *Vasquez*, 178 Wn.2d at 8. Because the Court of Appeals' decision to affirm conflicts with this Court's holding in *Vasquez* and failed to hold the State to its constitutional burden to prove every element of the crime beyond a reasonable doubt, this Court should accept review.

2. This Court should accept review to clarify its holding in *Berlin* and correct the Court of Appeals' flawed application of the *Workman* legal prong which deprived Mr. Norvell his right to a lesser included offense instruction.

The State can only prosecute a person for the crime charged. *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). But a jury may find the person guilty of a lesser offense that is necessarily included in the charged offense. *Id.*

The accused "has an absolute right" for the jury to be instructed on a lesser included offense "when the elements of the lesser offense are necessary elements of the offense

charged, and the evidence supports an inference that the lesser crime was committed." *State v. Laico*, 97 Wn. App. 759, 764, 987 P.2d 638 (1999); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; RCW 10.61.006.

In *State v. Henderson*, this Court said trial courts should err on the side of instructing juries on lesser included offenses recognizing the great risk that a jury, if only instructed on one crime, "will convict the defendant despite having reasonable doubts" the person committed the greater offense. 182 Wn.2d 734, 736, 344 P.3d 1207 (2015). Likewise, the United States Supreme Court acknowledges the vital role of lesser included instructions in protecting the integrity of the criminal justice system. In *United States v. Keeble* it stated, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. 205, 213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).

Therefore, "[w]hen the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense." *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). A person is "entitled" to a jury instruction on lesser included offense when two conditions—one legal and one factual—are met. *State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978). First, the legal prong requires that the lesser offense is a necessary element of the charged offense. *Id.* Second, the factual prong requires that the evidence presented supports an inference that only the lesser offense was committed. *Id.* This Court should accept review to correct the Court of Appeals' flawed application of the legal prong of the *Workman* test.

To prove a person is guilty of the crime of second degree robbery, the State bears the burden to prove the person "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." RCW 9A.56.190; *see* RCW 9A.56.210. "[T]he degree of force is immaterial." RCW 9A.56.190. The "use or threatened use of force" is the linchpin that elevates a theft to a robbery. *State v. Farnsworth*, 185 Wn.2d 768, 775–76, 374 P.3d 152 (2016).

For fourth degree assault, the State must prove the person assaults another under circumstances not amounting to assault in the first, second, or third degree. RCW 9A.36.041. A person assaults another when he uses unlawful force to: (1) intentionally touch another in a manner that is harmful or offensive, (2) inflict bodily injury on another, or (3) put another in apprehension and fear of bodily injury. *State v. Smith*, 159 Wn.2d 778, 781–82, 154 P.3d 873 (2007).

All degrees of assault require some unlawful force, though assault in the fourth degree does not require actual physical injury. *State v. Osman*, 192 Wn. App. 355, 378, 366 P.3d 956 (2016) (citing *State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011)). It is "essentially an assault with little or

no bodily harm, committed without a deadly weapon—so-called simple assault." *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012) (citing RCW 9A.36.041(1)).

Under the legal prong of the *Workman* test, the court must examine the offense "as charged and prosecuted," rather than the offense's broad statutory elements or possible definitions. *Berlin*, 133 Wn.2d at 548. The statute also focuses on the offense as charged. RCW 10.61.006. In *Berlin*, this Court explicitly overturned cases that required the court to look at all alternative means of committing an offense to decide whether the legal prong was satisfied. 133 Wn.2d at 548–59.

In other words, the legal test for whether an assault is a necessary element of robbery, as charged and prosecuted, does not require the court to conclude that all robberies contain an assault. *See id.* at 548. The Court of Appeals ruled otherwise.

In this case, the State charged Mr. Norvell with using force while committing a theft, which is one way to commit a robbery. As charged in this case, the critical overlapping

element is the use of force. It is not possible to commit robbery in the second degree without also, by the same act of unlawful force, committing assault in the fourth degree. Both offenses require the use of force to put another in apprehension of harm, without requiring a specific degree of force or injury. Therefore, fourth degree assault is a lesser offense of second degree robbery as charged.

In its flawed ruling, the Court of Appeals asserted that assault cannot be a lesser included of robbery because a person can be charged with robbery if the use or threat of force is directed to property. Op. at 6–7. But this argument conflicts with this Court's requirement that the court examine the offense as charged. *Berlin*, 133 Wn. App. at 548.

Double jeopardy case law is also instructive on this issue. For decades, "courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes." *State v. Freeman*, 153 Wn.2d 765, 774, 108 P.3d 753 (2005) (emphasis added). Due to

the overlapping elements in these two offenses, a court cannot punish a person for both second degree robbery and assault based on the same conduct, unless the conduct is particularly serious. *Id.* at 775–76. This is because convictions for assault and robbery are often "the same in law and in fact." *Id.* at 776.

Assault in the fourth degree is a lesser included offense of robbery in the second degree as charged in this case because the use of force to put a person in apprehension of harm necessary to commit a robbery also constitutes an unlawful use of force necessary to commit an assault in the fourth degree.

The trial court erred when it refused Mr. Norvell's request for the lesser instruction and the Court of Appeals compounded the injustice by failing to correct the err. Though the Court of Appeals did not analyze the factual prong of the *Workman* test, the evidence strongly suggests Mr. Norvell committed only the lesser offense of assault in the fourth degree. Indeed, the State conceded the factual prong at trial, saying "if assault in the fourth degree met the legal prong, I

think it would meet the factual prong under these very specific facts of this trial." RP 692.

As stated in *Henderson*, the right of the accused to a lesser included jury instruction "helps protect the integrity of our criminal justice system[.]" 182 Wn.2d at 742. Accordingly, this Court should accept review to reiterate its holding in *Berlin* and clarify a defendant's right to a lesser included instruction.

3. The trial court exceeded its statutory authority when it imposed the community custody condition requiring Mr. Norvell to complete an anger management evaluation and class.

This Court has held the trial court's authority to sentence a person and impose conditions of community custody is limited by statute. *State v. Jenks*, 197 Wn.2d 708, 713, 487 P.3d 482 (2021). "A [community custody] condition is manifestly unreasonable if it is beyond the court's authority to impose." *State v. Johnson*, 184 Wn. App. 777, 779, 340 P.3d 230 (2014).

The court may impose discretionary conditions of community custody. RCW 9.94A.703(3). The requirement to complete treatment or counseling services is a discretionary

condition, but the statute requires it to be "crime-related." *Id.* at (c). Other rehabilitative programs or affirmative conduct must be "reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." *Id.* at (d). Any condition must be supported by the record. *State v. Irwin*, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

The particular circumstances of a crime provide the basis for the court's authority to impose certain affirmative conditions. In *State v. Schmeck*, the defendant engaged in a pattern of domestic abuse where he repeatedly violated a protection order by contacting his ex-wife and threatening to kill her and himself. 98 Wn. App. 647, 648--49, 990 P.2d 472 (1999). Over the years, the defendant's threats increased in seriousness, escalating to the point where he "told her she was a 'dead woman . . . walking.'" *Id.* at 649. At sentencing, his ex-wife stated she was terrified of him, and the court found the offense was part of an ongoing pattern of abuse over a

prolonged period of time that manifested deliberate cruelty or intimidation. *Id.*

At sentencing, the trial court ordered the defendant to complete drug and alcohol programing and an anger management program on community supervision. *Id.* The Court of Appeals reversed the drug and alcohol treatment condition, concluding it "is not directly related to the criminal behavior at issue." *Id.* at 651. But it affirmed the anger management program, concluding the defendant had "unresolved anger toward his ex-wife, manifest in repeated threats and aggressive actions." *Id.* at 652. Therefore, it was crime-related treatment and a permissible discretionary condition.

The Court of Appeals should have followed its holding in *Schmek* in this case, but instead, it affirmed the anger management condition in the absence of any relationship to Mr. Norvell's crime. Neither his use of force nor Mr. Gochmanskys fear rise to the level of "unresolved anger" directed at any one

person as found in *Schmeck*. Moreover, there was no evidence anger was a factor in the crime.

Nor is the condition reasonably related to the safety of the community. Generally, counseling services are reasonably related to community safety only if the behavior it treats contributed to the offense. *State v. Jones*, 118 Wn. App. 119, 205, 76 P.3d 258 (2003). But there was no evidence anger contributed to Mr. Norvell's offense or threatens public safety.

The record does not demonstrate Mr. Norvell exhibited such anger to justify ordering him to complete an anger management evaluation and class as a condition of community custody. If it did, every conviction for assault or robbery would justify this condition. Rather, Mr. Norvell reacted to a stranger who approached him and demanded to examine his personal belongings. The condition is unrelated to the offense and public safety and is in excess of the court's sentencing authority.

The Court of Appeals' decision conflicts with its own prior decisions and with opinions from this Court holding there

must be, at least, a reasonable relationship between the crime of conviction and the community custody condition. *State v. Nguyen*, 191 Wn.2d 671, 684, 425 P.3d 847 (2018) (quoting *State v. Irwin*, 191 Wn. App. 644, 658–59, 364 P 3d 830 (2015)). For these reasons, this Court should accept review.

F. CONCLUSION

Based on the preceding, Mr. Norvell requests that review be granted. RAP 13.3, RAP 13.4.

This petition is 3,830 words long and complies with RAP 18.7.

DATED this 10th day of April 2024.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL EUGENE NORVELL, Appellant.	No. 85922-6-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Michael Norvell appeals the judgment and sentence entered on his conviction for robbery in the second degree. Norvell asserts that the trial court erred by declining to give an instruction on assault in the fourth degree as a lesser included offense, by finding that there was sufficient evidence to support his conviction, by imposing a community custody condition that he obtain an anger management evaluation, and by imposing a victim penalty assessment. We remand for the trial court to strike the victim penalty assessment and otherwise affirm.

FACTS

On July 30, 2022, Norvell entered a Grocery Outlet store in Silverdale, Washington. Store owners Mary Christina and James Gochmansky were both present on the premises that day. While observing the camera feed in the office, James[1] observed a man, later identified as Norvell, on aisle one carrying an

[1] We refer to the Gochmanskys as James and Christina solely for purposes of clarity.

orange shopping bag. When James looked up at the camera feed again, he observed Norvell still on aisle one, looking over his shoulder to see who was watching. James and Christina watched as Norvell pulled a pack of art pens and a large item, possibly an easel, from the shelf and put them in his bag. Norvell proceeded to "meander" around the store, "hanging around and just looking at things." Christina alerted some of the employees that they were watching Norvell for suspicious behavior.

At some point, Norvell tried to leave the store by walking past a cashier without paying. Christina approached Norvell and asked to look inside his bag. Norvell refused, told her "fuck you," and walked around her. Christina informed Norvell that he could not leave the store without paying for the items he had put in his bag.

James then approached Norvell and asked him to leave the item that he had put in his bag. Norvell pushed James out of his way. James followed Norvell out of the store and informed him that there were cameras inside the store and that he had been seen on video. Norvell swung his bag at James twice and then fled on foot.

The large item was eventually recovered from inside the store. The art pens were never recovered.

Norvell was charged by amended information with robbery in the second degree. At trial, the jury heard testimony from James, Christina, Kitsap County Sheriff's Deputies Chancie Grondin and Ryan McGovern, and Kitsap County Corrections Officer Ken Watkins.

James and Christina both testified that theft is a regular problem at their Grocery Outlet and they have multiple measures in place to help prevent theft. Both testified that the Grocery Outlet has upgraded cameras in place that capture each aisle and register, as well as the exterior of the store. The store also has a policy that large bags must be left at the front and has multiple signs posted to advise its customers of this policy. Each day, the store's objective is to account for all items coming and going from the store. These policies are in place because any item taken from the store comes out of the store's expenses and, accordingly, out of the Gochmanskys' salaries.

James and Christina also testified that people they have seen attempting to steal from their store tend to exhibit similar behavior patterns. These behaviors include lingering in an aisle until it is clear of other customers, looking around at other customers rather than purposely shopping, shuffling items around in grocery carts, putting items in bags, and hovering around the front of the store. James and Christina also testified that most items tend to be stolen from aisle one, where non-food items are displayed, and the alcohol display. If James or Christina notice someone attempting to leave the store with a concealed item in their bag, they usually approach the person and ask to see inside the bag. According to James and Christina, most people are defensive when asked but will give the product back.

After the State had rested its case, Norvell moved for a directed verdict of not guilty. Norvell argued that because he was not seen with the large item at the time he left the store and because the witnesses were not able to see him at

all times, no reasonable juror could find that he committed a theft. The trial court denied the motion, concluding that there was sufficient testimony to allow the case to be considered by the jury.

The jury found Norvell guilty as charged. Norvell was sentenced to 24 months of imprisonment, followed by 18 months of community custody. As a condition of community custody, Norvell was ordered to obtain an anger management evaluation. The trial court explained that it was ordering this condition because Norvell's swinging a full bag at the store owner multiple times in response to a simple request to open his bag was "out of line" and was indicative "that there is an issue that, you know, could be helpful to look at."

Norvell appeals.

ANALYSIS

Lesser Included Offense Instruction

Norvell asserts that he was entitled to a jury instruction on assault in the fourth degree as a lesser included offense of robbery in the second degree. Norvell contends that the trial court's refusal to give the requested instruction constitutes structural error requiring reversal of his conviction. We disagree.

"We review de novo a trial court's refusal to give an instruction based on an issue of law." State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). A criminal defendant is entitled to an instruction on a lesser included offense if "(1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence in the case supports an inference that the lesser crime was committed." State v. Henderson, 182 Wn.2d 734, 742,

344 P.3d 1207 (2015) (citing State v. Workman, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978)). This right derives from RCW 10.61.006, which states that "[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 or she is charged in the indictment or information."

We begin with the legal prong of the Workman test. Inherent in our analysis of Workman's legal prong is the defendant's constitutional right to have notice of the crime charged. State v. Gamble, 154 Wn.2d 457, 463, 114 P.3d 646 (2005) (citing State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997)). "Because the defendant must have notice of the offense of which he or she is charged, the elements of any lesser included offense must necessarily be included in the elements of the offense as charged." Berlin, 133 Wn.2d at 545. If the lesser offense contains an element that is not required for the offense charged by the State, it is not a lesser included offense and the defendant is not entitled to an instruction therein. See e.g., State v. Tamalini, 134 Wn.2d 725, 729-30, 953 P.2d 450 (1998) (first and second degree manslaughter not lesser included offenses of felony murder); State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993) (assault not a lesser included offense of attempted murder).

The State charged Norvell with robbery in the second degree. The amended information defined the offense as follows:

> On or about July 30, 2022, in the County of Kitsap, State of Washington, the above-named Defendant did, with intent to commit theft thereof, unlawfully take personal property that Defendant did not own from the person of another, to-wit: JAMES L. GOCHMANSKY, or in said person's presence against said person's

> will by the use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another; contrary to the Revised Code of Washington 9A.56.210(1) and 9A.56.190.

The charging document was consistent with RCW 9A.56.190, which states that

> [a] person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

"A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041(1). "Assault" is defined by the common law as

> " '(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [battery]; [or] (3) intentionally putting another in reasonable apprehension of harm, whether or not the actor actually intends to inflict or is incapable of inflicting that harm.' "

State v. Russell, 69 Wn. App. 237, 246–47, 848 P.2d 743 (1993) (first and second alterations in original) (quoting State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (1988)). At issue here is whether the commission of robbery in the second degree necessarily requires the commission of an assault. We hold that it does not.

As the State correctly asserts, it is legally possible to commit robbery in the second degree without committing assault in the fourth degree. Our Supreme Court has noted that the statute defining what constitutes a robbery "does not merely provide that the force must be directed at a person. It also provides that the use or threat of force, violence, or fear of injury may be directed

to property." State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005). The charging document reflects this distinction, charging Norvell with obtaining property belonging to James Gochmansky "by the use or threatened use of immediate force, violence, or fear of injury to said person *or the property* of said person or the person or property of another." (Emphasis added.) However, for an assault to occur, the threat of harm must necessarily be directed toward a person. Russell, 69 Wn. App. at 246–47. Therefore, because assault in the fourth degree contains an element (threat of harm to a person) that robbery in the second degree does not, it cannot be considered a lesser included offense.

Norvell nevertheless contends that assault in the fourth degree is necessarily a lesser included offense of robbery in the second degree where the State has alleged the use of force. For this assertion, Norvell relies upon Berlin's holding that the legal prong of Workman must analyze the crime "as charged." 133 Wn.2d at 545. But Norvell's argument conflates the crime charged with the evidence presented to support the charge. Norvell was charged with robbery in the second degree, which requires the State to prove that Norvell unlawfully took "personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190. Robbery in the second degree is not an alternative means crime and could not have been charged any other way.[2] State v. Todd,

[2] In Berlin, the defendant was charged with intentional murder in the second degree and felony murder in the second degree, which are alternative means of committing murder in the second degree. 133 Wn.2d at 553. The

200 Wn. App. 879, 888, 403 P.3d 867 (2017). That the State ultimately sought to prove that Norvell used physical force to retain the stolen property is relevant to the factual prong of Workman, not the legal prong. But because the legal prong has not been satisfied, we need not analyze the factual prong in this case. Norvell's argument fails regardless of the facts presented at trial.

Sufficiency of the Evidence

Norvell asserts that there was no evidence for the jury to find that he had committed a theft and, accordingly, that his conviction is not supported by substantial evidence. We disagree.

Evidence is sufficient if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence receives the same weight as direct evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "Appellate courts defer to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence." State v. Munoz-Rivera, 190 Wn. App. 870, 882, 361 P.3d 182 (2015).

court held that the trial court correctly instructed the jury that manslaughter was a lesser included offense of intentional murder but not felony murder. Berlin, 133 Wn.2d at 543.

The evidence presented in this case was sufficient for a jury to convict Norvell of robbery in the second degree. James and Christina both testified that they observed Norvell placing a set of art pens into his bag. A photograph was admitted into evidence depicting Norvell with the art pens in his hand. While the large item that Norvell had also placed in his bag was recovered from inside the store, the art pens were not.

James and Christina also testified about the behaviors they typically observe from people they have caught trying to steal from their store, including lingering in the non-food aisles until they are clear of other customers, looking around at other customers rather than purposely shopping, putting items in bags, and hovering around the front of the store. Both testified that they observed Norvell exhibiting all of these behaviors. Surveillance video from inside the Grocery Outlet was also admitted into evidence, which allowed the jury to observe Norvell's behavior themselves. Finally, Norvell became hostile when he was asked to open his bag, something both testified to and shown on surveillance video. When taken together, this evidence was sufficient for a jury to conclude beyond a reasonable doubt that Norvell had stolen an item from inside the Grocery Outlet.

Norvell nevertheless contends that the evidence was not sufficient because the Gochmanskys mistakenly identified the large item as an easel rather than a car window shade. We will not reassess credibility of the witnesses; this is a function of the jury. State v. Hecht, 179 Wn. App. 497, 511, 319 P.3d 836 (2014). Norvell also asserts that the evidence is not sufficient because the

photograph admitted into evidence depicts him holding the pens rather than putting them into his bag and the Gochmanskys did not have eyes on him at all times while he was in the store. Direct evidence is not required to sustain a conviction; circumstantial evidence and direct evidence are considered equally reliable on appellate review. Thomas, 150 Wn.2d at 874. The circumstantial evidence presented here was sufficient for a jury to find beyond a reasonable doubt that Norvell had committed robbery in the second degree.

Community Custody

Norvell asserts that the trial court erred by ordering him to obtain an anger management assessment as a condition of his community custody. This condition, he contends, is not crime related and thus cannot be legally imposed. We disagree.

A crime-related prohibition "prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). A " 'reasonable relationship' " must exist between the crime of conviction and the community custody condition. State v. Nguyen, 191 Wn.2d 671, 684, 425 P.3d 847 (2018) (quoting State v. Irwin, 191 Wn. App. 644, 658-59, 364 P 3d 830 (2015)). The prohibited conduct need not be identical but must have some basis for the connection to the crime of conviction. Nguyen, 191 Wn.2d at 684.

We review a trial court's imposition of crime-related conditions for abuse of discretion. Irwin, 191 Wn. App. at 656. A trial court abuses its discretion if its

decision is manifestly unreasonable or based on untenable grounds. State v. Sassen Van Elsloo, 191 Wn.2d 798, 807, 425 P.3d 807 (2018).

As an initial matter, the State asserts that we should not address Norvell's challenge to his community custody conditions because he did not object below.[3] But "Washington courts . . . will consider some sentencing errors that are raised for the first time on appeal, including some claims challenging conditions of community custody." State v. Casimiro, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019). Therefore, we review the merits of Norvell's challenge.

Here, the court ordered that Norvell obtain an anger management evaluation as a condition of his community custody. The trial court ordered this condition because when asked to open his bag, Norwell pushed James out of his way, and then once outside, swung the bag, laden with items, at James multiple times. This response, the trial court explained, was "out of line" and was indicative "that there is an issue that, you know, could be helpful to look at." As the trial court correctly noted, these facts establish a proper basis to connect the condition to the crime. We hold that the court did not abuse its discretion.

Victim Penalty Assessment

Finally, Norvell asserts that the victim penalty assessment (VPA) should be stricken from his judgment and sentence under RCW 7.68.035 because the trial court found him to be indigent. The State agrees that RCW 7.68.035 applies and concedes error as to the imposition of the VPA. The amended version of

[3] The State alternatively posits that Norvell invited the error but it provides no support for this assertion.

RCW 7.68.035 applies to cases on direct appeal. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). We remand for the trial court to strike the VPA from Norvell's judgment and sentence.

Because Norvell has failed to establish any error, we affirm his conviction. But we remand for the trial court to strike the VPA from the judgment and sentence.

Smith, C.J.

WE CONCUR:

Feldman, J.

Coburn, J.

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. 85922-6-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 / residence / e-mail address as listed on ACORDS / WSBA website:

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Kitsap County Prosecutor's Office

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Washington Appellate Project

Date: April 10, 2024

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