No. 99865-5

NO. 37369-0-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LANCE THOMASON,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Lance Thomason, poor enough to be found indigent in this case, picked up less than $15 in food items in a grocery store and left without paying. Outside, a security guard grabbed him, and he struck the guard and ran away. The State charged Mr. Thomason with first-degree robbery, reduced to second-degree robbery at trial, a class B felony.

The trial court felt a standard-range sentence would be harsh. It observed Mr. Thomason's conduct fell into a unique category of cases where "a chain of events with security personnel" turns a petty theft into a robbery. Clearly, in the court's view, that the theft was minor and that Mr. Thomason used force only when a security guard confronted him were mitigating circumstances. When Mr. Thomason requested an exceptional sentence, however, the court insisted it lacked discretion to depart below the standard range. As a result, Mr. Thomason is currently serving a sentence in excess of five years for what the trial court called a "glorified shoplifting."

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in refusing to consider Mr. Thomason's request for an exceptional sentence.

2. Mr. Thomason's trial counsel rendered ineffective assistance in failing to object to pervasive and prejudicial improper testimony by law enforcement witnesses.

3. The trial court erred in imposing a crime-related prohibition with a term longer than the statutory maximum sentence for second-degree robbery.

4. The trial court erred in including a discretionary legal financial obligation in the judgment and sentence despite finding Mr. Thomason indigent and waiving discretionary fees and costs during the sentencing hearing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court abuses its discretion when it refuses to consider a request for a downward exceptional sentence in the erroneous belief that it lacks discretion to do so. Here, the court identified a mitigating circumstance during sentencing—Mr. Thomason's conduct fell in a category of

"glorified shoplifting" distinct from the crime of robbery in general, consisting of de minimis theft inside the store followed by relatively minor force to evade security outside the store. Nonetheless, the court insisted it lacked discretion to depart below the standard range. Did the trial court abuse its discretion in failing to consider an exceptional sentence?

2. Ineffective assistance of counsel requires reversal where counsel's performance was deficient and prejudice results. Here, two police officers' testimony was rife with improper propensity evidence, improper opinion, hearsay, and a violation of the best evidence rule. Nonetheless, trial counsel did not interpose a single objection. This unchallenged, improper testimony raised the risk the jury would overlook weaknesses in the State's case and convict based solely on the aura of reliability surrounding law enforcement witnesses. Does trial counsel's ineffective assistance require reversal of Mr. Thomason's conviction of second-degree robbery?

3. A trial court may not impose a crime-related prohibition with a term in excess of the statutory maximum sentence for the offense of conviction. Second-degree robbery is a class B felony, with a maximum sentence of ten years. The court, however, imposed a no-contact order with a lifetime term. Did the trial court err in imposing a prohibition with a term in excess of the statutory maximum?

4. Supervision fees are a discretionary legal financial obligation that may not be imposed on an indigent defendant. Did the trial court err in including supervision fees in Mr. Thomason's judgment and sentence despite finding him indigent and indicating its intent to waive all discretionary fees and costs during the sentencing hearing?

D. STATEMENT OF THE CASE

The State alleged Mr. Thomason took $14.98 in merchandise from Yoke's Fresh Market, a grocery store, and later punched a security guard who confronted him outside. CP 2. On this basis, the State charged Mr. Thomason with

one count of first-degree robbery, reduced to second-degree robbery on the first day of trial. RP 14; CP 1, 46.

The security guard, Daniel Swartz, testified that he saw Mr. Thomason and another man enter the store together. RP 124.[1] He observed Mr. Thomason walk to the "lunch meat" section and remove one package each of hot dogs and sliced cheese from a cooler. RP 124–25. He then saw Mr. Thomason walk to the "meat department" and pick up a "package of hamburger." RP 125.

In plain clothes to blend in with customers, Mr. Swartz surreptitiously began to follow Mr. Thomason through the store. RP 123, 126. When Mr. Thomason walked down an aisle in the "natural food" section, Mr. Swartz headed down an adjacent aisle. RP 126. Mr. Swartz did not keep eyes on Mr. Thomason throughout, but watched Mr. Thomason's reflection in the doors of a row of coolers. RP 126–27, 145. When Mr. Thomason walked into a gap in a "split aisle," Mr.

[1] Citations to the verbatim report of proceedings without specifying a date are to the trial, held January 13 and 14, 2020.

Swartz hid behind a display and "peered around the corner" and "between the cracks." RP 127, 145–46. At this point, Mr. Swartz testified, Mr. Thomason concealed the food items "[d]own the front of his pants." RP 127.

Mr. Thomason walked to the store's exit, and Mr. Swartz followed. RP 127–28. Outside, Mr. Swartz grabbed Mr. Thomason's arm, showed him a badge, and "asked him to come back in the store." RP 129–30. Mr. Thomason tried to pull himself free, and Mr. Swartz shouted at him to "stop resisting." RP 130–31.

Mr. Thomason swung a fist at Mr. Swartz three times, hitting him in the face the third time. RP 131–32. At this point, Mr. Thomason escaped Mr. Swartz's grasp by slipping out of his sweatshirt, and ran. RP 131–32. In light of the low value of the items, Mr. Swartz let him go. RP 133, 157–58.

Mr. Swartz called 911. RP 133. While on the phone with dispatch, Mr. Swartz got in his car, drove around the neighborhood until he spotted Mr. Thomason running down the street, and followed him. RP 138–39. Mr. Thomason ran

into a house. RP 139. Soon afterward, the friend Mr. Thomason had entered Yoke's with pulled up in a car, and Mr. Thomason exited the house and got in. RP 139. Mr. Swartz reported the car's license plate and returned to Yoke's. RP 139.

The State played surveillance video recorded at Yoke's for the jury. RP 141. The video supported Mr. Swartz's testimony in some respects, in that it showed a man in a grey sweatshirt and cap—identified by Mr. Swartz as Mr. Thomason—enter Yoke's, and a man in a black T-shirt and jeans—identified by Mr. Swartz as himself—follow the man in the gray sweatshirt through the store. RP 142–43; Ex. P-22 at IMG_0166.MOV, IMG_0167.MOV, IMG_0168.MOV, IMG_0171.MOV.[2] But at each point in the video when Mr. Thomason is supposed to have taken merchandise or concealed it in his clothes, the action took place off camera or

[2] Exhibit P-22, the Yoke's surveillance video, consists of 11 video files in .MOV format.

behind an obstruction. RP 144–46; Ex. P-22 at IMG_0167.MOV, IMG_0168.MOV.

Mr. Thomason's mother, Kathy Thomason, was called by the State to testify. RP 111–12. Kathy[3] said police came to her house, which is near Yoke's, to ask whether anyone had gone into the house on the day of the incident. RP 113. She showed the officers footage recorded by surveillance cameras installed at the house, which depicted Mr. Thomason walking through a "side garden" on Kathy's property. RP 114. The officers did not try to collect the surveillance footage. RP 171.

Spokane police officers Ron Van Tassel and Darryl Groom testified as well. Officer Van Tassel related his visit to Kathy's house and review of the surveillance footage recorded there. RP 167–68. The officer recited Kathy's out-of-court statement that Mr. Swartz's description of the Yoke's suspect sounded like Mr. Thomason. RP 167–68. He also described the contents of the video, despite admitting he could have

[3] Kathy's first name is used to distinguish her from Mr. Thomason; no disrespect is intended.

collected the video himself and was unable to explain why he did not. RP 168–69, 171. He further said that he was able to identify Mr. Thomason based on "[p]hotographs that we have through our system, our computer system." RP 169. Mr. Thomason's trial counsel raised no objections to any of Officer Van Tassel's testimony. RP 161–72.

Officer Groom recalled going to Yoke's, speaking to Mr. Swartz, and reviewing surveillance video. RP 176–78. The officer recited Mr. Swartz's out-of-court statements about the incident, as well as Kathy's statements to Officer Van Tassel about her son matching Mr. Swartz's description of the suspect. RP 177–78, 184. He also identified Mr. Thomason as the suspect in court, despite never having seen him before trial except in the surveillance video played for the jury. RP 184–85. Trial counsel did not object to any of Officer Groom's testimony either. RP 174–85.

The jury found Mr. Thomason guilty. CP 62. At sentencing, the State recommended a sentence at the low end of the standard range: 63 months. 1/23/20 RP 4. Trial

counsel joined the State's recommendation. 1/23/20 RP 6. Mr. Thomason, however, personally requested an "exceptional sentence" of 12 months. 1/23/20 RP 9.

The court expressed frustration with what it called a "glorified shoplifting charge," in which "someone shoplifts and it ends up turning into a robbery because of a chain of events with security personnel generally, just like what happened here." 1/23/20 RP 10. Nonetheless, the court insisted the "only discretion" it had was to impose a standard-range sentence. 1/23/20 RP 10. It imposed a sentence of 63 months, remarking it lacked "discretion to go lower than that." 1/23/20 RP 12; CP 103–04. It also imposed a "lifetime" no-contact order in favor of Mr. Swartz. 1/23/20 RP 12; CP 108.

The court found Mr. Thomason indigent, waived the $200 filing fee, and declined to impose the $100 DNA collection fee. 1/23/20 RP 12; CP 106–07. It remarked it would "prefer to waive" the mandatory $500 victim penalty assessment, but of course had no choice but to impose it. 1/23/20 RP 12; CP 106. Nonetheless, boilerplate language in

the form judgment and sentence required Mr. Thomason to "pay supervision fees" as a condition of community custody. CP 105. The court also ordered restitution in the "de minimis" amount of $14.98. 1/23/20 RP 12; CP 107.

E. ARGUMENT

1. **The trial court abused its discretion by sentencing Mr. Thomason in the erroneous belief that it lacked discretion to sentence below the standard range.**

The Legislature enacted the Sentencing Reform Act of 1981 ("SRA") to "insure that sentences are commensurate with the punishment imposed on others committing similar offenses." *State v. Law*, 110 Wn. App. 36, 43, 36 P.3d 374 (2002) (citing RCW 9.94A.010(3)). The SRA "structures" sentencing discretion by requiring trial courts to determine an "offender score" based on the defendant's criminal history and look up the offense's "seriousness level." RCW 9.94A.010; RCW 9.94A.515; RCW 9.94A.525. With this information, the trial court determines a "standard sentence range," from within which the court selects the sentence "it deems appropriate." RCW 9.94A.530(1).

The trial court is not constrained to sentence within the standard range in all cases. If it finds "substantial and compelling reasons justifying an exceptional sentence," it may depart downward and impose a sentence below the standard range. RCW 9.94A.535. The SRA lists mitigating circumstances a court may consider, but makes clear the listed factors "are illustrative only" and not "exclusive reasons for exceptional sentences." RCW 9.94A.535(1).

Generally speaking, a sentence within the standard range cannot be appealed. RCW 9.94A.585(1). This provision does not prevent review, however, "where the court has refused to exercise discretion" as to whether to impose an exceptional sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (quoting *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

One way a court refuses to exercise discretion is by imposing a standard range sentence in the erroneous belief it lacks discretion to depart downward. *McGill*, 112 Wn. App. at 100.

Here, counsel for both parties believed that the standard range for Mr. Thomason's single count of second-degree robbery was 63 to 84 months. 1/23/20 RP 4, 6. Both recommended a low-end sentence of 63 months. *Id.* at 4, 7. During allocution, however, Mr. Thompson asked the court to consider an "exceptional sentence" of 12 months. *Id.* at 8–9.

The trial court expressed unease with the severity of the recommended low-end sentence. 1/23/20 RP 10. Nevertheless, the court believed it lacked discretion to impose a sentence below the standard range of 63 to 84 months. *Id.* "That's the only discretion I have. I wish I had more." *Id.*

The unique nature of Mr. Thomason's offense conduct—a poor person's theft of a small amount of food inside the store followed by a struggle with a security guard outside the store—was a mitigating circumstance the court could consider. The court therefore abused its discretion in

imposing a standard-range sentence in the erroneous belief that it lacked discretion to depart downward. Because the court suggested it might consider an exceptional sentence if it knew it was able to, remand is required.

a. That the crime was a "glorified shoplifting"— de minimis food items taken followed by relatively minor force to evade security—was a valid mitigating factor to support an exceptional sentence.

Whether a factor not listed in RCW 9.94A.535(1) may support a downward departure from the standard range turns on a "two-part test." *State v. O'Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015) (citing *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)). First, the factor cannot be one the Legislature "*necessarily* considered . . . when it established the standard sentence range." *Id.* Second, the "factor must be 'sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *Id.* (quoting *Ha'mim*, 132 Wn.2d at 840).

The manner in which the offense was committed can be a mitigating circumstance, if it is categorically less culpable than other cases of the same offense in a way the Legislature

did not necessarily anticipate. *See State v. Alexander*, 125 Wn.2d 717, 726–27, 888 P.2d 1169 (1995). In *Alexander*, the Supreme Court considered whether the delivery of only an "extraordinarily small amount" of cocaine could support a mitigated exceptional sentence for delivery of a controlled substance. *Id.* "[T]he Legislature did not necessarily consider" this factor, the Court reasoned, because the precise amount of drugs delivered is neither an element of the offense nor a fact considered in computing the standard range. *Id.* at 726–27. And the small amount of cocaine—less than one-tenth of a gram—was distinct enough to separate the defendant's offense from other instances of delivery of a controlled substance. *Id.* at 727. The Court found that the defendant's "low level of involvement" in the transaction was also a mitigating factor for similar reasons. *Id.* at 728–29.

The "glorified shoplifting" version of second-degree robbery Mr. Thomason was convicted of here satisfies both parts of the test. As relevant here, the Legislature defines "robbery" as taking property from the presence of another

against their will, using or threatening force to "obtain or retain possession of the property." RCW 9A.56.190; *see* RCW 9A.56.210(1) ("A person is guilty of robbery in the second degree if he or she commits robbery."). In short, robbery consists of both "a property crime and a crime against the person," *State v. Nelson*, 191 Wn.2d 61, 76, 419 P.3d 410 (2018) (quoting *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005)), without specifying any particular relationship in time or place between the taking and the use of force.

As proven to the jury, Mr. Thomason's "property crime" and "crime against the person" occurred at different times and in different places—taking $14.98 of merchandise inside the store, and later striking the security guard who accosted him outside the store. RP 125–27, 129–32, 1/23/20 RP 12. In fact, as Mr. Swartz was in plain clothes posing as a customer, Mr. Thomason likely did not know anyone was watching him inside the store and did not expect to use any degree of force before Mr. Swartz grabbed him outside. RP 123, 125.

If charged separately, these two acts would amount to third-degree theft, *see* RCW 9A.56.050(1) (theft of items worth less than $750), and fourth-degree assault, *see* RCW 9A.36.041(1) (assault without any of the criteria for superior degrees or custodial assault). Both offenses are gross misdemeanors in the circumstances of this case, RCW 9A.36.041(2); RCW 9A.56.050(2), and, if sentenced concurrently, the highest sentence Mr. Thomason would face would be the 12 months he asked for, RCW 9.92.020.

The Legislature did not necessarily consider the possibility that its definition of robbery would transform these two otherwise distinct misdemeanors, committed at different times, into the class B felony of second-degree robbery. RCW 9A.56.210(2); *see Alexander*, 125 Wn.2d at 724–25 ("not all exceptional fact patterns can be anticipated" (quoting *State v. McAlpin*, 108 Wn.2d 458, 465, 740 P.2d 824 (1987))). Nor does any provision of the SRA necessarily account for the degree of separation in time and place between the property and person aspects of the robbery, the "extraordinarily" low

value of food items taken, or the poverty of the taker. *Alexander*, 125 Wn.2d at 726–27; *see* RCW 9.94A.525(8) (how to calculate offender score for a violent offense); RCW 9.94A.030(55)(xi) (second-degree robbery is a violent offense); RCW 9.94A.515 (seriousness level of IV); RCW 9.94A.510 (sentencing grid). The first part of the test as therefore met.

The second part is met for much the same reason—a low-value shoplifting and a later struggle with security personnel are not "characteristic[s] inherent" in all cases of second-degree robbery. *Alexander*, 125 Wn.2d at 729. The separation in time and place between the two aspects of the robbery, as well as the "extraordinarily" low value of the merchandise taken, "therefore distinguish[Mr. Thomason's] crime from others in the same category." *Id.* at 727. Mr. Thomason's indigency, and the fact that he was alleged to have stolen only food items, are further distinguishing characteristics. RP 125; 1/23/20 RP 12.

Because the nature of Mr. Thomason's offense conduct—a low-value shoplifting combined with a later

struggle with a security guard—satisfies the two-part test, it is a valid mitigating circumstance under the SRA. *O'Dell*, 183 Wn.2d at 690. Accordingly, the trial court had discretion to consider whether, in light of the purposes of the SRA, the circumstances of the offense warranted an exceptional sentence. RCW 9.94A.535.

b. The trial court's standard-range sentence was an abuse of discretion where the court erroneously believed it could not depart downward.

A trial court abuses its discretion "when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible." *McFarland*, 189 Wn.2d at 56–59 (alteration in original) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). This is so whether or not trial counsel requested an exceptional sentence or pointed out the trial court's authority to do so. *Id.* at 57–58. "[A]n erroneous sentence, imposed without due consideration of an authorized mitigated sentence, constitutes a 'fundamental defect' resulting in a miscarriage of justice."

Id. at 58 (quoting *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332, 166 P.3d 677 (2007)).

Accordingly, remand for resentencing is required when a trial court imposes a standard-range sentence despite expressing an inclination to depart downward, in the erroneous belief that it lacked discretion to do so. *Id.* at 58–59; *McGill*, 112 Wn. App. at 100–01. In *McGill*, the trial court had discretion to depart downward from the standard range for the defendant's multiple controlled substance offenses if it found that "the multiple offense policy of the SRA" would lead to a "clearly excessive" sentence. 112 Wn. App. at 99 & n.4 (citing RCW 9.94A.535(1)(g)). The court evidently did not know this, however, noting at sentencing that "the legislature has decided that judges should not have discretion beyond a certain sentencing range" and it had "no option" but to impose a standard range sentence of 87 to 116 months. *Id.* at 98–99 (emphasis omitted). The court also expressed discomfort with the length of a standard-range sentence, noting "it doesn't seem to be justified" for mere "drug cases." *Id.*

This Court held that the trial court erred in imposing a standard-range sentence without considering whether to impose an exceptional sentence. *Id.* at 100–01. Because of its erroneous belief that it lacked discretion to depart downward, the court effectively "refused to exercise its discretion" at all. *Id.* at 100. And because the court's comments at sentencing suggested "it would have considered an exceptional sentence had it known it could," this Court remanded to give it the opportunity to do so. *Id.* at 100–01; *see also Mulholland*, 161 Wn.2d at 333–34 (remanding where trial court expressed sympathy for defendant but believed it lacked discretion); *State v. Bunker*, 144 Wn. App. 407, 411, 421–22, 183 P.3d 1086 (2008) (remanding where trial court erroneously stated it lacked discretion to depart downward, but "would probably do it" if it could).

The trial court here had discretion to depart downward because it could consider the unique combination of a theft of low-value food items and use of relatively minor force during a later confrontation with security as a mitigating factor. *See*

supra at 14–19. Nevertheless, the court incorrectly remarked that "[t]he only discretion I have is the time period between 63 and 84 months. That's all I've got." 1/23/20 RP 10. The court also expressed discomfort with even a low-end sentence, saying "I don't like" the charge of robbery in a case of "glorified shoplifting" and "I wish I had more" discretion than to choose within the standard range. *Id.* at 10. As in *McGill*, the court's failure to exercise its discretion in the mistaken belief it did not have it was an abuse of discretion warranting remand. 112 Wn. App. at 100–01; *accord McFarland*, 189 Wn.2d at 58–59; *Bunker*, 144 Wn. App. at 421–22.

2. Trial counsel rendered ineffective assistance in failing to object to police officers' pervasive and prejudicial inadmissible testimony.

The Sixth Amendment and article I, section 22 of the Washington State Constitution guarantee not merely the assistance of counsel, but the *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Ineffective assistance requires

reversal where (1) "defense counsel's conduct . . . fell below an objective standard of reasonableness," and (2) "the deficient performance resulted in prejudice." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

a. Counsel rendered deficient performance in choosing to raise no objection to police officers' propensity evidence, violation of the best evidence rule, improper opinion, and rampant hearsay.

Courts generally presume reasonable performance, and will not find deficient performance where counsel's conduct amounted to "legitimate trial strategy or tactics." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). The presumption is rebutted where "no conceivable legitimate tactic" can "explain[] counsel's performance." *Reichenbach*, 153 Wn.2d at 130 (citing *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)). For example, "counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason." *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019) (citing *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998)).

In *Hendrickson*, the State introduced evidence of the defendant's prior drug convictions. 129 Wn.2d at 77. Though the prior convictions were irrelevant to the State's case and inadmissible under ER 609, counsel did not object. *Id.* at 78. The Supreme Court rejected the State's argument that failure to object to this "damaging and prejudicial evidence" was a tactical choice—nothing in the defendant's testimony or counsel's argument suggested any reliance on the prior drug convictions. *Id.* at 78–79; *see also Saunders*, 91 Wn. App. at 579–80 (failure to object is deficient performance where prior conviction was inadmissible under ER 609).

Here, trial counsel failed to object to multiple instances of inadmissible evidence. In the most egregious example, the State asked Officer Van Tassel whether he recognized Mr. Thomason in the surveillance video Kathy, Mr. Thomason's mother, showed him. RP 169. The officer said he did not recognize Mr. Thomason while watching the video, but later saw him in "[p]hotographs that we have through our system, our computer system." RP 169. In other words, Officer Van

Tassel saw multiple mug shots of Mr. Thomason in the Spokane Police Department's database. RP 169.

By making clear to the jury the police department had Mr. Thomason's "photograph 'on hand,'" Officer Van Tassel's testimony implied Mr. Thomason "had previously been arrested or convicted on another charge" in violation of ER 404. *State v. Henderson*, 100 Wn. App. 794, 803, 998 P.2d 907 (2000). As a result, Van Tassel's testimony raised a "prejudicial inference of criminal propensity." *State v. Sanford*, 128 Wn. App. 280, 286–87, 115 P.3d 368 (2005). Yet trial counsel failed to object to this inadmissible and highly prejudicial statement. RP 169.

Relatedly, Officer Van Tassel's testimony describing the contents of Kathy's surveillance video violated the best evidence rule. Under this rule, a party may "prove the content of a . . . recording" only by way of the recording itself, unless the original was "lost" or "destroyed." ER 1002, 1004(a). "By far the most common means of proving loss or destruction" of an original is "a diligent but unsuccessful

search." *United States v. McGaughey*, 977 F.2d 1067, 1071 (7th Cir. 1992) (alteration omitted) (quoting 5 Weinstein's Evidence ¶ 1004(1)[05] at 1004–18 (1983)).[4]

In *State v. Nelson*, No. 76354-5-I, 2018 WL 4697269 (Wash. App. Oct. 1, 2018) (unpub.), a police officer "assumed" he would not be able to obtain a copy of surveillance video, but made no effort to do so. *Id.* at *3; *see* GR 14.1(a). "Because the State made no showing that the original was lost or destroyed," the officer's testimony describing the "contents of the surveillance video" was inadmissible. *Id.*

As in *Nelson*, Officer Van Tassel made no attempt to retrieve Kathy Thomason's surveillance footage—in fact, he admitted he "probably should have grabbed it." RP 171. Officer Groom testified the police "were not able to get a copy" of the footage, RP 184, but the State's evidence shows this to be false—the Yoke's footage was obtained by video recording

[4] Courts "may look to federal case law" analyzing federal evidence rules that "mirror" Washington's. *In re Det. of Pouncy*, 168 Wn.2d 382, 392 n.9, 229 P.3d 678 (2010); *compare* ER 1004 *with* Fed. R. Evid. 1004.

it in real time as it played on a computer screen, Ex. P-22, and Officer Van Tassel said he could have recorded Kathy's footage with a body camera, RP 171. His testimony describing the contents of the video therefore violated the best evidence rule. RP 168–69; *Nelson*, 2018 WL 4697269. Yet, again, counsel raised no objection. RP 168–69.

Unlike Kathy's video, the State played surveillance footage from Yoke's during the trial. RP 141–50; Ex. P-22. Officer Groom testified he reviewed the footage when he visited the store and spoke with Mr. Swartz. RP 176, 178. This video was Officer Groom's only opportunity to see what Mr. Thomason looks like—like the jury, he saw Mr. Thomason in person for the first time at trial. RP 11, 184. Yet the State asked Officer Groom to identify Mr. Thomason from the witness stand. RP 184–85.

Because Officer Groom was in no better position to identify Mr. Thomason from the surveillance video than the jury, his in-court identification was an improper opinion on guilt. *State v. George*, 150 Wn. App. 110, 119, 206 P.3d 697

(2009); *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). Counsel did not object to this inadmissible testimony either. RP 184–85.

Lastly, both police officers' testimony was rife with inadmissible hearsay. Officer Van Tassel testified Mr. Swartz told him he saw Mr. Thomason go into a house, and parroted Mr. Swartz's account of being assaulted at the store. RP 163–64, 167. The officer also related Kathy's statements that Mr. Swartz's description of the suspect sounded like Mr. Thomason, and that he was the man shown in her surveillance video. RP 167–69. Likewise, Officer Groom recalled Mr. Swartz's narrative of what had happened at Yoke's. RP 177–78. Had defense counsel objected to these statements, the State would have had to prove either they were not hearsay or a hearsay exception applied. *See State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015) (proponent of evidence must prove admissibility).

Prosecutors often attempt to argue that out-of-court statements to a police officer are offered, not for their truth,

but to show the officer's state of mind. *E.g.*, *State v. Johnson*, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). But out-of-court statements are admissible for this purpose only where the officer's "state of mind is relevant to a material issue in the case." *Id.* Here, there was no reason for the officers to relate Mr. Swartz's and Kathy Thomason's statements except to improperly bolster their credibility. The out-of-court statements were therefore inadmissible hearsay. *Id.* And counsel raised no objection to any of them. RP 163–64, 167–69, 177–78.

The damage the two officers' inadmissible testimony did to Mr. Thomason's case was substantial. Juries tend to imbue officers' statements with "a special aura of reliability." *State v. Kirkman*, 159 Wn.2d 918, 928–29, 155 P.3d 125 (2007). By referring to Mr. Thomason's multiple mug shots, describing the contents of Kathy's unproduced surveillance video, and identifying Mr. Thomason from the witness stand, the officers invited the jurors to discard any doubts they might have and rely on the officers' presumed expertise

instead. By reciting Kathy's and Mr. Swartz's statements, the officers implicitly endorsed their testimony, buttressing their credibility.

Counsel may have had a tactical reason for declining to object to one or two of these pieces of inadmissible evidence individually—say, to avoid "emphasizing" them. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Where counsel raised no objection to any of the inadmissible testimony—or to any part of the State's presentation of evidence, at any time—a strategic purpose becomes all but impossible to imagine. Nor did trial counsel make any use of the testimony for his own ends—he reserved opening, and did not touch on the officers' testimony at all during closing. RP 110, 210–12; *Hendrickson*, 129 Wn.2d at 79. "[N]o conceivable legitimate tactic" explains counsel's choice not to raise a single objection to any of this "damaging and prejudicial evidence." *Reichenbach*, 153 Wn.2d at 130; *Hendrickson*, 129 Wn.2d at 78–79.

b. The unchallenged, inadmissible testimony caused sufficient prejudice to undermine trust in the outcome.

Prejudice results where there is a "'reasonable probability' that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Crow*, 8 Wn. App. 2d at 511. That is the case here.

The State's case against Mr. Thomason was far from airtight. To prove him guilty of second-degree robbery, it needed to show he took merchandise from the store and used force to retain it—in other words, he still had the food when Mr. Swartz accosted him outside. RP 203–04; CP 59; RCW 9A.56.190. The State's only evidence on this score was Mr. Swartz's testimony that he saw Mr. Thomason take food out of two display cases and conceal the items in his clothing. RP 125–27. The State presented no direct evidence Mr. Thomason left the store with any unpaid-for merchandise in his possession—no stolen food was ever recovered, and no food items came loose from Mr. Thomason's clothing during his altercation with Mr. Swartz. RP 149–50, 158; Ex. P-22.

The jury had reason to doubt Mr. Swartz's opportunity to observe Mr. Thomason's conduct, at least at the time Mr. Thomason is supposed to have concealed the food. Rather than maintaining direct line-of-sight with Mr. Thomason, Mr. Swartz recalled walking down a separate aisle, peering toward Mr. Thomason from behind displays or watching his reflection in a cooler door. RP 126–27, 145–46. The surveillance video confirms that an entire grocery aisle lay between Mr. Thomason and Mr. Swartz, calling into doubt whether Mr. Swartz was able to clearly see Mr. Thomason hide the items in his clothes. Ex. P-22, at IMG_0168.MOV.

Moreover, at each of the moments Mr. Swartz said Mr. Thomason took or concealed merchandise, the action took place either out of frame or behind an obstruction. RP 144–46; Ex. P-22 at IMG_0167.MOV, IMG_0168.MOV. Mr. Swartz's inferior opportunity to observe and the unreliability of the surveillance footage left room for at least one juror to harbor a reasonable doubt as to whether Mr. Thomason still

had the food when he walked out of the store, and therefore whether he committed robbery.

It is impossible to know whether the jury weighed these weaknesses in the State's case and concluded they nonetheless did not create a reasonable doubt, or disregarded them in favor of the "special aura of reliability" projected by the police officers' unchallenged, improper testimony. *Kirkman*, 159 Wn.2d at 928–29. Accordingly, there is a reasonable probability that, had counsel not failed to object, the jury may have returned a different verdict. *Crow*, 8 Wn. App. 2d at 511; *Saunders*, 91 Wn. App. at 581. The conviction of second-degree robbery must be reversed.

3. The trial court erred in imposing a crime-related prohibition in excess of the statutory maximum sentence.

A trial court may impose "crime-related prohibitions" as part of a sentence. RCW 9.94A.505(9). This includes the power to impose no-contact orders. *State v. Armendariz*, 160 Wn.2d 106, 118, 156 P.3d 201 (2007). The effective term of a crime-related prohibition, however, may not exceed the

statutory maximum sentence for the offense of conviction. *Id.* at 119–20.

As a class B felony, second-degree robbery carries a statutory maximum sentence of ten years. RCW 9A.20.021(1)(b); RCW 9A.56.210(2). Accordingly, the trial court here was not authorized to impose crime-related prohibitions with a term greater than ten years. *Armendariz*, 160 Wn.2d at 119–20. Nonetheless, the court included a lifetime no-contact order in the judgment and sentence. CP 108. This Court should remand with instructions to strike the no-contact order and hold a new hearing on the term of any no-contact order to be imposed.

4. The trial court erred in imposing discretionary legal financial obligations despite finding Mr. Thomason indigent.

Courts may not impose discretionary legal financial obligations on defendants who have been found indigent. RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). Supervision fees as a condition of community custody are a discretionary legal financial

obligation because they "are waivable by the trial court." *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020); *accord State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Imposing supervision fees on an indigent defendant is an error requiring remand. *Dillon*, 12 Wn. App. 2d at 152–53. In addition, where the trial court makes clear on the record its intent to waive all discretionary fees and costs yet inadvertently fails to strike a boilerplate obligation to pay supervision fees, remand is warranted to correct the court's scrivener's error. *Id.* at 152.

Here, the trial court found Mr. Thomason indigent. 1/23/20 RP 12. It waived the discretionary $200 filing fee and remarked it would "prefer to waive" the $500 victim penalty assessment, indicating its intent to impose only mandatory legal financial obligations. 1/23/20 RP 12. Nonetheless, boilerplate language in the judgment and sentence included as a condition of community custody that Mr. Thomason "pay supervision fees." CP 105. This Court should remand with

instructions to strike the obligation to pay supervision fees. *Dillon*, 12 Wn. App. 2d at 152–53.

F. CONCLUSION

This Court should vacate Mr. Thomason's sentence and remand for a new sentencing hearing. For independent reasons, this court should reverse Mr. Thomason's conviction and remand for a new trial. Alternatively, this Court should remand with instructions to strike from the judgment and sentence the lifetime no-contact order in favor of Mr. Swartz and the obligation to pay supervision fees.

DATED this 17th day of September, 2020.

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Attorney for Lance Thomason

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 37369-0-III
	)	
LANCE THOMASON,	)	
	)	
APPELLANT.	)	

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