

FILED  
 COURT OF APPEALS  
 DIVISION II  
 2013 FEB -4 AM 9:10  
 STATE OF WASHINGTON  
 BY   
 DEPUTY

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

Frederick Carl Durgeloh,	)	Case No.: 43188-2-II
Petitioner,	)	
	)	
vs.	)	<b>STATEMENT OF ADDITIONAL</b>
	)	<b>GROUND, PURSUANT TO</b>
State Of Washington,	)	<b>RAP 10.10</b>
Respondent	)	
	)	
_____	)	

I, Frederick C. Durgeloh, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in the brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

**Additional Ground 1**

The State did not prove all the elements of RCW 9A.36.021 (1)(c) the crime of second degree assault with a deadly weapon; a Gun.

Second degree assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury, and jury may infer specific intent to create fear from defendant's pointing gun at victim, but not from mere display of weapon. State v. Eastmond 129 Wn.2d. 497, 919 P.2d. 577

(1996). In this case both alleged victims stated that at no time did the defendant see them.

Deputy Kimberly Moore Page 126 line 12 – 14 Q. “Was it a light .... able to illuminate your position? Where you were? Or what ... what effect did the light have?”  
“Page 126 line 16 – 18 A. “It’s called the curtain of light. It was behind Mr. Durgeloh so we were outside the curtain of light, so he could not see out into the darkness where we could see in to where he was.”

Deputy Ryan Cruser Page 161 line 7 -8 Q. “Did there come a point when you were able to actually see the defendant, Mr. Durgeloh?” Page 161, line 9 A. “Yes.”  
Page 161 line 11 Q. “When were you first able to see him?” Page 161 line 12 – 19 A. “You can see through the screen door to the far side of the house, which is large windows. And being at night and some lights on inside, they acted as a mirror and I could see his reflection. Because you could see ... you could almost see around the corner based on the reflection. And you could see him propelling himself in .. in a wheelchair, propelling himself with his foot, and I could see a gun in his hand.” Page 161 line 23 –  
page 162 line 1 Q. “When you saw him, did you just see his reflection or were you able to actually see him?” Page 162 line 2 A. “The reflection.” Page 162 line 6 -7 Q. “When you saw that he was coming towards you with a handgun, what did you do at that point?”  
Page 162 line 8 -9 A. “I got off the porch and took cover behind the truck that was in the driveway.” Page 163 line 4 -5 Q. “So you go behind the truck. Did he ever come out?”  
Page 163 line 6 A. “Yes.” Page 163 line 7 Q. “How did he come outside?” Page 163 line 8 – 10 A. “He was able to kick the screen door open and then he come out onto the porch.” Page 163 line 11 Q. “Did he have a gun with him at that point?” Page 163 line 12 A. “Yes.” Page 163 line 13 Q. “What was he doing with it?” Page 163 line 14 A. “He had

it up ... holding it up, waving it around.” Page 163 line 15 Q. “Was it pointed in your direction at all?” Page 163 line 16 – 17 A. “At time it did... was pointed in my direction as he waved it around and was looking around and moving it.” Page 166, line 11 – 12 Q. “Now did it appear from what he was doing that he was looking for you or trying to locate you?” Page 166 line 13 “Yes” Page 166 line 14 Q. “ How could you tell that?” Page 166 line 15 – 18 A. “Because he was looking around and ... and he ... he never was ... it didn’t seem like he was even able to fix on exactly where we were, but it did appear that he was looking and trying to find out where we were. ”Page 166 line 19 – 20 Q. “Was he scanning with the gun as he was looking around?” Page 166 line 21 – 23 and page 167 line 1 A. “It didn’t ... didn’t seem like both his eyes and the gun were in them same position at the same time, it was more of he was looking, and the gun weren’t really in sync.”

Pointing the gun in there direction would be any were from South-East to South-West from where Mr. Durgeloh was setting in his wheelchair, this is not pointing the gun at anyone! So when did the assault take place?

### **Additional Ground 2**

Mr. Durgeloh did not commit felony harassment. Because to do so you have to unlawfully threaten to kill someone.

9A.16.020 use of force – when lawful. (3). Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious

interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

Washington Practice 13A § 13.45 Reasonable force may be exercised to prevent one without privilege from trespassing. The right to use force belongs to the person in possession of the real estate.

If the owner or one in possession reasonable believes that the trespasser, unless expelled or excluded, is likely to cause him death or serious bodily injury, he is privileged to use the same degree and type of force appropriate in self defense because, in reality, he is defending himself or another, and not primarily defending his property. Reasonable force may include confinement of the trespasser as well as putting him in fear of physical harm. The use of excessive force or confinement renders the person defending his property liable for so much of the force or confinement which is excessive, and it gives the trespasser the privilege of self-defense.

In this case the officers did not do a good enough job of identifying them selves, they parked there cars out of sight and hide behind Mr. Durgeloh's truck and car. At no time could Mr. Durgeloh have seen the officers or have known that they for sure were officers.

DATED this 31 day of January, 2013.

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(Appellant's Signature)

Frederick Carl Durgeloh  
(Appellant's Printed Name)  
DOC # 356366 Unit# G-B-33-L  
Stafford Creek Correction Center  
191 Constantine Way,  
Aberdeen, Washington 98520

**DECLARATION OF SERVICE BY MAIL  
GR 3.1**

I, Frederick Carl Durgeloh, declare and say:

That on the 31 day of January, 2013, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 43188-2-II:

Statement of Additional Grounds \_\_\_\_\_ ;  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

addressed to the following:

John A. Hays No. 16654  
Attorney for Appellant  
1402 Broadway Suite 103  
Longview, WA. 98632

Cowlitz County Prosecutor  
871 11th Avenue Suite 2  
Longview . WA. 98632

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 31 day of January, 2013, in the City of Aberdeen, County of Grays Harbor, State of Washington.

  
Signature

Frederick Carl Durgeloh  
Print Name

DOC: # 356366 UNIT: G-B-33-L  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN WA 98520

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