

NO. 47253-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

AARON MYLAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 14-1-00325-0

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BRIEF OF RESPONDENT

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether counsel's performance was deficient by not asking for a necessity instruction when the evidence does not support the instruction?
2. Whether not seeking a necessity defense was not deficient performance because it was a matter of strategy and therefore?
3. Whether there was any prejudice due to not requesting a necessity defense instruction?

## II. STATEMENT OF THE CASE

### Mr. Mylan goes to Forks for the first time

On Aug. 24, 2014, the appellant, Mr. Mylan accompanied his friend Rachelle Cabe to Forks where he had never been before. RP 54, 75, 81 (1/29/15).<sup>1</sup> On the way Ms. Cabe began texting her drug supplier, Mr. Mueller, and informed Mr. Mylan that she was going to get heroin from Mr. Mueller because she was getting sick. RP 32–34.

Mr. Mylan was very experienced with heroin and was familiar with the signs of sickness from heroin withdrawal. RP 33, 34, 45, 87, 89. Mr. Mylan expressed his concern to Ms. Cabe about getting heroin. RP 34.

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<sup>1</sup> All of Mr. Mylan's testimony occurred on Jan. 29, 2015. Further references to Mr. Mylan's testimony will be cited with "RP" only and no date.

Without telling Ms. Cabe his intentions, he told Ms. Cabe that he would meet with Mr. Mueller for her. RP 35.

The plan was to meet up with Mr. Mueller at the 76 gas station in Forks. RP 35. Mr. Mylan had never met Mr. Mueller (RP 35) and had never been to the city of Forks during the 10 years he had lived in Clallam County. (RP 72–73). Therefore, Ms. Cabe described what Mr. Mueller looked like and what he was driving so Mr. Mylan could meet with him instead of her. RP 35.

According to Mr. Mylan, without telling anyone, Mr. Mylan decided to intervene to convince Mr. Mueller to not provide heroin to Ms. Cabe as they had already planned. RP 40–41.

Mr. Mylan approaches Mr. Mueller

After arriving at the 76 gas station in Forks, Mr. Mylan waited for Mr. Mueller to come out of the store and go to the truck described by Ms. Cabe. RP 36. Mr. Mylan approached Mr. Mueller while Mr. Mueller was pumping gas:

Mr. Mueller, or whatever, he's pumping gas and I say, hey, is your name Diamond and he says yes and he says who are you and I didn't answer that question at first I said are you supposed to meet Rachelle right now and he says yeah, who are you? I said I'm a friend of hers, she's not feeling too well so I came instead, I'm going to meet you instead and then I told him when you get done pumping your gas, how about you go park your car in the lot right here in front of the store so we can just talk for a couple of minutes and he said he

needed to go somewhere. He said how about you just getting in the truck and come with me and I'll bring you back afterwards.

RP 36-37 .

Mr. Mylan confronts Mr. Mueller

Without asking where they were going, Mr. Mylan agreed to go with Mr. Mueller and got into his truck. RP 37. When they got on the road, Mr. Mueller offered to Mr. Mylan what Mr. Mylan recognized to be heroin. RP 37. Mr. Mylan testified, "I said no I'm good, I don't do heroin and then he put it away, says it's some good shit." RP 37.

He looked at me like outrage or confused, you know. He made mention of Rachelle being sick and said it's some good shit, I got some good shit and I didn't respond to him so we get to the turnoff of the road of whatever the official turnoff for Sitkum or whatever you call it, A Road is what they call it I guess. We get to the turnoff and make a right and he reaches into his little cigarette pack and pulls out a baggy, you know, and offers it to me, which appeared to be heroin and I said, no I'm not here for that, you know. I'm assuming that he thought I was there to pick up heroin for her. She thought I was too but that wasn't my intention at all, as I'll tell you guys. He offers it to me and I say I'm not here for that and that's what I want to talk to you about and that's when he looks at me. He looks at me confused and who the fuck is this guy type of thing, you know

RP 38.

*Then*, after Mr. Mueller had already become outraged or confused and angry looking, Mr. Mylan confronted Mr. Mueller, "man to man," and tried to get Mr. Mueller to not sell drugs to Ms. Cabe, to cut her off from drugs due to her circumstances. RP 40, 41, 43.

I pretty much said I know you don't know me but I want to talk to you man to man, I wanted to come talk to you and ask you with this drug, you know, she calls you says, hey, I need this, I need that, would you, you know, cut her off, you know, would you tell her no.

RP 41.

At that point, Mr. Mueller stepped on the brakes, pulled out a pistol, and placed it on his right thigh facing forward. RP 43. Mr. Mylan testified:

And I was being quiet, I wasn't saying nothing further, you know, he looks agitated and he says, "so you want me to stop selling heroin to Rachelle because she has a kid", and that's what he said verbatim and I said, "yeah" . . . .

RP 44.

Then Mylan testified that Mr. Mueller pointed the firearm at Mr. Mylan's head and told him he was tired of people trying to tell him what to do and that Mr. Mylan was not going to tell him who to deal with or not to deal with. RP 45. Mr. Mylan testified that Mr. Mueller lowered the gun and said, "If you've got a problem with that you're going to get shot." RP 45-46.

There was no altercation still up to that point. RP 46. Mr. Mylan testified: [S]o as soon as his eyes diverted that's when I grabbed the pistol and I pushed it to the right and we started struggling. RP 47.

During the struggle for the firearm, the firearm discharged into the dashboard and the bullet lodged itself in the battery cable on the front driver's side of the vehicle. RP 47, 48 (1/27/15); RP 53, 122, 123 (1/27/15). Mr. Mylan managed to eject the magazine from the gun during the struggle. RP



48-49. Mr. Mueller kept trying to get the gun back but Mr. Mylan wrested control of the firearm. RP 49-50.

Mr. Mylan strikes Mr. Mueller's head with the firearm

Then Mr. Mylan testified that he repeatedly struck Mr. Mueller on the head 3 or 4 times with the firearm. (RP 50-51, 53, 92 (1/29/15)). Mr. Mylan testified that after striking Mr. Mueller, Mr. Mueller stopped trying to get the gun back and he kind of fell on the floor and rolled out of the truck. RP 53-54, 93. Meanwhile, a bystander, happened to be watching.

Mr. Stienbaugh was a bystander in his own truck who drove up behind Mr. Mueller's truck and slowed down to pass but stopped when he saw the driver side door open and close a couple of times. RP 43 (1/26/15).

Mr. Steinbaugh testified that he saw Mr. Mueller drop out of the truck like a sack of potatoes. RP 43. Then Mr. Muller staggered while standing up and his face was covered in blood. RP 43. Mr. Mueller came running toward Mr. Steinbaugh's truck and half fell on the hood of the truck, came over to Mr. Stienbaugh's window and started screaming, half sobbing, telling Mr. Steinbaugh that the guy (Mr. Mylan) asked for a ride up A Road and then started beating him and jacking him. RP 48 (1/26/15). Mr. Mueller asked Mr. Steinbaugh for a ride away but Mr. Steighbaugh didn't know him and said no. RP 48 (1/26/15).

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Mr. Mylan takes control of Mr. Mueller's truck

Mr. Mylan testified that, after Mr. Mueller rolled out of the truck, *he jumped in the driver's seat* of Mr. Mueller's truck, gunned it forward a little, tried to turn it around, and then after getting the truck stuck in a ditch, he found the gun on the floorboard, picked it up, and took off running with it. RP 55, 56, 71.

First, Mr. Mylan testified that he tried to take off in Mr. Mueller's truck because "I figured there would be police in place at once. They would come together all at once. I figured I need to get out of here." RP 54.

Then, Mr. Mylan testified that he tried to take the truck because he didn't know if Mr. Mueller still had the gun. RP 54. On cross examination, Mr. Mylan testified that he assumed the gun fell to the floor of the truck when Mr. Mueller rolled out of the truck. RP 94. Then Mr. Mylan testified again that he took the truck at first because he didn't know if Mr. Mueller had the gun. RP 96, 97.

Mr. Steinbaugh testified that Mr. Mueller had been at Mr. Steinbaugh's window for about 20–30 seconds, *and then*, Mr. Steinbaugh saw that Mr. Mueller's truck started moving and did a K turn in the middle of the road to head back in the opposite direction. RP 49 (1/26/15). Mr. Steinbaugh testified that Mr. Mylan drove the truck into a ditch and tried to gun it out and stopped a few feet from hitting Mr. Steinbaugh's truck head-

on. RP 49 (1/26/15).

Mr. Mylan takes the firearm from the truck and leaves on foot

Mr. Mylan testified that after he got Mr. Mueller's truck stuck in the ditch, "I grabbed the gun and got out of the vehicle and ran." RP 56. Mr. Mylan claimed to have run by Mr. Steinbaugh, and that "as soon as [Mr. Steinbaugh] heard the gun or seen the gun he left, he skirted out of there, hit the gas and got out of there." RP 56-57. Mr. Mylan later testified that he stopped to talk with Steinbaugh to tell Mr. Stienbaugh that Mr. Mueller just pulled a gun on him. RP 97-98.

Mr. Steinbaugh testified that Mr. Mylan got out and walked right past the front of his vehicle and walked by the passenger side and disappeared. RP 49-50 (1/26/15). Mr. Steinbaugh testified that as Mr. Mylan walked by, "I look at him, I looked at him, I looked down and I saw him holding a pistol in his right hand." RP 50 (1/26/15). Mr. Steinbaugh was pretty sure it was a firearm based on the way it looked and the way Mr. Mylan was carrying it. RP 54 (1/26/15).

Mr. Steinbaugh testified further that after Mr. Mylan walked by, Mr. Mueller was still saying the same things. RP 48, 50 (1/26/15). Mr. Steinbaugh took off and called 911 about 15 seconds after he saw Mr. Mylan walk by with the gun in his hand. RP 50 (1/26/15).

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Mr. Mylan gets rid of the gun and calls Ms. Cabe

Mr. Mylan testified that he ran down the road, threw the gun into the woods after getting 10 feet past Mr. Steinbaugh's truck, and then ran back towards the highway another 10 or 15 feet before jumping into a bush. RP 57-58. Mr. Mylan immediately called Ms. Cabe to come get him and get out of there and then he ran down the road again. RP 59. Ms. Cabe arrived within a minute or so although Mr. Mylan did not know where he was. RP 83-84. However, rather than simply leave, Mr. Mylan testified that he wanted to go back and check to make sure Mr. Mueller was ok:

like I said I didn't want nothing to happen to the guy to the point where I'd be accountable because like I say everyone's weird so we're going and I say, you know what, we need to stop. I don't know if this guy's alright, you saw the guy, Mr. Steinbaugh, he just kind of zoomed off so I'm like this guy, he's out in the middle of nowhere, you know, I don't know if he's laying in the ditch, I don't know if he's laying in his truck, I don't know if he's unconscious, I don't know if he has a head problem, I don't know if he's bleeding to death, or whatever, you know. Really turn around, I want you to turn around and take me back. I want to see if this guy's alright so we go . . .

RP 59-60.

Mr. Mueller's testimony RP 72-115 (1/27/15)

Mr. Mueller testified that on August 24, 2014, during the later afternoon, he was at the 76 gas station in Forks pumping gas when Mr. Mylan, talking on his cell phone, approached him and asked Mr. Mueller if he knew where the A Road was. RP 73. Mr. Mueller told him it was about a

mile up the road. RP 73. Mr. Mylan walked away and then came back and asked for a ride to the A Road to meet up with a friend. RP 74. Mr. Mueller agreed to take him there. RP 76. Mr. Mylan asked Mr. Mueller what kind of drugs they do around Forks and Mr. Mueller replied heroin, meth, and weed. Mr. Mylan did not ask for any drugs. RP 77.

Mr. Mueller pulled up to the A Road off the highway but there was nobody there so Mr. Mylan asked Mr. Mueller to keep going. RP 77-78. Mr. Mueller claimed he wasn't concerned because he has picked up hitchhikers in the area in the past. RP 78. Mr. Mueller also testified that lots of people go up the A Road to hunt, go shooting, or meet and do drugs. RP 78-79.

When they got to the blue gate where people go to do drugs, Mr. Mylan pulled out a gun and aimed it at Mr. Mueller's head. RP 79.

Mr. Mylan yelled at Mr. Mueller to pull over that he was taking the truck. RP 79. The two argued a bit and Mr. Mueller grabbed the gun and pushed it down and the gun discharged. RP 79. Mr. Mylan then pulled the gun back and started hitting Mr. Mueller in the face and the top of his head with the butt of the pistol. RP 79, 81.

Mr. Mueller believed he lost consciousness and from there on everything was fuzzy. RP 81. The next thing Mr. Mueller remembers is trying to start his truck when it was in the ditch. RP 82. Mr. Mueller does remember Mr. Mylan grabbing Mr. Mueller's cell phone which he remembers

was in his lap. RP 83.

Mr. Mueller provided the same story to law enforcement and witnesses Detective Cameron. RP 28–29 (1/26/15). Mr. Mueller told the same story to Mr. Steinbaugh while under the stress of the incident that just took place, (RP 46 (1/26/15), and he told Ms. Lindsey Cugham who showed up later what happened when he was still “jumbled like he didn’t quite know exactly what happened” (RP 60 (1/26/15)). Dr. Hillman testified that based on his 30 or so years experience, Mr. Mueller’s injuries were consistent with his story of being pistol whipped to the point of unconsciousness. RP 65 (1/26/15).

Mr. Mueller also testified that he hid his friend’s gun in the glove box because he was a felon as a minor and was not supposed to have it. RP 87. Mr. Mueller also admitted to having heroin in the truck. RP 87. Mr. Mueller testified that he had immunity to testify but had initially avoided law enforcement after that day because he heard everything had been found in his truck. RP 90.

About a month later, Mr. Mueller spoke with law enforcement and provided a statement about the incident. RP 90. Mr. Mueller testified that he understood that he did not have to cooperate and testify and he testified only after entering an immunity agreement. RP 110. Mr. Mueller was appointed counsel and would not have testified but for the immunity agreement. RP

### III. ARGUMENT

Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation. *State v. Bowerman*, 115 Wash.2d 794, 808, 802 P.2d 116 (1990). *Strickland* requires: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). [The defendant] bears the burden of showing that, but for the ineffective assistance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

*State v. Cienfuegos*, 144 Wn.2d 222, 226–27, 25 P.3d 1011 (2001).

#### A. UNDER *STATE V. JEFFERY*, THE NECESSITY DEFENSE FROM *U.S. V. LEMON* MAY BE AVAILABLE IN UNLAWFUL POSSESSION OF FIREARMS CASES, BUT THE DEFENSE SHOULD BE CONSTRUED NARROWLY.

Under the federal law, because the unlawful possession statute appears to impose strict liability<sup>2</sup> and the necessity defense was not made available by statute, federal courts have allowed application of the necessity defense in unlawful possession of firearms cases in recognition of the common law right to self-defense. *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 415 n.11,

100 S.Ct. 624, 637 n.11, 62 L.Ed.2d 575 (1980); *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)).

However, federal courts have consistently construed the necessity defense very narrowly and have also required that a “defendant must establish that he did not maintain possession of the weapon at issue any longer than absolutely necessary.” *United States v. White*, 552 F.3d 240, 247 (2d Cir. 2009) (citing *United States v. Singleton*, 902 F.2d 471, 473 (6th Cir.1990)); see also *United States v. Butler*, 485 F.3d 569, 573–74 (10th Cir. 2007) (finding Butler failed to relinquish the gun at the “earliest possible opportunity” and that the standard, “while not unforgiving, is demanding.”); *United States v. Al-Rekabi*, 454 F.3d 1113, 1123–24 (10th Cir. 2006) (“The justification of necessity lasts only as long as the circumstances giving rise to it. That is the potent lesson of [*U.S. v. Bailey*, 444 U.S. at 415, 100 S.Ct. 624.]”).

The courts that have recognized justification as a defense to a felon-in-possession charge have held that the defense must be construed “very narrowly.” *United States v. Perrin*, 45 F.3d 869, 875 (4th Cir.1995); *Singleton*, 902 F.2d at 472; accord *United States v. Paolello*, 951 F.2d 537, 541-42 (3d Cir.1991) (adopting a “restrictive view” of the defense).

As the Eleventh Circuit has stated, the defense “is available in § 922(g)(1) cases in only extraordinary circumstances.” *Deleveaux*, 205 F.3d at 1297; see also *Perrin*, 45 F.3d at 874 (“It has been only on the rarest of occasions that our sister circuits have found defendants to be

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<sup>2</sup> Former 18 U.S.C. App. s 1202(a)(1) prohibited convicted felons from possessing firearms.



in the type of imminent danger that would warrant the application of a justification defense.” (citing *Singleton*, 902 F.2d at 472)).

*United States v. White*, 552 F.3d 240, 247 (2d Cir. 2009).

The Supreme Court emphasized in *United States v. The Diana*, 7 Wall. (74 U.S.) 354, 19 L.Ed. 165 (1869), that for the necessity defense to be available the case must be one of “absolute and uncontrollable necessity; and this must be established beyond a reasonable doubt . . . . Any rule less stringent than this would open the door to all sorts of fraud.” 7 Wall. (74 U.S.) at 361, 19 L.Ed. at 166. This view was reiterated recently in a criminal case when the Supreme Court declared: “Under any definition of these defenses (duress and necessity) one principle remains constant: if there was a reasonable, legal alternative to violating the law, ‘a chance both to refuse to do the criminal act and also to avoid the threatened harm,’ the defense will fail.” *United States v. Bailey*, 444 U.S. 394, 410, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980).

*United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980).

In *State v. Jeffery*, the Washington State Court of Appeals, Division 3, addressed the issue of the availability of the necessity instruction in Unlawful Possession of Firearms cases as a matter of first impression. 77 Wn. App. 222, 889 P.2d 9568 (1995). The *Jeffery* Court compared the elements of the necessity defense from Washington State case law with the federal necessity defense and then expressly adopted the federal necessity defense as set forth in *United States v. Lemon*, 824 F.2d 763 (9th Cir.1987) based upon reasoning that parallels the federal cases:

We agree it is clear handgun legislation in Washington is designed to prohibit and punish potentially dangerous felons from possessing handguns. However, the statute does not address the unforeseen and sudden situation when an individual is threatened with impending danger. Certainly, the Legislature did not intend

for a person threatened with immediate harm to succumb to an attacker rather than act in self-defense.

*State v. Jeffrey*, 77 Wn. App. 222, 224–26, 889 P.2d 9568 (1995); *see also United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) (“We do not believe that Congress intended to make ex-felons helpless targets for assassins. The right to defend oneself from a deadly attack is fundamental. Congress did not contemplate that s 1202 would divest convicted felons of that right.”).

The necessity defense as set forth in *Lemon* requires the defendant to demonstrate, by a preponderance of the evidence, that:

- (1) he was under unlawful and present threat of death or serious bodily injury;
- (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
- (3) he had no reasonable legal alternative; and
- (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

*Lemon*, 824 F.2d at 765 (citing *United States v. Harper*, 802 F.2d 115, 117 (5th Cir. 1986); *United States v. Wheeler*, 800 F.2d 100, 107 (7th Cir. 1986)).

The *Jeffrey* Court adopted the necessity defense from *U.S. v. Lemon* for the same reasons the federal courts allowed the necessity defense to apply in unlawful possession of firearm cases. Therefore, it is the State’s position that the federal cases dealing with the application of the necessity defense in

the context of unlawful possession of firearms charges are instructive and should be viewed as persuasive authority.

Ultimately, in the absence of an applicable statutory defense, the necessity defense should be construed narrowly when asserted in unlawful possession of firearms cases.

**B. COUNSEL’S PERFORMANCE WAS EFFECTIVE DESPITE NOT REQUESTING A NECESSITY INSTRUCTION BECAUSE THE EVIDENCE DOES NOT SUPPORT THE INSTRUCTION.**

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. *State v. Clausing*, 147 Wash.2d 620, 626, 56 P.3d 550 (2002). A trial court commits prejudicial error by submitting an issue to the jury not warranted by the evidence. *Clausing*, 147 Wash.2d at 627, 56 P.3d 550.

*State v. Fleming*, 155 Wn. App. 489, 503–04, 228 P.3d 804 (2010).

“In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility. . . .” *State v. Buzzell*, 148 Wn. App. 592, 598, 200 P.3d 287 (2009) (citing *State v. May*, 100 Wash.App. 478, 482, 997 P.2d 956 (2000)).

Because [a defendant] is “entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility,” we must review the

evidence under [the defendant's] version of the facts. *See United States v. Hammons*, 566 F.2d 1301, 1302 (5th Cir.1982) (quoting *United States v. Young*, 464 F.2d 160, 164 (5th Cir.1972)).

*United States v. Lemon*, 824 F.2d 763, 764–65 (9th Cir. 1987).

[T]he trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is completely unsupported by evidence. *Barnes*, 153 Wash.2d at 382, 103 P.3d 1219. At the very least, the instructions must reflect a defense arguably supported by the evidence. *Id.*

*State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

“To qualify for an instruction on an affirmative defense such as necessity a defendant must produce evidence of each element sufficient to warrant its consideration by the jury.” *United States v. Al-Rekabi*, 454 F.3d 1113, 1122 (10th Cir. 2006) (citing *United States v. Bailey*, 444 U.S. 394, 415, 100 S. Ct. 624, 637, 62 L. Ed. 2d 575 (1980)).

**1. Mr. Mylan was not entitled to a necessity instruction because he recklessly placed himself in a situation where he would be forced to engage in illegal activity.**

In order to be entitled to a necessity instruction, Mr. Mylan had the burden to provide evidence that “he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct. . .”

*Jeffrey*, 77 Wn. App. 224; *Lemon*, 824 F.2d at 765.

Mr. Mylan argues that “he did not recklessly place himself in a situation where he would have to engage in criminal conduct, he just wanted to talk to Mueller.” Appellant Br. at 5.

Mr. Mylan provides no supporting evidence for this argument and also ignores the *Jeffrey* Court's reasoning for adopting the federal *Lemon* necessity defense. The *Jeffrey* Court, alluding to a wealth of out-of-state cases, reasoned that "the statute does not address the *unforeseen and sudden situation* when an individual is threatened with impending danger." *Jeffrey*, 77 Wn. App. at 226.

Here, the evidence shows that Mr. Mylan was essentially hitchhiking by getting into a known drug dealer's truck. Mr. Mylan did not know the stranger but knew he was a drug dealer. Mr. Mylan did not know where they were going and he had never been to Forks. Mr. Mylan did know the drug dealer was about to engage in a drug transaction. Additionally, Mr. Mylan hitchhiked with the drug dealer with the intent to convince the drug dealer to not deal drugs to his friend as they planned.

Any danger Mr. Mylan might have been putting himself in was not unforeseeable and was the result of a sudden situation. Mr. Mylan's testimony shows that he recklessly placed himself in a situation where serious danger was very foreseeable and it was an escalating situation rather than sudden. After each opportunity to defuse and avoid the situation, Mr. Mylan *escalated* it.

First, Mylan's testimony shows that he was very experienced with drug culture having been around those who use heroin, including his mother

and longtime friend Ms. Cabe. Although Mr. Mylan claimed to have never used heroin, Mr. Mylan was familiar with different varieties of heroin and comfortable confronting a complete stranger he knew to be a drug dealer. (RP 33, 34, 40, 44, 45, 87, 89 .

Nevertheless, Mr. Mylan testified that he got into a truck with a complete stranger, Mr. Mueller, that he knew from his friend Ms. Cabe to be a drug dealer (RP 33, 41, 75, 89 ), knowing he was going somewhere in Forks that he was completely unfamiliar with. RP 37, 54, 73.

Then Mr. Mylan, by not telling the drug dealer his true intentions, allowed the drug dealer to think Mr. Mylan was coming to get the drugs instead of Ms. Cabe (RP 37, 38) when in fact, Mr. Mylan was planning some sort of confrontation, "man to man" (RP 41) *with the intent to knowingly interfere or terminate a planned drug deal.* RP 33, 37, 38, 73, 77.

This was a deceptive means of forcing a confrontation. It was foreseeable that Mr. Mueller would be surprised and was taken off guard, and angered by being put on the spot, exposed to a complete stranger to whom he had just offered heroin. Not surprisingly, Mr. Mylan testified that Mr. Mueller had become outraged or confused and angry looking when Mylan declined to accept drugs from Mueller telling him that he doesn't do heroin and wasn't there for that. (RP 38).

*Then*, despite Mr. Mueller's reaction, Mylan testified that he asked

Mueller to not sell drugs to Ms. Cabe anymore. At that point, Mr. Mueller stopped the truck, pulled out a gun and put it on his lap and asked Mr. Mylan, "So you want me to stop selling heroin to Rachelle because she has a kid?"

Despite being faced with an obviously upset, surprised, exposed drug dealer, unknown to Mr. Mylan, and with a gun sitting on his lap, in a secluded place Mr. Mylan had never been to, Mr. Mylan, said, "*Yeah.*"

Then, Mr. Mueller pointed the gun at Mr. Mylan and conditionally threatened Mr. Mylan by telling Mr. Mylan that he was not going to tell him who or who not to sell drugs to and that if he has a problem with it he is going to get shot. RP 46. Then Mr. Mueller lowered the gun toward Mr. Mylan's waist. There was still no altercation up to that point. RP 46. Finally, when Mr. Mueller turned his head, Mr. Mylan reached for the gun and the struggle ensued.

Mr. Mylan, was familiar with drugs, and yet, rather than confront Ms. Cabe's drug supplier in Port Angeles or in the City of Forks in a public place to minimize any danger, Mr. Mylan confronted Mr. Mueller by surprise in an unknown secluded place. Furthermore, the association between drug dealing and violence is common knowledge and is a concept so prevalent in our society that it infiltrates the daily news, movies, music and deters people from going near certain communities. It is highly improbable that an adult of normal intelligence would be ignorant of this.

Danger was extremely foreseeable and, by Mr. Mylan's account, he purposefully injected himself into the situation. That was reckless. Further, even after Mr. Mueller put the gun on his lap, Mr. Mylan insisted on furthering the confrontation. This was beyond reckless. Mr. Mylan put himself in a position where he would have to protect himself from a drug dealer he knew was armed with a firearm.

Diamond Mueller's testimony was that Mylan pointed Mylan's own firearm at Mueller and told Mueller to get out of the truck and that he was taking his truck and stuff. Mueller testified that he grabbed the gun to get it away from his head and then Mylan beat Mueller with the gun.

By any account, the evidence does not support the necessity instruction because Mr. Mylan not only recklessly placed himself in a situation where it he would be forced to engage in illegal conduct, he escalated the situation.

- 2. A necessity instruction would not be appropriate because there was no evidence Mr. Mylan was faced with a present threat of death or serious bodily injury when he decided to take the fallen gun inside the truck and walk off with it.**

To be entitled to a necessity instruction, Mr. Mylan had the burden to provide some evidence that he was under unlawful and present threat of death or serious bodily injury. *Jeffrey*, 77 Wn. App. at 224; *Lemon*, 824 F.2d at 765



Here, Mr. Mylan did not provide any evidence at all that Mr. Mueller presented an unlawful and present threat of death or serious bodily injury to Mr. Mylan when Mr. Mylan grabbed the allegedly fallen firearm inside the truck. Rather, the evidence shows that when Mr. Mylan took possession of the firearm, he had already incapacitated and significantly disabled Mr. Mueller and had sole control of the truck and keys.

Mr. Mylan testified that he repeatedly struck Mr. Mueller on the head with the firearm Mr. Mueller allegedly used to threaten him. (RP 53, 92 1/29/15) Mr. Mylan testified that after striking Mr. Mueller, Mr. Mueller stopped trying to get the gun back and he kind of fell on the floor and rolled out of the truck. RP 53-54, 93. Mr. Mylan also testified that he got in the driver's seat of Mr. Mueller's truck and then after getting the truck stuck, he found the gun, picked it up, and took off with it. RP 56, 71 .

By Mr. Mylan's account, Mr. Mueller was not threatening to shoot Mr. Mylan with the gun when the gun was sitting on the floor of the truck, Mr. Mylan was the sole occupant of the truck with possession of the keys. At that point, Mr. Mueller was outside the truck getting Mr. Steingbaugh's attention. There was no evidence of a present threat of death or serious injury. Yet, Mr. Mylan still took the firearm, got out of the truck, and then left with the firearm in his possession.

Steingbaugh's testimony was that Mr. Mueller dropped out of the

truck like a sack of potatoes, then got up and stumbled over to Mr. Steinbaugh's vehicle seeking help. Mr. Mylan claims to have run by Mr. Steinbaugh and Steinbaugh says Mr. Mylan walked. By either account, Mr. Mylan had possession of the firearm as he passed Steinbaugh and Mr. Mueller was on the other side of Steinbaugh's vehicle with his face all bloody. Mr. Mylan later changed his story and said he stopped to talk with Steinbaugh to tell him Mr. Mueller just pulled a gun on him. RP 97-98.

Mr. Mylan testified on direct examination that he tried to take the truck to leave because he figured the cops would be over at once. RP 54. On cross examination Mr. Mylan claimed that he assumed the gun fell to the floor of the truck and Mr. Mueller rolled out of the truck. RP 94 Mr. Mylan later changed his story and said he took the truck at first because he didn't know if Mr. Mueller had the gun RP 96, 97.

In either situation, Mr. Mylan knew where the gun was after he got the truck stuck and that Mr. Mueller did not have it. Whether Mr. Mylan was a threat at that time is purely speculative. *See United States v. White*, 552 F.3d 240, 248 (2nd Cir. 2009) (although not the deciding issue, the Court found it doubtful that the threat was sufficiently imminent where the threat of harm is more attenuated and speculative in nature).

There was no evidence that Mr. Mueller posed any threat to Mr. Mylan when the gun was on the floorboard of the truck and Mr. Mueller was

outside it having sustained injuries from Mr. Mylan nor when Mr. Mylan passed by Mr. Steighbaugh's vehicle with the firearm in his hand.

This case is similar to *United States v. Lemon*, from which the necessity defense was adopted in *Jeffery*. 824 F.2d 763 (9th Cir. 1987). In *Lemon*, the defendant argued it was error for the court to not instruct the jury on the defense of necessity in an unlawful possession of firearms case. The *Lemon* Court held that the trial court did not err because the defendant was not under a "present" threat of death or serious bodily injury when he took possession of the firearm because the G.I. who had forced Lemon to the ground had left the scene. *Id.* at 765.

Additionally, in *U.S. v. White*, the 2nd Circuit Court of Appeals found that White was not entitled to the defense of necessity instruction because although White was in imminent danger at the moment Mobley pointed the gun at him, immediate danger to White was dispelled once he knocked the gun out of Mobley's hand and she ran out of the house. 552 F.3d 240, 247 (2d Cir. 2009).

The federal cases also point out that the danger must be more than than simply a legitimate fear for life or limb as exemplified in *United States v. Alston*:

Although Alston may have been under an unlawful threat of death or serious bodily injury, it is clear that at the time he was arrested, there was no evidence that Alston was under a present threat, that is, it was

not an imminent threat. Furthermore, there was no direct causal relationship between the criminal action (possession of a firearm) and avoidance of the threatened harm (retaliation by Bentley). The causal relationship in these circumstances is attenuated at best. The avoidance of the threatened harm lacks the requisite imminence. To hold otherwise would immunize a convicted felon from prosecution for carrying a firearm solely based on a legitimate fear for life or limb. Someone in Alston's circumstances must show more than a legitimate fear of life and limb, *as possession of a firearm by a convicted felon in the hope of deterring an assault is unlawful*. Congress has not allowed it, and courts have only allowed the defense where the immediacy and specificity of the threat is compelling, and other conditions are met. *See, e.g., Paolello*, 951 F.2d at 539; *Newcomb*, 6 F.3d at 1135–36, 1138 (defendant briefly possessed shotgun and shells after disarming a dangerous person); *Panter*, 688 F.2d at 269–72 (defendant, while pinned to the floor after being stabbed in the stomach, reached for a club but instead grabbed a gun).

Other cases have rejected the defense where the threat is diminished. *See, e.g., United States v. Parker*, 566 F.2d 1304, 1305–06 (5th Cir.1978) (defendant retained possession of a gun for thirty minutes after being attacked in his home); *United States v. Wofford*, 122 F.3d 787, 790–91 (9th Cir.1997) (most recent specific threat had occurred five months before possession of gun); *Perrin*, 45 F.3d at 875 (last threat came two days prior to possession of gun); *Holliday*, 457 F.3d at 128 (defendant wrestled firearm out of a police officer's hands but failed to “renounc[e] the gun as soon as any danger to his life had passed”).

526 F.3d 91, 95–96 (3d Cir. 2008) (emphasis added).

Mr. Mylan's testimony showed that Mr. Mueller was no longer an imminent threat. Mr. Mylan, subdued the immediate threat by striking Mr. Mueller with the gun to the point Mr. Mueller rolled out of the truck completely relinquishing any control of the firearm and his truck. Mr. Mueller did not come back to the truck or even approach or speak to Mr.

Mylan at all after that.

Additionally, Mr. Mylan testified that he stopped at the passenger side of Mr. Steinbaugh's truck to tell Mr. Steinbaugh that Mr. Mueller just pulled a gun on him. RP 97-98. Mr. Mylan still possessed the gun at that point. This completely contradicts a claim that Mr. Mueller was still a threat of death or serious injury at that point. Why would he walk toward his alleged attacker and stop on the other side of Steinbaugh's vehicle to talk if Mr. Mueller posed a threat of death or serious bodily injury?

Additionally, Mr. Mylan testified that after Ms. Cabe showed up almost immediately, he wanted to go back to make sure Mr. Mueller was ok:

I don't know if he's laying in the ditch, I don't know if he's laying in his truck, I don't know if he's unconscious, I don't know if he has a head problem, I don't know if he's bleeding to death, or whatever, you know. Really turn around, I want you to turn around and take me back.

RP 60 . This shows that Mr. Mylan thought he hit Mr. Mueller bad enough that required Mr. Mueller to be hospitalized. Additionally, Mr. Mylan had Ms. Cabe call the hospital to see if Mr. Mueller was ok because he knew head wounds could be serious. RP 52, 59-60 .

By Mr. Mylan's own account, he was willing to go back to the unknown drug dealer he claimed pulled a gun on him and threatened his very life, this just after beating the person with his own firearm and attempting to take off with his truck. RP 59-60, 85.

The evidence is that Mr. Mylan did not believe Mr. Mueller presented any threat of death or serious injury to him after he beat Mr. Mueller with the firearm and he was removed from the truck. Nor is there any other evidence establishing Mr. Mueller was an actual threat. Yet, Mr. Mylan still possessed the firearm. Therefore, Mr. Mylan would not have been entitled to a defense of necessity instruction.

**3. There was no evidence establishing the absence of any reasonable legal alternative.**

Mr. Mylan also had the burden to provide evidence that he had no reasonable legal alternatives to taking possession of the firearm. *Jeffrey*, 77 Wn. App. 224; *Lemon*, 824 F.2d at 765.

[I]f there was a reasonable, legal alternative to violating the law, ... the defense will fail.” *Bailey*, 444 U.S. at 410, 100 S.Ct. at 634.

In demonstrating that he had no reasonable alternative to violating § 1202, Gant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusory benefit of the alternative. *See id.* at 410–11 & n. 8, 100 S.Ct. at 634–35 & n. 8 (citing *People v. Richards*, 269 Cal.App.2d 768, 75 Cal.Rptr. 597 (1969), and *United States v. Boomer*, 571 F.2d 543, 545 (10th Cir.), cert. denied sub nom., *Heft v. United States*, 436 U.S. 911, 98 S.Ct. 2250, 56 L.Ed.2d 411 (1978), for the minimum showings needed to justify a prison escape).

The most obvious legal remedy that Gant failed to pursue was simply to call the police. *See R.I. Recreation Center, Inc. v. Aetna Casualty & Surety Co.*, 177 F.2d 603 (1st Cir.1949) (denying the duress defense because defendant did not call the police when he had an opportunity to do so).

*United States v. Gant*, 691 F.2d 1159, 1163–64 (5th Cir. 1982) (allowing

application of the defense of necessity in Unlawful Possession of Firearms cases).

“The [justification defense] does not arise from a ‘choice’ of several sources of action; it is instead based on a real emergency. It may be asserted only by a defendant who was confronted with a crisis as a personal danger, a crisis that did not permit a selection from among several solutions, some of which would not have involved criminal acts.” *United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir.1980), cert. denied, 450 U.S. 924, 101 S.Ct. 1375, 67 L.Ed.2d 353 (1981).

*United States v. Vigil*, 743 F.2d 751, 756 (10th Cir. 1984).

Here, there is no evidence showing that Mr. Mylan even considered any reasonable legal alternative. Although Mr. Mylan had the opportunity to do so, he never called the police.

A claim of necessity may be little more than an ex-post attempt by defense counsel to exculpate a client. Such a claim is easily made and so must be factually justified.

“Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense.” *Id.* at 415, 100 S.Ct. 624. Demanding a prompt and appropriate remedial response to the claimed “necessity” is a legitimate precondition to recognizing the defense and is also a useful tool in measuring the bona fides of a claimant.

*United States v. Al-Rekabi*, 454 F.3d 1113, 1124 (10th Cir. 2006) (citing *United States v. Bailey*, 444 U.S. at 415).

Nobody is arguing that Mr. Mylan was required to leave the firearm where Mr. Mueller was likely to obtain it again. However, Mr. Mylan did not testify why he did not lock the doors of Mr. Mueller’s truck and wait for the

police when he fully expected them to show up in a hurry (RP54), which was a reasonable assumption considering there was a spectator in Mr. Steinbaugh and Mr. Mueller stumbled over to Mr. Steinbaugh's truck. RP 54, 101.

Mr. Mylan did not testify about why he simply did not leave the firearm in the vehicle, lock the doors, keep the keys and leave. He did not testify about why he did not call the police himself when it was clear he had his phone as he called Ms. Cabe. RP 58–59, 82, 83, 84. Mr. Mylan also did not testify why he simply didn't throw the gun away in the woods right away rather than walk off with it. After all, Mr. Mylan claimed that he did do this later after he was 10 feet past Steinbaugh's truck. RP 57.

Mr. Mylan did not present any evidence that he considered any reasonable legal alternatives. Therefore, Mr. Mylan was not entitled to a necessity instruction and the Court should affirm the conviction.

**4. *State v. Stockton* is distinguishable from the facts of this case.**

Mr. Mylan cites to *State v. Stockton* claiming that the facts are similar. There is a glaring distinction between the facts of this case and those of *Stockton*.

In *Stockton*, the defendant grabbed the gun as he was actually being beaten and he ran off with it. *State v. Stockton*, 91 Wn. App. 35, 37–38, 955 P.2d 805 (1998).



Here, Mr. Mylan beat Mr. Mueller with the gun to the point where he was almost helpless, his face was bloodied and fractured, and he was sobbing for help from a bystander. *Then* Mr. Mylan took off with the gun. *Stockton* simply does not apply to these facts.

**C. THE DEFENSE THEORY IS A MATTER OF STRATEGY.**

“Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 226–27, 25 P.3d 1011 (2001) (citing *State v. Hendrickson*, 129 Wash.2d 61, 77–78, 917 P.2d 563 (1996)).

Mr. Mylan has not shown his counsel’s performance was deficient by not seeking a necessity instruction. The State’s evidence did not allow the defense to argue that the State had the wrong guy. Further, there was no basis for a necessity instruction as shown above. Thus, arguing self-defense was a strategic choice to seek acquittal of the Assault and Robbery charges at the expense of risking a lesser conviction on Unlawful Possession of the Firearm.

For example, the DNA evidence (RP 49, 55–60 (1/28/15)) shows that the sweatshirt Mr. Mylan was wearing in surveillance at the 76 gas station in Forks (RP 67–70, 74–76 (1/27/15)), contained DNA from both Mr. Mylan and Mr. Mueller. Considering that both Mr. Mylan and Mr. Mueller testified they had never met until Aug. 24, 2014, the day of the

crime, the presence of both their DNA on the sweatshirt shows that Mr. Mylan was indeed present at the crime scene. Additionally, the cell phone (RP 140-44, 48, 150-58 160-6-63; RP 47-48 (1/28/15)) found in Mr. Mylan's belongings was determined to have been used near the crime scene at the date and time of the crime. Finally, the *unexpected* identification of Mr. Mylan by Mr. Steinbaugh (RP 50, 52 (1/26/15)) made it impractical to argue a lack of identity.

Therefore, the self defense theory had the most chance to succeed. However, the self-defense theory admits to possessing the firearm in order to account for Mr. Mueller's testimony and Mr. Steinbaugh who was able to identify Mr. Mylan walking away with the firearm.

A review of the evidence shows that the explanation for not seeking a necessity instruction was because there was no basis for it after Mr. Mylan incapacitated Mr. Mueller and then got Mr. Mueller's truck in a ditch. After considering the evidence and the available defenses, it is evident that the overall defense approach was a matter of strategy and necessarily required conceding to Unlawful Possession of a Firearm.

Even where a defendant seeks an all or nothing approach to avoid a compromise verdict "a court should not second-guess that course of action, even where, by the court's analysis, the level of risk is excessive

and a more conservative approach would be more prudent.” *State v. Grier*, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011).

**D. THERE WAS NO PREJUDICE RESULTING FROM NOT REQUESTING THE NECESSITY INSTRUCTION.**

- 1. No reasonable juror would have found that Mr. Mylan established the elements of the necessity defense by a preponderance of the evidence.**

Mr. Mylan’s argument that the jury would have acquitted on the charge of Unlawful Possession of a Firearm in the First Degree if the necessity instruction was given is pure speculation.

First, Mr. Mylan would have had to prove the elements of the necessity defense by a preponderance of the evidence.

Mr. Mylan provided no evidence of the following:

1. That Mr. Mylan was faced with a present threat of death or serious injury when he grabbed the firearm and got out the truck with it; and
2. That Mr. Mylan did not recklessly put himself in the situation where he would have to engage illegal conduct; and
3. That Mr. Mylan tried or even considered any reasonable legal alternative.

On the other hand, there was overwhelming evidence negating the necessity defense. After Mr. Mueller fell out of the truck, Mr. Mylan took control of the truck and tried to drive away with it but got stuck in a ditch.

Then, Mr. Mylan picked up the firearm from the floorboard of the Mr. Mueller's truck and walked away with it.

There is clear evidence that Mr. Mueller no longer presented any threat to Mr. Mylan from the moment Mr. Mueller dropped out of the vehicle like a sack of potatoes. Mr. Mylan beat Mr. Mueller with the gun to the point Mr. Mueller stopped trying to get the gun and he fell and rolled out of truck. Mr. Mylan testified that as he passed Mr. Steinbaugh's vehicle, Mr. Mueller was on the other side with his face all bloody. Mr. Mueller was not trying to attack Mr. Mylan.

Mr. Steinbaugh testified that Mr. Mueller dropped out of the truck like a sack of potatoes and staggered to stand up and was yelling that Mr. Mylan beat him with the gun and was half sobbing seeking help. Mr. Steinbaugh testified that Mr. Mueller was trying to get Mr. Steinbaugh to give him a ride away from the scene.

Dr. Hillman testified that Mr. Mueller's injuries were consistent with being pistol whipped to the point of losing consciousness. Mr. Mueller testified that he did not really remember what happened after he fell out of the truck until he came to and everyone was gone and he tried to restart the truck. Ms. Cugham testified that when she found Mr. Mueller, he was still jumbled like he didn't quite know exactly what happened

The evidence shows that Mr. Mueller was no longer a threat at all to

Mr. Mylan when he picked up the firearm because Mr. Mylan beat Mr. Mueller to the point where he was disabled and incapacitated from the moment he dropped out of the driver seat and hit the ground.

Furthermore, the evidence shows that Mr. Mylan put himself in the situation recklessly by hitchhiking with a known drug dealer in a place he had never been to, not knowing where he was going, with the intent to tell the drug dealer to not go through with a drug deal. Mr. Mylan angered the drug dealer by surprising him after the dealer exposed himself as a drug dealer and offered heroin to Mr. Mylan. Mr. Mylan escalated the situation by asking Mr. Mueller to not deal drugs to Ms. Cabe. At that point Mr. Mueller stopped the vehicle and put his gun on his lap and asked Mr. Mylan if he wanted him to not deal drugs to Ms. Cabe because she has a child. Mr. Mylan answered "Yeah." Not only does this story not make sense, it is beyond reckless.

Why did Mr. Mylan leave his sick friend behind in the vehicle without knowing where he was going? Why did he try to stop her from getting heroin when she was starting to go through withdrawal? Why did he not simply have Ms. Cabe turn around, refuse to be around any heroin, and talk to her about getting into treatment fast rather than continue to go to the drug dealer. Mr. Mylan after all was experienced with drug culture.

Finally, there is no evidence that Mr. Mylan even considered any reasonable alternatives. Mr. Mylan wanted to avoid law enforcement not

seek their help. That is why he tried to leave and why he called Ms. Cabe instead of 911. The evidence is that Mr. Mylan continually escalated the dangerousness of his situation at every opportunity rather than seek any reasonable alternatives, or get himself out of the situation at the first opportunity

Considering the lack of evidence supporting the necessity defense, and the evidence tending to negate it, no reasonable jury would have been able to find the elements of the necessity defense were satisfied by a preponderance of the evidence. Therefore, there was no prejudice due to any failure to seek the necessity defense instruction.

**2. Mr. Mylan has not established that the jury would have acquitted simply because they acquitted on other charges.**

The jury was not required to believe Mr. Mylan and disbelieve both Mr. Mueller and Mr. Steinbaugh and any other witness in order to acquit Mr. Mylan of Assault in the Second Degree, Robbery in the First Degree, and Theft of a Motor Vehicle. The fact that Mr. Mylan was acquitted on those charges does not necessarily lead to a conclusion that the jury believed Mr. Mylan's account *at all* or that the jury would have found the necessity defense established by a preponderance of the evidence.

The jury may have simply found the State's evidence insufficient to find Mr. Mylan guilty beyond a reasonable doubt. Mr. Mylan and Mr.

Mueller's testimony were diametrically opposed. Mr. Mueller only testified because he had immunity and that may have created doubt. On the other hand, Mr. Mueller testified that he had been convicted of numerous crimes of dishonesty including 4 counts of Burglary in the Second Degree including one in 2013, shoplifting in 2012, Theft in the Third Degree in 2011, and Making False Statements to a Public Servant. RP 26-27 (1-29/15).

The jury may have acquitted on the other counts for other reasons such as nullification due to the evidence that the alleged victim, Mr. Mueller, was a drug dealer, there were drugs, brass knuckles, and a gun in the glove box. RP 56. Further, it should also be noted that the jury did acquit Mr. Mylan of Theft of the Motor Vehicle *without* a necessity instruction.

Mr. Mylan has not established that a different outcome of the trial was probable or that he was deprived of a fair trial or that the result of the trial was not reliable. Mr. Mylan has not established any prejudice from the alleged deficiency of not seeking a necessity defense instruction because no reasonable juror could find that Mr. Mylan provided evidence to prove each element of the necessity defense by a preponderance of the evidence.

Therefore, the conviction should be affirmed.

## I. CONCLUSION

Mr. Mylan has not met his burden to establish ineffective assistance of counsel. Defense counsel was not deficient by not seeking the instruction

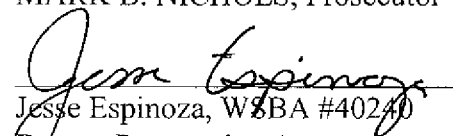
because there was no basis for it as it was not supported by evidence. Further, the defense approach to the case was a matter of strategy to avoid conviction on the more serious charge by arguing self defense and conceding possession of the firearm.

Moreover, no reasonable juror would have found that the defense met its burden to establish the elements of the necessity defense by a preponderance because the evidence negated the defense as overwhelming.

Therefore, the Court should affirm the conviction.

Respectfully submitted this 17th day of September, 2015.

MARK B. NICHOLS, Prosecutor

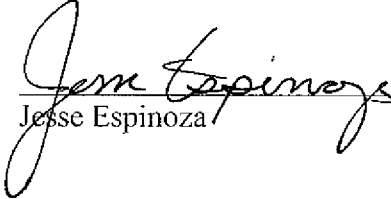
  
Jesse Espinoza, W&BA #40240  
Deputy Prosecuting Attorney  
Clallam County



CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lise Eller on 9/17/2015.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

# CLALLAM COUNTY PROSECUTOR

**September 17, 2015 - 6:30 PM**

## Transmittal Letter

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Court of Appeals Case Number: 47253-8

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