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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 37703-9-II  
Lewis County No. 07-1-00834-3

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ALBERT LEE BROWN, JR.**

**Appellant.**

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**BRIEF OF APPELLANT**

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ANNE CRUSER/WSBA #27944  
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bojen...

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**A. ASSIGNMENTS OF ERROR**

**I. MR. BROWN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO RAISE SELF-DEFENSE.**

**II. THE SENTENCE ON COUNT I IS UNLAWFUL.**

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**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

The Lewis County Prosecuting Attorney charged Albert Lee Brown, Jr. with assault in the third degree (Count I), possession of a controlled substance (Count II) and unlawful use of drug paraphernalia (Count III). CP 4. A jury trial was held on March 19<sup>th</sup> and 20<sup>th</sup>, 2008. Trial Report of Proceedings. Mr. Brown was convicted of assault third degree, possession of a controlled substance and unlawful use of drug paraphernalia. CP 109-112. He was given a sentence of 50 months' incarceration for assault in the third degree, with 9 to 18 months of community custody. CP 118. This timely appeal followed. CP 133.

## **2. FACTUAL HISTORY**

Nicole Chafin and Albert Brown are sister and brother. Trial RP I p. 36. On December 7<sup>th</sup>, 2007 Albert and Nicole got into an argument outside of the El Rancho restaurant in Centralia over some of Albert's personal property. Trial RP I, p. 38-39. According to Nicole's account of the fight, Albert began yelling at her and she put her arms up and said "What are you going to do, hit me?" Trial RP I, p. 39. She claimed that Albert then swung at her and hit her on her cheekbone. Trial RP I, p. 39-40. She assumed she was hit with a fist because it broke her "flipper lip," which is a fake tooth. Trial RP I, p. 40. She testified he hit her a second time and then she fell to the ground. Trial RP I, p. 41. She received stitches for a split lip and her fake tooth was damaged. Trial RP I, p. 42.

Sabra Burgess knows both Nicole Chafin and Albert Brown. Trial RP II, p. 10. She was in a car near the El Rancho in a friend's car. Trial RP II, p. 11. She claimed she saw Albert walk up to Nicole and punch her. Trial RP II, p. 11. Contrary to Nicole's testimony, she testified there were three or four punches. Trial RP II, p. 12. She conceded that Nicole was also yelling at Albert. Trial RP II, p. 13. Sabra has convictions for forgery and theft, but lied during her testimony and initially said she only had "traffic tickets." Trial RP II, p. 13-14.

Gordon Prante testified on behalf of Albert. Trial RP II, p. 26. He saw the fight between Nicole and Albert outside of the El Rancho that night. Trial RP II, p. 27. Gordon said that Nicole started the argument, that she “flipped out” and started hitting Albert. Trial RP II, p. 27-28. In response, Albert pushed her away. Trial RP II, p. 27. Gordon then left because he didn’t want to get involved. Trial RP II, p. 27. Gordon described Nicole as having a “very hot temper.” Trial RP II, p. 30.

Albert testified that this incident occurred on the night of his wife’s birthday. Trial RP II, p. 33. His wife had gone out for a drink with Nicole. Trial RP II, p. 34. At some point he and Nicole began arguing about the location of some of his personal property and the argument became physical when Nicole smacked him twice in the face. Trial RP II, p. 34. He then pushed her away but she grabbed his shirt and drew back like she was going to hit him, so he slapped her with an open hand and she fell. Trial RP II, p. 35. Albert testified he was defending himself. Trial RP II, p. 35.

During the discussion of jury instructions, the court asked defense counsel whether they were seeking self-defense instructions, and counsel said they were not. Trial RP II, p. 48-49. Defense counsel asked for, and was granted, an instruction on the offense of assault fourth degree, believing it is a lesser included offense of assault third degree. CP 95-97,

Trial RP II, p. 49. Mr. Brown was convicted of the assault third degree, as well as possession of a controlled substance and unlawful use of drug paraphernalia. CP 109-112. The trial court sentenced Mr. Brown to 50 months in prison on Count I, as well as 9 to 18 months of community custody. CP 133.

**D. ARGUMENT**

**I. MR. BROWN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO SEEK AN INSTRUCTION AND ARGUE SELF DEFENSE**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense

counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

RCW 9A.16.020 provides that the use of force against another is not unlawful whenever (3) “necessarily 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 reasonable;” and whenever (4) “reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person’s presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public.”

Here, Mr. Brown was denied effective assistance of counsel where his attorney declined to present the defense of self-defense. The only viable defense in this case was self-defense, and the testimony by Mr. Brown and his witness, Gordon Prante, supported self-defense. Both Mr.

Brown and Gordon testified that Nicole was the aggressor and attacked Mr. Brown.

“To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable... (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor.” *State v. Callahan*, 87 Wn.App. 925, 929, 943 P.2d 676 (1997) (internal citations omitted).

When questioned by the court about whether he sought instructions on self-defense, counsel suggested that he was choosing the instruction on assault fourth degree (which, it should be noted, is *not* a lesser included offense of assault third degree) in lieu of self-defense. Such an either-or choice was not necessary. Antagonistic defenses are not prohibited in Washington. *Callahan* at 930-31. Defense counsel could have presented both defenses, and it makes little sense that he didn't given that both defense witnesses gave testimony which exclusively suggested self-defense. There was no legitimate tactical basis for declining to present self-defense, particularly where counsel was not being asked to choose between that and assault fourth degree. Mr. Brown was denied effective assistance of counsel and should be granted a new trial.

**II. THE SENTENCE ON COUNT I EXCEEDS THE  
MAXIMUM PENALTY WHERE THE PERIOD OF  
COMMUNITY CUSTODY EXCEEDS 50 MONTHS.**

The trial court sentenced Mr. Brown to 50 months in prison on Count I, and added 9 to 18 months of community custody. The maximum penalty for assault third degree is 60 months in prison. Thus, the trial court was not permitted to order more than 10 months of community custody. “Under the SRA, a court may not impose a sentence in which the total time of confinement and supervision served exceeds the statutory maximum.” *State v. Linerud*, No. 60769-3-I (Dec. 29, 2008); RCW 9.94A.505 (5). A court does not comply with this requirement by simply noting on the judgment and sentence that the period of community custody combined with the period of incarceration cannot exceed the statutory maximum, leaving it to the Department of Corrections to determine the period of community custody once the period of earned early release has been determined. *Linerud* at p. 3. “[T]he SRA requires courts to impose a determinate sentence, which is a ‘sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, [or] of community supervision.’” *Linerud* at p. 3; RCW 9.94A.030 (18). A sentence must be determinate, and as such the community custody portion, along with the incarceration

portion of the sentence, must be specified in the judgment and sentence and it cannot exceed the statutory maximum. *Linerud* at p. 3.

Here, Mr. Brown must be re-sentenced. The court should be allowed to either specify that the community custody range is 9 to 10 months rather than 9 to 18 months, or to re-sentence Mr. Brown to a lesser period of incarceration in order to accommodate a community custody period of greater than 10 months. This decision lies within the discretion of the trial court.

**E. CONCLUSION**

Mr. Brown should receive a new trial. Alternatively, he must be re-sentenced.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February, 2009.

  
ANNE M. CRUSER, WSBA#27944  
Attorney for Mr. Brown

## APPENDIX

1. RCW 9A.16.020 The use, attempt, or offer to use force upon or toward the person of....

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction;

(2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody;

(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;

(4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;

(5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to the offender's personal safety;

(6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the

person.

2. **RCW 9.94A.505** (1) When a person is convicted of a felony, the court shall impose....

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range established in **RCW 9.94A.510** or **9.94A.517**;

(ii) **RCW 9.94A.700** and **9.94A.705**, relating to community placement;

(iii) **RCW 9.94A.710** and **9.94A.715**, relating to community custody;

(iv) **RCW 9.94A.545**, relating to community custody for offenders whose term of confinement is one year or less;

(v) **RCW 9.94A.570**, relating to persistent offenders;

(vi) **RCW 9.94A.540**, relating to mandatory minimum terms;

(vii) **RCW 9.94A.650**, relating to the first-time offender waiver;

(viii) **RCW 9.94A.660**, relating to the drug offender sentencing alternative;

(ix) **RCW 9.94A.670**, relating to the special sex offender sentencing alternative;

(x) **RCW 9.94A.712**, relating to certain sex offenses;

(xi) **RCW 9.94A.535**, relating to exceptional sentences;

(xii) **RCW 9.94A.589**, relating to consecutive and concurrent sentences;

(xiii) **RCW 9.94A.603**, relating to felony driving while under the influence of intoxicating liquor or any drug and felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

(b) If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; until July 1, 2000, a term of community supervision not to exceed one year and on and after July 1, 2000, a term of community custody not to exceed one year, subject to conditions and sanctions as authorized in **RCW 9.94A.710** (2) and (3); and/or other legal financial obligations. The

court may impose a sentence which provides more than one year of confinement if the court finds reasons justifying an exceptional sentence as provided in RCW **9.94A.535**.

(3) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

(4) If a sentence imposed includes payment of a legal financial obligation, it shall be imposed as provided in RCW **9.94A.750**, **9.94A.753**, **9.94A.760**, and **43.43.7541**.

(5) Except as provided under RCW **9.94A.750**(4) and **9.94A.753**(4), a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter **9A.20** RCW.

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(7) The court shall order restitution as provided in RCW **9.94A.750** and **9.94A.753**.

(8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

(9) The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW **71.24.025**, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

(10) In any sentence of partial confinement, the court may require the offender to serve the partial confinement in work release, in a program of home detention, on work crew, or in a combined program of work crew and home detention.

(11) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may, as part of any term of community supervision, community placement, or community custody, order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

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

STATE OF WASHINGTON, )  
 ) Court of Appeals No. 37703-9-II  
 ) Lewis County No. 07-1-00834-3  
 Respondent, )  
 )  
 vs. ) AFFIDAVIT OF MAILING  
 )  
 ALBERT LEE BROWN, JR., )  
 )  
 Appellant. )  
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ANNE M. CRUSER, being sworn on oath, states that on the 13<sup>th</sup> day of February 2009, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Lori Smith  
Lewis County Deputy Prosecuting Attorney  
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Chehalis, WA 98532

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Mr. Albert Lee Brown, Jr.

AFFIDAVIT OF MAILING- 1 -

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- (1) BRIEF OF APPELLANT
  - (2) RAP 10.10 (TO MR. BROWN)
  - (3) AFFIDAVIT OF MAILING

Dated this 13<sup>th</sup> day of February, 2009

  
ANNE M. CRUSER, WSBA #27944  
Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: Feb. 13, 2009, Kalama, WA

Signature: Anne M. Cruser