

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 38523-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Daniel Lewis, Jr.,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00346-1

The Honorable Judge David Edwards

Appellant's Reply Brief

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ARGUMENT

I. A PERSON MAY USE REASONABLE FORCE TO REPEL AN OFFENSE AGAINST THE PERSON.

No published opinion in Washington has addressed the applicability of self-defense to a charge of robbery. However, Washington courts have recognized that self-defense applies to crimes other than assault, and at least one other state has recognized self-defense as a defense to a robbery charge. *See, e.g., State v. Arth*, 121 Wn.App. 205, 87 P.3d 1206 (2004); *State v. Villanueva*, 862 A.2d 1195 (N.J., 2004).¹ Furthermore, under the reasoning in *Arth*, self-defense is available when the accused person is charged with robbery:

The self-defense statute does not expressly limit its application to assault or homicide. In fact, the statute's language appears to permit application of the defense *whenever* a person [such as the defendant] uses force toward another person... in an attempt to prevent an offense against him [the defendant].

Arth, at 210.

In this case, Mr. Lewis testified that Crocker assaulted him, and he denied taking anything from Crocker. RP (10/14/08) 82, 88. Under these circumstances, Mr. Lewis was entitled to use force to resist Crocker's

¹ In *Villanueva*, the defendant used limited force in self-defense against a father and son who interrupted his attempt to steal a car radio, attacked him with baseball bats, and later choked him. *Villanueva* at 1199.

assault, and thus was entitled to a self-defense instruction at trial. *Arth, supra*; RCW 9A.16.020(3). Respondent's argument assumes that Mr. Lewis committed the robbery—both the use of force and the taking. *See, e.g.,* Brief of Respondent, pp. 7, 8. This assumption ignores the rule that evidence is to be taken in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

Mr. Lewis clearly raised self-defense in his testimony. Because of this, the trial court should have instructed the jury on self-defense, and the failure to do so relieved the state of its burden to prove the absence of self-defense. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007).

II. APPELLANT CONCEDES THAT THE EVIDENCE DOES NOT SUPPORT A SECOND-DEGREE ROBBERY INSTRUCTION.

Appellate counsel misread the record, and concedes that the evidence introduced at trial does not support an inferior degree instruction on Robbery in the Second Degree.

III. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT VIOLATED MR. LEWIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Mr. Lewis stands on the argument made in his Opening Brief.

IV. MR. LEWIS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

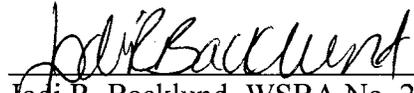
Mr. Lewis stands on the argument made in his Opening Brief.

CONCLUSION

Mr. Lewis's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on July 1, 2009.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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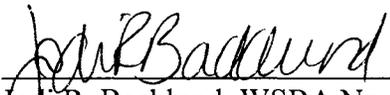
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 1, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 1, 2009.



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