

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY: cm
DEPUTY

No. 38523-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

DANIEL W. LEWIS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural background.

The defendant was charged by Information on July 3, 2008, with Robbery in the First Degree. RCW 9A.56.200(1)(a). (CP 1-2). The matter was tried to a jury commencing on October 14, 2008. The jury returned a verdict of guilty.

Factual background.

At the time of these events Thomas Crocker lived in Raymond, Washington. Mr. Crocker was a sixty-nine year old retired logger. (RP 5-6). On July 2, 2008, Mr. Crocker drove from his residence in Raymond to Aberdeen. He stopped at Walmart where he made some purchases. (RP 7, Exhibits 3, 4 and 6).

After he left Walmart, he ran into a female acquaintance of his, Andrea, outside the Crystal Steam Bath apartments. The two of them went upstairs to the second floor of the building. (RP 9). When they arrived upstairs the defendant was standing in the hallway. (RP 10, 75). Mr. Crocker and Andrea went to an apartment where they stayed for a short time. (RP 10-11). The defendant saw Andrea and Mr. Crocker in that

room briefly. The defendant testified that this room belonged to an acquaintance of his, "Kimmie." (RP 75).

Mr. Crocker and Andrea then went to her apartment where they talked for a time. Andrea asked for \$20 from Mr. Crocker, telling him that she was going to "get those guys high" so that she could get them out of the hallway. (RP 11). By this time, the defendant had gone back to Kimmie's apartment. (RP 77). A short time later, Andrea showed up at Kimmie's apartment with the \$20 Mr. Crocker had given her. (RP 77).

After Andrea left, Mr. Crocker remained in Andrea's apartment alone. About fifteen minutes later the defendant came into the room and asked to borrow a cigarette. Mr. Crocker gave him a Marlboro cigarette that was there in the room. The defendant then left. (RP 12). A short time later the defendant came back and asked to borrow another cigarette. (RP 12-13). Mr. Crocker explained to the jury that at this point the defendant "blind-sided" him. (RP 13).

The defendant hit him a number of times, including blows to the head and body. Mr. Crocker recounted that the defendant "beat the crap of me." (RP 13). The defendant demanded money then grabbed Mr. Crocker's wallet and checkbook that were in Crocker's pants pocket. Mr. Crocker had about \$150 and the Walmart receipt in the checkbook. (RP 14). The defendant grabbed the cash from the checkbook and threw the

wallet and checkbook on the bed in the room. (RP 14-15). He then left the room. During the course of the altercation, the defendant referred to himself as “Chilly Willy.” (RP 15).

Mr. Crocker walked to the Aberdeen Police Department, a short distance away, where he reported what had happened. He spoke to Officer Robert Kegel. (RP 16, 37). Kegel observed injuries to Mr. Crocker that were consistent with the beating described by Mr. Crocker. (RP 38, Exhibits 1, 2). Kegel took Mr. Crocker’s statement. (RP 39). This took approximately forty-five minutes. Crocker then took Officer Kegel back to Andrea’s apartment. When they knocked on the door they received no answer. The door was locked. (RP 49-50). Andrea never was located.

Kegel spoke to Officer Snodgrass who had also responded to the call. Snodgrass recognized “Chilly Willy” as being a nickname for the defendant. The defendant was located a short time later at the Pour House Tavern where he was placed under arrest. During a search of the defendant incident to arrest officers recovered Crocker’s Walmart receipt, (Exhibit 6), \$113 in currency, (Exhibit 5), a Marlboro cigarette, (Exhibit 8), and two knives, (Exhibits 7, 12), one of which was inscribed with the word “Chilly.” (RP 68, 43-46).

The defendant testified at trial. A good deal of his testimony coincided with that of Mr. Crocker. On the day of these events the defendant had been at the Crystal Steam Bath apartments with his friend Dion Obi and Obi’s girlfriend, Kimmie, who had an apartment upstairs.

The defendant was also acquainted with Andrea, Kimmie's neighbor. (RP 74). The defendant testified that he was preparing to leave with his friends when he saw Andrea and Mr. Crocker coming up the stairs. (RP 75). According to the defendant, Andrea asked if they could use Kimmie's room. At first she agreed and then changed her mind. According to the defendant, Mr. Crocker and Andrea then went back to Andrea's room. (RP 75).

Once Andrea and Mr. Crocker went into Andrea's room, the defendant and his friends went back to Kimmie's apartment where they were "waiting to get dope." (RP 77). Eventually, Andrea came back over to Kimmie's apartment with \$20. (RP 78-79). The defendant then went down the hall to make a phone call to arrange the transaction. (RP 79). The defendant testified that it was at this time that Andrea complained to him that Mr. Crocker was being "aggressive towards her in a manner that she didn't like." (RP 79). She asked him to tell Mr. Crocker to leave. (RP 79).

According to the defendant, he then went to Andrea's apartment and told Mr. Crocker that he was not wanted there and that he needed to leave. The defendant testified that Mr. Crocker "got all aggressive towards me and stuff and it was - it just went from there to a physical altercation. He came at me physically and I ended up defending myself." (RP 80). The defendant further explained that he told Mr. Crocker that he was an "old dirty pervert" and that he needed to leave. (RP 81). It was at

that point, according to the defendant, that Mr. Crocker told the defendant that he had given Andrea money to buy “dope” and “he came at me and that - that’s when the altercation came about.” (RP 82).

On cross-examination the defendant admitted hitting Mr. Crocker in the face, claiming that he was acting in self-defense. (RP 88). The defendant was asked to view pictures of Mr. Crocker’s injuries. When asked if that was how Mr. Crocker looked when he left the room, the defendant’s response was “I don’t recall.” (RP 90).

The defendant denied ever going through the wallet or the checkbook or taking anything from either. (RP 82). According to the defendant, Mr. Crocker eventually left and he went back to speak with Andrea. (RP 83).

RESPONSE TO ASSIGNMENTS OF ERROR

1. The defendant was not entitled to instructions on self-defense. (Response to Assignment of Error Nos. 1 and 2)

The defendant alleges that he was entitled to assert the defense of self-defense to the crime of Robbery in the First Degree. The defendant further asserts that the State of Washington had the burden of disproving self-defense beyond a reasonable doubt. Both of these assertions are incorrect.

The applicable statute is RCW 9A.16.020.

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

....

(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 possession or her possession, in case the force is not more than necessary.

Admittedly, self-defense may be available, under the right circumstances, to offenses other than assault. *State v. Arth*, 121 Wn.App. 205, 87 P.3d 1206 (2004).

In *Arth* the defendant was charged with malicious mischief for damage to the victim's motor vehicle. The defendant asserted the defense of "self-defense" alleging that he did the damage to the vehicle as part of his attempt to avoid being injured by the "victim" of the malicious mischief who was trying to run him over with the car. In that circumstance self-defense operated to negate one of the elements of offense. In essence, the defendant in *Arth* was asserting that he was not acting maliciously because the act was done to prevent injury to himself.

A defense of self-defense to a charge of robbery, is quite a different matter. Robbery is the theft of property from or in the presence of a another by the use or threatened use of force. Self-defense is not a defense to the theft of the property from the victim. The courts in at least two

states, Colorado and California, have recognized this. The use of force in “self-defense” is not a defense to the theft of property. The use of force, even if claimed to be in self-defense cannot be justification for a robbery. The lawfulness of the force used or threatened by the defendant is immaterial. *People v. Costa*, 218 Cal.App.2d, 310, 32 Cal. Rptr. 374 (1963). See *State v. Beebe*, 38 Colo.App. 80, 557, P.2d 840, 841 (1976).

The thrust of defendant’s argument is that one of the elements of aggravated robbery is the use of unlawful force. Thus, evidence tending to establish that the use of force was necessitated by self-defense, and was therefore, not unlawful, constitutes a complete affirmative defense to the crime. The defendant cites no authority to support this proposition, and we have found none.

What the defendant’s argument overlooks is that both the putting in fear and the taking of property constitute the gist of the offense of robbery. *People v. Thomas*, 181 Colo. 317, 509 P.2d 592 (1973); *People v. Small*, 177 Colo. 118, 493 P.2d 15 (1972); *Campbell v. People*, 124 Colo. 8, 232 P.2d 738 (1951). These elements of the offense are inseparable. Self-defense cannot justify the taking of a thing of value from the person or presence of another, and the lawfulness of the force used to accomplish the taking is immaterial. Therefore, self-defense is not an affirmative defense to the crime of aggravated robbery.

Self-defense is not a defense to the infliction of bodily injury during a robbery. RCW 9A.56.200 elevates Robbery in the Second Degree to Robbery in the First Degree if, during the commission of the

robbery or immediate flight therefrom, the defendant inflicts bodily injury. There is nothing in the statute that suggests that self-defense is involved at all. The statute requires only infliction of bodily harm. It does not require an assault on the victim. This is consistent with the holding in *Beebe*, *supra*, that the lawfulness of the force used to commit a robbery is immaterial.

Suppose the victim of the robbery picks a fight with the defendant and takes the first swing. Thereafter, the defendant overpowers the victim, inflicts greater injury, and then proceeds to steal the victim's wallet. Would anyone say that this was not a Robbery in the First Degree? Would anyone say that self-defense is justification for taking the wallet? Presumably, the legislature could have written the statute to require that the perpetrator intentionally assault the victim and thereby inflict bodily injury. This might implicate self-defense. The legislature chose not to do so.

The defendant further asserts that the State has the burden of proving the lack of self-defense. This also is incorrect. In a prosecution for assault, the State must prove the absence of self-defense. As explained in *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984), self-defense is defined by statute as a lawful act. It is impossible, therefore, for a person who acts in self-defense to be aware of facts or circumstances "described by a statute defining an offense." RCW 9A.08.010(1)(b)(i).

As the court explained, this is just another way of saying that proof of self-defense negates the intent element of second degree assault. Due Process, therefore, requires that the State must disprove self-defense.

A prosecution for Robbery in the First Degree, however, is an entirely different matter. There is no requirement that the defendant commit an assault. The only requirement is the theft of property by the use or threatened use of force. Robbery in the First Degree requires proof that the defendant inflicted bodily injury. It does not require an assault. Self-defense as asserted in this case, does not negate any element of the crime of robbery in the first degree.

This assignment of error must be denied.

2. The trial court properly declined to instruct the jury concerning Robbery in the Second Degree. (Response to Assignment of Error No. 3)

The law concerning when a defendant is entitled to instructions for a lesser degree of the charged offense is well settled. RCW 10.61.003 provides as follows:

Degree offenses - Inferior degree - Attempt. Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

This does not mean, however, that a defendant is entitled to instructions for a lesser degree of the charged offense in every case. Instructions on an inferior degree of the charged offense are proper only when:

(1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979).

In the case at hand, no one doubts that the “legal” test has been met. RCW 9A.56.190-.210 “proscribe but one offense.” The crime of robbery is divided into degrees. The only question herein is whether the factual test has been met, whether there is evidence that the defendant committed only the lesser offense of Robbery in the Second Degree.

The Washington courts have explained the factual showing that must be made before the court is required to instruct on a lesser degree of the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000):

Necessarily, then, the factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

In other words, instructions on the lesser degree of the charged offense should be given only “if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). The evidence must affirmatively establish the defendant’s theory of the case - it is not enough that the jury might disbelieve the evidence pointing to guilt. *State v. Fernandez-Medina*, 141 Wn.2d at 456; *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). The trial court is to review all evidence presented by both parties. *State v. Fernandez-Medina*, 141 Wn.2d at 456.

Examples of this principle abound. In *State v. Fowler, supra*, the defendant was charged with second degree assault. It was alleged that during a verbal altercation he pointed a gun at the victim. Defendant Fowler asked for an instruction for unlawful display of a weapon. The court characterized the testimony at trial as follows:

Fowler did not offer evidence at trial which would support a theory he intended to intimidate the Verbons with his gun or that he displayed his gun in a manner which would cause the Verbons alarm. Instead, his testimony only addressed whether he had a gun at all, and if he did, whether it would have been visible as he began to remove his shirt. This testimony served merely to discredit the Verbons’ testimony rather than support an instruction on the lesser included offense.

The same result was reached in *State v. Pacheco*, 107 Wn.2d 59, 70, 726 P.2d 981 (1986). Pacheco was charged with Robbery in the First

Degree. The only evidence at trial was that the person who committed the robbery was armed with a knife. The defendant denied committing the offense and denied that he was the person captured on the videotape of the robbery. The court in *Pacheco* held that since the only issue was identification of the defendant, the court properly denied instructions for the lesser degree of Robbery in the Second Degree.

The State would invite the court to review the entire record. Such a review will demonstrate clearly that there are no facts from which the trier of fact could conclude that only Robbery in the Second Degree was committed. The defendant asserts that he testified at trial that Mr. Crocker "...did not appear injured when he left the room." (Brief of Respondent, p. 11). This statement is not supported by the record. The defendant's testimony at trial, after being shown photos of Mr. Crocker's injuries was that he "could not recall" if this was how Mr. Crocker appeared when he left the room. (CP 90). The pertinent facts are outlined below.

The victim, Thomas Crocker, testified that the defendant came into Andrea's room and "blind-sided" him. Crocker was sitting in a chair. The defendant "...got me on the bed on my belly and he just beat the crap out of me." (RP 13). While he was beating up Mr. Crocker the defendant demanded money. The defendant took Crocker's wallet and checkbook from his pants pocket, went through them and grabbed the cash. (RP 14-15). The jury was shown photographs of the injuries that Mr. Crocker suffered as a result of the assault. (Exhibit 1, 2).

The defendant denied taking Mr. Crocker's money. He denied going through the wallet and checkbook. (RP 82, 89). According to the defendant he was asked to go into the room to tell Mr. Crocker to leave. He explained what happened when he went into the room. (RP 80, lines 11-18).

Q All right. So I'm wondering - did you go to talk to Mr. Crocker.

A Yes, I did.

Q Okay. Tell me what happened when you got there.

A I went told him that he wasn't wanted there and he needed to leave. He got all aggressive towards me and stuff and it was - it just went from there to a physical altercation. He came at me physically and I ended up defending myself.

The defendant expanded his testimony further during direct examination. (RP 81, lines 17 - 25, page 82, lines 1 - 7).

Q Okay. Okay. So where was - when you went in to talk to Mr. Crocker, where - do you remember where he was? Was he standing? Was he sitting? Or what was going on?

A He was standing.

Q Okay. And when you say he was being aggressive toward you, could you describe for the jury what you - what you saw?

A When I told him that he needed to leave the premises I didn't say - and I kind of termed - I told him he was an

old dirty pervert and that he needed to leave the premise and stuff and he wasn't wanted around there because of his actions weren't - what she was used to, I guess.

Q Okay. So what did he do though after you said that, specifically? I want to understand that.

A He got aggressive and said that he gave her money to get dope and stuff and he came at me and that - that's when the altercation came about.

Upon cross-examination, the defendant admitted hitting Mr. Crocker in the face. The defendant was unable to describe any injuries he may have suffered during the altercation. (RP 88, lines 12 - 25).

Q Okay. Did you hit Mr. Crocker in the face?

A In self-defense, yes.

Q Did you hit him more than once?

A There was - he was swinging on me. I swung on him twice is all I did.

Q Well, tell me about your injuries.

A There was none photographed.

Q What injuries did you have that the officer would have seen when he arrested you?

A I could describe injuries, but without photographs it would do no good.

Q So this 69-year-old man beat you up, is that what you're telling me?

A He had no problem coming at me
and stuff is what I'm saying.

During cross-examination the defendant was shown the photos of Mr. Crocker's injuries. When asked if that was how Mr. Crocker appeared when he left the room, the best the defendant could say was, "I don't recall." (RP 90, lines 11 - 19).

Q Have you seen the pictures of Mr.
Crocker's injuries?

A Yes, I have.

Q All right. Did you do this to him?

A I don't - I have not seen - this is the
second time that I've seen it.

Q Would you like to look at them?

A (Perusing.)

Q Is that how Mr. Crocker looked when
he went out of the room?

A I don't recall.

A person commits Robbery in the Second Degree when he commits robbery as defined by RCW 9A.56.190. Robbery in the Second Degree is elevated to Robbery in the First Degree, based upon the facts of this case, because it is alleged that the defendant committed a robbery and inflicted bodily injury on Mr. Crocker. RCW 9A.56.200(1)(a)(iii). The question then is two-fold: (1) is there any evidence in this case that Thomas Crocker did not suffer bodily injury? (2) is there any evidence that the injuries were not inflicted by the defendant during the robbery?

The term “bodily injury” is defined by statute. RCW

9A.04.110(4)(a):

“Bodily injury”...means physical pain or injury, illness, or an impairment of physical condition.

The officer described the injuries as did Mr. Crocker. Photographs of the injuries were admitted at trial. (RP 16, 38, Exhibits 1, 2). No reasonable trier of fact could conclude that Mr. Crocker did not suffer bodily injury. It would have been foolish for the defendant to argue that there was no evidence of bodily injury.

The second possibility would be for the jury to speculate that Mr. Crocker’s injuries were inflicted at a different time and place or by some other individual and not during the robbery. There is no evidence of any kind from which the jury could make that leap of faith. The only evidence in the record is that the defendant hit Mr. Crocker and inflicted the injuries upon him during the robbery.

Indeed, the defendant never presented any evidence that some third person inflicted the injuries on Mr. Crocker. He could not have made such a showing under the facts of this case. To introduce such evidence there would necessarily have to have been a foundation that would make it relevant. He could not have randomly speculated that some third person must have injured Mr. Crocker. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992).

Even if he could have shown that some third person may have had motive or opportunity to assault Mr. Crocker that would not have been adequate. A proper foundation must include evidence connecting that party with the actual assault and not mere opportunity to commit the crime. *Rehak*, 67 Wn.App. at 162-63; *State v. Maupin*, 128 Wn.2d 918, 927, 913 P.2d 808 (1996).

If the defendant had no basis to present such evidence, then the jury certainly had no basis to speculate that such evidence might exist. The only evidence in this case is that the defendant hit Thomas Crocker in the face and body and inflicted the injuries upon him. There is no evidence that some third person inflicted the injuries upon Mr. Crocker.

In short, the only evidence was that either Robbery in the First Degree occurred or no robbery at all. There was no basis to speculate that only Robbery in the Second Degree occurred.

The defendant's argument regarding the application of the State Constitution, while novel, totally misses the mark. This is not about whether the defendant has a right to a jury trial under Article 1, § 21 of the Washington State Constitution. He most certainly does have that right. Further, this is not about whether the defendant has the rights enumerated in Article 1, §22 of the Washington State Constitution. This case is about whether, on its facts, the defendant was entitled to an instruction for Robbery in the Second Degree.

The law in Washington has been the same at least since the enactment of RCW 10.61.003. The Washington Supreme Court has set forth the standard as to when a defendant is entitled, under state law, to instructions concerning a lesser degree of the charged offense. *State v. Fernandez-Medina, supra*. Is the defendant now suggesting that, under the Washington State Constitution, the rules are different? Is the defendant now entitled to instructions a lesser degree charged crime regardless of whether there is any evidence to support them?

This is not about whether state or federal constitutional law applies. This is about whether the defendant can meet the standard established in *Fernandez-Medina*. The defendant has not done so.

This assignment of error must be denied.

3. The State did not commit misconduct during final argument. (Response to Assignment of Error Nos. 4 and 5)

The defendant has taken a very small portion of the State's final argument out of context and tried to raise it to the level of prosecutorial misconduct. Upon review of the entire final argument made by the State, this court must find that the jury was asked to do nothing more than use its good common sense, apply the facts to the law, and decide what they believe the facts to be. At no point did counsel for the State express a personal opinion about the guilt of the defendant or tell the jury that they had to disbelieve the complaining witness in order to acquit.

The State began final argument by giving the jury an overview of the law and their responsibility. The jury was reminded they had the duty to “act impartially and with an earnest desire to determine and declare the proper verdict.” Counsel for the State expressed the belief that the jury could do this and that the jury could refuse to decide the case on extraneous matters not related to the truth of the charge. (RP 98). Counsel for the State explained the concept of reasonable doubt. (RP 98).

As to the credibility of the witnesses, the jury was told the following. (RP 99, lines 3-11).

Hopefully, these instructions are written in a way that a lay person can understand. I’m going to suggest that you should approach this from the angle of what was the testimony and what makes sense. Every witness is entitled, I believe, to be believed until you find some reason that doesn’t make sense, something that’s inconsistent, something in the testimony, something in the evidence. And when you do that, you will come to the conclusion that Mr. Crocker was robbed.

Thereafter, the State properly spoke to the jury about the various facts of the case and urged them to consider what made sense. For instance, when Mr. Crocker gave \$20 to Andrea did she see more money in the checkbook? Did it make sense that she went out in the hall and told the defendant about the money? (RP 99). Did it make sense that a sixty-nine-year-old man would start a fight with the defendant? (RP 100-101). Did the defendant’s claim that he did not take the money and did not go through wallet make sense in light of the fact that the defendant ended

with the Walmart receipt that Mr. Crocker had on his person at the time he was robbed? (RP 101).

These are all legitimate arguments. No one claims otherwise. The defendant's response was to accuse Mr. Crocker of lying. (RP 103):

You know, we're just not getting the whole story from Mr. Crocker about what happened that day. And I'm going to pointed [sic] out a few reasons why I think that he's just not - has not come into this courtroom and told you the truth.

The State responded to this argument in rebuttal. Counsel for the State did not express his personal opinion about Mr. Crocker's credibility. Indeed, the portion of the record cited by the defendant at page 21 of the Brief of Respondent has been taken out of context. The entire argument was as follows (RP 106-07).

Your Honor, Counsel. I get the last word because the State of Washington has the burden of proof. And I get the last word because there's things that need to be said in response to what Mr. Campbell has said. All right. Mr. Campbell has told you in so many words that Mr. Crocker is lying about what happened, that he made this whole thing up apparently about the robbery, that he went down to the police station to tell some of the police that he had been robbed. You know, he could have said, I have been beat up. But no, he told the truth about what happened, that he had been beaten up and robbed and that his money and his wallet and his checkbook had been rifled through, his money had been taken. Mr. Crocker doesn't know this guy from adam. Mr. Crocker has no motive, no bias, no reason to go out of his way to try to implicate the defendant. If what the defendant says

happened, Mr. Crocker would probably could have just walked and said, I've learned a lesson, don't hang around the Crystal Steam Baths. But that's not what happened.

In context it is immediately apparent that counsel for the State is not arguing his personal opinion. The State was simply arguing what made sense in the entire context of the case, especially in light of the allegation made by counsel for the defendant that the victim lied. The jury, in the end, is being asked "Who do you believe?"

A statement by counsel for the state that clearly expresses his or her personal opinion as to the credibility of a witness or the guilt of the defendant is misconduct. *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59 (1983). Misconduct does not occur, however, unless it is "clear and unmistakable" that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *State v. Price*, 126 Wn.App. 617, 653, 109 P.3d 27 (2005). Counsel in this matter was not arguing personal belief.

In *State v. Papadopoulos*, 34 Wn.App. 397, 399, 662 P.2d 59 (1983), counsel for the State during final argument stated, "Patty and Theil have testified honestly before you" and later said, "the gist of what they have said has been the truth." The court in *Papadopoulos* found that this argument did not amount to a situation in which counsel was "vouching" for the credibility of the witness." *Papadopoulos*, 34 Wn.App. at 400:

A statement by counsel clearly expressing his personal belief as to the credibility of the witness of the guilt or innocence of the

accused is forbidden. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *State v. LaPorte*, 58 Wn.2d 816, 365 P.2d 24 (1961). Here, the entire argument in context reveals the deputy prosecutor merely called the jury's attention to those facts and circumstances in evidence tending to support the credibility of Mr. and Mrs. Papadopoulos.

Counsel for the defendant, an experienced trial attorney, understood that the State was not arguing personal opinion. No objection was made.

Even if by some stretch this court were to find that the argument was improper, there can be no showing that it was prejudicial to the defendant. In order for reversal of the conviction, the defendant must show a substantial likelihood that the allegedly improper argument affected the jury's verdict. *State v. Riley*, 69 Wn.App. 349, 353, 848 P.2d 1288 (1993). He must make a showing that the misconduct was so egregious that the resulting prejudice could not have been obviated by a curative instruction. No such showing has been made herein.

Likewise, the State made no argument in which it asserted, in any way, that in order to acquit they must disbelieve the testimony of Mr. Crocker. Indeed, the portion of the record cited by the defendant is clear on its face. The State is asking the jury to decide who they believe. (RP 107, lines 10-14).

Do you believe that Mr. Crocker isn't telling you the whole story or do you believe that the defendant is fudging on the story?
Do you believe that Mr. Crocker took a swing or do you believe that the defendant beat him up to take the money and the wallet?

The jury is the sole and exclusive judge of the credibility of the witnesses. Is the State entitled to ask them to consider all the evidence and decide who they believe? Has it really come to the point that the State cannot make such an argument?

Simply stated, there was no prosecutorial conduct. This assignment of error must be denied.

4. The defendant received effective assistance of counsel. (Response to Assignment of Error Nos. 6-9)

To demonstrate ineffective assistance of counsel, the defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable

probability that except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). Competency of counsel is determined based upon the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). There is a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Since this is a direct appeal, and no personal restraint petition has been filed, the issues raised herein must be decided based upon the trial records identified on this appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Self-Defense.

Counsel's decision to forego self-defense instructions was not conduct which fell below an "objective standard of reasonableness." Self-defense is not a defense to Robbery in the First Degree. The defendant was not charged with assault. An assault is not part of the elements of Robbery in the First Degree. Self-defense is not a defense to the taking of the property. There is no Washington case law that remotely suggests that self-defense is a defense to the charge of Robbery in the First Degree. The only authority on the matter holds that self-defense is not a defense to robbery. *People v. Costa, supra*; *State v. Beebe, supra*. Trial counsel cannot be deficient for not reaching out to try to manufacture this new and novel theory.

Counsel for the defendant had to decide on a trial strategy, based upon the defendant's story about what happened. The defendant denied robbing Mr. Crocker of his wallet, checkbook and money. The defendant admitted hitting Mr. Crocker, who he says came after him first. In this context, does it make better sense for the defendant to argue "I didn't commit the robbery" and to further argue "I was the victim. He assaulted me"? In that context, would trial counsel really want to interject a claim of self-defense that would allow the State to ask the jury how in the world taking the money was necessary to defend himself? Does it not make better sense to simply argue his alleged facts and paint himself as the victim of an assault? This was a legitimate trial strategy, especially in light of the fact that self-defense is not a recognized defense to Robbery in the First Degree.

There is nothing in the record to suggest that counsel's approach was anything other than legitimate strategic and tactical decision. This court cannot go outside the record and start making presumptions about what it thinks trial counsel should have done. *McFarland, supra*, 127 Wn.2d at 336; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Alleged failure to impeach Thomas Crocker.

Counsel for the defendant was not incompetent for failing to attack Mr. Crocker's credibility through use of his prior drug convictions. Taken

in its entire context, the record does not support a determination that an attempt to impeach the victim on a collateral matter would have been proper.

Once they were at Andrea's apartment, Mr. Crocker admittedly gave Andrea \$20. She explained that "...she was going to get these guys high so she could get them out of the hallway." (RP 11). Mr. Crocker did not testify that her intent to was to bring the drugs back to the apartment or share them with him. The defendant, essentially corroborated this information. He testified that after he ran into Andrea and Mr. Crocker in the hallway, that he went back to Kimmie's apartment. They were waiting to make a purchase of "dope." (RP 76-77).

Q So . . . All right. So then that - they were told no, or that plan changed or something?

A The plan changed, yes. No was the answer to that.

Q Okay. Then what happened next as far as you could tell?

A Everybody - we left - there - their part of the area we was getting to leave anyways and stuff and Dion - or Andrea and Mr. Crocker went inside.

Q To where?

A Inside Andrea's apartment.

Q Okay. Okay. And so then what happened?

A Then what happened is we - we went back over - we was getting ready to leave, we went back over to Kimmie's and stuff, we was waiting - we was waiting to get dope.

Q Okay. All right. Did wait - what does that mean, waiting to get dope?

A We was waiting for a drug deal, was waiting around to get dope. We ...

Q Okay. Did that - did that happen or can you tell me sort of -

A It turned into a waiting game basically. We was waiting for - to come to where we was at and stuff.

Q Okay. The - was somebody within your group going to buy, as you say, dope?

A Yes.

Andrea eventually showed up at the room with \$20 to purchase "dope."
(RP 79).

The State did not raise the issue of Mr. Crocker's character during its direct examination. Mr. Crocker testified to the circumstances of the day in question. All the jury was told on direct examination concerning Mr. Crocker's character was that he was a retired logger who lived in Raymond. The State did not put Mr. Crocker's character in issue. The one and only time that Mr. Crocker's character may have been placed in issue was during his cross-examination by counsel for the defendant when counsel accused Mr. Crocker of going to the Crystal Steam Bath for the purpose of buying drugs. (RP 21).

Q All right. So - why did you go - what you were going to do with Andrea? Why were you hanging out with Andrea?

A I stopped to talk to her.

Q Okay. Were you - were you there to buy drugs?

A No, I wasn't. I don't do drugs.

Is it reasonable to believe that Mr. Crocker, by this one sentence, placed his character in issue? The issue of his drug use was collateral to the charges herein. The defendant has not cited any case in which a witness is deemed to have "opened the door" to impeachment by such a one sentence response to cross-examination on a collateral matter. That is because there is no authority to allow such impeachment under these circumstances.

In *State v. Smith*, 115 Wn.2d 434, 443, 798 P.2d 1146 (1990) a defendant who was charged with theft, made a point of the fact that he was on very limited income and was unemployed, claiming that he was only living on the money that he had in his bank account. The State was properly allowed to ask the defendant if it was not true that he was also receiving \$400 in public assistance.

In *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974), the defendant placed her character in issue by testifying to "...her work experience, that she had attended college, that she had been a candidate in the Miss Yakima pageant, and that she had participated in glee club, drill

team, pep club, and was treasurer of a science club.” *Renneberg, supra*, 83 Wn.2d at 738. The court in *Renneberg* determined that the defendant, by her testimony, had tried to paint a picture of a person most unlikely to commit the crime of grand larceny. *Renneberg, supra*, 83 Wn.2d at 738.

A similar result was reached in *State v. Brush*, 32 Wn.App. 445, 452, 648 P.2d 897 (1982) when the defendant testified, at length, on direct examination, regarding his background and character.

Indeed, case law supports a determination that the remarks of Mr. Crocker during cross-examination did not “open the door” to impeachment by prior convictions. In *State v. Downs*, 11 Wn.App. 572, 575, 523 P.2d 1196 (1974), a prosecution for Assault in the Second Degree, the Court of Appeals held that the trial court properly disallowed proof of other misconduct of the defendant when the defendant testified during cross-examination that he would never hit anyone unless he was provoked. Similarly, in *State v. Beel*, 32 Wn.App. 437, 442-43, 648 P.2d 443 (1982), the Court of Appeals held that the defendant in a murder prosecution who allegedly ran his victim down with a car did not “open the door” to cross-examination concerning other misconduct by his statement, “I would never intend to run over anyone.”

In the case at hand, the State made no attempt of any kind to place Mr. Crocker’s character in evidence. This one response came up when the defendant accused him of being at the Crystal Steam Bath apartments to purchase drugs. The trial court had the discretion in this matter to exclude

such impeachment by a prior conviction. *State v. Smith, supra*, 115 Wn.2d at 444. All of the facts and circumstances were before the jury. Everyone knew that the \$20 had been given to Andrea for the purpose of purchasing “dope.” What does it add to the mix whether she was going to purchase the drugs for the defendant or Mr. Crocker? Trial counsel could certainly have determined that he had made his point and that the trial court, in all likelihood, having previously denied the motion to impeach would deny it again. The trial counsel could also have concluded, as is supported by the case law, that Mr. Crocker, by this remark elicited through cross-examination, had not placed his character in issue.

Once again, counsel for the defendant now claims that trial counsel was incompetent because he failed to pursue a trial tactic that is not supported by the law or the evidence in the case.

This assignment of error must be denied.

Final argument.

There was no improper argument during the State’s final argument. Counsel for the defendant cannot be found deficient for failing to object to legitimate argument made by the State.

CONCLUSION

For the reasons set forth, all assignments of error should be denied.

The court should affirm the conviction.

Respectfully Submitted,

By: *Gerald R Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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

STATE OF WASHINGTON,

Respondent,

No.: 38523-6-II

v.

DECLARATION OF MAILING

DANIEL W. LEWIS,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 6-8-09 day of June, 2009, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501, and Daniel W. Lewis 729635; Clallam Bay Corrections Center; 1830 Eagle Crest Way; Clallam Bay, WA 98326, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 8th day of June, 2009, at Montesano, Washington.

Barbara Chapman