

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY Ca DEPUTY

No. 38523-6-II

COURT OF APPEAL DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL WILLIAM LEWIS, JR.,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00346-1
The Honorable Judge David L. Edwards

APPELLANT'S PRO SE
STATEMENT OF ADDITIONAL GROUNDS RAP 10.10

Daniel Lewis, Jr., DOC#729635
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APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

Procedural background

Appellant Daniel William Lewis, Jr., was charged by Information on July 3, 2008, with Robbery in the First Degree. RCW 9A.56.200(1). CP 1-2. The matter was tried before a jury on October 14, 2008. The jury returned a verdict of guilty as charged. CP 39. On October 27, 2008, Lewis was sentenced to 68 months in prison. CP 45.

The State of Washington was represented by Chief Deputy Criminal Prosecuting Attorney Gerald R. Fuller, WSBA 5143.

Appellant Daniel William Lewis, Jr., was represented by Defense Counsel Scott A. Campbell, WSBA 19595.

Pretrial. (RP) August 4, 2008. On August 4, 2008, Lewis agreed to waive his right to a speedy trial, and agreed to a new commencement date of September 1, 2008, extending the last allowable date for trial to November 1, 2008. CP 18; RP 1-4. The court accepted Lewis' waiver and entered an order continuing trial from August 26, 2008, to October 14, 2008. CP 19-20. Defense Counsel Scott Campbell advised the court that he discussed the matter with Lewis and they agreed a waiver would be in his best interests so Campbell could locate witnesses and have additional time to prepare for trial. RP 1-4.

Pretrial. (RP) September 29, 2008. The State offered Lewis a plea agreement. Lewis rejected the offer and invoked his right

to trial. RP 10.

Pretrial. On October 9, 2008, Defense Counsel Scott Campbell filed a RESPONSE TO DEMAND FOR DISCOVERY AND NOTICE OF CLAIM OF SELF DEFENSE. CP 30. For defense witnesses Campbell listed "all individuals disclosed in plaintiff's discovery, and provided notice that Lewis would claim the force used, if any, was lawful and that Lewis acted in self-defense." CP 30, page 1, Nos. 1 & 4.

Pretrial. (RP) October 13, 2008. On October 2, 2009, the State filed a MOTION IN LIMINE and declaration in support asking the trial court for an order precluding any reference during trial that Andrea Flores may be a prostitute. CP 27-29. On October 13, 2008, the In Limine motion was heard. RP 11-15. Defense Counsel Scott Campbell did not oppose the motion or lodge an objection. RP 12. The court granted the motion. CP 35; RP 13, lines 13-16.

Post-trial. On November 6, 2008, Defense Counsel Scott Campbell filed a MOTION AND AFFIDAVIT FOR PAYMENT OF COURT APPOINTED ATTORNEY FEES. CP 48-49. Campbell declared under oath that he met with Lewis on July 27, 2008, for 1.5 hours, and on October 12, 2008, for 3.5 hours, totaling 5 hours. Id. He also declared that he tried to call witness Andrea Flores on September 30, 2008. Id.

Post-trial. On November 6, 2008, Campbell also filed a MOTION FOR PAYMENT OF INVESTIGATION FEES. CP 50-51. The itemization

declares that investigator John Delia spent a total of 1.5 hours attempting to locate (ATL) witness Andrea Flores in Aberdeen on September 29, 2008. Id. (Note: The ATL witness/victim in the Raymond area on 9/12/08 and 9/26/08 refers to the victim Thomas Crocker). Id.

Factual background

Trial. (RP) October 14, 2008. Thomas Crocker (the alleged victim) testified that, on July 2, 2008, he drove from Raymond, where he lived, to Aberdeen to visit Sydney's Casino. RP 5, 8, 19. He claimed to have \$150 dollars cash in his checkbook, which he carried in his back pocket. RP 14, 24. On his way to the Casino, he stopped at Walmart to purchase some cat litter and a litter box. RP 7. According to Crocker, he left Walmart with a receipt that he put in his checkbook with the \$150 dollars cash. RP 14.

Shortly after leaving Walmart, Crocker ran into an acquaintance of his, Andrea Flores, who was outside the Crystal Steam Bath apartments. He admitted knowing Flores for about two or three weeks, and that he had seen her on two occasions prior to July 2, 2008. RP 19-21. He testified that she invited him to come up to her apartment. RP 9. He drove around the block, parked in the alleyway alongside the Crystal, and then the two of them went upstairs to the second floor of the apartment building. RP 10, 75. When they arrived upstairs Crocker seen

Lewis and some other guys in the hallway, and this was the first time he'd seen Lewis. RP 10, 75. As they proceeded, Flores asked Kimmie if they (i.e., Flores & Crocker) could use Kimmie's room. Kimmie said yes at first, but then changed her mind. RP 10-11, 25, 75-77.

Crocker and Flores then went to her apartment. Crocker testified that Flores asked him for \$20 dollars, telling him that she was going to "get those guys high" so she could get them out of the hallway. RP 11. He gave her the \$20 and she left. RP 11-12, 23. Crocker testified that this was the last time he'd seen her. RP 11.

After Flores left, Crocker remained in her apartment alone. Crocker testified that he sat there watching T.V., but that he could not remember what he was watching. RP 11, 27. About fifteen minutes later Lewis came into the room and asked to borrow a cigarette. According to Crocker, he gave Lewis a Marlboro cigarette and Lewis left. RP 12. A short time later Lewis came back and asked to borrow another cigarette. RP 12, 13. Crocker maintained that Lewis never asked him to leave Flores' apartment. RP 94. Crocker testified that Lewis turned to walk out and then he spun and 'blind-sided' (hit) him. RP 13. Crocker denied ever taking a "swing" or throwing a "punch" at Lewis. RP 94. Crocker testified further that Lewis demanded money then grabbed his wallet and checkbook from his pants pocket. He stated that Lewis grabbed

the cash from his checkbook and threw the wallet and checkbook on the bed in the room. RP 14-15. Crocker testified, that during the course of the altercation, Lewis referred to himself as "Chilly Willy" and said "he would kill me if I went to the police." RP 15, 31.

Crocker walked to the Aberdeen Police Department, where he reported the alleged incident. He spoke to Officer Robert Kegel. RP 16, 37. On first contact, Kegel observed injuries and asked Crocker if he needed an ambulance. He testified that Crocker responded "No, he was okay. He spoke clearly and succinctly." RP 39. Kegel then took Crocker's statement. RP 39. Kegel testified that Crocker told him he was missing his eyeglasses and about \$150 dollars. RP 40. This took approximately thirty to forty-five minutes. Crocker then took Officer Kegel back to Flores' apartment to verify the location and attempt to find Crocker's eyeglasses. RP 40-41. When they knocked on Flores' door, apartment number six, they received no answer and the door was locked. RP 41, 49-50. Andrea Flores was never located. RP 41.

On cross-examination, Kegel admitted that he didn't recall asking if Crocker had identification, a wallet or checkbook, and that he did not remember seeing a checkbook in Crocker's hand. RP 51-52. Kegel also admitted that no one from the police department went back to the alleged crime scene (apartment #6),

to take photographs or investigate the layout of the apartment.
RP 53, 71.

Kegel spoke to Officers Andy Snodgrass and Gary Sexton who had also responded to the call. RP 41, 49, 66. Snodgrass recognized "Chilly Willy" as being a nickname for Daniel Lewis. RP 41-42, 66-67. Lewis was located a short time later at the PourHouse Tavern where he was placed under arrest. RP 42-43, 67. Kegel testified that Officer Snodgrass arrested Lewis. RP 43, 67. While searching Lewis incident to arrest, Kegel testified that he found Crocker's Walmart receipt in his pants pocket, \$113 in U.S. currency in his left front pocket, a single Marlboro filter tip cigarette in his coat pocket, and two folding knives in his pants pocket. RP 43-46.

Officer Snodgrass testified that he believed a hyperdermic needle was taken out of Lewis' left rear pocket and some cash out of his left front pocket, with miscellaneous other items, but that he really didn't recall. RP 68.

Lewis testified at trial. On July 2, 2008, Lewis had been at the Crystal Steam Bath apartments visiting his friend Dion Obi and Obi's girlfriend, Kimmie, who had an apartment upstairs. Lewis was also acquainted with Andrea Flores, Kimmie's neighbor who lived directly across the hallway. RP 74, 78, 80. Lewis testified that he was preparing to leave with his friends when he saw Flores and Thomas Crocker (the alleged victim) coming up

the stairs. RP 75, 87. Neither Crocker nor Lewis knew each other and, until that moment, had never seen each other before. RP 10, 13, 89. As they approached, Flores asked if her and Crocker could use Kimmie's room. At first Kimmie agreed, but then changed her mind. RP 75-76. With no other room available, Flores then took Crocker to her own apartment, #6 in the Crystal. RP 75.

Once Flores and Crocker went into Flores' room, Lewis and his friends returned to Kimmie's apartment where they were waiting to buy dope (narcotics). RP 77. Eventually, Flores returned to Kimmie's apartment with a \$20 dollar bill. Flores gave Lewis the bill folded in half and then in half again. RP 78-79. Lewis testified that he went down the hall to make another phone call to arrange the transaction. RP 79. On the way back from making the phone call, Flores told Lewis that Crocker was being "aggressive towards her in a manner that she didn't like." RP 79. She asked Lewis to tell Crocker to leave her apartment because "she didn't feel safe there at that time." RP 79-80.

Lewis testified that while Flores remained at Kimmie's apartment, he went and told Crocker that he was not wanted there and needed to leave the premises. When he entered the apartment Crocker was standing. Lewis maintained that there was no T.V. in the apartment. All of the tenants were moving out of the apartment because it was being renovated. As a consequence of everyone preparing to move out, Lewis testified that "everything

was all boxed up," and there was no T.V. in Flores apartment, one that was hooked up anyway. RP 63(ref), 80-81. Lewis also maintained that Crocker "got all aggressive" towards him which turned the incident into "a physical altercation." Lewis testified that "Crocker came at me physically and I ended up defending myself." RP 80. Lewis explained that he told Crocker he was an "old dirty pervert" and that he needed to leave the premises because his "actions weren't what she (Flores) was used to." RP 81-82. Lewis testified that after asking Crocker to leave he became aggressive and said that he gave Flores money to buy "dope ... and he came at me and that - that's when the altercation came about." RP 82.

Lewis testified that he did not go through Crocker's wallet or checkbook or take any cash from either of them. RP 82, 89. Lewis admitted that Crocker offered him a cigarette, but denied every asking Crocker to borrow one. He maintained that he "did not borrow anything from Crocker." RP 84. Lewis also denied telling Crocker that he would kill him if he talked to the police or went to the police. RP 83. Lewis further denied telling Crocker his nickname was "Chilly Willy." RP 83.

On cross-examination Lewis testified that Crocker was swinging on him, and that he "swung on Crocker twice" only in self-defense. RP 88. Lewis maintained that Crocker was upset and took a swing at him because he was asked to leave Flores' apartment. RP 90.

Lewis denied taking any money from Crocker's wallet or checkbook. RP 89. Lewis testified that he had \$150 dollars of his own, consisting of three fifty dollar bills which was given to him by his mother, and that he had \$113 dollars when he was arrested. RP 87, 91. Lewis also maintained that Crocker knew his nickname was "Chilly Willy" because Flores announced it when they first seen each other in the apartment hallway; that this was a way of saying "Hi!" RP 89. Lewis further maintained that the only way he could have got Crocker's Walmart receipt was when Flores handed him the folded \$20 dollar bill. RP 91.

STATEMENT OF THE CASE

On July 2, 2008, sixty-nine year old Thomas Crocker traveled from his home in Raymond to Aberdeen to meet his "friend," twenty-eight year old Andrea Flores. CP 28. Crocker had known Flores for about two or three weeks, and had been with her on two occasions prior to that date. Flores lived in Apt.#6 on the second floor of the Crystal Steam Bath apartments. She operated as a part time prostitute in that area for convenient access to her room. On the way to see Flores, Crocker stopped at Walmart to purchase some items. He left Walmart at 6:15pm with a receipt and about \$100 or \$150 dollars. His sole purpose for going to see Flores was to solicit sexual favors from her in exchange for money. He drove straight from Walmart directly to the Crystal

looking for Flores on her beat. After spotting her, he stopped and she promptly invited him to her room. He drove around the block and parked his vehicle in the alley alongside the Crystal.

On the way up to Flores' room, they encountered Daniel Lewis (Appellant), Dion Obi, and Obi's girlfriend Kimmie in the hallway. Flores said "Hi!" to Lewis by saying "Chilly Willy," and then asked Kimmie if they (Flores & Crocker) could use her room. At first Kimmie agreed, but then changed her mind. So Flores took Crocker to her own room. Crocker then paid Flores \$100 dollars for sex. They engaged in sexual intercourse for awhile, but Crocker was having problems with an erection and kept going limp. He complained that the noise other tenants were making in the hallway made him nervous. He gave Flores another \$20 dollars to purchase some marijuana for the guys in the hallway. Flores told Crocker she would get them out of the hall by getting them high, and then she would come back. Flores left with the \$20 dollars and the \$100 Crocker already paid her.

Flores went from her room across the hall to Kimmie's room and asked Lewis to get her \$20 dollars worth of dope (marijuana). She gave Lewis the bill folded in half and then in half again. Lewis took the \$20 and went down the hall to make a phone call. When Lewis returned, Flores advised him that Crocker was taking to long, that he couldn't get it up (i.e., an erection), and that she was not used to that sort of thing (i.e., men taking so long

to ejaculate). She was afraid to go back and tell Crocker she was done, so she asked Lewis to go ask Crocker to leave. Lewis agreed.

While Flores remained at Kimmie's apartment, Lewis went to Flores apartment and asked Crocker to leave. Crocker instantly got upset and advised Lewis that he paid Flores for sexual services and didn't get to finish. Lewis advised him Flores was done, that he was an "old dirty pervert" and needed leave the premises. Crocker got visibly agitated, felt that he was being cheated out of his money, and lunged at Lewis with a punch. Acting in self-defense and with a reasonable amount of force, Lewis threw two punches back, knocking Crocker's glasses off his face and directed him to leave immediately. In defeat and in haste Crocker left without his glasses.

With his pride hurt, a few lumps, and feeling cheated, Crocker went to the Aberdeen Police Department and manufactured a story that he'd been robbed by a person known as "Chilly Willy." He conveniently left out details that he was soliciting prostitution with Flores for fear that he would be arrested and charged himself. In sum, this was not a case of robbery, but a prostitution deal gone bad.

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ARGUMENT

I. MR. LEWIS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. (Also Wash. Const. Art. I, Sec. 22).

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon vs. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The right to counsel is the right to have the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn.App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning there is "a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would

have been different." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)(citing *Strickland*); see also *State v. Pittman*, 134 Wn.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption can be overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making" *In re Hubert*, 138 Wn.App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. When counsel does not develop the defense theory of the case because he fails to investigate evidence supporting the State's case, the omission cannot be justified as a strategic decision. *Henderson v. Sargent*, 926 F.2d 706, 711, 939 F.2d 586 (8th Cir. 1991). Rather, that kind of failure is evidence that counsel did not prepare for trial.

Defense counsel is not required to investigate and research each evidentiary issue to exhaustion and is not deficient if he makes strategic choices to limit investigation based on reasonable professional judgments. *Strickland*, 466 U.S. at 690-91. However, counsel must undertake sufficient investigation to subject the State's case to a meaningful adversarial test. *Strickland*, 466 U.S. at 696. A criminal defendant is denied his right to a fair trial when counsel's deficient performance renders the result

unreliable by a breakdown in the adversary process. *State v. King*, 130 Wn.2d 577, 531, 925 P.2d 606 (1996).

A. Mr. Lewis' defense counsel was constitutionally ineffective because he failed to conduct an appropriate pretrial investigation, failed to investigate and determine what legitimate defenses were available, and failed to subpoena and secure necessary evidence and material witnesses.

Generally, deciding whether to call a witness is a matter of legitimate trial tactics, which will not support a claim of ineffective assistance of counsel. *State v. Byrd*, 30 Wn.App. 794, 799, 638 P.2d 601 (1981). However, a defendant can overcome this presumption by showing that counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses. *Byrd* at 799; *State v. Jury*, 19 Wn.App. 256, 263-64, 576 P.2d 1302 (1978); *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991); *State v. Maurice*, 79 Wn.App. 544, 552, 903 P.2d 514 (1995).

A lawyer who 'fails adequately to investigate, and introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.' *Riley v. Payne*, 352 F.3d 1313, 1318 (9th Cir. 2003). Defense counsel must, at a minimum, conduct a reasonable

investigation enabling him to make informed decisions about how best to represent the client. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004)(quoting In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). And failure to investigate, interview and call witnesses to a crime may be deficient performance. Id.

1. Failure to Investigate Lewis' \$113 Dollars

Lewis contends that defense counsel's failure to investigate the \$113 dollars seized off his person during his arrest constitutes deficient performance and denied him a fair trial.

Lewis testified that his mother gave him three \$50 dollar bills, totaling \$150 dollars. When the Aberdeen Police located and arrested him at the PourHouse Tavern they seized two \$50 dollar bills and \$13 dollars. At a minimum, counsel should have, pretrial, contacted Lewis' mother Cathrine Brooks, established what bank she withdrew the \$50 dollars bills from, and verified that the lot serial numbers on the bills were, in fact, delivered from the Federal Reserve and distributed from her bank. Counsel then could have subpoenaed the bank manager and Lewis' mother as witnesses to establish that the bills were given to Lewis, and that Crocker did not have an account at the bank where they were distributed.

This evidence was extremely relevant and exculpatory because counsel could have conclusively proven by the bill serial numbers

that they came from a bank not connected to Crocker. This evidence could have also established that Lewis was telling the truth about receiving the bills from his mother and, most importantly, that he did not take them from Crocker.

Lewis received ineffective assistance of counsel because his attorney failed to adequately investigate the \$113 dollars. Any reasonable attorney would have tried to prove the money was not the victims by calling Lewis' mother and her bank manager and records to the stand. Had counsel adequately investigated this issue, he could have proven where Lewis' money came from and, arguably, could have used this information to impeach Crocker's testimony. Due to the fact that Crocker's credibility was a major factor in the case, it was crucial for the defense to admit any evidence that would have questioned his credibility and motive to fabricate. *State v. Horton*, 116 Wn.App. 909, 916-17, 68 P.3d 1145 (2003); *State v. Wilder*, 4 Wn.Ap. 850, 854, 486 P.2d 319 (1971). See herein ARGUMENT III., *infra* (If Lewis had his own money provided to him by his mother, a reasonable juror could have believed Crocker gave his money to Flores in exchange for sex; lending credibility to Lewis' theory of the case).

Counsel's failure to investigate, locate exculpatory evidence, and call witnesses prejudiced Lewis and violated his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. His conviction must be reversed and the case remanded for a new

trial.

2. Failure to Investigate Crocker's \$150 Dollars

Crocker testified that he had \$150 dollars when he was robbed. Lewis contends that counsel's failure to investigate this claim and adequately interview Crocker constitutes deficient performance and denied him a fair trial. At a minimum, counsel should have, pretrial, asked Crocker when and where he got the \$150 dollars and denomination the bills came in. Then counsel could have subpoenaed Crocker's bank and ATM records to verify his claims, and whether the lot serial numbers on the bills were delivered from the Federal Reserve and distributed from his bank.

This evidence was extremely relevant because Lewis had three \$50 dollar bills of his own given to him by his mother. Establishing that Crocker had bills in other denominations with serial numbers dissimilar to the ones Lewis possessed at the time of his arrest would have cast considerable doubt on Crocker's testimony that Lewis took his money.

Lewis received ineffective assistance of counsel because his attorney failed to adequately investigate the allegation that Crocker had \$150 dollars of his own. Any reasonable attorney would have tried to prove that the money Lewis possessed was not Crocker's. Had counsel adequately investigated this issue, he could have established Crocker was not being forthright about his money and, arguably, a reasonable juror could have believed

Crocker gave his ~~money~~ to Flores in exchange for sex; again lending credibility to Lewis' theory of the case -- see herein ARGUMENT III., Infra. Again, because Crocker's credibility was a major factor in the case, it was crucial for the defense to admit any evidence that would have questioned his credibility and motive to fabricate. Horton, supra, at 916-17; Wilder, supra, at 854.

Counsel's failure to investigate, locate exculpatory evidence, and call witnesses prejudiced Lewis and violated his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. His conviction must be reversed and the case remanded for a new trial.

II. THE TRIAL COURT VIOLATED MR. LEWIS' RIGHTS TO THE COMPULSORY PROCESS AND DUE PROCESS BY FAILING TO LOCATE AND SECURE THE PRESENCE OF MATERIAL WITNESSES.

The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor" Sixth Amendment U.S. Const., Article 1, Section 22 (Amend 10) Wash. Const. This right is applicable to the state's through the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version

of the facts as well as the prosecutions to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecutions witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976)(this right directly impacts the right to present a defense).

Lewis asserts that he should have been allowed to call and cross-examine Andrea Flores, Dion & Kimmie Obi, and Cathrine Brooks (Lewis' mother). He contends the trial court's failure to locate and secure their presence at trial as material witnesses violated his right to the compulsory process and due process.

1. Andrea Flores (Crocker's friend or Prostitute?)

Lesiw and Crocker's testimony varied drastically. Crocker admitted during a pretrial interview that he expected sexual relations with Flores at some point that day. At trial he testified that they just talked in her apartment, that he gave her only \$20 dollars and she never returned. Then according to Crocker, Lewis came and robbed him of \$100 to \$150 dollars.

Lewis testified that Flores came out of her apartment with \$20 dollars and asked if he could get some dope (narcotics). When Lewis returned from arranging the drug transaction, Flores

expressed some fear about returning to her apartment because Crocker was being an old pervert and doing stuff she wasn't used to. She asked Lewis to ask Crocker to leave. Lewis agreed. He left Flores at Dion & Kimmie's and went to Flores' apartment to ask Crocker to leave. Crocker immediately got upset and advised Lewis he'd given Flores money. Lewis maintained that Crocker had to leave. Crocker then swung at Lewis and Lewis swung back in self-defense striking Crocker twice. Crocker left the apartment immediately without his eyeglasses.

Lewis' theory of the case was that Crocker gave his money to Flores for sex. After Crocker took too long to do his business with her, she felt that he'd got his money's worth and conjured up a story to leave. Because it was noise in the hallway that was interrupting Crocker's ability to perform sexually, Flores asked for an additional \$20 dollars and told Crocker she'd get rid of them by getting them high. She then left the apartment with no intention of returning. She then summoned Lewis and asked him to ask Crocker to leave. When Lewis asked Crocker to leave he got upset and swung at Lewis. Lewis protected himself by swinging back. Crocker left the apartment immediately leaving his eyeglasses behind. With his pride hurt and feeling that he'd been cheated out of his money, money that he'd given to Flores, he went to the police and fabricated the robbery story. His motive for fabricating the robbery was to avoid charges of soliciting

prostitution, so he conveniently left all details out about paying Flores for sex.

From these drastically opposite testimonies and case theories, there is no question that Andrea Flores was a material witness to this case. Had her presence been secured she could have corroborated Lewis' testimony, in which case there is no doubt the outcome of the trial would have been different. If Flores confirmed that Crocker paid her in exchange for sex, a reasonable juror could have believed Lewis' defense theory and acquitted him of robbery.

2. Dion and Kimmie Obi (Lewis' friends)

Lewis and Crocker both testified that they seen each other in the hallway and that Flores asked Kimmie if they (Her & Crocker) could use her room. Again, there is no question that Dion and Kimmie were material witnesses to this case. They were both there before, during and after the alleged robbery. Moreover, they also had contact with Lewis and Flores before, during and after the alleged robbery. Had their presence been secured for trial they could have corroborated Lewis' testimony and shed light on why Flores needed to use a room with a 69 year old man she'd only known for two weeks. Was it just for "talking" as Crocker testified, or for some other immoral reason like "sex" from a 28 year old prostitute?

Certainly, their testimony would have, at least, challenged

Crocker's credibility and motive to lie, lending credence to Lewis' theory of the case, in which case there is a high probability the outcome of the trial would have been different. Again, if they testified Flores wanted to use Kimmie's room for sex with Crocker, a reasonable juror could have believed that he gave his money to Flores, that he got upset because he didn't get to finish, swung at Lewis in frustration, and fabricated the robbery story. Based on Lewis' defense theory and this potential corroboration a reasonable juror could have believed Lewis used a lawful amount of force and defended himself when removing Crocker from Flores' apartment. In which case the jury would have acquitted.

3. Cathrine Brooks (Lewis' mother)

There is no question that Lewis' mother's testimony was material to the outcome of the case. See herein ARGUMENT I(A)(1) Failure to Investigate Lewis' \$113 Dollars. Had Cathrine Brooks testimony been secured for trial, at least, it may have undermined Crocker's credibility. Again, because Crocker's credibility was a major factor in the case, it was crucial for the defense to admit any evidence that would have questioned his credibility and motive to fabricate. Horton, supra, at 916-17; Wilder, supra, at 854. Again, a reasonable juror could have believed, after hearing that Crocker paid Flores for sex and that he was an unsatisfied customer, that the \$113 dollars Lewis had when arrested was not Crocker's. He testified that his mother had given it to

him. Her testimony would have certainly corroborated Lewis' and more likely than not changed the outcome of the trial.

On August 4, 2008, Lewis waived his right to a speedy trial, and agreed to a new commencement date of September 1, 2008, extending the last allowable date for trial to November 1, 2008. CP 18; RP 1-4. This waiver was made and declared to be in Lewis' best interest so defense counsel would have additional time to locate witnesses and prepare for trial. Id. As such, there was plenty of time for the court to locate and secure material witnesses for trial. Through the compulsory process Lewis had the right to present his version of the case. This right is a fundamental element of due process. The trial court's failure to secure the presence of these material witnesses violated Lewis' rights to the compulsory process and due process, denying him a fair trial. The conviction must be reversed and the case remanded for a new trial.

4. Ineffective Assistance of Counsel / Material Witness Warrants

Lewis contends that counsel's failure to ask the court for material witness warrants for Andrea Flores and Dion & Kimmie Obi constitutes deficient performance and denied him a fair trial.

After Lewis waived his right to a speedy trial on August 4, 2008, counsel waited until September 29, 2008, just two weeks before the trial date, to make the first and only attempt to locate Flores. CP 18; CP 50-51. No attempts were made to locate Dion

and Kimmie obi.

On September 29, 2008, the State also offered Lewis a plea bargain. September 29, 2009 - RP 10. On this date, and only after Lewis rejected the bargain, did counsel's investigator attempt to locate Flores. CP 50-51. With 14 days left until trial no other attempts were made to locate any witnesses. From the record, its clear that counsel anticipated Lewis would plea bargain out, so he waited until September 29, 2009, before allocating time and resources to locate Flores.

With the October 14, 2008, trial date approaching, and the last allowable date for trial being November 1, 2008, counsel should have asked the court for material witness warrants and a continuance of time for trial to locate them. These witnesses had exculpatory information. *Riley v. Payne*, 352 F.3d 1313, 1321 (9th Cir. 2003)(defense counsel performed deficiently where he failed to locate, interview and call a witness who would have said the victim was the first aggressor); *Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999)(counsel's performance was deficient where counsel failed to locate, interview and call three witnesses who had material evidence as to their client's innocence). Because this was a credibility match between Lewis and Crocker, locating these witnesses was vital to Lewis' defense. As a consequence, there was no legitimate trial tactic for not seeking material witness warrants through the court. *Byrd*, supra, at 799; *Jury*,

supra, at 263-64; Ray, supra, at 548; Maurice, supra, at 552. Lewis was denied his right to effective representation and a fair trial by counsel's deficient performance rendering the result of the trial unreliable by a breakdown in the adversary process. King, supra, at 531. In plain terms, counsel waited until September 29, 2008, to see if Lewis would accept a plea before attempting to locate Flores, and then after failing on the first attempt quit without seeking the court's assistance through the compulsory process.

Counsel's failure to investigate, locate exculpatory evidence, and call witnesses material to Lewis' defense violated his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. His conviction must be reversed and the case remanded for a new trial.

III. THE TRIAL COURT'S IN LIMINE ORDER PRECLUDING TESTIMONY THAT ANDREA FLORES WAS A PROSTITUTE VIOLATED MR. LEWIS' RIGHT TO PRESENT A DEFENSE AND DENIED HIM A FAIR TRIAL.

The Sixth Amendment to the U.S. Constitution and Article 1, Section 22 (Amend. 10) of the Washington State Constitution grant criminal defendant the right to present evidence in one's defense, as long as its relevant. This right is applicable to the states through the Fourteenth Amendment. *Washington v. Texas*, supra, 388 U.S. at 17-19. This right directly impacts the right

to present a defense. *State v. Burri*, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976).

The exposure of a witnesses motivation is a proper and important function of the constitutionally protected right to cross-examination. *David v. Alaska*, 515 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Where a case stands or falls on the jury's belief or disbelief of one central witness, that witness' credibility or motive must be subject to close scrutiny. *State v. Wilder*, 4 Wn.App. 850, 854, 486 P.2d 319 (1971); *State v. York*, 28 Wn.App. 33, 37, 621 P.2d 784 (1980)(reversible error to exclude evidence probative of prosecutions chief witness' motivation to fabricate allegations, noting that the witness' questionable credibility was the very essence of the defense).

A challenge to Crocker's credibility was central to the defense theory of Lewis' case. Crocker's solicitation and sexual encounter with Flores was the very essence of Lewis' lawful force and self-defense theory of the case. As a result, Lewis contends the court erroneously excluded the only evidence that might have allowed the jury to determine whether Crocker felt cheated by the fact that he gave Flores a total of \$120 dollars for a sexual encounter he didn't get to finish, because Lewis asked him to leave the premises. Lewis simply contends that he had a right to expose Crocker's motivation to fabricate the robbery, and that the court's In Limine order eliminated his defense by removing

the heart of the case -- that it was a prostitution deal gone bad, not a robbery.

During a pretrial interview, Crocker admitted that he was going to Aberdeen to meet his friend "Andrea," and that he was expecting to have sexual relations with her at some point that day. CP 28. After the court's In Limine order was issued, CP 35, Lewis effectively had no defense to the robbery allegation.

Contrary to Crocker's pretrial testimony, at trial he testified that he drove from Raymond to Aberdeen to visit Sydney's Casino. RP 8, 19. On his way to the Casino, he saw Flores by the Crystal Steam Bath apartments and she asked him to her apartment. RP 9, 19-20. He'd known Flores for only two or three weeks and had met with her two time prior to July 2, 2008. RP 19-21. At her apartment all they did was talk and watch T.V.. RP 11, 23. The following exchange of testimony illustrates the restriction the court's In Limine order placed on Lewis' ability to undermine Crocker's credibility with the heart of the case.

Q You just were driving by and you were able to see her?

A Yes.

Q And you - how did you know her?

A I met her a couple of times before, talked to her.

Q In what context did you meet her before?

MR. FULLER: Your Honor, I object. We talked

about this.

MR. CAMPBELL: Okay. Well ...

RP 20, lines 12-19.

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

A I stopped to talk to her.

RP 21, lines 18-20.

Q Okay. And you ... gave her some money?

A Yeah, I gave her \$20. She said she was going to get those three guys that were out in the hallway high and then come back.

A She wanted to get rid of them.

Q Okay. What - what do you mean get rid - if they're out in the hallway, why did she need to get rid of them? I don't understand.

A Were kind of - one of them, didn't want hear them, overhear us talking.

RP 23, lines 10-19.

Q Okay. All right. So - and so you went down there and then were you watching TV the whole time you were in Andrea's room?

A Yes.

Q That's my - kind of my question. Did you do anything other than watch TV while you were sitting there?

A No.

RP 27, line 3-8.

Q Okay. When - is it true that you were asked to leave at some point? Were you ever asked

to leave by either Mr. Lewis or her or anybody else?

A No.

Q Was there any sort of commotion or any kind of - anything about you being there?

A No, there wasn't.

RP 28, lines 4-10.

Here, the State's case stood or fell on the jury's belief or disbelief of one central witness, Crocker's testimony. Therefore, his credibility and motive to fabricate should have been subject to close scrutiny. The court's In Limine order prevented counsel from scrutinizing Crocker's testimony and exposing the heart of the case. As a result, Crocker's credibility and motive to fabricate went unchallenged before the jury. The court's In Limine order crippled Lewis' defense.

Lewis' defense was that he used a lawful amount of force when asking Crocker to leave Flores' apartment. Crocker got upset and swung at Lewis because he'd given Flores money (approximately \$120 dollars) for sex, and he didn't want to leave. He felt that he was being cheated out of his money because he didn't get to finish the sexual encounter with Flores. Lewis, then protected himself from Crocker's aggression by defending himself. This was Lewis' defense, but the court's In Limine order prevented the jury from hearing the truth.

The following testimony illustrates the restriction the

court's In Limine order placed on Lewis' ability to assert his defense.

A After we was getting ready to leave we seen them out in the hallway ... and Andrea ... asked if they could use Kimmie's room and Kimmie said yeah ... at first and then no and then she turned around and went -they went back into Andrea's room

RP 75, lines 12-17; see also RP 76, lines 10-15.

Q Okay. So ... All right. So then ... 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 - ... their part of the area ... and ... Andrea and Mr. Crocker went inside.

Q Okay. To where?

A Inside Andrea's apartment.

RP 76, lines 16-24.

Q Okay. All right. Did Andrea come back to the area where you were at any point after that?

A Yes, she did. We was across the hall at Kimmie and Dion's ... and she came across the hallway.

RP 77, lines 15-18.

Q I think you were describing ... Did Andrea come back to where you were?

A Oh, yes. After she came back over ... she ended up asking if we could get some dope.

Q Okay. Did she have money with her?

A She had money with her.

Q Okay. Do you remember how much it was?

A She gave me \$20.

RP 79, lines 1-8.

Q Okay. So then tell the jury what happened next, if anything?

A I ended up talking to Andrea, I went down the hall to make another phone call because we was still waiting to get our dope on my way back from making the phone call ... she told me that guy was being ... aggressive towards her in a manner that she didn't like.

Q All right.

A And she asked me if I could have him leave.

RP 79, lines 13-23.

Q Okay. All right. Go ahead.

A And she told ... me to have him leave the premises ... because she didn't feel safe there at that time.

Q All right. So I'm wondering - did you go 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 ... it just went from there to a physical altercation. He came at me physically and I ended up defending myself.

RP 80, lines 6-18

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

A When I told him that he needed to leave the premises ... I told him he was an old dirty pervert and that he needed to leave the premises ... he wasn't wanted around there because of his actions weren't - what she was used to.

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's when the altercation came about.

RP 81-82, lines 21-25; 3-7

Q Now, Andrea went into room Number 6 with Mr. Crocker?

A Yes. When we was coming out of Kimmie and them's place, she came across the hall to try to get Kimmie to use her room, for what I don't know, but ...

Q Right.

A Since Kimmie said no, that was it.

RP 87-88, lines 20-25; 1-3.

Q So I understand you went in the room and asked him to leave?

A Yes, sir.

Q Told him he was an old pervert?

A Yes, sir.

Q And, what, he took a swing at you?

A He was upset that he had to leave and stuff so he pretty much left the premises.

RP 89-90, lines 24-25; 1-5.

Had Lewis been able to testify that Crocker gave his money to Flores for sex, his defense of lawful force and self-defense may have made sense to the jury. Lewis could have told the jury that Crocker really got upset when he was asked to leave because Flores had more than \$20 dollars of his money; she had at least \$120 dollars that he'd given her all together for sex. Upset about this, her not returning and being asked to leave, he got aggressive and swung at Lewis, and Lewis, in turn, protected himself with use of lawful force.

This testimony would have cast doubt on Crocker's credibility and provided a plausible motive for him to fabricate the robbery story. A reasonable juror could have believed that Crocker felt cheated out of his money because Flores left and didn't return as she promised. Instead, she sent Lewis back to ask him to leave. In frustration Crocker swung at Lewis and Lewis protected himself. With a few lumps and his pride hurt he went to the police and fabricated the robbery story. His motive for the robbery allegation was to avoid soliciting prostitution charges, so he left that detail out. Had the jury heard this version, Lewis' defense theory, the outcome of the trial may have been different.

Not being able to present testimony that Flores was a prostitute prejudiced Lewis' defense the most during the State's

cloing argument. The prosecutor argued.

... This wasn't a situation where the defendant came in and told Mr. Crocker to leave. ... Mr. Crocker was robbed. Mr. Crocker from all accounts here, from the looks of things, was set up. Here's a guy, he's in the room, he's got money, he give \$20 to Andrea who goes out the door. And what do you think? He opened up the checkbook and money was exposed and Andrea saw the money, got \$20 and saw more and went out and talked to the defendant. Does that make sense? Ask yourself.

RP 99, line 11-20.

He thought he was going to the casino, he saw Andrea on the street, stopped said hello, he went up to her room.

RP 100, lines 4-6.

... Do you really believe that ... Mr. Crocker took a swing at a 35-year-old man in a room? Do you really believe that the defendant didn't take the money, that the defendant didn't inflict these injuries on Mr. Crocker? Is this what he would have needed to do to defend himself from a swing from a 69-year-old man? ... No, he beat him up, he took his money, he robbed him and he ran off.

RP 101-02, lines 22-25; 1-4.

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 Mr. Crocker has no motive, no bias, no reason to go out of his way to try to implicate the defendant. 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?

RP 106-07, lines 20-25; 1-12.

Ladies and Gentlemen, in the end you decide what makes sense. And what makes sense is that Mr. Crocker was beaten and robbed. What makes sense is we can't find Andrea. What makes sense is that there's more to this story from that end that we'll never know.

RP 108-09, lines 24-25; 1-3.

Lewis literally had no defense to the State's closing argument that Crocker was "set up," that he only went to Flores' room to "talk and watch T.V.," that he had no motive to swing at Lewis, and no motive to fabricate the robbery. A fundamental concept of American Jurisprudence is the 'Truth Seeking Process.' Here, the trial court's In Limine order precluding evidence that this case was really a prostitution deal gone bad violated the very concept of the trial process - "to seek the truth." The truth was kept from the jury, so their ability evaluate Lewis' version was distorted by "half-truths" that made the incident appear to be a robbery, when, in fact, there was more to the case -- evidence that Crocker actually gave his money to a prostitute, that he didn't just go to Flores' room to talk and watch T.V., and that he had several motives to fabricate a robbery; namely to avoid soliciting prostitution charges and protect his image. With this evidence there is no doubt a reasonable juror could have believed Lewis' defense theory.

Defense counsel's closing argument demonstrates the crippling effect the court's In Limine order had on Lewis' defense and

ability to counter the State's closing argument with the truth.

You know, we're just not getting the whole story from Mr. Crocker about what happened that day. And I'm going to point out a few reasons why I think that he's just - has not come into this courtroom and told you the truth. He said that he was heading for the casino when he just randomly bumped into Andrea who he saw on the street. ... Says he was only there for one half an hour, when the fact is he had to have been there for about an hour and a half. ... That's a long time to be just sort of hanging out when you're on your way to the casino. And he just continues to hang out while Andrea is gone. Just doesn't make any sense.

The fact is that we don't know how much money, if any money, that Mr. Crocker had when he got to the Crystal Steam Baths. We don't know even if he had a wallet or if he had a checkbook. Nobody ever saw a checkbook that day. The police didn't check it. He didn't show the police. There is no evidence that he had any money and if he did have the money that he claims to have, where did he get it?

RP 103-04, lines 6-25; 1-4.

... So those are just a few reasons - the only evidence that you have if money was taken from Mr. Crocker is his own word, which is suspect. He admitted to giving some money to Andrea to buy drugs for somebody else he says. So we know that some of his money left even by his own admission. So there is no connection between the money and what turned into a fight. So for that reason robbery in the first-degree is not supported by the evidence.

It seems strange that Mr. Crocker would say at the end of this event where he described being robbed and beaten that the person who did it would say Chilly Willy ... would identify himself. That seems strange. And it seems from this evidence unusual that the person who is supposed to have done this goes a half a block from the Crystal

Steam Bath to the Pourhouse. This was not a robbery, this was not an assault. ... They have suspect testimony from one person and for that reason you should find Daniel Lewis not guilty. Thank you.

RP 105-06, lines 11-25; 1-11.

Limiting the scope of defense counsel's ability to cross-examine Crocker and present evidence through Lewis' testimony about Flores being a prostitute unduly restricted his right to present a defense. Without the court's In Limine order counsel would have been able to argue that 69-year-old Crocker had nothing in common with the 28-year-old Flores, and that a prostitution deal gone bad made the most sense.

Where did his money really go? He gave it to Flores for sex, noise in the hallway interrupted his performance and he kept going limp so Flores offered to get the noise out of the hallway by going to get the guys high. She asked for \$20 dollars more and left, with no intention of returning. Then she asked Lewis to have Crocker leave her apartment. When asked to leave by Lewis, Crocker got upset because he didn't get to finish (i.e., ejaculate) with Flores. He complained to Lewis that he'd given her money and wasn't leaving -- he felt that he was being cheated. Frustrated, he swung at Lewis and Lewis swung back to protect himself, striking Crocker only twice -- and knocking Crocker's eyeglasses off his face. Accepting defeat, Crocker retreated and immediately left the apartment in haste and without his eyeglasses.

Feeling that he'd been cheated out of his money, he went to the police and falsely reported the incident as a robbery. Had counsel been able to make this argument, a reasonable juror could have believed that it made sense and acquitted Lewis of robbery.

Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of this action more probable or less probable than it would be without the evidence." ER 401.

Evidence that Crocker paid Flores for sex and that she was a prostitute, is a fact that certainly would have had a "tendency" to make Lewis' defense "more probable" than without it. Therefore, the evidence was relevant to the case and the trial court erred by excluding it. Because the trial court precluded this evidence Lewis was denied his right to present a defense and a fair trial. The conviction must be reversed and the case remanded for a new trial.

1. Ineffective Assistance / Not Objecting to In Limine Order

Lewis contends that counsel's failure to object to the trial court's In Limine order and, at least, explain the relevance between Flores being a prostitute and counsel's defense theory (lawful force and self-defense CP 30), constitutes deficient performance and deprived him of a fair trial. U.S. Const. Sixth and Fourteenth Amends., Art. 1, Section 22, Wash. State Const.; Strickland v. Washington, supra.

The prejudicial effect of this deficient performance is obvious from the record, as illustrated above by the crippling effect it had on Lewis' ability to establish his version of the case. Moreover, there is no tactical or strategic reason counsel would abandon the only evidence that had a tendency to support his defense theory. Had counsel objected and successfully demonstrated the relevancy of Flores being a prostitute to Lewis' theory of the case, there is no doubt the outcome of the trial would have been different. Counsel's failure to object to the In Limine order deprived Lewis of the effective assistance of counsel and a fair trial. The conviction must be reversed and the case remanded for a new trial.

IV. MR. LEWIS' DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR PRESENTING A DEFENSE STRATEGY/THEORY THE LAW DID NOT RECOGNIZE FOR ONE CHARGED WITH ROBBERY IN THE FIRST DEGREE.

The Sixth and Fourteenth Amendments and Article 1, Section 22, of the Washington State Constitution both guarantee criminal defendants the right to have the assistance of counsel. This right includes the right to effective assistance of counsel. In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). In order to make the adversarial process meaningful, defense counsel has a duty to investigate all reasonable line of defenses. Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Even if no viable defense theory

is available, the Sixth Amendment still requires counsel to "hold the prosecution to its heavy burden of proof beyond a reasonable doubt." Id.

Lewis contends that his attorney presented an erroneous defense strategy based on a theory the law does not recognize for one charged with First Degree Robbery. Lewis claims this error constitutes deficient performance and rendered the adversarial process in this case meaningless depriving him of a fair trial.

Counsel's defense theory was lawful force and self-defense. CP 30. Lawful force and self-defense is not a defense to the taking of property. In fact, the elements of robbery affirmatively negate such a defense, and read that "the taking was against Thomas W. Crocker's will by the defendant's use or threatened use of immediate force, violence or fear of injury," and "that the force or fear was used by the defendant to obtain or retain possession of the property." CP 34 - COURT'S INSTRUCTIONS TO THE JURY, Instruction No. 4, Section (3) & (4). This "taking by immediate force" is inherently unlawful. Therefore, lawful use of force and self-defense cannot legitimately be a defense to robbery. There is no Washington case law that suggests lawful use of force and 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*, 218

Cal.App.2d 310, 32 Cal.Rptr. 374 (1963); State v. Beebe, 38 Colo.App. 80, 557 P.2d 840, 841 (1976).

Here, counsel's failure to present a legitimate defense for Lewis clearly constitutes deficient performance and fell below an "objective standard of Reasonableness." The adversarial process was meaningless because the jury was prohibited by the court's instructions and the law from concluding lawful force was used during the robbery. Counsel's theory provided no defense for Lewis and he should not have attempted to manufacture a new novel one not recognized by the law. The conviction must be reversed and the case remanded for a new trial.

V. THE CUMULATIVE EFFECT OF THE ERRORS CONTAINED IN BOTH -- APPELLATE COUNSEL'S OPENING BRIEF AND THIS STATEMENT OF ADDITIONAL GROUNDS DENIED MR. LEWIS HIS CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR TRIAL.

Even if this Court does not grant reversal based upon any one of the individual errors argued both in Appellate Counsel's Opening Brief and this Statement of Additional Grounds, reversal should nevertheless be granted because the cumulative effect of those errors deprived Lewis of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Hodges, 118 Wn.App. 668, 673-74, 77 P.3d 375 (2003).

These errors all went to the heart of the case -- Crocker's credibility and motive to fabricate, and defense counsel's

deficient performance. All of these error clearly compounded one another, and the result was a trial that was far less than fair. The conviction must be reversed and the case remanded for a new trial.

CONCLUSION

For the foregoing reasons, Mr. Lewis' conviction must be reversed and the case remanded for a new trial.

DATED this 21st day of June, 2009.

Respectfully Submitted,



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