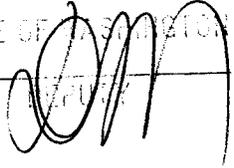


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 38682-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Stephen Shores,

Appellant.

Lewis County Superior Court Cause No. 02-1-00761-3

The Honorable Judge James Lawler

Appellant's Reply Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

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ARGUMENT

I. MR. SHORES PRESENTED “SOME EVIDENCE” THAT HE ACTED WITH LAWFUL FORCE; THEREFORE, THE ABSENCE OF SELF-DEFENSE WAS AN ELEMENT OF THE CHARGED CRIMES.

A trial judge must instruct the jury on every essential element of a criminal offense. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The absence of self-defense is an element of assault whenever there is some evidence that the use of force was lawful. *State v. Woods*, 138 Wn. App. 191, 199, 156 P.3d 309 (2007). To determine whether or not a self-defense instruction is appropriate, the evidence must be viewed in a light most favorable to the accused person. *State v. Walker*, 136 Wn.2d 767, 780-781, 966 P.2d 883 (1998). The court “must not weigh the proof, which is an exclusive jury function.” *State v. Douglas*, 128 Wn.App. 555, 561, 116 P.3d 1012 (2005).

In this case, Mr. Shores produced some evidence that his use of force was lawful. RP (12/4/08) 99-130, 138-177. Accordingly, self-defense was an essential element of the charged crimes. *Woods*. Respondent argues that the evidence was not credible; however, this is irrelevant under *Woods* and *Douglas, supra*. Brief of Respondent, pp. 1, 4, 11. The evidence must be viewed in a light most favorable to Mr.

Shores; neither the trial court nor the Court of Appeals may weigh the evidence or make a credibility determination. *Woods, supra; Douglas, supra*. Furthermore, the question of whether his actions were reasonable and necessary was for the jury. Brief of Respondent, p. 4. Accordingly, Respondent's lengthy evaluation of the merits of the self-defense claim is misdirected. Brief of Respondent, pp. 1-13. *Woods, supra; Douglas, supra*.

Respondent has not argued that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40, 45, 21 P.3d 1172 (2001). Because Mr. Shores provided "some evidence" of self-defense, the absence of self-defense became an element of the offense. *Woods, supra*. The court's omission of self-defense instructions relieved the state of its burden. *Woods, supra*. Accordingly, Mr. Shores's convictions violate his Fourteenth Amendment right to due process and must be reversed. The case must be remanded to the trial court, with directions to instruct the jury on the issue of self-defense if the case is tried a second time. *Woods, supra*.

II. THE TRIAL COURT SHOULD HAVE GIVEN A UNANIMITY INSTRUCTION.

To protect an accused person's right to a unanimous jury, the court must give a unanimity instruction whenever the state presents evidence of

multiple acts and fails to elect a specific act to establish each charged crime. Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005); *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Jurors have a constitutional “responsibility to connect the evidence to the respective counts.” *State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

In this case, the state charged seven assaults, but presented evidence of more than seven assaults. CP 25-28; RP (12/4/08) 31-66, 98-130. Although the Information provided details differentiating the charges, the Information was not submitted to the jury during deliberations, and these details were not incorporated into the court’s instructions. CP 25-28; Court’s Instructions to the Jury, CP 44-76. Nor did the state clearly tie each act to a particular charge in closing. RP (12/4/08) 197-204, 216-219.

The state did not elect which actions constituted each charge, and the court failed to provide a unanimity instruction. This failure is presumed to be prejudicial, and requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman*, at 512. In this case, the evidence confused the jury, as can be seen by their note to the court. Inquiry from the Jury and Court’s Response, CP 43. Accordingly, the

assault convictions violated Mr. Shores's constitutional right to jury unanimity, and must be reversed. *Vander Houwen, supra*.

III. RESPONDENT'S CONCESSION REQUIRES VACATION OF THE DEADLY WEAPON ENHANCEMENT.

Respondent concedes that the jury was not properly instructed on the deadly weapon enhancement. Brief of Respondent, p. 21.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The instructions given to Mr. Shores' jury did not require them to find that the chainsaw was used in a manner that was likely to produce death before finding the enhancement applied. RCW 9.94A.602. This error was not trivial, formal, or merely academic: a reasonable juror could have had a reasonable doubt that the chainsaw was used in a manner likely

to produce death. Accordingly, the deadly weapon enhancement must be vacated and the case remanded for resentencing without the enhancement.

Lorang, supra.

IV. THE RECORD DOES NOT ESTABLISH FACTS SUPPORTING AN OFFENDER SCORE OF 9+.

Respondent argues that the court's offender score calculation was correct, based on Mr. Shores's stipulation. Brief of Respondent, p. 24.

But an accused person "cannot agree to a sentence in excess of that which is statutorily authorized." *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). While Mr. Shores's factual stipulations are binding, his agreement to the legal effect of those facts is not, and may be challenged for the first time on appeal. *Cadwallader*, at 874.

A. The record establishes that six prior Class C felonies washed out.

The record here—including the complete statement of criminal history to which the state and Mr. Shores agreed—establishes that six prior Class C felonies washed out in January of 2008.¹ RCW 9.94A.525(2)(c); Finding No. 2.2, CP 6. Mr. Shores did not have the

¹ Respondent cites an unpublished decision to establish a prior period of confinement. Even if Respondent's use of this unpublished decision is proper, it is not a part of the record in this case, and was not before the sentencing court. Furthermore, the trial court's findings do not include the facts asserted by Respondent.

power to stipulate that they should be included in the offender score when the record shows that they washed out. *Cadwallader*.

B. The two prior California convictions should not have been included in the offender score.

Mr. Shores entered a binding stipulation to the comparability of the prior California convictions. *See Cadwallader*, at 875 (Stipulation to comparability of an out-of-state conviction constitutes waiver on appeal.) However, he did not stipulate (and the court did not find) that they were equivalent to Class A felonies. Accordingly, as with the six prior Class C felonies, the California convictions should have washed out. Mr. Shores did not have the power to stipulate that these prior convictions should be included in the offender score, when the record establishes that they washed out. *Cadwallader, supra*.

Neither the record nor the court's findings support an offender score of 9+. The sentence must be vacated and the case remanded for resentencing without any criminal history.

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

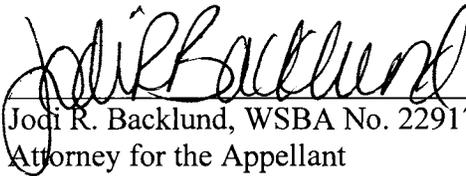
Mr. Shores rests on the argument set forth in his Opening Brief.

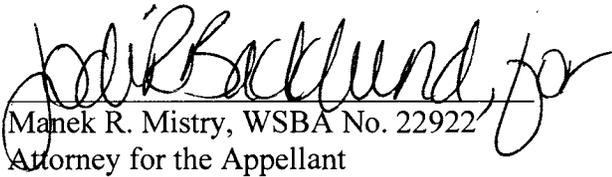
CONCLUSION

Mr. Shores's convictions must be reversed and the case remanded for a new trial. In the alternative, if the convictions are not reversed, the sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on August 25, 2009.

BACKLUND AND MISTRY


Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

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CERTIFICATE OF MAILING

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

Stephen Shores, DOC #851463
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

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

All postage prepaid, on August 25, 2009.

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

Signed at Olympia, Washington on August 25, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant