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Court of Appeals  
Division III  
State of Washington

30017-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID L. HICKAM, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's request to instruct the jury regarding self-defense.
2. The trial court erred in denying appellant's request to instruct the jury that the amount of force used to detain a suspected shoplifter must be reasonable.
3. The trial court erred in denying appellant's request to instruct the jury on a lesser included offense.
4. Cumulative error violated appellant's due process right to a fair trial.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT ERR BY REFUSING TO GIVE A SELF-DEFENSE INSTRUCTION?
- B. DID THE TRIAL COURT ERR IN FAILING TO DEFINE THE SCOPE OF ACTIONS PERMISSIBLE BY A "SHOPKEEPER?"

- C. DID THE TRIAL COURT ERR BY REFUSING TO GIVE A LESSER INCLUDED INSTRUCTION OF THIRD DEGREE THEFT?
- D. WAS THERE ANY CUMULATIVE ERROR?

### III.

#### STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

### IV.

#### ARGUMENT

- A. THE TRIAL COURT PROPERLY REJECTED THE DEFENDANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION.

Before a judge can give a self-defense instruction, the defendant has to present at least some evidence that tends to support a self defense argument. *State v. Walden* 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wash.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wash.2d 541, 544, 947 P.2d 700 (1997). The trial

court's refusal to give an instruction based upon a ruling of law is reviewed *de novo*. *Id.*

*State v. Walker*, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998).<sup>1</sup>

Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *Janes*, 121 Wash.2d at 238, 850 P.2d 495 (*citing Allery*, 101 Wash.2d at 594, 682 P.2d 312). This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Janes*, 121 Wash.2d at 238, 850 P.2d 495.

*State v. Walden*, 131 Wn.2d at 474.

In an attempt to bolster his set of arguments, the defendant “spotlights” narrow pieces of *State v. Lewis* 156 Wn. App. 230, 233 P.3d 891 (2010)<sup>2</sup> in an attempt to distinguish the holding of *Lewis* from this case. In *Lewis*, Division II of the Court of Appeals held that a self-defense instruction is not needed in a First Degree Robbery case because the crime of first degree robbery does not include an element of intent to inflict

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<sup>1</sup> The court in *State v. Walker*, *supra* held that if the issue for the trial court's refusal to give a self-defense instruction was based on legal issues, the review would be *de novo*. No doubt it would be to the defendant's benefit to push the argument towards the legal aspects as opposed to the factual bases so as to be able to take advantage of the *de novo* review standard as opposed to the abuse of discretion standard.

<sup>2</sup> The defendant's numerical citations to *State v. Lewis* are uniformly incorrect throughout his brief. The defendant cites the case as *State v. Lewis*, 146 Wn. App. 230. The correct citation is: *State v. Lewis*, 156 Wn. App. 230.

bodily injury. The State has no burden to prove the absence of self-defense to prove the crime of robbery. *State v. Lewis, supra*.

The defendant claims that *Lewis* is factually distinct from the present case by pointing to Division II's language "under the facts here" as proof that the *Lewis* decision was to be limited to cases involving "infliction of bodily injury." The State sees no such limitation in the *Lewis* decision. The *Lewis* court was looking at the situation from the other end of the problem than the defendant's approach. The defendant here points out the supporting assault facts and then works down the decision chain from that point to reach a conclusion. The *Lewis* decision actually adopts a more inclusive approach by noting that, logically, since First Degree Robbery does not require an intent to cause injury on the part of the defendant as one of the elements, the various permutations of self-defense law have no application to First Degree Robbery.

The defendant denies the application of *Lewis* to this case and argues that RCW 9A.16.020 applies to this case and makes self-defense applicable to the facts of this case. Again, the defendant demonstrates a "top down" logic that mires the reader in the application of statutes when the "bottom line" is that there is no application for self-defense instructions in this case because it cannot be, under *Lewis*, an element for the State to prove.

B. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE SCOPE OF ACTIONS AVAILABLE TO A “SHOPKEEPER.”

The defendant shifts his argument from self-defense to an analysis of the scope of the physical acts available to a security officer in his/her attempts to capture a potential robbery suspect. The defendant claims the trial court erred when it did not give a defense created instruction on the topic of reasonableness in the context of detaining a suspect.

The defendant uses the previous arguments on self-defense and applies the same logic, i.e. the defendant was defending himself from an unreasonable detention. Thus, the flaw in defendant’s arguments remains. The defendant was not permitted to use force against the security person by way of spraying him with MACE. Under the facts of this case, the reasonableness of the initial detention became irrelevant when the defendant swallowed (against the instructions of the security person) what appeared to the security person as a controlled substance.

During argument on instructions, the defense asked the trial court to prohibit the State from arguing in closing argument that the security person was acting within his authority as a limited commission police officer or within the authority of a shopkeeper. The defense pointed out

that there was no instruction on this topic. RP 294-95. However, the defense presented no instruction on shopkeeper authority.

*Barnes v. Seattle*, 88 Wn.2d 483, 489, 563 P.2d 199 (1977) stands for the proposition that the defendant on appeal cannot use arguments not used in trial. On appeal, the defendant argues that there is a “reasonableness” standard for the use of force by the security person. Brf. of App. 17-18. These arguments were not presented to the trial court in the form used on appeal. These arguments should be ignored.

As a strictly logical observation, the State asks how it could be unreasonable for a security person to attempt to prevent the defendant from swallowing an unknown substance in the security officer’s presence. Would the defense truly wish to promote a version of the law whereby security officers simply stand by and watch suspects ingest possibly deadly substances?

C. THE TRIAL COURT COULD NOT GIVE A LESSER INCLUDED INSTRUCTION WHERE THERE IS NO EVIDENCE THAT ONLY THE LESSER CRIME OCCURRED.

The defendant faults the trial court for refusing to instruct the jury on the lesser included crime of third degree theft. A trial court’s decision to refuse a lesser included instruction is reviewed under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 966 P.2d 883 (1998).

A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged, and (2) the evidence supports an inference that the lesser offense was committed. *State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984) and *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *Workman*, 90 Wn.2d at 447-48. *State v. Workman*, 90 Wn.2d at 447-48.

It is not enough that the jury might simply disbelieve the State's evidence. There must be evidence presented which affirmatively establishes the defendant's theory before a lesser included offense instruction will be given. *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). In other words, there must be affirmative evidence supporting an inference that *only* the lesser included offense was committed.

The State concedes the legal prong of *Workman*.

The defendant repeats his initial "self-defense" theories in this context by claiming that the jury could have found the spraying of the MACE at the security person was done in self-defense so it was legally justified. The defendant ignores his own testimony regarding the contretemps entered between he and the security person. According to the

defendant's own testimony he knew the security guard was attempting to effect a "stop" but the defendant refused to remove his hands from his pockets. The defendant testified that the security person threw him into a window and grabbed him by the throat.

At no point in the record did the defendant surrender to the security person, give up his struggles, or show any signs of cooperation. While minimizing his knowledge of the circumstances, even the defendant testified that he knew he was being stopped by some form of authority. If he did not know he was going to be detained, the defendant would not have needed to swallow his contraband. The inference is that, in fact, the defendant knew exactly what was occurring and sought to obstruct and delay his stop until after he had swallowed the contraband.

Factually, the scenario in this case does not support the idea that *only* third degree theft occurred. By both the defendant's testimony and the security person's testimony more occurred than would be involved in a straightforward third degree theft.

It is somewhat difficult to explain exactly what sort of evidence the defendant would have needed to present in order to meet the factual prong of the *Workman* test. Since the fact that events occurred after the defendant left the store with the aluminum foil in his possession, the defendant needed to present evidence that all the later events did not

occur. There is no debate that certain events occurred after the defendant left the store. Of course, the defendant has a different interpretation of the events, but that does not negate the existence of the events. The defendant presented no affirmative evidence that the events that both he and the security person related to the jury, in fact, did not occur. The defendant tries to change the facts by claiming that a self-defense instruction would have cured everything for the defendant. The State counters by pointing out that changing the defendant's alleged justification for spraying MACE at the security person does not change the fact that the defendant *did* spray MACE at the security person.

Once the defendant struggled with the security person and ultimately sprayed the security person with MACE, the existence of facts for third degree theft were obliterated. The trial court properly rejected the lesser included instruction.

The defendant's theory on appeal is that if the court had given the self-defense instruction, the rest of the defendant's appellate arguments would fall into place. Unfortunately for the defendant, there was no self-defense instruction given and that converts the defendant's arguments into speculative "coulda," "woulda," "shoulda" arguments.

D. THERE WERE NO ERRORS TO ACCUMULATE.

The State does not concede that any errors occurred in this case. In the absence of error, the defendant's "cumulative error" arguments must fail as there are no errors to accumulate.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 2<sup>nd</sup> day of February, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )     NO.   30017-0-III  
                                  v.                )  
  )  
DAVID L. HICKAM,                )  
  )  
                                  Appellant,    )  
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I certify under penalty of perjury under the laws of the State of Washington, that on February 2, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

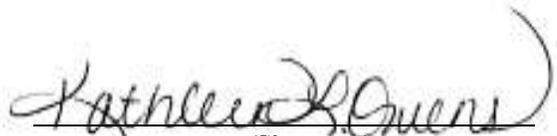
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