

67146-4

67146-4

NO. 67146-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN DASHO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 SEP 11 PM 4:16  
K. Relyea

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

KRISTIN A. RELYEA  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	6
1. THE TRIAL COURT PROPERLY DENIED DASHO'S FOR-CAUSE CHALLENGE TO JUROR NO. 12 .....	6
a. Relevant Facts .....	7
b. The State Constitution Does Not Afford Defendants A Broader Right To An Impartial Jury .....	11
c. The Trial Court Properly Exercised Its Discretion To Deny Dasho's Challenge To Juror No. 12 .....	20
2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED CRIME OF ATTEMPTED THIRD- DEGREE ASSAULT .....	24
3. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LAW REQUIRING NO DUTY TO RETREAT .....	31
4. THE TRIAL COURT PROPERLY REFUSED TO ADMIT EVIDENCE OF DASHO'S REPUTATION FOR TRUTHFULNESS .....	34
D. <u>CONCLUSION</u> .....	40

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Martinez-Salazar, 528 U.S. 304,  
120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) ..... 13, 14, 20

Washington State:

City of Kennewick v. Day, 142 Wn.2d 1,  
11 P.3d 30 (2000)..... 39

McMahon v. Carlisle-Pennell Lumber Co.,  
135 Wash. 27, 236 P. 797 (1925)..... 18, 19

State ex rel. Carroll v. Junker,  
79 Wn.2d 12, 482 P.2d 775 (1971) ..... 26

State v. Benn, 120 Wn.2d 631,  
845 P.2d 289 (1993)..... 31, 32

State v. Blair, 117 Wn.2d 479,  
816 P.2d 718 (1991)..... 25

State v. Bowerman, 115 Wn.2d 794,  
802 P.2d 116 (1990)..... 25

State v. Byrd, 125 Wn.2d 707,  
887 P.2d 396 (1995)..... 26

State v. Deach, 40 Wn. App. 614,  
699 P.2d 811 (1985)..... 38

State v. Eakins, 127 Wn.2d 490,  
902 P.2d 1236 (1995)..... 35, 37, 39

State v. Fire, 145 Wn.2d 152,  
34 P.3d 1218 (2001)..... 6, 11, 12, 13, 14, 15

<u>State v. Fowler</u> , 114 Wn.2d 59, 785 P.2d 808 (1990).....	25
<u>State v. Ginn</u> , 128 Wn. App. 872, 117 P.3d 1155 (2005).....	32
<u>State v. Godsey</u> , 131 Wn. App. 278, 127 P.3d 11, <u>review denied</u> , 158 Wn.2d 1022 (2006).....	27, 28
<u>State v. Gonzales</u> , 111 Wn. App. 276, 45 P.3d 205 (2002).....	21
<u>State v. Gosser</u> , 33 Wn. App. 428, 656 P.2d 514 (1983).....	21
<u>State v. Griffith</u> , 91 Wn.2d 572, 589 P.2d 799 (1979).....	32
<u>State v. Grunewald</u> , 55 Wn. App. 807, 789 P.2d 1332 (1989).....	21
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	12, 13, 16, 17, 18, 19, 20
<u>State v. Hall</u> , 104 Wn. App. 56, 14 P.3d 884 (2000).....	26
<u>State v. Haq</u> , No. 64839-0-I, 2012 WL 279477 (Wash. Ct. App. Jan. 30, 2012) .....	17
<u>State v. Harper</u> , 35 Wn. App. 855, 670 P.2d 296 (1983), <u>review denied</u> , 100 Wn.2d 1035 (1984).....	37
<u>State v. Koch</u> , 157 Wn. App. 20, 237 P.3d 287 (2010), <u>review denied</u> , 170 Wn.2d 1022 (2011).....	33
<u>State v. Moody</u> , 7 Wash. 395, 35 P. 132 (1893).....	18

<u>State v. Music</u> , 40 Wn. App. 423, 698 P.2d 1087 (1985).....	26
<u>State v. Noltie</u> , 116 Wn.2d 831, 809 P.2d 190 (1991).....	20, 22, 24
<u>State v. Parnell</u> , 77 Wn.2d 503, 463 P.2d 134 (1969).....	13, 14, 15, 16, 19
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	32, 34
<u>State v. Rivera</u> , 108 Wn. App. 645, 32 P.3d 292 (2001), <u>review denied</u> , 146 Wn.2d 1006 (2002).....	16, 17, 20
<u>State v. Robinson</u> , 75 Wn.2d 230, 450 P.2d 180 (1969).....	19
<u>State v. Rutten</u> , 13 Wash. 203, 43 P. 30 (1895).....	18
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	18, 19
<u>State v. Stentz</u> , 30 Wash. 134, 70 P. 241 (1902).....	18
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	37
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	25
<u>State v. Witherspoon</u> , 82 Wn. App. 634, 919 P.2d 99 (1996).....	22
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	25

## Constitutional Provisions

### Federal:

U.S. Const. amend. V .....	3
U.S. Const. amend. VI .....	6, 12, 14

### Washington State:

Const. art. I, § 21.....	6, 12, 14, 15, 17
Const. art. I, § 22.....	12, 14, 16, 17, 18, 20

## Statutes

### Washington State:

RCW 10.61.006.....	25
RCW 10.61.010.....	25

## Rules and Regulations

### Washington State:

ER 404 .....	37, 38
ER 608 .....	38

## Other Authorities

Karl B. Tegland, <u>Washington Practice:</u> <u>Courtroom Handbook on Washington</u> <u>Evidence</u> , 233 (2009-2010) .....	37
WPIC 17.05.....	32, 34

**A. ISSUES**

1. Assuming the court erred in failing to grant Jonathan Dasho's for-cause challenge to Juror No. 12, whether Dasho is entitled to a new trial when Juror No. 12 never served on the jury.

2. Whether the trial court properly denied Dasho's for-cause challenge to Juror No. 12.

3. Whether the trial court properly refused to instruct the jury on the lesser included offense of attempted third-degree assault.

4. Whether the trial court properly refused to instruct the jury on the lack of a duty to retreat.

5. Whether the trial court properly refused to admit evidence of Dasho's reputation for truthfulness.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Jonathan Dasho with two counts of Assault in the Second Degree, with deadly weapon enhancements on each count, and alternatively with two counts of Assault in the Third Degree. CP 101-03. The jury acquitted Dasho of second-degree assault, but convicted him of both third-degree assault

charges. CP 221-24; 16RP 2.<sup>1</sup> At the request of both parties, the trial court declined to impose a standard-range sentence and granted Dasho a first time offender waiver. CP 288-95; Supp CP \_\_ (Sub. 99, Statement of Prosecuting Attorney).

## **2. SUBSTANTIVE FACTS**

On August 19, 2009, Federal Way Police Officers Kelly Smith and Steven Wortman responded to a call at an apartment complex of two males fighting. 5RP 36-40; 8RP 27-28. According to dispatch, one of the males had fallen and struck his head. 8RP 28. By the time the officers arrived, the fighting males had left and a neighbor directed the officers to Dasho's apartment. 7RP 130; 8RP 33. The officers noticed a trail of blood leading up the stairs to Dasho's apartment, along with a large pool of blood at the top of the landing outside Dasho's door. 5RP 50; 8RP 36.

Wortman knocked on the door and loudly announced, "Police, please open the door," at least four times. 7RP 53-55,

---

<sup>1</sup> The Verbatim Report of Proceedings consists of sixteen volumes designated as follows: 1RP (2/14/11), 2RP (2/15/11), 3RP (2/16/11), 4RP (2/22/11), 5RP (2/23/11), 6RP (2/24/11), 7RP (3/3/11 morning session), 8RP (3/3/11 afternoon session), 9RP (3/7/11), 10RP (3/8/11), 11RP (3/9/11), 12RP (3/10/11), 13RP (3/14/11), 14RP (3/15/11), 15RP (3/16/11), and 16RP (3/17/11).

132-34. At the same time, Smith looked inside an apartment window and saw Dasho, who was naked, walk into the dining room area and lay down on his back in front of the window. 5RP 59-60. Dasho's brother, Jared Dasho,<sup>2</sup> eventually answered the door and let the officers inside. 5RP 73; 8RP 44-45.

As soon as the officers entered, Dasho jumped up and headed to the kitchen. 5RP 78; 8RP 48-49. Although Wortman yelled at Dasho to stop, Dasho did not comply and "forcefully" opened a kitchen drawer. 8RP 49. Wortman and Smith heard the sounds of "clanging metallic items hitting against each other" as Dasho rummaged through a drawer. 5RP 79-80; 8RP 50-51. With a "very angry and agitated look on his face," Dasho grabbed a table knife<sup>3</sup> and let out a gasp or a scream before turning and running toward the officers. 5RP 80, 85; 7RP 63-65; 8RP 51-52, 128.

Dasho raised the knife over his head with the blade pointed in the officers' direction. 5RP 83; 8RP 53. Despite being ordered to drop the knife multiple times, Dasho continued advancing toward

---

<sup>2</sup> The trial court excluded Jared Dasho's testimony at trial based on his assertion of the Fifth Amendment privilege against self-incrimination for having lied to police and provided Dasho, a minor, with alcohol. 2RP 29.

<sup>3</sup> The knife was a standard table knife with a rounded tip and a 4 ¾ inch blade. 5RP 105-07; 12RP 149-50.

the officers in a "very fast, continuous pace." 5RP 85; 8RP 52. Believing that they were about to be stabbed and possibly killed, both officers opened fire. 5RP 92; 8RP 56. Dasho fell to the ground with the knife landing two feet away from his hand. 6RP 157. Dasho sustained multiple gunshot wounds. 11RP 145-47. Blood alcohol testing subsequently revealed that Dasho was highly intoxicated at the time of the incident. See 11RP 11-12 (State expert estimating Dasho's blood alcohol level was .15-.19); 14RP 63-65 (defense expert estimating Dasho's blood alcohol level was .30).

Dasho's girlfriend at the time, Emily Breen, corroborated the officers' accounts of Dasho's actions immediately before being shot. According to Breen, Dasho "bolted for the kitchen" the moment the officers walked into the apartment. 7RP 60-61. Dasho fumbled around in the silverware drawer, took out a knife, and "ran around the corner like towards the officers." 7RP 63, 65. Dasho raised the knife over his head in a "stabbing motion" with the knife tip pointed at the officers. 7RP 66-67. Although the officers commanded Dasho to stop, he did not listen and continued moving

toward them. 7RP 67. Breen estimated that the officers shot Dasho when he was within five to seven feet of them. 7RP 67. Neighbors confirmed hearing an officer yell, "drop it" or "put it down" immediately before opening fire. 7RP 135; 11RP 82.

At trial, Dasho testified that he had no memory of the incident. 14RP 125, 134-37. Dasho pursued a voluntary intoxication defense, arguing that his extreme state of intoxication prevented him from forming the necessary intent to assault the officers. CP 246; 15RP 37-39. Dasho requested jury instructions on the lesser included offense of attempted third-degree assault, and the law eliminating a duty to retreat. 13RP 25, 34-37; CP 125-27, 133. The trial court denied both requests, finding that Dasho had failed to show sufficient facts to warrant either instruction. 14RP 155-61. Additionally, Dasho sought to introduce evidence of his reputation for truthfulness. 1RP 38-40; 2RP 8-13, 33-35. The court excluded the evidence because Dasho's reputation for truthfulness was not pertinent to the crimes charged. 13RP 46.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY DENIED DASHO'S FOR-CAUSE CHALLENGE TO JUROR NO. 12.**

Dasho contends that the trial court abused its discretion by refusing to strike Juror No. 12 for cause based on the juror's alleged bias in favor of law enforcement officers and the juror's apparent disagreement with the law on intoxication. Dasho also argues that he should not have been forced to use a peremptory challenge to remove Juror No. 12 because article I, section 21 of the Washington Constitution affords defendants a broader right to an impartial jury than the Sixth Amendment of the U.S. Constitution.

Dasho's claim fails. As a threshold issue, this Court should decline to consider the merits of Dasho's claim because he cannot show that he was prejudiced when he exercised a peremptory challenge to remove an allegedly biased juror, and was convicted by a jury on which no biased juror sat. State v. Fire, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001) (plurality opinion).

Dasho's state constitutional claim also fails given the agreement of all nine justices in Fire that forcing a defendant to choose between exercising a peremptory challenge to remove a juror, and allowing the juror to remain on the panel to preserve the

claim for appeal, violates neither the state nor federal constitution. Id. at 154, 167 (Alexander, J., concurring), 176-77 (Sanders, J., dissenting).

Even if Dasho was prejudiced by having to exercise a peremptory challenge to Juror No. 12, he cannot show that the trial court abused its discretion by denying the challenge for cause to Juror No. 12. At trial and on appeal, Dasho has failed to show that the juror demonstrated a probability of actual bias.

a. Relevant Facts.

During introductory questioning by the court, Juror No. 12 indicated that he had previously had "an extremely pleasant or an extremely unpleasant" experience with law enforcement. 4RP 36. In follow-up questioning with the prosecutor, Juror No. 12 explained that he had had both types of experiences, including a negative experience in 1959 with an officer who provided a false declaration, and more recent positive experiences with officers who provided security services at his workplace. 4RP 45-46.

When asked whether his prior experiences would affect his ability "to be fair and impartial," Juror No. 12 admitted that he "would probably give a great deal of weight" to a police officer's

testimony because he knew many of them, and considered them "honest . . . individuals attempting to do a good job." 4RP 47. The following exchange ensued:

STATE: [D]o you feel that you would be able to come into sitting on a jury in a case and judge based on the facts of the particular case, or do you feel that your own experiences would cloud your ability to do that?

JUROR NO. 12: No, I can do it based on the facts, good facts.

4RP 47.

Defense counsel did not ask Juror No. 12 any questions during the first round of voir dire, despite asking other prospective jurors about their law enforcement experiences. 4RP 79-105. Counsel waited to inquire of Juror No. 12 until the next round when the juror volunteered that he found it "very difficult" to accept that a defendant's level of intoxication could negate an element of the crime charged. 4RP 149-50. Upon further questioning, Juror No. 12 agreed with defense counsel that he would "have a hard time not taking a police officer's word over someone else," because police officers have "very little reason to falsify, except I've had it happen, as I said before." 4RP 150. When asked whether he could set his "biases aside" and "follow the law," Juror No. 12 responded that it would be "extremely difficult." 4RP 150.

Defense counsel subsequently asked Juror No. 12 if he would want someone to serve on a jury who could not say with "100 percent" certainty that he could be fair. 4RP 150-51. Juror No. 12 responded that he "would certainly want that, but what you can do and what you do do is a sum of all your experiences and . . . to be absolutely certain would just entirely depend upon the facts o[f] the case" and how they were presented. 4RP 151. Juror No. 12 agreed with defense counsel that it would be "difficult" for him to "not trust the police over another witness" and to accept an instruction on intoxication. 4RP 151. Additionally, Juror No. 12 volunteered, without elaborating further, that he "absolutely would not" want to sit on the jury for the "wood carver case." 4RP 151. Dasho subsequently moved to strike Juror No. 12 for cause. 4RP 152.

Before ruling, the trial court allowed the prosecutor to inquire further:

STATE: Juror No. 12, you indicated that based upon your own personal perceptions, your own biases you came into this courtroom with, that it may be difficult for you to set those aside . . . [I]f the court instructs you that - - to some extent you are to leave your bias outside the courtroom and base your decision as a juror on the facts and the evidence that you hear in this trial, are you going to be able to do that?

JUROR NO. 12: That I can do.

STATE: And you can follow those instructions from the court, despite - - we all come in here with bias, but can you separate your personal opinions and your thoughts and your beliefs from what your job as a juror is to follow the law and apply that law to the facts of the particular case?

JUROR NO. 12: I think so.

4RP 152.

Immediately following this exchange, the court asked, "[I]f I instruct you on certain aspects of the law and certain defenses, whether you agree with them or not, can you follow those instructions?" 4RP 152-53. Juror No. 12 responded, "I think so."

4RP 153. The court denied Dasho's motion to strike Juror No. 12.

4RP 153.

Defense counsel subsequently asked Juror No. 12 about his earlier statement that he would not want to serve on the jury for the "wood carver's case." 4RP 153. Juror No. 12 acknowledged that the officer was "probably in a difficult situation" and that he would "probably accept the officer's view, *but*" his "limited knowledge" of the case led him to believe that "the officer probably acted prematurely and probably used too much aggression." 4RP 153 (emphasis added). Consequently, defense counsel asked Juror

No. 12 if he could "assure" her that he would "do everything in [his] power" to set his "biases aside and be fair" to Dasho. 4RP 154.

Juror No. 12 unequivocally stated, "Yeah. I can assure you of that." 4RP 154. Dasho did not renew his for-cause challenge to Juror No. 12.

Prior to impaneling the jury, the court exercised its discretion to strike four jurors for cause based on either their bias in favor of, or against, police.<sup>4</sup> 3RP 55-56, 67-70; 4RP 41-44, 95-96. Dasho exercised all of his peremptory challenges, including his fifth peremptory challenge to remove Juror No. 12 from the panel. 4RP 186-89.

b. The State Constitution Does Not Afford Defendants A Broader Right To An Impartial Jury.

Dasho's claim fails because he cannot show that his right to a fair and impartial jury was violated when he was convicted by a jury on which no biased juror sat. Fire, 145 Wn.2d at 154 (refusing

---

<sup>4</sup> The court also exercised its discretion to strike six other jurors for cause based on their inability to be fair and impartial. See 3RP 70-72 (juror biased against drug and alcohol use), 108-10 (juror's son unfairly charged with assault), 124-28 (two jurors expressed difficulty viewing graphic photos), 147-50 (juror expected defendant to testify); 4RP 181-83 (juror disagreed with law on mental illness and intent).

to consider whether the trial court erred in denying the defendant's for-cause challenge because the defendant exercised a peremptory challenge to remove the juror, and there was no showing that a biased juror sat on the panel that convicted him). Dasho cured any error by the trial court by using a peremptory challenge to remove Juror No. 12 from the panel.

The Federal and Washington State Constitutions guarantee a defendant the right to a fair and impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, § 21-22. Dasho does not contend that a biased juror sat on the panel that convicted him. Rather, Dasho contends that the trial court erred in failing to grant his for-cause challenge to Juror No. 12.

Urging this Court to conduct an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), Dasho argues that article I, section 21 of the Washington Constitution provides greater protection of a defendant's right to an impartial jury than the Sixth Amendment. Dasho is mistaken. A Gunwall analysis is unnecessary given that all nine justices agreed in Fire that a defendant's state and federal constitutional right to an impartial jury is not infringed when a defendant exercises a peremptory challenge to strike a juror who should have been dismissed for cause.

145 Wn.2d at 154, 167 (Alexander, J., concurring), 176-77 (Sanders, J., dissenting). Even under a Gunwall analysis, Dasho cannot show a principled basis to depart from federal constitutional precedent.

In Fire, a plurality of the Washington Supreme Court adopted the United States Supreme Court's reasoning in United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), and resolved "two conflicting lines of cases" in Washington concerning whether a defendant is prejudiced when he is forced to choose between using a peremptory challenge to remove a juror, and allowing the juror to remain on the panel to preserve the error on appeal. Id. at 159.

The plurality held that a defendant is not prejudiced by having to exercise a peremptory challenge if the defendant was convicted by a jury on which no biased juror sat. Id. at 162 ("the forced use of a peremptory challenge is merely an exercise of the challenge and not the deprivation or loss of a challenge"). To reach its conclusion, the plurality explicitly abandoned the prior line of Washington cases applying the "Parnell<sup>5</sup> rule" which held that a

---

<sup>5</sup> 77 Wn.2d 503, 463 P.2d 134 (1969).

defendant is prejudiced by having to exercise a peremptory challenge. Id. at 159-63.

Writing for the plurality, Justice Bridge observed that "[n]o Washington case has thus far recognized a difference between the right to an impartial jury guaranteed under the federal constitution and that guaranteed under the Washington constitution." Id. at 164. Relying on decades of Washington case law that failed to distinguish between the federal and state constitutional right to an impartial jury, the plurality concluded that "since no Washington case states that the Washington constitution contains a more expansive right to an impartial jury than does the federal constitution, the United States Supreme Court remains the controlling authority." Fire, 145 Wn.2d at 164-65.

In his concurring opinion, Justice Alexander agreed and offered further explanation:

The Court's decision in Martinez-Salazar makes perfect sense to me and is a far better rule than that which we enunciated in Parnell. More importantly, the rule does not trample on any constitutional rights guaranteed by the Sixth Amendment to the United States Constitution or Washington Constitution article I, sections 21, 22.

. . . The language of article I, section 22 of our state constitution is similar to that of the Sixth Amendment and has been construed to ensure and

protect one's right to a fair and impartial jury . . . In addition, Washington Constitution article I, section 21 states that a defendant has a right to be tried by an impartial 12 person jury . . . Neither provision provides that a person has a right to a jury containing a particular juror or jurors . . . [T]hese constitutional rights are not infringed when a defendant exercises a peremptory challenge to cure an erroneously denied for cause challenge . . . [T]he mere fact that one uses his or her peremptory challenge to cure a wrongfully denied for-cause challenge does not establish a constitutional violation.

145 Wn.2d at 167 (internal citations omitted). Justice Alexander specifically rejected the idea that the Parnell rule was constitutionally based and asserted that it was rooted in Washington common law. Id. at 167-68.

The dissenting justices agreed, stating:

The basis for the rule that a defendant is presumed to be prejudiced when he is compelled to exhaust his peremptory challenges to remove a juror who should have been removed for cause is *found in neither the state nor the federal constitution*. Rather it is firmly ensconced in Washington common law.

Id. at 177 (emphasis added). Thus, all nine justices agreed in Fire that neither the state nor the federal constitution provides relief when defendants are forced to choose between exercising a peremptory challenge to remove a juror and allowing the biased juror to remain.

While the justices *disagreed* about whether prejudice results in such a situation under Washington common law, they *agreed* that a defendant's state and federal constitutional right to an impartial jury is not infringed. In his dissent, Justice Sanders specifically noted that Fire's failure to provide "an independent state constitutional analysis" under Gunwall was by "no means dispositive" because the "Parnell rule" stemmed from Washington common law. Id. at 176-77. Given the justices' unanimous agreement about the scope of a defendant's state and federal constitutional right to an impartial jury, this Court should reject Dasho's claim and decline to engage in a Gunwall analysis.

Alternatively, Dasho fails to show a principled basis to depart from federal constitutional precedent under Gunwall.<sup>6</sup> This Court has already held that "all of the Gunwall factors support the conclusion that the state constitution provides the same protection as the federal constitution" when construing a defendant's constitutional right to an impartial jury under article I, section 22 of the Washington Constitution. State v. Rivera, 108 Wn. App. 645,

---

<sup>6</sup> The six Gunwall factors are: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." 106 Wn.2d at 58.

648 n.2, 32 P.3d 292 (2001), review denied, 146 Wn.2d 1006 (2002).

Dasho attempts to sidestep this holding by tethering his claim to the general jury trial right guaranteed by article I, section 21 of the Washington Constitution, rather than the more specific grant of the right to an impartial jury contained in Article I, section 22.<sup>7</sup> Neither constitutional provision references peremptory challenges, or the potential prejudice incurred by exercising such a challenge.

Although article I, section 21, contains the term "inviolable," which suggests a broader state jury trial right under the first Gunwall factor, none of the other factors indicate that this right encompasses a defendant's ability to seek relief on appeal after being forced to use a peremptory challenge. State v. Haq, No. 64839-0-I, 2012 WL 279477, at \*7 (Wash. Ct. App. Jan. 30, 2012).

Regarding the second Gunwall factor, Dasho correctly points out that the state constitution contains two provisions guaranteeing a defendant's right to jury trial, while the federal constitution only

---

<sup>7</sup> Article I, section 21 provides that the "right of trial by jury shall remain inviolable . . .," while Article I, section 22 provides "in criminal prosecutions the accused shall have the right to . . . trial by an impartial jury."

has one. Yet, the Washington Supreme Court has recognized that "this fact fails to provide guidance as to the scope of that right," and directed that "the extent of the right must be determined from the law and practice that existed in Washington at the time of our constitution's adoption in 1889." State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003).

Dasho fails to offer any constitutional history or preexisting state law, the third and fourth Gunwall factors respectively, to support his claim that a broader jury trial right requires a finding of automatic prejudice whenever a defendant exercises a peremptory challenge to remove a juror who should have been stricken for cause. Instead, Dasho relies on Washington cases decided *after* the state constitution was ratified that do not distinguish between the state and federal constitutional right to an impartial jury, let alone seek to apply the constitutional provision at issue here. See State v. Moody, 7 Wash. 395, 396-97, 35 P. 132 (1893) (referencing neither the state or federal constitution); State v. Rutten, 13 Wash. 203, 207-08, 43 P. 30 (1895) (referencing a defendant's "constitutional right" to an impartial jury without further explanation); State v. Stentz, 30 Wash. 134, 142, 70 P. 241 (1902) (referencing article I, section 22); McMahon v. Carlisle-Pennell

Lumber Co., 135 Wash. 27, 236 P. 797 (1925) (referencing neither the state or federal constitution and relying on Washington common law); State v. Parnell, 77 Wn.2d 503, 507-08, 463 P.2d 134 (1969) (referencing a defendant's "right to "an unbiased and unprejudiced jury" and relying on federal and state precedent); State v. Robinson, 75 Wn.2d 230, 450 P.2d 180 (1969) (referencing neither the state or federal constitution and relying on Washington common law).

The fifth Gunwall factor offers little guidance because it always favors an independent analysis, and "the difference in structure between the federal and state constitutions does not address the scope of the right." Smith, 150 Wn.2d at 152.

Finally, the sixth Gunwall factor, does not favor an independent analysis because the right to an impartial jury is a general concern of litigants nationwide, not just those in Washington. The fact that other states have resolved prejudice issues differently sheds no light on the historical record in Washington before 1889. See Gunwall, 106 Wn.2d at 66-67 (recognizing the sixth factor "overlaps" with the fourth factor, "preexisting state law").

In summary, Dasho has failed to offer "well founded legal reasons" for this Court to depart from United States Supreme Court precedent in Martinez-Salazar, and its own precedent in Rivera applying the more specific constitutional grant of the right to an impartial jury guaranteed in article I, section 22. See id. at 62-63 (recognizing that the Gunwall factors are aimed at ensuring that Washington courts rely on independent state constitutional grounds only after an "articulable, reasonable, and reasoned" approach). Dasho cannot show that exercising a peremptory challenge to remove Juror No. 12 violated his state or federal constitutional right to an impartial jury.

c. The Trial Court Properly Exercised Its Discretion To Deny Dasho's Challenge To Juror No. 12.

Assuming in the alternative that Dasho can show prejudice and that his state constitutional right to an impartial jury was violated, this Court should reject Dasho's claim on the merits. The trial court properly exercised its discretion to deny the challenge for cause. To obtain removal of a juror for cause, a defendant must prove that actual bias exists. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). A juror's "equivocal answers alone" are

insufficient to warrant removal; rather, the critical inquiry is "whether a juror with preconceived ideas can set them aside" and decide the case impartially. Id. at 839.

A trial court's decision on a challenge for cause will be upheld on appeal absent a manifest abuse of discretion. Id. at 838. Reviewing courts have repeatedly recognized that the trial court is in the "best position" to determine a juror's ability to be fair and impartial because the trial court personally observes the juror's demeanor during questioning, and is better able to evaluate and interpret the juror's responses. Id. at 839, n.6; see also State v. Gosser, 33 Wn. App. 428, 434, 656 P.2d 514 (1983) (acknowledging the limits of the "cold record").

Dasho argues incorrectly that "bias is established when jurors hold relevant opinions . . . which *may* impact their impartiality." Pet. Br. at 16 (emphasis added). None of the cases Dasho cites stand for this proposition. See State v. Gonzales, 111 Wn. App. 276, 281, 45 P.3d 205 (2002) (acknowledging a juror's preference in favor of law enforcement "does not, standing alone, conclusively demonstrate bias"); State v. Grunewald, 55 Wn. App. 807, 810-11, 789 P.2d 1332 (1989) (refusing to presume actual bias based solely on the juror's personal experience and

association with a particular organization); State v. Witherspoon, 82 Wn. App. 634, 637-38, 919 P.2d 99 (1996) (finding actual bias where the juror unequivocally conceded a "specific prejudice" that African Americans deal drugs, and the defendant was African American and charged with drug possession).

Contrary to Dasho's claim, a defendant must show more than a "mere possibility" of actual bias. Noltie, 116 Wn.2d at 838-40. In Noltie, the Washington Supreme Court upheld a trial court's decision declining to strike a juror who expressed discomfort about listening to an alleged child victim of sexual abuse, and a fear that it would be difficult to be impartial, because the juror's comments did not amount to "a probability of actual bias." Id.

Here, Dasho has failed to show that Juror No. 12's comments demonstrate "a probability of actual bias." Juror No. 12 repeatedly and unequivocally stated that he could be fair and impartial. See 4RP 47 (stating "I can do it based on the facts"), 152-53 (responding "That I can do" when asked if he could leave his bias "outside the courtroom" and decide the case based "on the facts and the evidence"), 154 (answering "I can assure you of that" when asked if he would "do everything in [his] power" to set his "biases aside and be fair").

Despite having had multiple positive experiences with police, Juror No. 12 recognized that police officers are fallible and even capable of false statements. Juror No. 12 recounted an earlier personal experience with an officer who gave "a false declaration" that he characterized as "extremely unpleasant." 4RP 36, 45, 150. Moreover, Juror No. 12 volunteered that he would not want to serve as a juror on the "wood carver's case" because he believed that "the officer probably acted prematurely and probably used too much aggression." 4RP 153.

Although Juror No. 12 candidly admitted that he would find it "difficult" or "extremely difficult" to set aside his biases, he never suggested that he was incapable of setting them aside and in fact, stated repeatedly that he thought he could set them aside. See 4RP 152-54 (stating "That I can do," "I think so," and "I can assure you of that"). The trial court - uniquely able to observe Juror No. 12's tone, manner, and demeanor - concluded that he had the ability to be fair and impartial. The court showed no hesitation in removing jurors when there were such doubts; the court granted for-cause challenges 10 times during the course of voir dire. 3RP 55-56, 67-72, 108-10, 124-28, 147-50; 4RP 41-44, 95-96, 181-83. On four occasions, the court struck prospective jurors who

demonstrated bias in favor of, and against, law enforcement.

3RP 55-56, 67-80; 4RP 41-44, 95-96.

Juror No. 12 repeatedly and unequivocally stated that he could be fair and impartial, despite candidly admitting that it would be difficult to set aside his preconceived notions. The trial court was in the best position to judge whether Juror No. 12's answers reflected "honest caution" or "a likelihood of actual bias." Noltie, 116 Wn.2d at 840. Given Juror No. 12's comments and the trial court's willingness to strike jurors for cause, Dasho cannot show that the trial court's denial of his motion amounted to a manifest abuse of discretion.

**2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED CRIME OF ATTEMPTED THIRD-DEGREE ASSAULT.**

Dasho argues that the trial court erred by failing to instruct the jury on the lesser included crime of attempted third-degree assault. Dasho's claim fails. At trial and on appeal, Dasho has failed to show sufficient facts to warrant an instruction on the lesser included offense.

A defendant's right to a lesser included offense instruction is statutory. RCW 10.61.006, 10.61.010. A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the charged offense (legal prong), and (2) the evidence supports an inference that the defendant committed the lesser offense (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Under the factual prong, a defendant must produce affirmative evidence to support the inference that he committed the lesser offense. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991). "It is not enough that the jury might simply disbelieve the State's evidence." Id. Further, the evidence must support an inference that only the lesser offense was committed. State v. Bowerman, 115 Wn.2d 794, 805-06, 802 P.2d 116 (1990).

A trial court's refusal to give a jury instruction based on the facts of a case is reviewed for an abuse of discretion, while a trial court's refusal based on a matter of law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A court abuses its discretion only when its decision is "manifestly

unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Washington generally recognizes three types of assault: (1) actual battery, (2) attempting to inflict bodily injury on another while having an apparent present ability to inflict such injury, and (3) placing another in reasonable apprehension of bodily harm.

State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995).

Courts have recognized the lesser included offense of attempted third-degree assault under the first and third prongs, but refused to recognize it under the second prong which already includes the element of attempt. State v. Music, 40 Wn. App. 423, 432, 698 P.2d 1087 (1985); State v. Hall, 104 Wn. App. 56, 64-65, 14 P.3d 884 (2000).

Here, the court agreed that an instruction on the lesser included offense of third-degree assault was legally justified under the "reasonable apprehension" prong of assault, but refused to give it based on the lack of evidentiary support:

I'll tell you what I mulled over more than anything else, and that's the Attempted Assault 3. I don't see it. . . . [T]hat's why I asked you again this morning. . . . I don't see affirmative evidence. . . . It seems to me, and correct me if I'm wrong, your

argument is based really on Kay Sweeney's testimony. . . .

So what affirmative act do I have that shows an Attempted Assault 3? I've looked at the Godsey<sup>8</sup> case, which seems very much on point. In this case they talk about you can legally have an Attempted Assault 3 on the third factor. . . . But they didn't find factually it was there because they had completed the assault by means of causing apprehension of imminent bodily harm because the deputies . . . testified that the defendant had taken a charge, in a fighting stance. They perceived, were fearful.

And that's the same thing we have here. They had apprehension of imminent bodily harm. They both testified that's why they reacted. So I think this case is very similar to Godsey.

14RP 155-57. After hearing further argument, the court denied Dasho's request, stating "I have thought this over a lot, last evening, today, lunch. . . . I don't think the factual basis is there."

14RP 160.

The trial court properly relied on State v. Godsey, 131 Wn. App. 278, 127 P.3d 11, review denied, 158 Wn.2d 1022 (2006), to reach its decision. In Godsey, the court upheld a trial court's refusal to instruct the jury on attempted third-degree assault where the defendant raised his fists at a deputy, said "Come on," and took a step toward the deputy. Id. at 288. The court characterized the defendant's actions as a completed assault under

---

<sup>8</sup> 131 Wn. App. 278, 127 P.3d 11, review denied, 158 Wn.2d 1022 (2006).

the "reasonable apprehension" prong,<sup>9</sup> and noted that the defendant "clearly created apprehension" in the deputy who responded by kicking him. Id. The court held that the defendant was not entitled to an instruction on attempted third-degree assault because he *completed* the assault by "causing apprehension of imminent bodily harm." Id.

Dasho makes no reference to Godsey in his brief, despite its parallel facts and the court's explicit reliance on it. Similar to the defendant in Godsey, Dasho created a reasonable apprehension of imminent bodily harm in the officers. Unlike the defendant in Godsey, Dasho armed himself with a knife and ran at the officers with it pointed in their direction. Dasho did far more to "complete" his assault on the officers than the defendant in Godsey.

Dasho's efforts at trial and on appeal to argue that he "voluntarily discarded the knife right as he came out of the kitchen and diverted away from, rather than aggressing on the officers" are meritless. Pet. Br. at 24. All three eyewitnesses who testified at trial unequivocally agreed that Dasho quickly advanced on the

---

<sup>9</sup> The Godsey court further reasoned that the defendant's conduct also likely fell under the "attempt to cause bodily injury" prong of assault, which does not include the lesser offense of attempted assault. 131 Wn. App. at 288.

officers with a knife in his hand. See 5RP 89 (Ofc. Smith stating Dasho was "running/walking very fast at me" with a knife); 7RP 66 (Breen stating Dasho "was walking really fast . . . like running" at the officers with a knife in his hand); 8RP 56 (Ofc. Wortman stating Dasho "was running at us with a knife").

Dasho's ex-girlfriend, who admitted to still caring "very much" for him when she testified, arguably provided the most damning characterization of Dasho's actions, stating that he "bolted" for the kitchen when the officers came in, "grabbed a silverware knife," and "ran around the corner like towards the officers" with the knife raised "above his head" in a "stabbing motion." 7RP 32, 60-61, 64-67. Dasho's ex-girlfriend, and two nearby neighbors, testified that they heard the officers yell multiple times at Dasho, "stop moving," "drop it," and "put it down," before firing. 7RP 67, 135; 11RP 82. Viewing the evidence in the light most favorable to Dasho, there is no evidence to support Dasho's claim that he voluntarily dropped the knife and diverted away from the officers.

Dasho vaguely relies on his "confusion and diminished state of reasoning at the time of the incident," his "lack of hostility toward police," and "the physical evidence that disputed officers' accounts

of the events," as the evidence that entitled him to a lesser included instruction on attempted third-degree assault. Pet. Br. at 24.

Dasho's reliance on this evidence, without further explanation, is puzzling.

Assuming that Dasho is referring to his extreme intoxication at the time of the incident by "confusion and diminished state," this evidence fails to shed any light on what he actually *did* during the incident, specifically whether he discarded the knife or diverted away from the officers. Additionally, Dasho's claimed "lack of hostility toward police" is wholly refuted by the officers' and Breen's testimony that he armed himself with a knife and ran at the officers.

Dasho's reliance on "physical evidence," without further explanation, is similarly unpersuasive. Assumably Dasho is referring to the testimony of his ballistics expert, Kay Sweeney, that he was shot from the side and behind, and was not holding the knife when he fell to the ground. 12RP 82-83, 173-74. These conclusions, however, are of dubious weight given Sweeney's candid admission on cross examination that he could not say "based on the physical evidence" or scene reconstruction, whether Dasho "did or did not run into the main dining area with a knife raised above his head at the officers." 12RP 144. Sweeney further

admitted that he could "only relate things to the shooting," and could not "say, based on the physical evidence, what people were doing." 12RP 158. Thus, any reliance on Sweeney's testimony as evidentiary support for the lesser included instruction is misplaced. Dasho has failed to show that the trial court abused its discretion by declining to instruct the jury on the lesser included offense of attempted third-degree assault.

**3. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LAW REQUIRING NO DUTY TO RETREAT.**

Dasho argues that trial court also committed reversible error by refusing to offer a "no duty to retreat" instruction. Dasho's claim fails. Dasho strategically chose to pursue a voluntary intoxication defense, and to argue that his extreme state of intoxication prevented him from forming the necessary intent to assault the officers. Given his decision not to pursue a self-defense claim, Dasho cannot show that the trial court erred in refusing to instruct the jury on the lack of a duty to retreat.

In general, a defendant is entitled to an instruction on his theory of the case if the law and "substantial evidence" support it. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); State v.

Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). The trial court must interpret the evidence most strongly in the defendant's favor when evaluating whether evidence is sufficient to support giving a jury instruction. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

A person has no duty to retreat when he is assaulted in a place that he has a right to be. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). A court should instruct the jury on the lack of a duty to retreat when a jury "may objectively conclude that flight is a reasonably effective alternative to the use of force in *self-defense*." Id. at 495 (emphasis added). Washington's pattern no duty to retreat jury instruction "supplements," and "should be combined" with, the jury instructions on self defense and lawful use of force. WPIC 17.05, Note on Use. The instruction is not warranted when the evidence shows that the defendant was the original aggressor. Benn, 120 Wn.2d at 659.

Here, the court rejected the proposed "no duty to retreat" instruction because Dasho did not raise a self-defense claim, and the jury could be misled by learning only "one sliver" of the law on lawful use of force. 15RP 7-8. Dasho does not acknowledge the basis for the court's ruling, nor does he identify what "[a]pplicable

evidence" entitled him to a "no duty to retreat" instruction. Pet. Br. at 26. Instead, Dasho advances his claim in one brief paragraph by selectively quoting State v. Koch, 157 Wn. App. 20, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011). Dasho omits the sentence immediately following the section quoted in his brief, which states that "[a]t the very least, the instructions must reflect a defense arguably supported by the evidence." Id. at 33; Pet. Br. at 25.

Dasho does not show how the evidence supported giving a "no duty to retreat" instruction. Having testified that he had no memory of the incident, and having claimed that he was too intoxicated to form the requisite intent, Dasho could not reasonably claim that he believed the police were attacking him and that he acted to defend himself. Indeed, Dasho candidly admitted that he was *not* pursuing a self-defense claim. 13RP 35 (stating "we have not raised a complete claim of self-defense"); 15RP 8 (stating "[T]his is not a pure self-defense case. We are not asserting that the State has an obligation to disprove that Mr. Dasho acted in self-defense.").

Dasho makes no effort to explain how the trial court erred by refusing to give an instruction that "supplements" and "should be combined" with the instructions on self defense. WPIC 17.05, Note on Use. Nor does Dasho explain how the jury could have objectively concluded that flight was "a reasonably effective alternative" to using force in self-defense. Redmond, 150 Wn.2d at 495. Having failed to demonstrate either the factual or legal basis to warrant a "no duty to retreat" instruction, Dasho's claim of error fails.

**4. THE TRIAL COURT PROPERLY REFUSED TO ADMIT EVIDENCE OF DASHO'S REPUTATION FOR TRUTHFULNESS.**

Dasho argues that the trial court erred by refusing to admit the testimony of witnesses who could testify to his reputation for truthfulness. He contends that the witnesses' testimony was critical to proving that he truthfully could not remember the incident, and harbored no intent to assault the officers. Dasho is mistaken. His reputation for truthfulness was not pertinent to the crime charged.

Dasho cannot show that the trial court abused its discretion by excluding the testimony.

On appeal, Dasho argues that evidence of his reputation for truthfulness was admissible without specifying which evidence rule allowed for its admission. During pretrial motions, Dasho indicated that he would seek to admit such evidence on rebuttal if the State suggested during cross examination that he was lying about his lack of memory. 1RP 37-38; 2RP 13.

The court preliminarily denied Dasho's motion, distinguishing the sole authority provided by Dasho, State v. Eakins, 127 Wn.2d 490, 902 P.2d 1236 (1995), which held that evidence of a defendant's reputation for peacefulness is relevant to proving intent on an assault charge. 2RP 33-34. The court reasoned that a defendant's reputation for peacefulness "gets to more of the elements" of assault than a defendant's reputation for truthfulness. 2RP 34. Further, the court reasoned that the likelihood of admitting evidence of Dasho's reputation for truthfulness on rebuttal was low, given the inherent difficulty in proving on cross-examination that

Dasho actually remembered the incident. 2RP 34. Dasho acknowledged the court's preliminary ruling and promised to "alert" the court and counsel as the facts unfolded and the issue developed further. See 2RP 35 ("I'll alert [the State] and the Court as to what our intentions are and we can deal with it more fully.").

Dasho did not raise the issue again until weeks later, *after* two witnesses testified on his behalf. 13RP 45-46. Dasho claimed that the witnesses knew his reputation for truthfulness "within the community of family and his friends." 13RP 45-46. Dasho also claimed that he had two other witnesses who could testify to his reputation for truthfulness in his work community. 13RP 46. Dasho indicated that he was "not asking" the court to reconsider its prior ruling, but seeking to note it "for the record." 13RP 45. The court responded that it had excluded the evidence because truthfulness is not an essential element of the crime, unlike in a perjury case. 13RP 46. Dasho never raised the issue again, including after he testified the next day.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). The court's decision "will be reversed only if no reasonable person would have decided the matter as the trial court did." Id.

A defendant may offer evidence of "a pertinent trait of character" under ER 404(a)(1). A pertinent character trait is "one that is relevant to an essential element of the crime charged." Eakins, 127 Wn.2d at 502. In an assault case, evidence of a defendant's reputation for being peaceful and nonviolent is relevant, while evidence of the defendant's reputation for truthfulness is not. Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, 233 (2009-2010); see also State v. Harper, 35 Wn. App. 855, 860, 670 P.2d 296 (1983), review denied, 100 Wn.2d 1035 (1984) ("Unless an accused's character for truthfulness is a trait pertinent to the charge, e.g., fraud, the defendant as the accused, cannot present evidence of his good reputation for truthfulness").

A defendant may also offer evidence of his reputation for truthfulness after he becomes a witness, and his character is attacked by reputation evidence or otherwise. ER 608(a); see also State v. Deach, 40 Wn. App. 614, 618-19, 699 P.2d 811 (1985) (holding defendant did not have the right to present evidence of his truthful character to the jury in an attempted rape case because the State's cross-examination of him did not amount to an attack on his truthfulness).

Here, Dasho does not argue that the State attacked his reputation for truthfulness by reputation evidence or otherwise.<sup>10</sup> Dasho has not claimed that the State attacked him on cross-examination thereby opening the door to rebuttal evidence of his reputation for truthfulness. Thus, Dasho appears to argue that the trial court erred by refusing to admit evidence of his reputation for truthfulness before he took the stand, under ER 404(a)(1). Yet,

---

<sup>10</sup> Dasho's argument that the State suggested in closing that he "was dishonest in saying he had no memory of the incident," is unclear because the page citation is incorrect. See Pet. Br. at 26 (citing "RP 3/16/11 57" which is the last page of the transcript, and contains only the court reporter's certification). Assuming that Dasho is referring to the State's comment in rebuttal that Dasho's lack of memory is "as he reports" without an "objective way to test" it, the State properly summarized the evidence at trial. See 14RP 98 (defense expert admitting that a person's self-reported lack of memory "is as reliable as the person who's providing it"); 15RP 50-51 (rebuttal argument). Dasho did not object to the statement at the time, and has not claimed prosecutorial misconduct.

Dasho has not provided any authority, at trial or on appeal, to support his claim that a defendant's reputation for truthfulness is pertinent to the crime of assault.

Dasho mistakenly relies on Eakins and City of Kennewick v. Day, 142 Wn.2d 1, 11 P.3d 30 (2000). Eakins held that evidence of a defendant's reputation for *peacefulness* is pertinent to an *assault* charge, while Day held that evidence of a defendant's reputation for sobriety is pertinent to charges of drug possession and possession of drug paraphernalia. Eakins, 127 Wn.2d at 502-03; Day, 142 Wn.2d at 15. Both cases stand for the unassailable principle that a pertinent character trait is one that is relevant to an essential element of the crime charged. Neither case addressed the issue here, whether a defendant's reputation for truthfulness is pertinent to the crime of assault.

Dasho fails to show how his reputation for truthfulness tends to make more or less probable the essential elements of assault. Unlike a defendant's reputation for peacefulness, which bears directly on whether the defendant was more or less likely to have intended an assault, a defendant's reputation for truthfulness sheds no light on any of the essential elements of assault. Dasho cannot

show that the trial court abused its discretion by refusing to admit evidence of his reputation for truthfulness.

**D. CONCLUSION**

For the reasons stated above, the Court should affirm Dasho's conviction.

DATED this 18<sup>th</sup> day of March, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Kristin A. Relyea  
KRISTIN A. RELYEA, WSBA #34286  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002