

MAR 29 2012

No. 30170-2-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

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**State of Washington,**  
*Respondent*

v.

**Donald J. LaFavor,**  
*Appellant*

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Appeal from the Superior Court of Spokane County

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*BRIEF OF APPELLANT*

---

Attorney for Appellant Donald J. LaFavor:  
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## **I. INTRODUCTION**

On December 16, 2009 Mr. Donald LaFavor was charged with two counts of second degree assault with a firearm enhancement. On June 07, 2011 the case proceeded to trial on one count of second degree assault with a firearm enhancement. The trial was conducted before Spokane County Superior Court Judge Kathleen O'Connor. Ultimately, the jury returned a verdict of guilty on the second degree assault and yes as to the firearm enhancement. Mr. Donald LaFavor was sentenced on July 20, 2011. A timely appeal was filed in Spokane County Superior Court.

## **II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS**

1. Was defense counsel ineffective in failing to request any jury instructions including self-defense, lesser included instruction, and voluntary intoxication?
2. Did the conviction of Second Degree Assault violate the defendant's constitutional rights pursuant to the 2<sup>nd</sup> and 14<sup>th</sup> amendments to the United States Constitution and Washington State Constitution Article I § 24?
3. Was there insufficient evidence as a matter of law to find the defendant guilty of Second Degree Assault?

## **III. STATEMENT OF THE CASE**

On June 07, 2011 the trial of Donald LaFavor began in Spokane County Superior Court with Judge Kathleen O'Connor presiding. (RP 3) A hearing was

held pursuant to CrR 3.5. At the hearing Detective Madsen testified regarding interviews with Donald LaFavor after the shooting. (RP 6) An interview occurred on December 10, 2009 at 2:34pm at Sacred Heart Medical Center. (RP 6 lines 16-18) Detective Madsen testified that Mr. LaFavor was medicated and confused with rambling conversation. (RP 6-7) Donald LaFavor talked about it being a full moon and he was in restraints in a hospital bed. (RP 7-8) That Mr. Donald LaFavor believed he was in Riverside Hospital in St. Paul Minnesota and kept saying repeatedly he was in Riverside Hospital. (RP 8-9) Mr. LaFavor was unsure how he got to the hospital and did not know what happened. (RP 10-11) Miranda warnings were not given to Mr. LaFavor. (RP 12) He needed to interview him in the event that Mr. LaFavor died. (RP12)

Detective Madsen next interviewed Donald LaFavor on December 16, 2009 when he was released from the hospital at the Public Safety Building. (RP 14) Mr. LaFavor was in a wheelchair because he was unsteady on his feet. He was wearing hospital type clothing and he was arrested on two counts of second degree assault. (RP 14) Mr. LaFavor was advised of his arrest and given Miranda warnings. (RP 14) The interview was recorded with both audio and video. (RP 15) Mr. LaFavor acknowledged his rights and signed the Miranda card presented by Detective Madsen. (RP 15-16)

During the interview process Mr. LaFavor agreed to answer questions and was not confused. (RP 16) The DVD on which the recording was made was

unable to be heard and ordered not to be played by the court. (RP 18) In the interview the defendant admitted he was at 8910 East Broadway Apt. 15 with Kerry Edison on November 28, 2009 around 9pm. (RP 19) He had told Kerry Edison to stay in the corner and got his gun from under his mattress. Mr. LaFavor loaded the gun with birdshot. (RP 19) He looked out the window and saw no one. Upon opening the door he was shot. (RP 19-20) When told that the police were outside the door in uniform and he had pointed a gun at them Mr. LaFavor responded "What the fuck is going on here?" (RP 20) Mr. LaFavor fell out of his wheelchair and said "Now I do have to take a shit." (RP 20) Then Mr. LaFavor went to the bathroom and returned to the interview. (RP 20) When told that he pointed the gun at deputies with his right hand he said he wanted to hold that question for his attorney. (RP 20)

Mr. LaFavor said he had been on a bender drinking the day of the incident. (RP 20) When he fell out of the wheelchair it appeared it was because he was surprised by the statement that he had pointed a gun at police outside his door. (RP 21) The police made no promises or threats and the statements appeared to be knowing and intelligently made. (RP 21-22) Defense counsel and the prosecution stipulate the first interview is out but second interview was admissible. (RP 22-23) Court instructs defendant as to his rights at 3.5 hearing and he does not testify. (RP 25-26) Court rules the first interview inadmissible but second interview will be admissible. (RP 27-28) The prosecution dismissed Count II which was the

assault as to Deputy Olsen. The court grants the dismissal of Count II pursuant to motion. (RP 30-31)

During the jury voir dire the prosecution questioned a juror about “safety tips when using a gun.” (RP 35) Juror 14 responds to never point a gun at anything you do not intend to shoot. (RP 36) Defense counsel objects to the question as outside of “selection and into argument” which the court overrules. (RP 36) Prosecution proceeds to question about why you “never point a gun at somebody you don’t intend to kill.” (RP 36) A jury was selected and seated. (RP 58)

They began with Deputy Ryan Walter who testified for the state stating he had been a deputy for four years. (RP 64) On this date he was dispatched to a call of two people yelling and he was the primary officer on the call. (RP 65) He was driving a blue Spokane Valley squad car and a black uniform called BDU. (RP 67) He testified that people arguing is a fairly common type of police call. (RP 67) He walked about 50 to 60 yards into the apartment complex when he met a man who had called the police. (RP 68-69) He proceeded to apartment 15 and heard the television playing and nothing else. (RP 69-70)

He knocked on the door and knocked very hard and repeatedly on the door. (RP 70) Deputy Olson also knocked on the door of the apartment. (RP 70) He was unsure if he identified himself but does not do that because people will refuse to answer the door. (RP 70-71) The door opened and a gun was pointed

directly at his face. (RP 73) He thought immediately “Oh shit I am going to get shot.” (RP 73) He pulled his gun and shot until the gun was no longer pointed at him. (RP 73) The defendant fell backwards and the door went shut. (RP 74) The door then opened slightly and the suspect was in the doorway face down on the ground. (RP 75) Mr. LaFavor never discharged his gun. (RP 76)

As a deputy he is trained to shoot to kill and not to injure. (RP 87) He shot until Donald LaFavor was no longer a threat and was out of his sight. (RP 87) He testified that the .38 caliber weapon used by Donald LaFavor was a deadly weapon. (RP 89) There had been no indication the call was violent or indication of threats prior to arrival. (RP 90) Upon his arrival at 8910 East Broadway it was quiet and without yelling. (RP 91) There was glass on the side of the doorway that you could not clearly see through. (RP 94-95)

The door to the apartment swung open very quickly. (RP 98) The defendant stated, “What the fuck is going on here.” (RP 98) The deputy started shooting and was unable to hear all the words. (RP 99-100) He is uncertain if Mr. LaFavor had his finger on the trigger when he shot him. (RP 100) Everything happened within a couple of seconds and he dove to the right. (RP 100)

The state next called Deputy Olson to testify. (RP 105) He was an officer for about 12 ½ years and works patrol. (RP 107) On November 28, 2009 he responded to 8910 E. Broadway at 10pm on male and female arguing call. (RP 107) The officers were in separate cars and approached the apartment side by

side. (RP 108) Both deputies knocked on the door and rang the doorbell. (RP 109) Someone looked out a window by the apartment door. (RP 109)

Within a minute someone opened the door and Deputy Walter was in front of the door. (RP 110) A gun was pointed out the door at Deputy Ryan Walter. (RP 110) He shot his gun because he believed the man intended to shoot Deputy Walter dead. (RP 110) Neither officer announced “police drop your weapon” because there was no time. (RP 111) He fired two shots as he went toward other officer. (RP 111) Donald LaFavor was on the ground and was told to not reach for the gun. (RP 113) He believed Deputy Walter was going to be shot in the head when he saw the gun. (RP 116) They gave statements a couple of days later. (RP 127) Somebody looking out the glass by the door of the apartment would probably just see a silhouette outside. (RP 132) The deputy never identified himself as law enforcement and knocked on the door about four times and rang the doorbell about four times. (RP 132)

The state next called Thomas J. Sullivan of 8910 E. Broadway Apt. 13 in the Spokane Valley. (RP 141) He heard lots of yelling from the apartment with lots of “not nice conversation” before police arrived. (RP 142) He was outside smoking when the police arrived and told police where the apartment was located. (RP 143) He heard the police banging on the apartment door repeatedly and the door bell ringing. (RP 144) He heard pops of gunshots and got his kids down on

the floor and towards the fridge. (RP 144) He remembers hearing words like “what’s going on” but was unsure when it was said. (RP 152)

The court discusses with counsel, outside of the jury’s presence, the video recording of the interview of Donald LaFavor. (RP 159) The government would not be offering the video recorded interview. (RP 160) Mr. Kirkham for the defense would only use the recording to impeach Detective Madsen. (RP 160) Detective Madsen enters the court and says the transcript is only partially complete to the point where Mr. Donald LaFavor goes to the bathroom. (RP 162) The court releases the copy of the video held by the clerk but not yet entered, to Detective Madsen. (RP 165-166)

Next witness called by the government was Glen Davis of the Washington State Patrol with the forensic unit. (RP 168) He is a scientist with the firearm and tool mark section and has worked there eight and a half years. (RP 168) The defense counsel then interjects that they will stipulate that he is an expert. (RP 169) The government proceeds with the witness qualifications. (RP 169) The government introduces Exhibit 56, a .38 caliber revolver involved in this case. (RP 171) The defense stipulated to the admission of the weapon. (RP 171) The court admits the revolver. (RP 171)

Mr. Davis testifies that he tested both the bullets and the gun which was a workable weapon. (RP 172-173) He testifies that the revolver is a deadly weapon

as a firearm. (RP 175-176) He explains how the weapon operates and what birdshot bullets are. (RP 173-176)

Karey Edison was the next witness called by the prosecution. (RP 180) Mr. Donald LaFavor is known to her and she was at his apartment on November 28, 2009. (RP 180) When the banging at the door continued for a third time Mr. LaFavor said he was going to go get his gun. (RP 180)

As she passed Mr. LaFavor in the hallway he said that "I'm gonna go get my gun" to which she responded "are you sure". Then Mr. LaFavor said "yes". At that point Mr. LaFavor went upstairs and she went to the bathroom. (RP 181)

She was concerned about Mr. LaFavor getting his gun because there are other ways of protecting yourself. There are better ways of dealing with situations. (RP 181) The knock was more of a pounding on the apartment door. (RP 182) The people at the door never identified themselves as law enforcement. (RP 181) She did not believe that it was the police at the door. (RP 182)

Marvin R. Hill, a detective with the Spokane Police Department Major Crimes Unit was called for the state. (RP 184) He was called to 8910 E. Broadway after the shooting. (RP 185) There had been an officer involved shooting and he was assigned to process the crime scene. (RP 186) He established a crime scene and obtained a search warrant. (RP 187) Detective Hill describes the approach to the apartment and where casings from the police officers weapons were found. (RP 189) Casings were located in a flower bed in front of apartment

twelve. (RP 189) The casings do not tell where the weapon is fired. (RP 190) They do tell a general area where the gun is fired. (RP 190) There were six bullet holes in the front of the building and two bullet impact spots between door knob and the dead bolt lock. (RP 190)

It was his belief that the officer was on the sidewalk close by on the planting strip along the sidewalk. (RP 191) In the apartment he found a .38 caliber revolver on the stairs leading up to a loft area. (RP 191) In the loft area upstairs the police found two long rifles. (RP 191) The gun on the stairs was a .38 caliber with birdshot used for shooting birds or clay pigeons. (RP 192) Detective Marvin Hill identified five bullets that were removed from the .38 caliber weapon found on the stairs. (RP 193) The bullets were admitted as Exhibit 58 by stipulation (RP 194) as were Exhibits 9 to 13. Exhibits 9 to 13 were various photos of the crime scene. He located more .38 caliber ammunition upstairs in the loft in a dresser. (RP 198) In the living room area downstairs there was some reloading equipment for ammo. (RP 198)

The prosecutor then questioned Detective Hill about alcohol in the residence. (RP 199) The defense objected on the basis of relevance which was overruled. (RP 199) Then Detective Hill testified to a pinkish colored alcohol in a glass, a yogurt cup of alcohol, open cans of beer, and glasses of wine. The detective observed a bottle of wine and more wine in the bathroom. (RP 199) In the refrigerator there was a bottle of Jim Beam which was partially consumed.

(RP 199) Under the kitchen sink he found a myriad of bottles of alcohol. There were states exhibits 7 and 8 showing the alcohol testified to by Detective Hill over the defense objection. (RP 200-201)

Detective Hill testified that the firearm was not in a cocked position. (RP 206) The gun had been moved onto the stairs by Deputy DePriest. (RP 207) There was a police scanner in the apartment that appeared to be inoperable. (RP 209) It appeared that the people in the apartment had been drinking. (RP 210-211) It appeared to him that there were lots of little projects in the apartment including electronics repair. (RP 212-213)

Deputy Timothy H. Madsen was the next witness called by the prosecution. (RP 215) He has been a law enforcement officer for thirty years. He was called to investigate a shooting at 8910 E. Broadway where he was the primary detective. (RP 217) They waited about a week before they interviewed the officers involved to let them calm down and depress. (RP 221)

He conducted interviews of Donald LaFavor first on December 10, 2009 at 2:34 in the afternoon. (RP 222) The first interview was at Sacred Heart Medical Center and Mr. Donald LaFavor was fairly disorganized and confused. (RP 222) Mr. LaFavor was a suspect at the time of the first interview. (RP 222)

The next interview was conducted on December 16, 2009 when Mr. LaFavor was released from Sacred Heart Medical Center. (RP 223) Mr. LaFavor was brought to the public safety building by patrol units upon release from the

hospital. (RP 223) Mr. LaFavor was told he was under arrest for two counts of second degree assault. (RP 223) At the time of this interview he was not handcuffed but in police custody. (RP 223) Detective Madsen informed him of his constitutional rights. He was aware of his rights and understood the rights. (RP 224) The signed rights card was introduced and admitted into evidence. (RP 225) Both Detective Madsen and Detective Johnson conducted the interview which was recorded both audio and video. (RP 225-226)

In the statement Mr. LaFavor stated that on the night Karey Edison came to the apartment about 9 p.m. He heard a loud knock at the apartment door and he looked out the apartment door peephole. When he didn't see anyone he went upstairs to get his gun. The gun is a .38 caliber Smith and Wesson from under his mattress. The weapon was loaded with birdshot at the time. He was left handed and unable to see anyone outside the door. (RP 227)

The door of the apartment was opened with his left hand. As he opened the door he was immediately shot. Never made any claim that he said anything as he opened the door. (RP 228) He had been on a bender all day drinking vodka and had no general recollection of what had occurred. (RP 228) The entire interview was 109 minutes with a long period while Mr. LaFavor was in the bathroom. (RP 229)

Detective Madsen on cross-examination stated both deputies refused to have their statements recorded. (RP 230) The detective acknowledged that Mr.

LaFavor had no objection to his statement being recorded. (RP 231) Mr. LaFavor stated he looked out the door peep hole and then went for his gun. (RP 231)

That Mr. LaFavor had been watching a movie the “Mad, Mad, Mad World” and that he sat back down after he looked out the peephole of the door. (RP 232) He heard pounding at the door again after returning to the movie. (RP 232) The pounding sounded like it was a baseball bat pounding on the door. (RP 233) He then got his gun and looked out the peephole again and he saw no one. (RP 233) The detective asked if he would be surprised to know it was deputies outside. (RP 234) Mr. LaFavor said he was surprised it would be a deputy outside. (RP 234) Mr. LaFavor admitted to drinking a half pint of vodka. (RP 238) Mr. LaFavor stated on the night he had one hell of a bender. (RP 240) The defense rested without any testimony. (RP 242)

Next, the court excuses the jury to review jury instructions with the lawyers. (RP 242) The court then reviews a series of fourteen separate instructions. (RP 243-244) The defense proposes no instructions beyond those prepared by the court. The only question was whether there had been an instruction regarding the defendant is not compelled to testify. (RP 244 line 14-16) The court responds that is included at instruction number 6. (RP 244 line 17-18) The court questions if there are any missing instructions. (RP 245 line 1-7) The court then inquires if either counsel has objections and both counsel respond that they have no exceptions. (RP 245 lines 1-13) The defense proposed no

instructions beyond those presented by the court. (RP 245) The court reads the instructions to the jury including number one to fourteen. (RP 250-261)(CP 16-34) The court did not instruct the jury on self-defense, on any lesser included offenses, or voluntary intoxication. (RP 250-261)(CP 16-34)

The government began closing argument by prosecutor Patrick Johnson. (RP 261) The prosecution states that “A man’s home is his castle.” The prosecutor argues that: “Mr. LaFavor didn’t open up the door with a gun just available and ready in case of danger. (RP 262) You can defend your home against somebody attacking you. What you cannot do is open your door, stick out a gun just because somebody is banging on your door.” (RP 266)

The defense argues all he knew was someone was out there pounding on the door and the officers never identified themselves. (RP 269) Mr. LaFavor says, “What the F is going on here?” Somebody’s screwing with him, they’re pounding on the door with a baseball bat, he doesn’t know what he’s going to run into when he opens the door. (RP 269) Mr. LaFavor is not exactly a spring chicken. (RP 269) Mr. LaFavor never intended to point a gun at Deputy Walter. He was unaware he was there. (RP 270) In the later interview it was clear he did not know that the police were outside. (RP 270 lines 1-8) The question then was whether Mr. LaFavor intended to assault Deputy Walker. (RP 271)

The prosecution then replies to the defense argument that the purpose in getting the gun was to scare someone. (RP 273) That he intended to scare

someone and that someone was Deputy Ryan Walter. (RP 273) After deliberation they jury returned a verdict of guilty on second degree assault and yes on the special verdict. (RP 276)(CP 35-36) The jury was polled at defense request. (RP 276-279)

The defendant was sentenced by the court on July 20, 2011. (RP 282) The defense counsel acknowledged at the sentencing that he has instructed his client that he should argue ineffective assistance of counsel. (RP 286 line 15-23) The court imposed a 3 month sentence plus 36 months for the firearm enhancement for a total of 39 months plus 18 months of community custody. The court states alcohol had a part in the offense but does not require alcohol treatment. (RP 293)(CP 49-60)

#### IV. ARGUMENT

**Issue 1: Defense counsel was ineffective in failing to request any jury instructions including self-defense, lesser included offense instructions, and voluntary intoxication instruction.**

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wash.2d 1, 9, 162 P.3d 1122 (2007) It is particularly true of errors affecting fundamental aspects of due process, such as the presumption of innocence and the right to have the State prove every element of the charge beyond a reasonable

doubt. *State v. Johnson*, 100 Wash.2d 607, 614, 674 P.2d 145 (1983), overruled on other grounds in *State v. Bergeron*, 105 Wash.2d 1, 711 P.2d 1000 (1985)

Jury instructions must clearly indicate that the State must prove the absence of self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wash.2d 612, 621, 683 P.2d 1069 (1984); *State v. Roberts*, 88 Wash.2d 337, 345, 562 P.2d 1259 (1977) The due process clause of the 14<sup>th</sup> amendment of the United States Constitution requires the State to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S. Ct. 2450, 2457, 61 L.Ed.2d 39, 48 (1979); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L.Ed. 368, 375 (1970)

To establish ineffective assistance of counsel the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996) Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all circumstances." *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995) Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91, 104 S. Ct. 2052 The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.

*State v. Leavitt*, 111 Wash.2d 66, 72, 758 P.2d 982 (1988) If either element of the test is not satisfied, the inquiry ends. *Hendrickson*, 129 Wash.2d at 78, 917 P.2d 563

“The legal standard applied to jury instructions is: ‘Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.’” *State v. Rodriguez*, 121 Wash. App. 180, 184-85, 87 P.3d 1201 (2004) (quoting *State v. Irons*, 101 Wash. App. 544, 549, 4 P.3d 174 (2000)) However, self-defense instructions are subject to heightened appellate scrutiny: “Jury instructions must more than adequately convey the law of self-defense. *State v. LeFaber*, 128 Wash.2d 896, 900, 913 P.2d 369 (1996)” Read as a whole, the jury instruction must make the relevant legal standard manifestly apparent to the average juror. *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997) Further, “[a] jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” *LeFaber*, 128 Wash.2d at 900, 913 P.2d 369

In order to find that trial counsel was ineffective, the defendant must show that counsel’s performance was deficient in some respect, and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 674 (1984); *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995) The defendant must also demonstrate the absence of legitimate

strategies or tactical reasons for the challenged conduct. *McFarland*, 127 Wash.2d at 336, 899 P.2d 1251

The defense in this case failed to propose any instructions to the court or to make any exceptions to the courts instructions. (RP 242-245) The facts of the case were that Mr. Donald LaFavor was in his apartment (RP 227) Ms. Karey Edison was at the apartment with Mr. LaFavor. (RP 180) The people pounding at the door never announced they were police. She did not believe they were police officers at the door. (RP 181-182) The deputies never identified themselves as law enforcement and rang the doorbell repeatedly while knocking on the door. (RP 132, 144)

Mr. LaFavor told Detective Madsen he was watching a movie “Mad, Mad, Mad, World.” (RP 232) There was pounding at the door, he looked through a peephole, saw no one, and he went upstairs to get his gun. (RP 231) He heard pounding on the door after he returned to his movie. (RP 232) The pounding sounded like it was with a baseball bat on the door. (RP 233) When he looked out the peephole on the door he saw no one outside. (RP 233) He admitted to drinking half a pint of vodka. (RP 238) Mr. LaFavor said he had been on “one hell of a bender” that night. (RP 240) Mr. LaFavor was surprised to know it was deputies outside that day. (RP 234) There was testimony that he yelled “What the fuck in going on here” as he opened the door. (RP 98) (RP 152) Karey Edison testified she was concerned that Mr. LaFavor went for his gun because there are better

ways to defend yourself than with a gun. (RP 181) She knew the people at the door never identified themselves and the knocking was more of a pounding. (RP 181-182) She did not believe it was police at the door. (RP 182)

The testimony established that Mr. LaFavor went to get his gun for self-defense and only went to the door as the pounding was so loud it sounded like a baseball bat. Mr. LaFavor and Karey Edison were unaware it was the police outside the apartment. He never shot the weapon but only displayed the weapon.

The facts establish arguments for self-defense, a basis for lesser included charges of fourth degree assault and unlawful display of weapon, and testimony of voluntary intoxication. To be entitled to an instruction on self-defense, the defendant need only prove “any evidence” of self-defense. *State v. Gogalin*, 45 Wash. App. 640, 643, 727 P.2d 683 (1986) When some evidence of self-defense is presented, the jury “should be instructed that the state bears the burden of proving the absence of self-defense beyond a reasonable doubt.” *State v. McCullum*, 98 Wash.2d 484, 500, 656 P.2d 1064 (1983) Here the defense attorney was ineffective in failing to request a self-defense instruction which would have required the government to prove beyond a reasonable doubt that self-defense was absent. It would seem that there could be no conceivable reason why the defendant’s lawyer would fail to propose a self-defense instruction. The Court of Appeals has held “there was no strategic or tactical reason for counsel’s proposal of an instruction that incorrectly stated the law [and] eased the state of its proper

burden of proof on self-defense.” *State v. Kylo*, 166 Wn.2d 856, 869, 215 P.3d 177 (Wash. 2009) citing *State v. Woods*, 138 Wash. App. 191, 201-202, 156 P.3d 309 (2007) The failure of defense counsel to request self-defense instructions constitutes ineffective assistance of counsel. There could not be a strategic or tactical reason to fail to request the self-defense instruction which effectively relieved the government of the duty to prove the absence of self-defense beyond a reasonable doubt.

Additionally, defense counsel in this case failed to request a lesser included instruction where the facts warranted a lesser included instruction. A lesser included instruction is proper when “(1) each element of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence, viewed most favorably to the defendant, supports an inference that only the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) The two parts of the test are respectively referred to as the “legal” and the “factual” prongs. *State v. Rodriguez*, 48 Wash. App. 815, 817, 740 P.2d 904 (1987) After satisfying the two *Workman* prongs, the “Washington rule” commands that “a lesser included offense instruction is required as a matter of right.” *In re Pers. Restraint of Andress*, 147 Wash.2d 602, 613, 56 P.3d 981 (2002); *State v. Lyon*, 96 Wash. App. 447, 450, 979 P.2d 926 (1999), overruled on other grounds by *Andress*, 147 Wash.2d at 613-16, 56 P.3d 981

“To convict a defendant of second degree assault, the jury must find specific intent to create reasonable fear and apprehension of bodily injury.” *State v. Ward*, 125 Wash. App 243, 248, 104 P.3d 670 (2004) (citing *State v. Byrd*, 125 Wash.2d 707, 713, 887 P.2d 396 (1995)) For instance, a defendant’s “intent may be inferred from pointing a gun, but not from mere display of a gun.” *Ward*, 125 Wash. App. At 248, 104 P.3d 670 (citing *State v. Eastmond*, 129 Wash.2d 497, 500, 919 P.2d 577 (1996))

To convict based on unlawful display of a weapon, the defendant must: “carry, exhibit, display, or draw any firearm, dagger, sword, knife, or other stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” RCW 9A.36.011; *Ward*, 125 Wash. App. At 248, 104 P.3d 670; see, e.g. *Fowler*, 114 Wash.2d at 67, 785 P.2d 808

Once again defense counsel failed to propose defense instructions and made no exceptions to the courts instructions. (RP 242-245) The courts instructions did not instruct on any lesser included offenses (RP 249-260; CP 16-

34) including unlawful display of a weapon or fourth degree assault. Here the evidence at the trial is that Mr. LaFavor responded to loud banging at his apartment door. (RP 180, 227) Ms. Karey Edison was at the apartment with Mr. LaFavor. (RP 180) The people at the door never announced they were police. Karey believed they were not police. (RP 181-182) When Donald LaFavor looked through the peephole he saw no one outside. (RP 231) Mr. LaFavor went to the door armed with a gun and swung the door open quickly. (RP 98) As the door opened Donald LaFavor yelled, "What the fuck is going on here." (RP 98) He had been on a bender drinking vodka all day long. (RP 228) Mr. LaFavor never discharged his gun. (RP 76)

The defendant was entitled to a lesser included instruction on unlawful display of a weapon as Fourth Degree Assault a lesser included offense of second degree assault. The facts presented support that Mr. LaFavor displayed a gun pointing it out the door. (RP 98) Mr. LaFavor was unsure who was outside as he saw no one in looking through the peephole. (RP 231) As he opened the door he yelled, "What the fuck is going on here." (RP 98) The prosecution argued in closing about the intent in getting the gun. (RP 271-273) Without any defense instructions there was no effective way to make arguments about the lack of intent.

The failure of the defense to request the unlawful display of the weapon and Fourth Degree Assault as a lesser included offense gave the jury no

alternative to second degree assault. Although the defense argued that displaying the gun did not demonstrate intent to assault the lack of a lesser included instruction allowed no other alternative to the jury. Even though the government could only infer intent from the displaying of the gun the defense ability to argue otherwise was diminished by the lack of a lesser included instruction. The case law requires a lesser included instruction where the case supports the inference that the defendant committed only the lesser crime. *State v. Gamble*, 137 Wash. App. 892, 905, 155 P.3d 962 (2007), *aff'd*, 168 Wash.2d 161, 225 P.3d 973 (2010) The petitioner here provided “substantial evidence in the record supports a rational inference that the defendant committed only the lesser included....offense to the exclusion of the greater offense.” *State v. Fernandez-Medina*, 141 Wash.2d 448, 461, 6 P.3d 1150 (2000) requiring a lesser included instruction.

Lastly, the counsel for the defendant failed to request an instruction on voluntary intoxication. (RP 242-245) The court gave no instruction on voluntary intoxication. (RP 249-260); CP 16-34) Although there was considerable testimony that the defendant drank a lot of vodka and had been on a bender all day. (RP 228, 238, 240) Further, there was testimony of great amounts of alcoholic beverages stored throughout the apartment. (RP 199-201) Further, the court found at sentencing that alcohol had a part in the offense. (RP 293) (CP49-60)

A voluntary intoxication instruction allows a jury to consider the effect of voluntary intoxication by alcohol or drugs on a defendant’s ability to form the

necessary mental state for a charged crime. *State v. Coates*, 107 Wash.2d 882, 889, 735 P.2d 64 (1987) Indeed, our supreme court has held that a voluntary intoxication instruction, if requested, is mandatory because, without it, the jury is not informed of the legal significance of intoxication and counsel cannot effectively present the defense. *E.g. State v. Rice*, 102 Wash.2d 120, 123, 683 P.2d 199 (1984)

A defendant is entitled to a jury instruction on his theory of the case when he produces sufficient evidence to support the instruction. *State v. Williams*, 132 Wash.2d 248, 259-60, 937 P.2d 1052 (1997) Failure to instruct is reversible error. Id. A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is substantial evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wash. App. 230, 238, 828 P.2d 37 (1992) The effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use. *State v. Thomas*, 123 Wash. App. 771, 782, 98 P.3d 1258 (2004) The appellate court and trial court are to view the evidence and draw all reasonable inferences in the light most favorable to the defendant. *State v. Douglas*, 128 Wash. App. 555, 561-62, 116 P.3d 1012 (2005)

Ultimately, defense counsel was ineffective in failing to request jury instructions on self-defense, lesser included instructions, and voluntary

intoxication. The defendant is entitled to effective representation which requires that legal counsel request instructions which “read as a whole.....makes the relevant legal standard apparent to the average juror.” *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997) Here, there can be no tactical or strategic for the defense counsel to fail to request instructions on all three defenses to the charges.

**Issue 2: The conviction of second degree assault violated the defendant’s constitutional rights pursuant to the 2<sup>nd</sup> and 14<sup>th</sup> amendments to the United States Constitution and under the Washington State Constitution Article I § 24.**

The 14<sup>th</sup> Amendment makes the 2<sup>nd</sup> Amendment right to keep and bear arms fully applicable to the states. *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020, 3050, \_\_\_ U.S. \_\_\_ 2010 The United States Supreme Court held a self-defense is a basic right, recognized by many legal systems from ancient times to present day, and in *Heller* the court held “self-defense is “the central component” of the second amendment right.” *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2801-2801; see also *Id.*, at \_\_\_ 128 S. Ct. 2783, 2817 noting that handguns are “overwhelmingly chosen by American society for the lawful purpose of self-defense.” The court concluded citizens must be permitted “to use handguns for the core lawful purpose of self-defense.” *Id.*, at \_\_\_ 128 S. Ct. at 2818

The Washington State Constitution at Article I § 24 declares: “Right To Bear Arms. The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.” also plainly guarantee’s an individual right to bear arms. *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010)

In evaluating the application of Article I § 24 there must be an analysis based upon the factors established in *State v. Gunwall*, 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986) The six factors are (1) the texts, (2) significant differences in parallel provisions, (3) state constitutional and common law history, (4) pre-existing state law, (5) structural differences between federal and state constitutions, and (6) matters of particular state interest.

In comparing the texts the Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” To the language of the Washington State Constitution Article I § 24 which reads: “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individual corporations to organize, maintain or employ an armed body of men.”

In comparing these two constitutional provisions the Washington Supreme Court in *State v. Rupe*, 101 Wn.2d 664, 706-707, 683 P.2d 571 (1984) states that

Washington Constitutional provision is “facially broader than the Second Amendment, which restricts its reference to “a well regulated militia.” The Washington Supreme Court in *Rupe*, Id 707-708 cites to the Oregon State Constitution Article I § 27 which has been interpreted to protect a citizens right to possess firearms outside the home. The Washington Supreme Court further held that using possession of firearms in the death penalty phase violated a defendant’s due process rights. *Rupe*, Id. 708

In conducting a *Gunwall* analysis we must next examine the significant differences between the parallel provisions. Once more the state version of the constitution provision specifically states the individual right to “bear arms in defense of himself.” The language as expressed in *Rupe* supra specifically addresses the right to bear arms in defense of himself – while the Second Amendment does not mention the “individual right to ‘bear arms in defense of himself’”. The words are strikingly different clearly explaining the right is both to the individual and to possess for self-defense. The words of the constitution are interpreted as they would have been commonly understood at the time the constitution was ratified. *State v. Brunn*, 22 Wash.2d 120, 139, 154 P.2d 826 (1945); see also *Robert F. Utter, Freedom and Diversity in a Federal System: Perspective on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 509-10 (1984)

In looking at the third factor of the state constitutional and common law history there are historical reasons for the language of the state constitutional provision of Article I § 24. The provision addresses the formation of private militia because of concerns about corporations employing armed bodies of men against labor unions. The 1880's in Washington was a time of serious social upheaval, including labor unrest, as the railroad expansion led to rapid urbanization and population explosion. *Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution: A Reference Guide* 11(2002) After the railroads completion, wide scale unemployment generated additional tensions. *Mary W. Avery, History and Government of The State of Washington* 197 (1961) Serious clashes between private armies hired by mine owners and miners in the Cascade coal fields in the late 1880's ensured that labor issues influenced the debate of the constitutional convention. *Carlos A. Schwantes, Radical Heritage; Labor, Socialism, and Reform in Washington and British Columbia, 1885-1917*, at 32 (1979) Two members of the convention directly represented labor: Matt J.M'Elroy, a logger, and William L. Newton, a coal miner. *Id.* One historian credits the two prolabor provisions – Article 29, § 2 and Article I, § 24 (forbidding corporations from employing armed bodies of men) directly to the labor influence on the delegates. *Id.* A clear intent was expressed for the right to bear arms for the purpose of self-defense.

The fourth factor addresses the preexisting state law in establishing the application of the constitutional provision. It is important to remember that the United States Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797-2799, 554 U.S. 570 (2008) establishes that the “right to have arms had become a fundamental for English subjects,” citing *Malcom* 122-134. In Washington State the Washington Supreme Court has analyzed the historical considerations of the Article I § 24 finding that “Forty-four state constitutions explicitly recognize the right to keep and bears arms and ‘nearly all secure (at least in part) an individual right to keep some kinds of guns for self-defense.’” *State v. Sieyes*, 168 Wn.2d 276, 287, 225 P.3d 995 (2010)

The fifth factor is the structural differences between the two provisions as cited earlier. Article I § 24 reads: “The right of the individual citizen to bear arms in defense on himself, or the state, shall not be impaired”. The language prohibits any impairment of the right the individual to bear arms in defense of himself. The language grants the citizen much greater right to bear arms in defense of himself. The language has been held to be “facially broader than the Second Amendment”. *State v. Rupe*, 101 Wn.2d 664, 706-707, 683 P.2d 571 (1984)

The sixth factor that is to be considered is the matter of particular state interest. Washington State has legislation which grants citizens acting in defense of themselves or others protection from unwarranted prosecution. RCW 9A.16.020 allows the use of force to protect themselves and their property. There

is legislation that provides “no duty to retreat”. *State v. Williams*, 81 Wn. App. 738, 916 P.2d 445 (1996) The state has the burden of proving the absence of self-defense in prosecution for assault. *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984) It is significant that our legislature had provided strong legal protection through legislative acts to protect citizens acting in defense of themselves or their property.

The defendant has been denied his constitutional protection under the Second Amendment to the United States Constitution and Article I § 24. He has been convicted of second degree assault where he was merely asserting his right to possess a handgun in protecting himself while lawfully in his home. The conviction here violates his constitutional right to bear arms in defending himself in the home.

**Issue 3: There was insufficient evidence as a matter of law to convict the defendant of second degree assault.**

There was insufficient evidence to establish that a second degree assault was committed with intent (1) to inflict bodily injury or (2) with intent to create in another apprehension and fear of bodily injury.

When sufficiency of the evidence is at issue, the test is “Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)

(quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)) All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *Id.* See also *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977) In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (internal citation omitted) It is the fact-finder's province to believe or disbelieve any witness whose credibility it is called upon to consider. *State v. Williams*, 96 Wn.2d 215, 222, 634 P.2d 868 (1981) (quoting *Rettinger v. Bresnahan*, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953))

The government here has been unsuccessful in demonstrating that Mr. LaFavor displayed the weapon in his home with the intent to inflict bodily injury or to create in another the apprehension and fear of bodily injury. He was intoxicated and uncertain who was outside the door if anyone was outside the door. The weapon was displayed while in his home an area of the greatest protection of the right to bear arms. The government failed to provide sufficient evidence as to the intent for second degree assault.

## V. CONCLUSION

The case should properly be remanded for a new trial because the ineffective representation requires a new trial. The instructions given deny the defendant his due process right to have the state prove every element of the

charged offense of second degree assault requiring a new trial. Further, the case should also be remanded due to insufficient evidence as a matter of law.

Additionally, the conviction for second degree assault under these facts violates the defendant's rights under the 2<sup>nd</sup> and 14<sup>th</sup> Amendment to the U.S. Constitution and Article I § 24 of the Washington State Constitution.

Respectfully submitted this 28 day of March, 2012



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