

No. 41357-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Scott Davis,**

Appellant.

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Clallam County Superior Court Cause No. 09-1-00039-4

The Honorable Judge Kenneth Williams

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. Mr. Davis's two convictions violate his constitutional right not to be twice put in jeopardy for the same offense.
2. The imposition of a firearm enhancement on Count II violated Mr. Davis's right to be free from double jeopardy.
3. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of attempted murder in the first degree.
4. The court's instructions on attempted murder failed to make the relevant legal standard manifestly clear to the average juror.
5. Mr. Davis was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel unreasonably failed to present evidence of Mr. Davis's good character.
7. The trial court violated Mr. Davis's jury trial right under Wash. Const. Article I, Section 21.
8. The trial court violated Mr. Davis's jury trial right under Wash. Const. Article I, Section 21.
9. The trial court erred by giving Instruction No. 1, which reads (in part) as follows:

It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.
10. The trial court erred by giving Instruction No. 12.
11. The trial court erred by giving Instruction No. 13.
12. The trial court erred by giving Instruction No. 23.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person may not receive multiple convictions for the same offense. In this case, Mr. Davis received two convictions for engaging in a gunfight with one other person. Did the entry of two convictions violate Mr. Davis's right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9?
2. Double jeopardy prohibits multiple punishments for a single offense. In this case, Mr. Davis was punished for assault with a firearm, and for being armed with a firearm during the assault. Did the two punishments violate his right to be free from double jeopardy?
3. A conviction for attempt requires proof that the accused person took a "substantial step" toward commission of the crime charged; the phrase "substantial step" means "conduct strongly corroborative of the actor's criminal purpose..." Here, the court's instructions defined the phrase as "conduct that strongly indicates a criminal purpose..." Did the instruction relieve the prosecution of its burden to prove the elements of attempted murder beyond a reasonable doubt?
4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Defense counsel unreasonably failed to offer available evidence establishing Mr. Davis's good character. Was Mr. Davis denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
5. An accused person has a state constitutional right to trial by a jury with the unqualified power to acquit, even when the prosecution has proved its case beyond a reasonable doubt. In this case, the court's instructions affirmatively misled jurors about their power to acquit. Did the court's instructions violate Mr. Davis's right to a jury trial under Wash. Const. Article I, Sections 21 and 22?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Fifty-nine-year-old Scott Lincoln Davis had no criminal history when he engaged in a near-fatal shootout with Clallam County Sheriff's Deputy William Cortani in January of 2009. CP 6-17.

Mr. Davis's life was characterized by decades of service and achievement. He was an Eagle Scout, a decorated veteran who served in Vietnam, Korea, and the Gulf War, a graduate of Washington State University and the Florida Institute of Technology (where he earned a graduate-level degree). After retiring from the U.S. Army (as a major) with 20 years of service, he worked for fourteen years as a computer programmer and technician for the Kitsap School District. Pre-Sentence Investigation (PSI), p. 9, Supp. CP.

He married twice and raised four children, none of whom had anything negative to say about their childhood. PSI, pp. 10-11, Supp. CP. All three of his daughters strongly support Mr. Davis; his son (who is serving in the Army) could not be reached for comment. PSI, p. 11, Supp. CP. Mr. Davis also continues to enjoy the support of his ex-wife, his current wife, two of his siblings,<sup>1</sup> his parents, and his cousin. PSI, pp. 10-11, Supp. CP.

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<sup>1</sup> The other two could not be reached for comment. PSI, p. 10

Mr. Davis was diagnosed with bipolar disorder and PTSD, and he began to experience severe problems in 2005. That year, his medications were changed, and he stopped taking them regularly. PSI p. 10; RP (7/28/10) 67-73. A psychiatrist would later testify that it is very common for people with bipolar disorder to have trouble taking medication consistently, and that the disorder itself interferes with the patient's ability to monitor her or his own medication. RP (7/28/10) 80, 90-91.

In 2005, Mr. Davis quit his job, left the family home, and was eventually located in a mental hospital in Bali, Indonesia. PSI, pp. 9-10, Supp. CP. Before he was discovered in Bali, Mr. Davis had spent large sums of his own money to provide food and clothing for impoverished locals. PSI, p. 9, Supp. CP. At some point during his stay in Indonesia, he received a head injury that affected his memory (and possibly other mental faculties). After being transferred to the mental hospital, he received treatments that included electroshock therapy. RP (7/28/10) 72-73; CP 36.

After he was returned to the U.S. and provided with appropriate care, his disorder became manageable again. RP (7/28/10) 73, 83. However, in 2008, a Veterans' Administration psychiatrist added Provigil (modafinil), a stimulant, to his medications. After prescribing this new medication, Mr. Davis was not closely monitored. RP (7/28/10) 81-82. He decompensated rapidly and stopped taking his medication. According

to a psychiatrist who testified at Mr. Davis's trial, the decision to prescribe Provigil was extremely questionable, as was the failure to provide close monitoring to determine the effects of the medication.<sup>2</sup> RP (7/28/10) 81.

After Provigil was prescribed, Mr. Davis again had difficulty taking his medications on a consistent basis. He moved out of the family home again (at some point striking his wife). PSI, p. 10, Supp. CP.

Mr. Davis's thoughts and behaviors became increasingly bizarre. He began preparing for the collapse of civilization, constructing a tent city on the Olympic Peninsula, complete with a set of decoy cabins to confuse his enemies. He predicted society's decline, accompanied by a reversion to cannibalism, and he planned to provide protection to those who sought shelter in his tent city, away from the urban areas where he thought the worst troubles would arise. Mr. Davis also began accepting credit card offers, and went heavily into debt purchasing supplies and equipment to further his goals. RP (7/28/10) 12-60. He amassed a collection of firearms, which he kept loaded, along with a large number of knives. RP (7/28/10) 27.

During this period, he was extremely difficult to get along with. He could not carry on a coherent conversation; instead, he monopolized

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<sup>2</sup> This opinion was echoed by Mr. Davis's cousin, a clinical psychologist. PSI, pp. 12-13, Supp. CP.

the conversation and shifted from topic to topic, with no logic to his speech. RP (7/28/10) 12-14, 19, 22, 25, 31. He resisted attempts to help him, and refused to return to Madigan Army Hospital. Several times, he expressed his belief that if he went onto property owned by the military, he would not receive treatment; instead, he would be kidnapped, taken to Guantanamo, and tortured. RP (7/28/10) 25-26, 33.

His sister Jenny Davis made numerous attempts to alert authorities that Mr. Davis was a danger to himself and others. She called the police, the military, the Department of Homeland Security, and the local mental health agency. None of her calls produced a response. RP (7/28/10) 24-25, 29-30, 38, 41.

Four days before the shootout with Deputy Cortani, Mr. Davis was approached by LaPush Police Officer Michael Foster at the Lonesome Creek Campground. RP (7/21/10) 5. When Officer Foster learned that Mr. Davis had three loaded rifles at his campsite, he instructed Mr. Davis to unload them and store them in his car, to avoid frightening tourists. RP (7/21/10) 7. Mr. Davis agreed, and then said he might bring them to the police department for safekeeping. RP (7/21/10) 8.

A few days later, Mr. Davis did bring his guns to the LaPush police department. He told Officer Foster that he had “major” PTSD stemming from his service in the Vietnam War and the Gulf War, and that

if he did not take his medication he'd put a bullet in his own or someone else's head. RP (7/21/10) 9-10, 13. He also said that he hoped that no one approached his campsite at night, and opened his coat to show the officer a collection of knives (including one with a blade that was more than a foot long). RP (7/21/10) 10.

LaPush Police Chief William Lyon visited Mr. Davis the following day at Lonesome Creek. RP (7/21/10) 20-21. Chief Lyon thanked Mr. Davis for storing his guns with the police, and Mr. Davis replied that he didn't want anyone to get hurt. RP (7/21/10) 21. The two discussed Mr. Davis's military service, and Chief Lyon saw a rifle that Mr. Davis used to hunt grouse while hiking. RP (7/21/10) 21-22. When Chief Lyon asked Mr. Davis if he had other guns, Mr. Davis became offended and loud, and denied having other guns. RP (7/21/10) 22-23. Chief Lyon thought that Mr. Davis was oriented and aware of his own history, but feared that he might be suicidal. RP (7/21/10) 24-27.

The day before the shootout, Mr. Davis appeared at Ray's Grocery. He told Joel Ray that he was on psychotropic medication and that he had PTSD. RP (7/21/10) 112-115. Ray described him as disjointed. RP (7/21/10) 115.

Mr. Davis returned to the store later that afternoon and showed Ray a Glock pistol, a knife, and silver bars. He told Ray that he'd

managed to “ranger” his way into some nearby cottages and that he planned to stay there. RP (7/21/10) 115-118. He brought up his medication again, and told Ray that he needed help to remind him to take his medication, and that sometimes he accidentally took a double dose, which became really confusing. He also claimed that he wore two GPS devices because he often didn’t know where he was. RP (7/21/10) 118-120. Ray described him as rambling and jumping from topic to topic as though he were free-associating. RP (7/21/10) 120-121.

Store clerk Anita Rogers also interacted with Mr. Davis on his second visit to the Ray’s Grocery, on the day before the shootout. RP (7/21/10) 58-61. She described him as weird, and said that their conversation was strange. RP (7/21/10) 58-61. She said he seemed “out of it,” and that he talked about his magical computer, which allowed him to create universes. RP (7/21/10) 60-61. He explained that he could create universes because he was the world’s greatest graphic designer. RP (7/21/10) 64. He also said that there was no connection between his brain and his mouth, and he “went off on the fact that he was nuts.” RP (7/21/10) 64.

Mr. Davis told her that he planned to move into an “abandoned” cottage not far from the store. RP (7/21/10) 61. She told him that the house was not abandoned. RP (7/21/10) 61. The next morning a call was

made to the owner of the house, Dave Sperline, who lived out of town. Sperline called the sheriff's department and asked Deputy Cortani to check on the property. RP (7/21/10) 62-63, 70, 73-74.

Deputy Cortani arrived at the house at around 1:30 p.m. on January 19, one day after Mr. Davis's interactions at Ray's Grocery. RP (7/26/10) 82, 85. When he saw an open door, he drew his gun and told the dispatcher that he was preparing to enter and clear the house. RP (7/26/10) 87. Before he entered, he heard footsteps coming around from the side of the house, and saw Mr. Davis, wearing a "Grizzly Adams, old mountain man" buckskin jacket and camouflage pants. RP (7/26/10) 88.

When Cortani told Mr. Davis that he was there to investigate a trespass complaint, Mr. Davis said that he'd "taken care of that" and was renting the house, and that he'd left a note for the owners, who had not contacted him yet. RP (7/26/10) 89. Cortani explained that he'd talked to the owners, that no one was supposed to be there, and that a person could not just move into a house without permission. RP (7/26/10) 89. He asked Mr. Davis for identification. RP (7/26/10) 89.

Mr. Davis responded by telling Cortani, in a "commanding" tone of voice, that "he was a retired major from the United States Army and he didn't have to listen to this." RP (7/26/10) 89-90. He continued by saying

that he didn't like Cortani having his gun drawn, and asked him to put it away. RP (7/26/10) 90.

Cortani replied "I don't know you yet, I need to see some identification so we can figure this out." RP (7/26/10) 90. Mr. Davis then turned and walked away, saying again that he didn't have to listen to this. RP (7/26/10) 90. Cortani followed, ordered him to stop, and repeated his demand for identification, putting his gun away and drawing his taser. RP (7/26/10) 90-91. He told Mr. Davis he was under arrest and aimed the taser at him. The weapon had a laser targeting system that painted Mr. Davis with a laser spot. Cortani directed Mr. Davis to put his hands on his head. RP (7/26/10) 91-92. Mr. Davis began to comply, but when he looked over his shoulder and saw the taser aimed at him, he moved his hands to his waist and drew a pistol as he began twisting his upper body to face Cortani. RP (7/26/10) 92-93. Cortani fired the taser, but it had no effect on Mr. Davis. RP (7/26/10) 93.

Cortani said "Oh, shit." As Mr. Davis raised the gun and (according to Cortani) said "[Y]ou're right, oh shit," and fired, hitting Cortani in the arm. RP (7/26/10) 93-94. Cortani screamed, dropped the taser, and grabbed his gun as Mr. Davis fired again. RP(7/26/10) 94-95. Cortani ducked and scooted off the deck and escaped, firing his own weapon as Mr. Davis shot back at him. RP (7/26/10) 94-97. Mr. Davis

remained on the deck, still shooting, while Cortani took cover behind a log and emptied his magazine, firing at Mr. Davis. RP (7/26/10) 97-98.

Cortani reloaded as Mr. Davis continued to shoot. RP (7/26/10) 98-99.

Fifteen to twenty seconds passed during this initial gunfight, and then Mr. Davis turned and went into the house. Cortani sought better cover, and radioed for help. RP (7/26/10) 101. Mr. Davis returned with a shotgun and went to the log where Cortani had been hiding. Cortani yelled "drop it, it's over, it's done, drop it." RP (7/26/10) 103. Mr. Davis raised the shotgun and turned toward Cortani, and Cortani recommenced firing. RP (7/26/10) 103. Mr. Davis dove to the ground, raised the shotgun over his head, and threw it aside without firing. He told Cortani he was hurt and needed help. RP (7/26/10) 103-105. Cortani radioed again for help; both men were eventually taken from the scene by ambulance. RP (7/21/10) 169; RP (7/26/10) 106, 110-111.

Mr. Davis gave a statement several days later. At the time, his medication and the trauma of his injuries combined with his mental illness to cause him severe distress; at one point during the interview he hallucinated that there was a bulldog on his hospital bed. RP (7/26/10) 62; RP (7/28/10) 92-93.

The state charged Mr. Davis with first-degree assault (with a firearm enhancement) and attempted first-degree murder. CP 95.

The prosecution moved *in limine* to exclude evidence of Mr. Davis's good character. Motion in Limine (State's), Supp. CP. Defense counsel opposed the motion, and the court reserved ruling. RP (7/19/10) 16-22. The prosecution also moved *in limine* to prevent defense counsel from suggesting nullification to the jury. Motion in Limine (State's), Supp. CP. Defense counsel responded forcefully:

Well, Your Honor, this is more of a personal principal stand on my part, jury's – I take umbrage with that. Jurors have the right and the power of nullification I frankly believe it to be, and as I said, this is a personal -- more of a personal stand. I believe it to be close to an obscenity that although they are given that power and it is integral to our nation's legal history, that we not only can't tell them they have that power, but we actually all but force them – well, in fact, we do force them to swear not to use it and we compel and essentially create a circumstance where this grant that we have that's so integral to our judicial system can only be exercised by virtue of a person violating their oath as a juror and that doesn't ring well with me.  
RP (7/19/10) 23.

The court granted the state's motion, precluding any reference to the jury's power of nullification. RP (7/19/10) 23-24.

The defense strategy at trial was to cast doubt on the state's proof of premeditation and intent. In addition, Mr. Davis asked the jury to find him not guilty by reason of insanity. *See* Instructions Nos. 34-36, Supp. CP. Mr. Davis suffered from bipolar disorder and PTSD, both of which had a severe effect on him. Muscatel Report, pp. 3-7, Supp. CP. A significant amount of evidence was available to show that he behaved in

an exemplary fashion before the illness intensified and when he had his medication under management, and that he underwent a radical transformation when the illness gained the upper hand. *See, e.g.*, PSI, pp. 9-15, Supp. CP; Muscatel Report, pp. 2-8, Supp. CP; CP 26-70. Defense counsel did not introduce the available evidence showing Mr. Davis's positive attributes, allowing the jury to see him, instead, as a person with few redeeming qualities. *See RP generally.*

Because the state alleged that Mr. Davis was armed with a firearm at the time of each offense, the court provided instructions and a special verdict form relating to a firearm enhancement. Instruction No. 32, Supp. CP; Special Verdict Forms (four) Supp. CP. Mr. Davis took exception to these instructions, arguing that imposition of a firearm enhancement on Count II would violate double jeopardy because use of a firearm was an element of first-degree assault as charged in this case. RP (7/29/10) 39. The court noted the objection. RP (7/29/10) 39.

The jury convicted Mr. Davis of both counts, and answered "yes" on the special verdict forms, finding that he was armed with a firearm at the time of each offense.<sup>3</sup> Verdict Forms A, C, Special Verdict Forms (four), Supp. CP.

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<sup>3</sup> The jury also found by special verdict that Mr. Davis knew he his victim was a law enforcement officer performing official duties.

At sentencing, the court found that the two charges occurred at the same time and place, against the same victim, with the same overall criminal purpose, and thus comprised the same course of conduct. RP (10/19/10) 10-26; CP 18-76. Following the recommendation of the prosecutor, the court sentenced Mr. Davis within his standard range. RP (10/26/10) 8, 21; CP 83-94. Mr. Davis timely appealed. CP 82.

### **ARGUMENT**

**I. THE TRIAL COURT VIOLATED MR. DAVIS'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). This includes double jeopardy violations. *State v. Freeman*, 153 Wash.2d 765, 771, 108 P.3d 753 (2005).

B. The state and federal constitutions prohibit entry of multiple convictions for the same offense, or multiple punishments for a single offense.

The Fifth Amendment<sup>4</sup> provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. A similar prohibition is set forth in the Washington Constitution. Wash. Const. Article I, Section 9.

Double jeopardy protects an accused person against multiple punishments for the same offense. *State v. Mutch*, 171 Wash.2d 646, 662, 254 P.3d 803 (2011).

Similarly, double jeopardy forbids entering multiple convictions for the same offense. *State v. Hall*, 168 Wash.2d 726, 730, 230 P.3d 1048 (2010). The court must determine whether multiple crimes constitute the same offense in light of the legislature’s intent. *Freeman*, at 771 (citing *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 815, 100 P.3d 291 (2004)). If the legislature authorizes cumulative punishments for two crimes, double jeopardy is not offended (unless the legislature oversteps limitations imposed by the double jeopardy clause). *Freeman*, at 771, n. 2. To determine whether the legislature intended to punish two crimes separately, a reviewing court first considers any express or implicit statements of legislative intent. *Freeman*, at 771-772. If the legislature

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<sup>4</sup> The Fifth Amendment’s double jeopardy clause applies in state court trials through action of the Fourteenth Amendment’s due process clause. *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

has made clear its intention to punish both crimes separately, double jeopardy is not offended. On the other hand, if there is no such clear statement, further analysis is required. *Id.*

Second, the offenses are examined under the *Blockburger* test. *Id.* at 772 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Under the *Blockburger* test, the legislature's intent to create and punish separate crimes is presumed if each crime contains an element that the other does not.<sup>5</sup> *Freeman*, at 772. However, the elements are not analyzed in the abstract; instead, the test is applied to the facts alleged and proved at trial. *Id.* (citing *Orange*, at 817). Thus, where one of the two crimes is an attempt, the test requires the court to consider the phrase "substantial step" as "a placeholder in the attempt statute, having no meaning with respect to any particular crime and acquiring meaning only from the facts of each case." *Orange*, at 818. Thus convictions for assault and attempted murder violate double jeopardy where the substantial step toward murder is the assaultive conduct. *Id.* at 815-818.<sup>6</sup>

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<sup>5</sup> The presumption may be rebutted by other evidence of legislative intent. *Freeman*, at 772.

<sup>6</sup> In *Orange*, the assault and attempted murder were based on a single shot fired at one person. Presumably the same result would apply even if the assault and attempted murder were based on a continuing course of conduct such as shooting a spray of bullets

The third test to be applied is the merger doctrine. *Freeman*, at 772. Under the merger doctrine, when an offense is raised to a higher degree by conduct separately criminalized, the legislature is presumed to have intended to punish both offenses through a greater sentence for the greater crime. *Id.*, at 772-773. The merger doctrine does not apply where the facts suggest an independent purpose or effect for each crime. *Id.*, at 773.

C. Mr. Davis committed only one crime during the firefight with Deputy Cortani.

In this case, Mr. Davis engaged in a single assault that began when he first drew his pistol and fired at Cortani, and ended when he tossed aside his shotgun and called for help. *Tili*, at 117; *see also State v. Smith*, 124 Wash.App. 417, 432, 102 P.3d 158 (2004) (unit of prosecution in assault case depends on number of victims). Mr. Davis could not have been charged with multiple counts of first-degree assault for this behavior, given that the entire episode was a continuing course of conduct, directed at a single victim. The prosecution avoided this “unit of prosecution” problem by charging Mr. Davis with attempted murder, and arguing that

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from an automatic weapon. *See, e.g., State v. Tili*, 139 Wash.2d 107, 117, 985 P.2d 365 (1999) (discussing the unit of prosecution in assault cases).

his intent changed from a desire to inflict great bodily harm to a premeditated desire to kill Cortani. CP 95-96; RP (7/29/10) 41-42.

The legislature has not made a clear statement unequivocally allowing or prohibiting assault and attempted murder to be punished separately. *See Orange*, at 816 (statutes criminalizing assault and attempted murder “do not expressly disclose legislative intent.”) Accordingly, the issue is resolved by examination of the facts under *Blockburger*.

As charged and argued at trial, the “substantial step” that Mr. Davis took toward committing murder was the act of retrieving the shotgun to continue his ongoing assault on Cortani. RP (7/29/10) 41-42; 46-47. Under these facts, the attempted murder contains an element that the first-degree assault does not: the premeditated intent to kill. RP (7/29/10) 41-42; 46-47. However, the same cannot be said of the first-degree assault; instead, proof of attempted murder by means of an assault with a firearm is sufficient to establish the first-degree assault; this is so because substituting the actual shooting for the “placeholder” of a substantial step makes the first-degree assault a part of the attempted murder rather than a separate crime, even though the statutory elements are different in the abstract. *See Orange*, at 818. Under *Blockburger*, the

legislature meant to punish only the more serious offense—the attempted murder. *See Freeman, at 772.*

Mr. Davis committed only one offense: a prolonged assault against Cortani. The convictions for assault and attempted murder violated his right to be free from double jeopardy under the Fifth and Fourteenth Amendments and Article I, Section 9. Accordingly, Count II (the assault charge) must be vacated and dismissed with prejudice. *Freeman, at 772.*

D. The imposition of a firearm enhancement in Count II violated Mr. Davis’s right to be free from double jeopardy (included for preservation of error).

Mr. Davis was charged with assaulting Cortani with a firearm (with intent to inflict great bodily harm). CP 96; Instructions Nos. 19-23, Supp. CP. He was also accused of being armed with a firearm during the commission of the crime. CP 97; Instructions No. 32, Supp. CP; Special Verdict Forms, Supp. CP.

The imposition of a five-year firearm enhancement, in addition to the punishment for the underlying crime, violated Mr. Davis’s right to be free from double jeopardy. *Mutch, at 662.*

**II. MR. DAVIS’S ATTEMPTED MURDER CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME.**

A. Standard of Review

Constitutional violations are reviewed *de novo*, as are jury instructions. *E.S.*, at 702; *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010). Instructions must make the correct legal standard manifestly apparent to the average juror. *See, e.g., State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A trial court’s failure to instruct the jury as to every element violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a

reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

C. The court's instructions relieved the state of its burden to prove that Mr. Davis engaged in conduct corroborating an intent to commit the specific crime of first-degree murder.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978); *Aumick*, at 427.

In this case, the trial court gave an instruction that differed from the definition of "substantial step" adopted by the *Workman* Court. The court's instruction defined "substantial step" (in relevant part) as "conduct that strongly *indicates a* criminal purpose..." Instruction No. 13, Supp. CP (emphasis added). This instruction was erroneous for two reasons.

First, the instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word "corroborate" means "to strengthen or support with *other* evidence; [to] make *more* certain." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company) (emphasis added). The *Workman* Court's choice of the word "corroborative" requires the prosecution to provide some independent

evidence of intent, which must then be corroborated by the accused's conduct. Instruction No. 13 removed this requirement by employing the word "indicate" instead of "corroborate;" under Instruction No. 13, there is no requirement that intent be established by independent proof and corroborated by the accused's conduct. Instruction No. 13, Supp. CP.

Second, Instruction No. 13 requires only that the conduct indicate *a criminal purpose*, rather than *the criminal purpose*. This is similar to the problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts*, 142 Wash.2d 471, 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in "a crime," even if he was unaware that the principal intended "the crime" charged); *see also State v. Cronin*, 142 Wash.2d 568, 14 P.3d 752 (2000). As in *Roberts* and *Cronin*, the language used in Instruction No. 13 permits conviction if the accused person's conduct strongly indicates intent to commit *any* crime.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of attempted murder.<sup>7</sup> Under the instructions as given, the prosecution was not required

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<sup>7</sup> This creates a manifest error affecting Mr. Davis's right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. *See State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

to provide independent corroboration of Mr. Davis's alleged criminal intent; nor was it required to show that his conduct strongly corroborated his intent to commit the particular crime of first-degree murder. Because of this, the conviction must be reversed and the case remanded for a new trial. *Brown, supra*.

**III. MR. DAVIS WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have

the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to

the introduction of evidence of ... prior convictions has no support in the record.”)

- C. Defense counsel should have introduced character evidence supporting Mr. Davis’s insanity claim and his argument that he did not premeditate an attempt to kill Cortani.

Evidence of a pertinent trait of character may be offered by an accused person in a criminal trial.<sup>8</sup> ER 404(a)(1). A pertinent trait of character is “one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait.”

*State v. Eakins*, 127 Wash.2d 490, 496, 902 P.2d 1236 (1995); *see also*

*City of Kennewick v. Day*, 142 Wash.2d 1, 6, 11 P.3d 304 (2000).

Evidence of an accused person’s general good character or reputation for law abiding behavior will almost always be admissible in a criminal trial:

[S]uch evidence may, in and of itself, create a reasonable doubt of the guilt of the accused ... [Reasonable jurors] may, upon a consideration of all the evidence, reach the conclusion that even though the other evidence, if believed, would point to the guilt of the accused, it is doubtful that a person of the defendant’s character would commit the crime charged. In such a case the jury cannot say, beyond a reasonable doubt, that he is guilty. In effect, the evidence of his good character weakens the credibility of the other evidence.

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<sup>8</sup> This stands as an exception to the general rule that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” ER 404(a).

*State v. Allen*, 89 Wash.2d 651, 657, 574 P.2d 1182 (1978); *see also* *Territory v. Klehn*, 1 Wash. 584, 587, 21 P. 31 (1889) (“Evidence of the good character of the defendant is always admissible in a criminal case.... ‘Good character, like all other facts in the case, should be considered by the jury, and, if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is their duty to acquit’”) (citations omitted).<sup>9</sup> Furthermore, where conviction requires proof of a particular mental state, “character evidence may be relevant and admissible to support an inference that the defendant lack[ed] the necessary mental state.” *Eakins*, at 495.

In this case, evidence of Mr. Davis’s general good character was admissible to rebut the accusations against him, including the allegation that he premeditated an intent to murder Cortani. ER 404(a)(1); *Allen*, at 657. He was a law-abiding person,<sup>10</sup> and the only evidence of violent acts outside the theater of war related to the incident in Bali<sup>11</sup> and the time he

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<sup>9</sup>The Supreme Court has noted that character evidence “is different from most evidence.” *State v. Thomas*, 110 Wash.2d 859, 865, 757 P.2d 512 (1988). Character evidence “does not prove or disprove an element of a charged crime nor prove or disprove a particular defense. Its relevance is to permit, but not require, the jury to infer from the particular character trait that it is unlikely or improbable that the defendant committed the charged act.” *Id.*

<sup>10</sup> Mr. Davis had no misdemeanor or felony convictions. CP 1-7.

<sup>11</sup> Which may not have occurred as described. *See* CP 36.

struck his wife; both incidents occurred when he was in the grip of his illness. PSI, p. 10, 11, Supp. CP. Evidence of his good character should have been introduced to support his insanity claim and to rebut the allegation that he premeditated an intent to kill Cortani. *See Eakins, at* 495-593 (evidence of defendant's peaceful character admissible to establish diminished capacity in assault case). Such evidence was readily available through the testimony of numerous family members, family friends, and other community members familiar with Mr. Davis. *See* PSI, pp. 9-15, Supp. CP; Muscatel Report, pp. 2-8, Supp. CP; CP 26-70. Despite this, defense counsel did not make any effort to place evidence of Mr. Davis's good reputation before the jury, despite the ready availability of such evidence. *See* RP *generally*.

Counsel was not pursuing a strategy to keep negative information from the jury. *See State v. Fisher*, 130 Wash.App. 1, 17, 108 P.3d 1262 (2005) ("By relating a personal history supportive of good character, a defendant may be opening the door to rebuttal evidence along the same line.") Evidence of negative behaviors since 2005 was admitted to show the effect of the bipolar disorder and PTSD. The only negative information preceding 2005 appears to be unfounded allegations relating to two dismissed court-martial proceedings. RP (10/19/10) 3-6.

Character evidence would have provided the jury powerful evidence relating to Mr. Davis's mental state and his insanity plea. His actions were—by all accounts—completely out of character with the person he was when not afflicted, and were brought about because of his mental illness. RP (7/28/10) 85-89, 93, 95, 122; Muscatel Report p. 3, 5, 6-7, Supp. CP. Had counsel offered the available character evidence, there is a reasonable possibility that jurors would have concluded that he did not premeditate an attempted killing. The jury might also have decided that he was insane at the time of the incident. Accordingly, absent the error, the outcome of the proceeding would have differed, and defense counsel's deficient performance prejudiced Mr. Davis. *Reichenbach*, at 130.

Mr. Davis was deprived of the effective assistance of counsel. *Id.* His convictions must be reversed and the case remanded for a new trial. *Id.*

**IV. MR. DAVIS'S STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED BY THE COURT'S INSTRUCTIONS, WHICH AFFIRMATIVELY MISLED THE JURY ABOUT ITS POWER TO ACQUIT.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, at 702. Jury instructions are reviewed *de novo*. *State v.*

*Bashaw*, at 140. Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, at 864.

- B. The state constitution guarantees an accused person the right to a trial by a jury with the power to acquit even when the prosecution proves its case beyond a reasonable doubt.

The Washington Constitution guarantees that “[t]he right of trial by jury shall remain inviolate....” Wash. Const. Article I, Section 21.

Furthermore, “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. These provisions provide greater protection to individual rights than does the federal constitution. *See, e.g., State v. Hobble*, 126 Wash.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wash.2d 87, 97, 653 P.2d 618 (1982).

The scope of a state constitutional right is determined with reference to the six nonexclusive criteria set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986). Absent controlling precedent, a party asserting that the state constitution provides more protection than the federal constitution must analyze the issue under *Gunwall*. *State v. Ladson*, 138 Wash.2d 343, 979 P.2d 833 (1999). Here, the *Gunwall* factors support an independent application of Wash. Const. Article I, Sections 21 and 22.

**The language of the State Constitution.** Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” (emphasis added). The strong, simple, direct, and mandatory language (“shall remain inviolate”) implies a high level of protection, and, in fact, the Court has noted that the language of the provision requires strict attention to the rights of individuals. *See, e.g., State v. Furth*, 5 Wash.2d 1, 104 P.2d 925 (1940). Furthermore,

[t]he term “inviolate” connotes deserving of the highest protection. [Webster’s Dictionary] defines “inviolate” as “free from change or blemish: pure, unbroken ... free from assault or trespass: untouched, intact ...” Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

*Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

Similarly, Article I, Section 22’s simple, direct, and mandatory language (“[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury...”) implies a high level of protection. The existence of a separate section specifically referencing criminal prosecutions further emphasizes the importance of the jury right in Washington criminal cases.

**Significant differences in the texts of parallel provisions of the federal and state constitutions.** The Sixth Amendment and Article I, Section 22 are similar in that both grant the “right to ... an impartial jury.” However, Article I, Section 21 has no federal counterpart. This difference is significant. *Mace*, at 99-100.

**State constitutional history and common law history.** State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Furthermore, Washington’s declaration of rights was based on other state constitutions. *State v. Silva*, 107 Wash.App. 605, 619, 27 P.3d 663 (2001), citing Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound Law Review 491 at 497 (1984).

State common law history also favors an independent application. Article I, Section 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” *Mace*, at 96; see also *Hobble*, at 299. Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. *Leonard v. Territory*, 2 Wash.Terr. 381, 7 P. 872 (Wash.Terr.1885). In *Leonard*, the court instructed the jurors that they

“should” convict and “may find [the defendant] guilty” if the prosecution proved its case, but that they “must” acquit in the absence of such proof.<sup>12</sup> *Leonard*, at 398-399. Thus the common law practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient.<sup>13</sup> *Id.*

**Preexisting state law.** In criminal cases, an accused person’s guilt has always been the sole province of the jury. *State v. Kitchen*, 46 Wash. App. 232, 238, 730 P.2d 103 (1986); *see also State v. Holmes*, 68 Wash. 7, 122 P. 345 (1912); *State v. Christiansen*, 161 Wash. 530, 297 P. 151 (1931). This rule applies even where the jury ignores applicable law. *See, e.g., Hartigan v. Washington Territory*, 1 Wash. Terr. 447, 449 (1874) (“[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.”)<sup>14</sup>

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<sup>12</sup> The court’s instructions were found erroneous on other grounds.

<sup>13</sup> Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). *See, e.g., Miller v. Territory*, 3 Wash. Terr. 554, 19 P. 50 (Wash. Terr. 1888); *White v. Territory*, 3 Wash. Terr. 397, 19 P. 37 (Wash. Terr. 1888); *Leonard, supra*.

<sup>14</sup> This is likewise true in the federal system. *See, e.g., United States v. Moylan*, 417 F.2d 1002, 1006 (4<sup>th</sup> Cir. 1969).

### **Differences in structure between the Federal and State**

**Constitutions.** In *State v. Young*, 123 Wash.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent State Constitutional analysis because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State’s power.” *Young*, at 180.

**Matters of particular state interest or local concern.** The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See, e.g., State v. Smith*, 150 Wash.2d 135, 152, 75 P.3d 934 (2003). *Gunwall* factor number six thus also requires an independent application of the state constitutional provision in this case.

All six *Gunwall* factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

- C. The court's instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt.

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence.<sup>15</sup> *Hartigan, supra*. An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. *Kyllo, at* 864.

In this case, the court instructed the jurors that it was their "duty" to accept the law, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. Instructions Nos, 1, 12, 23, Supp. CP. A duty is "[a]n act or a course of action that is required of one by... law." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court's use of the word "duty" in the instructions conveyed to the jury that it *could not* acquit if the elements had been established. This is a misstatement of the law, and deceived the jurors about their power to acquit in the face of sufficient evidence.

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<sup>15</sup> Indeed, the Court of Appeals has held that a trial court may consider the prospects for jury nullification in deciding to admit evidence. *State v. Salazar*, 59 Wash.App. 202, 211, 796 P.2d 773 (1990).

*Leonard, supra.* It failed to make the correct legal standard manifestly apparent to the average juror. *Kyllo, at 864.*

The trial court's error violated Mr. Davis's state constitutional right to a jury trial. Article I, Sections 21 and 22. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Hartigan, supra; Leonard, supra.*

### **CONCLUSION**

For the foregoing reasons, the convictions must be reversed. The assault charge must be dismissed with prejudice, and the attempted murder charge must be remanded for a new trial.

Respectfully submitted on November 16, 2011,

### **BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Scott Davis, DOC #342381  
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Brian Wendt  
Clallam County Prosecuting Attorney  
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on November 16, 2011.



Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

**November 16, 2011 - 10:03 AM**

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