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No. 67146-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN DASHO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina Cahan, Judge

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Jonathan Dasho's convictions for assault in the second degree against two police officers fail to meet the constitutional requirements for fairness and due process. The facts surrounding the police shooting of Mr. Dasho and his culpability for the alleged assaults were vigorously contested by the parties. The trial court's failure to give proffered jury instructions and allow evidence of Mr. Dasho's reputation for truthfulness prevented him from fully and fairly presenting a defense. Additionally, this case presents unique circumstances that warrant review of the Washington State constitutional protections in jury trials as Mr. Dasho was forced to use a valued peremptory challenge after the trial court failed to exclude a biased juror for cause.

The following supplemental facts, argument and authority are offered in reply to the State's Brief of Respondent. In all other respects, Mr. Dasho relies on the facts, argument and authority set forth in his Opening Brief of Appellant.¹

¹ References to the State's Brief of Respondent are abbreviated as "SB" and references to Mr. Dasho's opening Brief of Appellant are "AB". Relevant trial exhibits have been abbreviated as "Exh." A Supplemental Designation of Clerk's Papers including trial exhibits cited in appellant's briefs has been filed with the Superior Court.

II. ARGUMENT

A. Substantial evidence refuted the officers' accounts of the shooting and alleged assault and warranted proposed instructions and evidence crucial to Mr. Dasho's alternative theories of defense.

1. Introduction

Jurors in this case were tasked with determining Mr. Dasho's intent during a confusing and fast-paced period of time when police entered his apartment, and he reacted by retrieving a butter knife from his kitchen only moments before the two officers shot him ten times. Mr. Dasho maintained both that he lacked the ability to form legal intent given his extreme intoxication, and that the evidence failed to prove he in fact formed the requisite intent to commit assault in the second or third degree against the officers based on course of the events. Despite the brief timeframe involved, there were a variety of potential interpretations of the available evidence. The trial court's errors in refusing Mr. Dasho's proffered jury instructions and testimony undermined his constitutional right to fully and fairly present his defense.

2. Sufficient Facts Supported the Proposed Instructions

In closing argument, counsel for Mr. Dasho urged the jury to consider that Mr. Dasho's actions fell short of an intent to assault the officers. In addition to a voluntary intoxication defense, counsel urged the

jury to consider the possibilities that Mr. Dasho grabbed a butter knife from the kitchen before realizing that he was being confronted by police officers, that he might have been attempting to protect himself or his family from a misunderstood threat, that he was prevented from actually carrying out any intended assault, or that he may have complied with orders to discard the knife and was retreating away from the officers when he was shot. RP 3/16/11 46-47. The impact of these arguments was eviscerated by the inability to tie the evidence to a stated instruction of law.

Had counsel been able to explain that it “[i]t is lawful for a person who is in his home who has reasonable grounds for believing that he is being attacked to stand his ground and defend against a perceived threat of harm,” the jury may well have accepted that Mr. Dasho’s initial reaction given his state of mind was not unlawful. (Citing proposed instruction modified WPIC 17.05). Similarly, had the jury been given the lesser include attempt instruction, it could have concluded that even if a substantial step toward an intentional assault was initiated, the action was abandoned or prevented, fitting the criteria for attempted versus a completed third degree assault. Additionally, the option of an attempted assault charge may have impacted jurors’ decisions about applying the voluntary intoxication defense.

The State attempts to minimize the expert testimony and physical evidence available at trial by ignoring inconsistencies between the testimony of the two officers and Emily Breen. *See* AB 10-12. Instead, the State argues that the testimony of Kay Sweeney did not sufficiently dispute the officers' version of events, e.g., RB 30-31. This conclusion fails to account for significant physical evidence supporting Mr. Sweeney's testimony that Mr. Dasho was diverting away from and not toward the officers when he was shot. Mr. Dasho presented a variety of exhibits and analyses to contradict the suggestion that he was aggressing on the officers prior to being shot. Photographs shown to several witnesses supported the conclusion that Mr. Dasho was against the rear wall of the living room and behind the couch when he was shot; his injuries confirmed he was turned away from the officers not coming toward them. *See, e.g.*, Exhs. 13, 54, 55, 187, 512, 514, 515, 517. Even the lead detective concluded that viewing the wall with bullet defects and blood splatter would conclude that Mr. Dasho was next to the wall when he was shot. RP 3/9/11 59-60.

Using computer simulated images, Mr. Sweeney was able to show the jury the likely location and positioning of Mr. Dasho in comparison with several bullet trajectories and the location of the shooting officers – a

scenario that contradicted the state's theory and the officers' testimony about Mr. Dasho's route from the kitchen. Exhs. 527-534. The nature of Mr. Dasho's injuries also confirmed that he was heading away from, not toward the officers when he was shot and with the injuries to his arms/hands would have been unable to hold on to the knife in an ongoing assault during this time. Exhs. 515, 516, 525a&b.

Mr. Dasho's presentation of credible evidence to infer that he might reasonably have perceived a danger when the police entered, that he had the opportunity to flee, or that he may have abandoned any initial steps toward an assault, required the giving of his proposed instructions. While the trial court may have favored the officers' accounts of what happened, "in evaluating the adequacy of the evidence [to support a proposed instruction], the court cannot weigh the evidence." *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000) (reversal required when court rejected lesser degree instruction that was supported by expert testimony even when it was inconsistent with the proffered alibi defense). *See State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003) (failure to provide a no duty to retreat instruction was reversible error despite trial judge's opinion that only minimal evidence supported the theory).

The State's focus on the perception of fear by the police officers in this instance is not conclusive to the evaluation of Mr. Dasho's intent. In addition to the physical evidence documented and collected, Dr. Julien's testimony also supported the possibility that Jonathan's initial reaction to the police entry may have been reflexive and not intentional. RP 3/15/11 109-112. Even if the jurors chose not to accept the voluntary intoxication defense, Mr. Dasho's high level of intoxication was undisputed and his confused and delayed responsiveness was attested to by several witnesses. These facts further support the possibility of a limited or non-criminal intent that could have been argued in conjunction with these instructions.

The State's reliance on *State v. Godsey*, 131 Wn. App. 278 (2006), is also misplaced. RB 27-28. *Godsey* is distinguishable on its facts. The defendant apparently did not contest that he had raised his fists and advanced on the officers, saying "come on." 131 Wn. App. at 288. ("Even when viewed in the light most favorable to Mr. Godsey, no facts support the idea that Mr. Godsey was prevented from carrying out this type of assault"). Furthermore, the court confirmed, and the State conceded, that attempted assault is a lesser included of "'apprehension' type" assault. *Id.* Here, the eyewitness testimony of Ms. Breen, the expert testimony from Mr. Sweeney and Dr. Julien, in conjunction with the physical evidence all viewed in the light most favorable to Mr. Dasho,

supports an inference that Mr. Dasho either abandoned any *intent* to place the officers in apprehension or was prevented from doing so.

Similarly, the State improperly dismisses the importance of *State v. Koch*, 157 Wn. App 20, 237 P.3d 287 (2010), *review denied*, 170 Wn.2d 1022 (2011). RB 33. In *Koch*, the court concluded that even if a requested instruction is part of an otherwise complex area of the law, if it assists the defense theory, the requested instruction must be granted. In this case, Mr. Dasho had no way to convey to the jury that the law allows one to stand their ground and defend themselves in their own home. The evidence did support the possibility that this was what motivated Mr. Dasho's actions and thus went to the heart of the state's burden – to prove he intended to commit an unlawful assault on the officers. Yet, without this argument he was in the same predicament as the defendant in *Koch*: “Without this instruction, Koch was not able to negate the subjective culpability element of knowledge or recklessness, which the State had to prove to convict him.” 157 Wn.App. at 39-40. Mr. Dasho was deprived of a plausible, lawful explanation for his actions and thereby limited from fully and fairly presenting his defense.

Mr. Dasho was entitled to jury instructions that encompassed all his theories of defense. Contrary to the State's suggestion, there was

nothing improper about Mr. Dasho putting forth multiple theories of defense. Although he relied on a voluntary intoxication defense, the State adamantly encouraged the jury to reject the defense. RP 3/16/11 16-17. It was reasonable for the defense to assert alternative bases acquittal in disputing the state's version of events and maintaining that the circumstances did not demonstrate Mr. Dasho's intent to commit assault.

When a constitutional due process right to have a defense theory presented to the jury benefits the state, "there is a rebuttable presumption that the error was harmful." *Koch*, 157 Wn. App at 40. As in *Koch*, the state cannot prove beyond a reasonable doubt that the jury would have reached the same verdict if it had been able to consider the state of the law with regard to Mr. Dasho's intent as it pertained to a perceived threat in his home, as well as the consideration of the lesser attempted assault charge. *Koch*, 157 Wn. App. at 41. For these reasons, Mr. Dasho is entitled to a reversal and new trial

3. Mr. Dasho's Reputation Witnesses were Relevant and Necessary to His Defense

The State fails to recognize that the proffered reputation evidence for honest was directly pertinent to an element of Mr. Dasho's intoxication defense, i.e., his self-report that he had no memory of the incident as evidence of his being in a blackout state. This evidence was necessary to

a crucial theory of the defense and was not merely a general attempt to rehabilitate Mr. Dasho's credibility. The trial court erred in excluding this testimony based on the grounds that honesty is not generally an element of assault, rather than considering it in relation to the element of the proffered defense.

During both his direct and cross-examinations, Dr. Julien repeatedly acknowledged that a self-report of memory loss was the primary indicator along with elevated blood alcohol concentrations that an individual was in a blackout state and unable to form intent. *E.g.*, RP 3/15/11 75, 96, 103. Mr. Dasho proffered multiple witnesses with knowledge of his reputation for honesty in the community and was denied the opportunity to present this critical evidence, leaving the state free to question his reliability on this issue in closing. The State took advantage of this by suggesting that it was possible Mr. Dasho did have a memory of the event, contrary to his testimony. RP 3/16/11 50-51.

Because the proffered testimony would have made it more likely that Mr. Dasho's report was truthful and this was a crucial element of his defense, it was error to exclude it. *State v. Eakins*, 127 Wn.2d 490, 902 P.2d 1236 (1995), is applicable to this case because the reputation evidence offered here went directly to Mr. Dasho's claim of diminished

capacity to form intent to commit the assault, just as the reputation evidence improperly excluded in *Eakins*. 127 Wn.2d at 502-03. This error further deprived Mr. Dasho's full and fair presentation of his defense.

B. The impact of requiring Mr. Dasho to use a peremptory challenge on an admittedly biased juror in this case was improper and warrants the broader protection of the Washington Constitution.

In his opening Brief of Appellant, Mr. Dasho outlined the need for a *Gunwall* analysis to invoke the more expansive State constitutional jury trial protections given the trial court's failure to excuse a biased juror for cause. AB 15-23. In addition the arguments and authority set forth therein, Mr. Dasho urges this Court to recognize the impact of having to exercise a valuable peremptory challenge in a case involving substantially politically charged issues surrounding an police shooting and alleged assault on law enforcement, as well as a proffered defense of voluntary intoxication by a minor. The inability of the court to seat a jury during the first round of voir dire was testament to the difficulty of ensuring the availability of unbiased and fair jurors in this case.

The record below as set forth in the opening Brief of Appellant clearly establishes that Juror No. 12 was biased and that there was a strong probability that he would be unable to be fair given his repeated concern

that he would give higher weight to a police officer's word and concern about a voluntary intoxication defense. AB 8-10. The facts of this case support application of the broader State constitutional protections that ensures a fair and just jury selection process. Requiring Mr. Dasho to use a peremptory challenge under these circumstances was error.

III. Conclusion

For the reasons above and those outlined in Mr. Dasho's Opening Brief of Appellant, the trial court's errors cumulatively and individually violated Mr. Dasho's federal and state constitutional trial rights; he respectfully seeks relief from this Court from his unlawful convictions.

Dated this 30th day of April, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, one original and one copy of the foregoing brief was filed with the Clerk of the Court of Appeals, Division I. A copy of this brief was mailed via the United States Postal Service to the following:

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Dated this 30th day of April, 2012.



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