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67146-4

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

BRIEF OF APPELLANT

Anna M. Tolin, WSBA #22071
Tolin Law Firm
5400 Carillon Point
P.O. Box 2391
Kirkland, WA 98083-2391
Phone: (206) 812-5850
Attorney for Appellant Jonathan Dasho

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I. INTRODUCTION

Jonathan Dasho was a 20 year-old commercial carpenter when he was shot inside his apartment by Federal Way police in August 2009. Officers were called to investigate reports of an earlier altercation between Mr. Dasho and his brother outside the apartment. When police arrived, they saw Mr. Dasho lying naked on his dining room floor. Mr. Dasho's brother responded to police threats to break in the door, and two officers quickly entered the apartment. Jonathan Dasho was highly intoxicated and looked confused as he jumped up, ran to the kitchen, rummaged through a silverware drawer and came out with a butter knife. The details surrounding the subsequent shooting of Mr. Dasho were debated during a lengthy trial.

Mr. Dasho made no verbal threats and did not come into direct contact with either officer. The officers alleged Mr. Dasho was coming directly at them toward the apartment entry way when they shot him. Physical evidence contradicted these reports and suggested Mr. Dasho was heading away from the officers along a living room wall when he was shot and struck by bullets ten times from his side and from behind as he fell to the ground. Mr. Dasho suffered significant injuries and was taken to Harborview Medical Center. He was charged by the King County Prosecutor with assaulting the officers with a deadly weapon.

Mr. Dasho has no memory of the shooting or the events leading up to it. At trial he maintained he did not have the required intent to assault the officers and that physical evidence and conflicting witness testimony disputed the state's allegations surrounding the shooting. The jury found Mr. Dasho not guilty on the two counts of assault in the second degree with a deadly weapon, but he was convicted on two counts of assault in the third degree. In light of the trial errors set forth below, Mr. Dasho respectfully seeks to reverse this conviction.

II. ASSIGNMENTS OF ERROR

1. Mr. Dasho's right to a fair and impartial jury under the Washington Constitution was violated when the trial court failed to excuse a juror for cause who expressed a clear bias toward the police and was unable to assure the court that he could follow the law and be fair to Mr. Dasho in considering his proffered defense.

2. The trial court improperly denied Mr. Dasho's proposed jury instructions to support his theory of defense as to the lesser included crimes of attempted assault in the third degree and the lack of duty to retreat from a perceived threat in one's home.

3. The trial court's erroneous evidentiary ruling improperly restricted Mr. Dasho's constitutional right to present a defense when he was prohibited from presenting evidence of his reputation for truthfulness.

Issues Pertaining to the Assignments of Error:

1. Did the trial court err in failing to grant the defense request to excuse prospective Juror No. 12 for cause?

2. Does Article 1, Section 21 of the Washington Constitution provide greater protection than the Sixth Amendment right to a fair and impartial jury, such that it was reversible error to refuse to excuse a juror for cause and force the unnecessary use of a peremptory challenge to remove him from the seated panel?

3. Did the trial court commit reversible error when it refused to instruct the jury on the lesser included crimes of attempted assault in the third degree?

4. Did the trial court commit reversible error when it refused to give the requested instruction on the law that one has no duty to retreat from perceived threats in one's own home?

5. Did the trial court erroneously hamper Mr. Dasho's full presentation of his defense when it excluded testimony of his reputation for truthfulness in the community?

III. STATEMENT OF THE CASE

A. Procedural Background

On August 21, 2009, Jonathan Dasho was charged by information with one count of second degree assault with a deadly weapon against

Federal Way Police officers Kelly Smith and Steven Wortman on August 19, 2009. CP 1. The state also alleged a special deadly weapon sentencing enhancement in reference to the butter knife. *Id.* Mr. Dasho moved pretrial to dismiss the charge of assault in the second degree, arguing that a butter knife which was never used to inflict harm could not be deemed a deadly weapon. CP 5-35. The motion to dismiss was denied at a preliminary hearing. RP 2/14/11 24. The charges were ultimately amended at trial to two counts of second degree assault with a deadly weapon (one count for each officer), two deadly weapon sentence enhancement allegations, and two counts of assault in the third degree for assault against the two law enforcement officers. CP 258-67.

Trial began on February 14, 2011, but the initial attempt to seat a jury failed due to an insufficient number of eligible jurors to proceed. RP 2/16/11 185. The second attempt to seat a jury began on February 22, 2011. RP 2/22/11 2. During these proceedings, the court denied the defense request to excuse Juror No. 12 for cause. RP 2/22/11 153. Ultimately, Mr. Dasho used a peremptory challenge to excuse this juror, and all of his peremptory challenges were exhausted prior to the seating of the jury. RP 2/22/11 189, 191.

As trial proceeded, Mr. Dasho proffered several witnesses who could testify to his reputation for truthfulness which was pertinent to his

voluntary intoxication defense and to rebut the suggestion that his reported lack of memory was false. RP 2/14/11 38, RP 3/14/11 45-46. The court prohibited Mr. Dasho from offering this testimony. RP 3/14/11 46.

The court denied Mr. Dasho's requests to instruct the jury on the lesser included offenses of attempted assault in the third degree. CP 225-253; RP 3/14/11 25; RP 3/15/11 160; RP 3/16/11 3-6. It further denied his request to instruct the jury there is no duty to retreat from a perceived threat in one's home. CP 225-253; RP 3/14/11 34-36; RP 3/15/11 160; RP 3/16/11 3-6.

Jury deliberations concluded on March 17, 2011; the jury rejected the state's contention that Mr. Dasho had committed assault with a deadly weapon and acquitted him on both counts of second degree assault. CP 221-22; RP 3/17/11 2. However, the jury found Mr. Dasho guilty on the two lesser charges of assault in the third degree against a police officer. CP 223-24; RP 3/17/11 2. The trial court sentenced Mr. Dasho to a period of probation as a first time offender. CP 288-95. Mr. Dasho timely filed his Notice of Appeal to this Court. CP 296.

B. Incident Facts

August 19, 2009, began as a typical day for Jonathan Dasho. He woke up at 2:30 a.m. to arrive in Seattle at 4:00 a.m. for his commercial carpentry job with Howard S. Wright construction. RP 3/15/11 120. He

left work about 12:30 p.m., returned home and worked on moving things in the new apartment he shared with his girlfriend, Emily Breen. RP 3/15/11 120-22. August 19th was also the 24th birthday of Jonathan's brother, Jared. RP 3/15/11 123. When Jared came to visit Jonathan and Emily that evening, Jonathan made a life altering decision to consume alcohol Jared supplied. RP 3/3/11am 36¹; RP 3/15/11 122-23.

The three began drinking vodka around 6:00 or 6:30 that evening; Jonathan and Jared finished off an entire fifth of vodka. RP 3/3/11am 37-38, 87 RP 3/15/11 123. Jonathan Dasho quickly became intoxicated and continued to drink, consuming an additional pint of vodka during the evening. RP 3/3/11am 39; RP 3/15/11 120-24. Jonathan had been up for over 18 hours and likely had little to eat since his 9:00 a.m. lunch break that morning. *Id.* Jonathan Dasho's last memory of that day was drinking and talking in the living room with Jared and Emily while playing video games. RP 3/15/11 125; 132.

A few hours later Jonathan and Jared Dasho were involved in a fight outside the apartment. RP 3/3/11am 43-45. Both brothers were intoxicated, and Jonathan's behavior ranged from confused and concerned

¹ There are two volumes for transcripts from the March 3, 2011 session that are not sequentially numbered. The volume for the morning session by reporter Marci Chatelain is indicated as 3/3/11am and the volume from the afternoon session by reporter Dave Erwin is referenced as 3/3/11pm. Additionally, references in the brief to Mr. Dasho refer to Jonathan Dasho.

to belligerent and aggressive. *E.g.*, RP 3/3/11am 43-45, 90; RP 3/3/11pm 83. Witnesses saw Jonathan punch Jared, resulting in the police response by Federal Way officers Smith and Wortman. RP 2/23/11 40; RP 3/3/11pm 38. When officers arrived on scene, dispatch advised the fight had resolved and neighbors directed officers to the Dasho/Breen apartment. RP 2/23/11 41-42, 45.

As officers listened at the apartment door, they looked in the window and saw Jonathan Dasho inside as he lay down on the floor naked. RP 2/23/11 60; RP 3/3/11pm 42. The officers had no knowledge of Mr. Dasho prior to this call, and Mr. Dasho had expressed no animosity towards police in the past. RP 2/23/11 16-17; RP 3/15/11 132; RP 3/3/11pm 104. Jonathan was unresponsive to police commands to get up, put on clothes and come to the door. RP 3/3/11am 43. After officers threatened to force entry, Jared Dasho opened the door and officers quickly entered the unit. RP 3/3/11am 58-59. Both officers were wearing black jumpsuits and armed with handguns and Tasers. RP 2/23/11 26-27; RP 3/3/11pm 17-19. There was conflicting testimony whether the officers had their guns drawn as they entered the apartment. *E.g.*, RP 2/23/11 83; RP 3/3/11am 91; RP 3/3/11pm 18-19, 51.

As the officers came inside, Jonathan Dasho jumped up and appeared confused before he ran to the kitchen, rummaged through the

silverware drawer, and came out holding what is commonly referred to as a butter or table knife. RP 3/3/11am 59-66; Exh. 1. Both officers quickly fired multiple rounds from their service weapons striking Mr. Dasho. RP 3/3/11am 92; RP 3/3/11pm 54-55. Multiple backup units arrived to the scene. Officers cleared the apartment and ultimately turned the scene over to the Kent Police Department for investigation. RP 3/9/11 25.

C. Additional Trial Facts

Jury selection proved challenging given the anticipated length of trial and issues involved in the case. RP 2/16/11 185. During the second attempt at voir dire, the court refused a defense request to excuse prospective Juror No. 12 for cause. This juror stated he spent significant time with police officers in the course of his retail work for Safeway and counted many of these officers among his friends. RP 2/22/11 45-46. When asked if he could be fair in a case involving allegations of assault on a police officer, the juror admitted he would “probably give a great deal of weight” to a police officer’s word. RP 2/22/11 47. Although he recounted one negative experience with an officer that was rectified in 1959, he expressed his opinion that police officers are honest individuals who attempt to uphold their oath to do a good job. *Id.*

When the state asked how jurors felt about recent news reports and protests alleging unwarranted police violence, Juror No. 12 expressed

his belief that too much restraint was being put on police. RP 2/22/11 58. When asked by defense counsel about issues relevant to a voluntary intoxication defense, the juror stated it would be very difficult to accept that an element of a charge could be negated because of a person's intoxication. RP 2/22/11 149. He again stated that he would have a hard time taking someone else's word over a police officer's word, and that it would be extremely difficult to put these biases aside. *Id.* He agreed he would want someone to be 100 percent fair if he were Mr. Dasho, but continued to candidly admit it would be extremely difficult for him. RP 2/22/11 150. Juror No. 12 reiterated how hard it would be for him not to trust the police over another witness or to accept an instruction of the law that would allow a certain state of intoxication to be a defense to some element of a crime. RP 2/22/11 150-51. This prospective juror then volunteered that he absolutely would not want to sit on the jury in the woodcarver case.

The "woodcarver" case references the officer involved shooting death of John T. Williams in downtown Seattle. A Seattle police officer saw Williams was crossing the street carrying a carving knife. Williams was intoxicated, and when he failed to drop the knife quickly enough, the officer shot him. There was significant media and public response contemporaneous with the Dasho jury selection, including a decision by

the King County Prosecutor not to criminally charge the officer despite his department concluding the shooting was unjustified. *See* Steve Militech, *No charges against Seattle officer who shot woodcarver*. Seattle Times, Feb. 15, 2011, available at <http://tinyurl.com/7kj4pqj>.

Juror No. 12 had apparently followed the competing facts in that case, and said he would likely side with the police officer given his views. RP 2/22/11 153. At this point, the defense asked the court to excuse Juror No. 12 for cause. RP 2/22/11 151-52. When the prosecutor asked if he could separate his bias and beliefs to follow the law and apply it to the facts of the case, Juror No. 12 said, "I think so." RP 2/22/11 152. The Court also inquired whether Juror No. 12 could follow her instructions whether he agreed with them or not, he again equivocated by saying, "I think so." The court then denied the defense challenge. RP 2/22/11 152-53. Mr. Dasho ultimately used a peremptory challenge (all of which were eventually exhausted) to remove Juror No. 12 from the panel. RP 2/22/11 189, 191.

The state's three witnesses to the shooting were Emily Breen, Steven Wortman and Kelly Smith. Each described varying details of what occurred as Mr. Dasho came out of the kitchen and shots were fired, given the reported stress and confusion of the incident. Officer Wortman and Ms. Breen describe Mr. Dasho going directly toward the silverware

drawer in the back corner of the kitchen, while Officer Smith insisted he was rummaging near the dishwasher facing out toward the living room. RP 2/23/11 79; RP 3/3/11am 62; RP 3/3/11pm 50-51; Exh. 37. The officers claimed Mr. Dasho charged directly into the living room toward where they stood in the entry of the apartment. RP 2/24/11 84-85; RP 3/3/11pm 53; Exh. 91. Ms. Breen recalled Mr. Dasho being shot nearly instantly as he came out of the kitchen. RP 3/3/11am 92.

Officer Wortman recalled seeing the knife fly out of Mr. Dasho's hand as he fell from being shot. RP 3/3/11pm 55. Officer Smith noted that he experienced auditory exclusion and tunnel vision and couldn't say when the knife ended up on the ground. RP 2/23/11 88-90 95. Ms. Breen did not see what happened to the knife. RP 3/3/11am 71. While officers Smith and Wortman could not recall if Mr. Dasho fell to his back or stomach when shot, despite some conflicting testimony responding officers did confirm Mr. Dasho had been rolled to his back prior to being photographed. E.g., RP 2/24/11 84-85, 118, 153, 164-65; Exh. 13. When being removed from the scene, Officer Wortman advised Officer Smith to keep his mouth shut about what had occurred. RP 2/24/11 10.

In his defense, Mr. Dasho introduced testimony by Kay Sweeney, a former State crime lab director with extensive experience in crime scene reconstruction, who evaluated and examined the scene, physical and

medical evidence in this case, as Kent had conducted minimal forensic analysis. *See generally* RP 3/9/11 97-162; RP 3/10/11 34-192; Exh. 519. As a result of his lengthy investigation, Mr. Sweeney concluded that it was impossible for the shooting to have occurred as described by Officers Smith and Wortman. Rather, it was clear that Mr. Dasho was shot while next to the rear wall of the living room. Exhs. 527-34; RP 3/10/11 52-58, 71-83.

Mr. Sweeney reviewed the nature and location of Mr. Dasho's injuries, and Mr. Dasho testified to the extent of the injuries – that the shots to his legs and buttocks prevented him from walking, and that shots to his arms continued to limit use of his right hand at the time of trial. RP 3/10/11 48-51, Exh. 525. Mr. Sweeney concluded that Mr. Dasho was shot from behind and from the side as he was falling or diving to the ground – not as he was running toward the officers in the living room, and that the knife had to have been discarded or dropped prior to the conclusion of the shooting. RP 3/10/11 82-83; 173-174; Exhs. 54, 55. Mr. Sweeney confirmed that the photographs of Mr. Dasho on his back show evidence he had been rolled over, and blood staining on the carpet in relation to his wounds establish that Mr. Dasho fell forward onto his stomach as he was shot, not backwards. RP 3/9/11 140-41; Exhs. 512, 515. The state offered no rebuttal to Mr. Sweeney's testimony.

Mr. Dasho also offered testimony from Dr. Robert Julien who reviewed emergency response and hospital medical records and analyzed the blood alcohol analyses performed by both the hospital and Washington State Patrol Crime Lab. RP 3/15/11 45-55; Exh. 541. Based on the timing of these tests and the medical interventions involved, Dr. Julien concluded that Jonathan Dasho's blood alcohol concentration at the time of the shooting was approximately .30. RP 3/15/11 67. Dr. Julien explained that this level of intoxication, combined with a lack of memory for an event would result in a "blackout" state. RP 3/15/11 68. Dr. Julien explained to the jury how one can appear conscious while at this level of intoxication but have insufficient brain functioning to form intent to act. RP 3/15/11 68-76.

In support of his testimony that he suffered a memory blackout during the incident, Mr. Dasho sought to introduce evidence of his reputation for truthfulness from a family member, friend and co-workers. RP 3/14/11 45-46. The court ruled the reputation testimony was not relevant to the proceedings. RP 3/14/11 46.

At the conclusion of the evidence, the court foreclosed the defense from instructing the jury on the lesser included offenses of attempted assault in the third degree and an instruction on the law that one does not

have a duty to retreat from a perceived threat in their home. CP 225-253; RP 3/14/11 25, 34-36; RP 3/15/11 160; RP 3/16/11 3-6.

The jury then acquitted Jonathan Dasho of the most serious charges, but convicted him on the two counts of assault in the third degree. CP 221-22; RP 3/17/11 2. Mr. Dasho appeals for relief from his unlawful conviction.

IV. SUMMARY OF ARGUMENT

A defendant's rights to a fair, impartial and properly instructed jury are paramount in a criminal case. The state and federal constitutions protect this right along with the critical right to fairly defend against criminal charges. In this case, the trial court violated the more expansive and fundamental protection of the Washington constitution when it failed to excuse an admittedly biased juror for cause, forcing Mr. Dasho to lose a valuable peremptory challenge in order to eliminate the ineligible juror. The court's failure to instruct the jury on valid lesser included offenses and on the lack of a duty to retreat when faced with a threat in one's home was also reversible error. The offered instructions accurately stated the law and were viable for the defense to argue when viewing the trial facts most favorably to the defense. Mr. Dasho's conviction was further tainted when the trial court excluded evidence of Mr. Dasho's reputation for

truthfulness, unfairly limiting his ability to present his defense to the alleged crimes.

V. ARGUMENT

A. The trial court abused its discretion in failing to excuse an admittedly biased juror for cause; the Washington State Constitution affords Mr. Dasho broader protection against violations of the right to an impartial jury, and the availability of a peremptory challenge is an insufficient remedy for the failure to excuse and unqualified juror.

1. Juror No. 12 should have been excused for cause given his admitted biases.

The trial court abused its discretion in refusing to grant Mr. Dasho's request to excuse Juror No. 12 for cause. A prospective juror must be excused for cause if the juror is actually or impliedly biased. RCW 4.44.170, 4.44.180; *Cheney v. Grunewald*, 55 Wn.App 807, 810, 780 P.2d 1332 (1989). A juror is considered biased if he or she holds a state of mind in reference to the action, or to either party, which suggests the challenged juror cannot try the issue impartially and without prejudicing the substantial rights of the challenging party. RCW 4.44.170(2). The *Grunewald* Court reiterated that trial courts should honor challenges for cause when there is a reasonable suspicion that circumstances outside the evidence may create an appearance of or actual

bias on the part of the challenged juror. 55 Wn. App. at 811 (citing *Rowley v. Group Health Co-op*, 16 Wn. App. 373, 377, 556 P.2d 250 (1976)).

Several Washington decisions support the conclusion that bias is established when jurors hold relevant opinions, such as those expressed by Juror No. 12 in Mr. Dasho's case, which may impact their impartiality. In *Grunewald*, for example, the Court concluded that a prospective juror in a drunk driving case who had joined an organization opposed to drunk driving after his niece was killed by an intoxicated driver should have been excused. *Grunewald*, 55 Wn. App. at 809-11. The Court so held despite the juror's reported willingness to keep an open mind and separate his biases, particularly when he agreed he would not like a juror with his biases if he were in the defendant's place. *Id.* In *State v. Witherspoon*, 82 Wn. App. 634, 919 P.2d 99 (1996), the court held it was error not to excuse a juror who was to decide whether an African American defendant possessed drugs who admitted "being a little bit prejudiced" because he saw reports of a lot of black people dealing drugs. 66 Wn. App. at 637-38. The Court concluded this bias could not be adequately mitigated by the juror's ultimate agreement to presume the defendant innocent. *Id.* Similarly, in *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), a juror should have been excused who stated she would presume a police officer to be truthful and, given her experience and upbringing, would

have a very hard time deciding against the word of an officer. 111 Wn. App. at 279-80. The court reasoned this juror's admitted bias in favor of police witnesses was contrary to the defendant's right to an unbiased jury, particularly when she expressed uncertainty about presuming the defendant innocent despite being willing to hold the state to its burden of proof. *Id.*

In Mr. Dasho's case, Juror No. 12 repeatedly expressed his bias toward police witnesses and acknowledged how difficult it would be for him not to give police testimony more weight or to take someone else's word over that of an officer. RP 2/22/11 46, 149-51. His further confirmation that he did not agree with and would find it very difficult to follow an instruction that allowed consideration of voluntary intoxication to negate criminal intent established a separate and equally substantial ground for the cause challenge. RP 2/22/11 149-51. Juror No. 12 was candid in expressing his views that most police officers are honest, that despite recent local protests of excessive force too much restraint is put on officers, and that he would not have wanted to side against the police officer in a recently publicized case involving some similar issues to Mr. Dasho's case. RP 2/22/11 46, 47, 58, 151. Given this case involved the use of deadly force by officers who alleged an assault by Mr. Dasho, where the defense both disputed the officers' version of critical events and

proffered a voluntary intoxication defense, the court's failure to excuse Juror No. 12 for cause was in error.

2. The Washington Constitution affords broader protection of the right to an impartial jury and does not require Mr. Dasho to use a valued peremptory challenge or keep a biased juror seated on the panel to preserve the error for appeal.

The United States Supreme Court concluded that peremptory challenges are not of a constitutional dimension pursuant to the Sixth Amendment right to an impartial jury. *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). As a result, the Court held that when a defendant elects to use a peremptory challenge to cure a judge's error in refusing to excuse a biased juror for cause, there is no remedy under the Sixth Amendment absent a showing of bias on the part of seated jurors. 528 U.S. at 307. Our Supreme Court acknowledged this decision in *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218. Without reaching the issue of whether the trial court erred in not excusing the challenged juror for cause, the *Fire* majority followed *Martinez-Salazar* in holding that even if a juror should have been excused for cause, there was no violation of the federal constitution when the juror is ultimately excused with a peremptory challenge. 145 Wn.2d at 159. In *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982), the Court concluded that "the

right to trial by jury which was kept ‘inviolable’ by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789.” 96 Wn.2d at 99. However, the majority in *Fire* refused to reach the issue of whether the error violated Washington constitutional protections because *Fire* had failed to raise and brief this claim pursuant to *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Fire*, 145 Wn.2d at 159. Mr. Dasho contends that under a *Gunwall* analysis, the trial court’s failure to excuse Juror No. 12 was reversible error.

In evaluating whether the Washington Constitution's right to an impartial jury provides protection beyond the federal constitutional right, this Court first determines whether the Washington provision at issue should be given an independent interpretation and then, if so, whether it affords greater protection than its federal counterpart. *Madison v. State*, 161 Wn.2d 85, 92-95, 163 P.3d 757 (2007). The Court should answer both questions in the affirmative here.

To determine whether a provision of the Washington Constitution requires an interpretation independent from its federal counterpart the Court analyzes six factors established in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Those factors are: (1) the textual language of the state constitution provision; (2) differences in the texts of the parallel state

and federal constitutional provisions; (3) state constitutional history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern. *Gunwall*, 106 Wn.2d at 58. These factors weigh in favor of an independent analysis of the right to an impartial jury under the Washington Constitution.

The text of the Washington Constitution, favors an independent analysis. Article I, §21 states: “The right of trial by jury shall remain inviolate. . .” This provision “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, 98 Wn.2d at 96. In interpreting “inviolate,” the Court has previously relied on Webster’s definition: “free from change or blemish: PURE, UNBROKEN ... free from assault or trespass: UNTOUCHED, INTACT.” *State v. Smith*, 150 Wn.2d 135, 150, 75 P.3d 934 (2003) (emphasis added) (quoting *Webster’s Third New International Dictionary* 1190 (1993)). This Court has held that “inviolate” “connotes deserving of the highest protection” (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989)), and “indicates a strong protection of the jury trial right.”² *Id.* This clear constitutional commitment to preserving the right

²Article I §22, the other provision of the Washington Constitution dealing with the right to a trial by jury states: “in criminal prosecutions the accused shall have the right to ...

to a jury trial “free from change” is also consistent with RCW 9A.04.060, which explains that the provisions of the common law are to “supplement all penal statutes of this state.”

The difference between the text of the Washington and federal constitutions, also favors an independent analysis. The federal constitution mentions the right only in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....” U.S. Const. amend.VI. The Washington Constitution, in contrast, has two separate provisions protecting the right to trial by jury. Indeed, the Court has observed that “the fact that the Washington Constitution mentions the right to a jury trial in two provisions instead of one indicates the general importance of the right under our state constitution.” *Smith*, 150 Wn.2d at 151. Further, although the Sixth Amendment and Article I §22 are similar, “article I, section 21 has *no federal equivalent*.” *Id.* (emphasis added) (citing *State v. Schaaf*, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987)). See *State v. Martin*, 171 Wn.2d 521, 531, 252 P.2d 872 (2011).

have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed”

Washington constitutional history and preexisting state law also favor an independent and broader protection of the right to an impartial jury that requires reversal when a defendant is forced to use a peremptory challenge to remove a juror who should have been excused for cause. Previous state decisions support Mr. Dasho's argument that the court's failure to excuse Juror No. 12 when he later used a peremptory challenge to do so *and* when he exhausted all available challenges was error. In his dissent in *State v. Fire*, Justice Sanders outlines more than 100 years of Washington courts presuming prejudice in such a situation. 145 Wn.2d at 168 (citing *State v. Moody*, 7 Wash. 395, 35 P. 132 (1893); *State v. Rutten*, 13 Wash. 203, 43 P. 30 (1895); *State v. Stentz*, 30 Wash. 134, 70 P. 241 (1902); *McMahon v. Carlisle-Pennell Lumber Co.*, 135 Wash. 27, 236 P. 797 (1925); *State v. Parnell*, 77 Wn.2d 503, 463 P.2d 134 (1969); *State v. Robinson*, 75 Wn.2d 230, 450 P.2d 180 (1969)).

The differences in structure between the Washington and federal constitutions, always weigh in favor of an independent analysis because the Washington Constitution is a limitation on the State's otherwise plenary powers while the federal constitution is an affirmative grant of power. *Smith*, 150 Wn.2d at 151-52 (citing *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994)). The state common law history further favors an independent analysis of Mr. Dasho's claim of error. There is no

required national uniformity on this issue and the Supreme Court recognized the difference in previous applications of state law in *Martinez-Salazar*. 528 U.S. at 313.

For these reasons, this Court should apply the broader protection afforded by the Washington Constitution and long established Washington law, requiring reversal of Mr. Dasho's conviction when while exhausting his peremptory challenges, he was forced to unjustly use a valued challenge against a juror that should have been excused for cause in violation of due process and his inviolate right to an impartial jury.

B. The trial court committed reversible error when it failed to instruct the jury on the lesser included crimes of attempted assault and on the law eliminating a duty to retreat against perceived threats in one's home.

A defendant is entitled to a lesser included offense instruction when each element of the lesser offense is a necessary element of the charged offense and there is evidence to support a factual inference that the lesser crime was committed. RCW 10.61.006, 10.61.010, *State v. Hahn*, 162 Wn. App. 885, 901, 256 P.3d 1267 (2011) (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)). Due process also requires courts to give requested instructions that accurately state the law if they support any possible theory of the defense. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).

Mr. Dasho urged the court to instruct the jury that it could consider lesser included crimes of misdemeanor attempted assault in the third degree (WPIC 100.01, 100.05). RP 3/14/11 25; RP 3/15/11 160. Additionally, Mr. Dasho sought a modified version of WPIC 17.05 to advise the jury of the law that a person in his home is not required to retreat from a reasonably perceived threat of harm. RP 3/14/11 34-36; RP 3/15/11 160. The court's failure to provide these instructions prevented Mr. Dasho from fully presenting reasonable alternative arguments in case the jury rejected the voluntary intoxication defense. There was no certainty in the evidence offered to the jury to explain Mr. Dasho's conduct that evening, and the defense argument that he did not form intent to assault, or abandoned a course of action once he came to realize the situation, was a legitimate and viable argument for the defense – a viability made more likely by the jury's acquittals on the second degree assault charges. Jurors could have concluded that Mr. Dasho voluntarily discarded the knife right as he came out of the kitchen and diverted away from, rather than aggressing on the officers. These alternative possibilities were supported by evidence of Mr. Dasho's confusion and diminished state of reasoning at the time of the incident, his lack of hostility toward police, and the physical evidence that disputed officers' accounts of the events.

In evaluating the requested instructions, the court was required to view the evidence in the light most favorable to the defense. *Hahn*, 162 Wn.App at 902. In this case there was no actual battery to form the basis of assault, and the jury was asked to consider whether Mr. Dasho was guilty of the “apprehension” type of assault where one uses unlawful force with an intent to put another in fear of bodily harm. *See State v. Hall*, 104 Wn.App 56, 64-65, 14 P.3d 884 (2000) (discussing the three means of assault under Washington law). Case law confirms that attempted assault is a lesser included offense of an apprehension-based assault. *Hall*, 104 Wn. App. at 65; *State v. Music*, 40 Wn. App. 423, 432, 698 P.2d 1087 (1985). The jury was entitled to consider this lesser means of third degree assault, and the failure to properly instruct the jury requires reversal.

It was also reversible error not to offer the instruction concerning no duty to retreat in one’s home, supporting the theory that any intentional act derived from Mr. Dasho’s desire to protect himself and his family in his home. In *Koch*, a murder conviction was reversed when the court failed to give a requested instruction to support a lesser assault defense.

The Court explained:

To guard against false convictions, a structural commitment of our criminal justice system, the trial court should deny a requested jury instruction that presents a theory of the defendant’s case only where the theory is *completely* unsupported by evidence.

Koch, 157 Wn. App. at 33. Applicable evidence existed in Mr. Dasho's case, and the failure to give proffered instructions was reversible error.

C. The court further erred in excluding testimony about Mr. Dasho's reputation for truthfulness to support his claim that he did not form the requisite intent to commit assault.

The trial court erroneously denied Mr. Dasho's proffered testimony from at least four witnesses who were familiar with his reputation in the community and prepared to testify as to his reputation for truthfulness. RP 3/14/11 45-46. Mr. Dasho testified that he had no memory of the incident surrounding the alleged assault, and that he has never harbored any intent to assault police officers. RP 3/15/11 124-35. Whether the jury found Mr. Dasho credible on this point was critical to his defense. The issue was particularly relevant to a voluntary intoxication defense. Dr. Julien testified that Mr. Dasho's blood alcohol level in conjunction with his reported lack of memory confirmed a "blackout" state or type of amnesia in which one cannot act in an intentional manner. The trial court improperly concluded that because this was not a perjury case, Mr. Dasho's reputation for truthfulness was not an element of the offense and thus not admissible. RP 3/14/11 46. This error was compounded by the state's suggestion in closing that perhaps Mr. Dasho was dishonest in saying he had no memory of the incident. RP 3/16/11 57.

Our Supreme Court has consistently held that a defendant is entitled to offer evidence of a pertinent or relevant character trait by reputation evidence. *Kennewick v. Day*, 142 Wn.2d 1, 6, 11 P.3d 304 (2000). In *Day*, the Court held it was reversible error to exclude a defendant's reputation for sobriety in defense to his charge of intentional possession of marijuana because the reputation evidence was relevant to the defense if it "had *any* tendency to make the existence of *any* fact that is of consequence. . . more probable or less probable." 142 Wn.2d at 7-8 (quoting ER 401). The *Day* Court followed *State v. Eakins*, 127 Wn.2d 490, 902 P.2d 1236, which found reversible error when the trial court excluded evidence of the defendant's character for peacefulness to support his claim of diminished capacity to form intent to commit assault. 127 Wn.2d at 502-03.

Mr. Dasho offered evidence of his reputation for truthfulness to rebut the state's suggestion that he was not accurately reporting his lack of memory of the incident, and to directly support his lack of intent to commit assault. The court's ruling denied Mr. Dasho the right to offer relevant testimony in his defense as guaranteed by both the federal and Washington constitutions. It was reversible error to exclude the proffered reputation witnesses.

VI. Conclusion

The trial court's errors cumulatively and individually violated Mr. Dasho's federal and state constitutional trial rights and unfairly hindered his defense. For all the foregoing reasons, appellant Jonathan Dasho respectfully asks this Court to reverse his unlawful convictions.

Dated this 5th day of January, 2012.

Respectfully submitted,

TOLIN LAW FIRM

A handwritten signature in black ink, appearing to read "Anna M. Tolin". The signature is stylized with a large initial "A" and a cursive "M".

Anna M. Tolin, WSBA #22071
Attorney for Jonathan Dasho