IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JONATHAN AARON DASHO, Appellant.	)	DIVISION ONE No. 67146-4-I UNPUBLISHED OPINION FILED: November 13, 2012

Dwyer, J. — Jonathan Dasho appeals from the judgment entered on a jury's verdict finding him guilty of two counts of assault in the third degree. On appeal, Dasho contends (1) that a right to an impartial jury in a criminal case is contained in article I, section 21 of the Washington Constitution and that he was denied this right when he was forced to exercise a peremptory challenge to a potential juror whom, Dasho also asserts, should have been dismissed for cause, (2) that the denial of the challenge for cause to the aforementioned juror constitutes reversible error, (3) that the trial court erred by not instructing the jury on the lesser included offense of attempted assault in the third degree, (4) that the trial court erred by not instructing the jury that Dasho had no duty to retreat,

and (5) that the trial court erred by not allowing Dasho to present evidence of his reputation for truthfulness. Because the experienced trial judge ruled correctly in all pertinent respects, we affirm.

I

On the evening of August 19, 2009, Jonathan Dasho was in his apartment with his girl friend, Emily Breen, and his older brother, Jared Dasho.[1] Dasho and Jared were drinking vodka in celebration of Jared's birthday. As the evening progressed, Dasho consumed a substantial amount of vodka and became highly intoxicated. Later in the evening, the two brothers engaged in an altercation outside of the apartment. Neighbors noticed the commotion and notified the police.

Within 10 minutes, Officers Steven Wortman and Kelly Smith of the Federal Way Police Department responded to the scene. By that time, Dasho, Breen, and Jared had returned to the apartment. The officers were directed to the apartment by witnesses who had heard the altercation. After Officer Wortman and Officer Smith knocked on the apartment door and identified themselves several times, Jared opened the door.

When the officers entered, Dasho was lying naked on the floor in the living room.[2] Upon noticing the officers' entry, Dasho jumped up, ran into the kitchen, obtained a table knife with a rounded tip and a 4 ¾ inch blade, and then

[1] We refer to Jared Dasho by his first name herein in order to avoid confusion.

[2] At trial, Wortman, Smith, and Breen testified to the events that transpired in the apartment. All three testified consistently regarding the material facts discussed herein. Jared did not testify.

ran back into the living room. He ran toward the officers with the knife in hand. Neighbors reported hearing the officers warning Dasho to "stop moving," "drop it," and "put it down." Nevertheless, Dasho continued moving toward the officers with the knife in his hand. The officers shot Dasho several times. Dasho later testified at trial that he had no memory of the events that occurred while he was intoxicated, including the events in the apartment.

Dasho was charged with two counts of assault in the second degree and two counts of assault in the third degree. During voir dire, prospective juror 12 expressed opinions about the police and about the defense of voluntary intoxication.[3] The defense challenged prospective juror 12 for cause. The trial court denied the challenge. The defense subsequently exercised a peremptory challenge to remove the juror. Thus, prospective juror 12 did not serve on the jury.

During trial, the trial court denied Dasho's request to present testimony concerning his reputation for truthfulness. Following the conclusion of testimony, Dasho requested the trial court to instruct the jury on the lesser

[3] For example, the prospective juror stated that police officers served as hired security where he worked and that he considered some of them to be friends. He also stated that he thought that police officers would have no reason to lie and that he would give a great deal of weight to the word of a police officer. However, he also related a past experience where a police officer had made a "false declaration, something I was involved in once." The prospective juror additionally stated that it would be "very difficult [for him] to accept" the law that voluntary intoxication could negate an element of a charged crime. However, when directly asked if he could decide the case impartially, prospective juror 12 affirmed multiple times that he believed that he would be able to decide the case without relying on his own personal experiences. In addition, when directly asked by the court, "if I instruct you on certain aspects of the law and certain defenses, whether you agree with them or not, can you follow those instructions?" The juror replied, "I think so."

included offense of attempted assault in the third degree. The court declined to do so, citing a lack of factual support for the instruction. Dasho also requested that the trial court instruct the jury that Dasho had no duty to retreat when he was confronted by the police in a place where he had a right to be. The trial court denied this request as well, ruling that the instruction did not accurately state the law, given that Dasho did not claim self-defense at trial.

The jury found Dasho guilty of two counts of assault in the third degree and acquitted him of two counts of assault in the second degree.

Dasho appeals.

II

Dasho first asserts that the jury right guaranteed in the Washington Constitution, article I, section 21, was denied him. This claim rests on the dual-contention that article I, section 21 guarantees the right to an impartial jury in a criminal case and that this right was violated when he was compelled to exercise a peremptory challenge to remove prospective juror 12 who, he asserts, should have been removed for cause. Because Dasho's argument stems from a false premise, it is entirely without merit.

Article I, section 21 does not contain a right to an impartial jury in a criminal case. In its entirety, the provision reads:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 21. By its plain terms, article I, section 21 does not address the right to an impartial jury in a criminal case. This is unsurprising, given that the very next section of the constitution does that very thing: "In criminal prosecutions the accused shall have the right to . . . trial by an impartial jury." Wash. Const. art. I, § 22. Thus, the right to an impartial jury in a criminal case is explicitly set forth in section 22 of article I. No such right is encompassed within the ambit of section 21.

Why, then, does Dasho claim to the contrary? The reason is simple: because prospective juror 12 did not actually sit on his jury, Dasho has no meritorious claim for appellate relief under either the federal constitution or article I, section 22. Thus, he seeks to avoid controlling authority by contending that the right at issue is found in article I, section 21.

The Sixth Amendment to the United States Constitution provides a right to an impartial jury in criminal cases.[4] U.S. Const. amend. VI; United States v. Martinez-Salazar, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). That right is not violated when (1) the trial court denies a challenge to a juror for cause, (2) the defendant then uses a peremptory challenge to remove the challenged juror, and (3) the defendant fails to demonstrate that a biased juror actually served on the jury. Martinez-Salazar, 528 U.S. at 307. Here, Dasho

[4] Dasho does not assert that he has a right to a partial jury or a jury biased in his favor. Indeed, no such right exists. State v. Hughes, 106 Wn.2d 176, 184, 721 P.2d 902 (1986) ("Neither the state nor the defendant is entitled to an unfair juror whose interests, biases or prejudices will determine his or her resolution of the issues.") (quoting Smith v. Balkcom, 660 F.2d 573, 583 (5th Cir. 1981)).

cannot claim that a biased juror actually served on his jury. Thus, Dasho has no meritorious claim for relief under the Sixth Amendment.

Our Supreme Court has adopted this rule for Washington courts. "Washington law does not recognize that article I, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the United States Constitution. Hence, Martinez-Salazar defines the scope of a defendant's right to an impartial jury in this situation." State v. Fire, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001).[5] Thus, the combination of Martinez-Salazar and Fire forecloses the possibility of Dasho receiving appellate relief on his claim.

Here, however, Dasho asserts that article I, section 21 – not the Sixth Amendment and not article I, section 22 – was violated by the trial court's denial of his challenge for cause, which, Dasho avers, compelled his use of a peremptory challenge. In effect, Dasho seeks to recast the state constitution by contending that article I, section 21 provides a right to an impartial jury in a criminal case, that this right is different than the right to an impartial jury explicitly set forth in article I, section 22, and that this implicit right was violated by the trial court. Making no mention of a right to a biased or partial jury, he necessarily relies on the same right to an impartial jury that is explicitly set forth in article I, section 22, while arguing that article I, section 21 implicitly confers on him a right

[5] The Fire opinion was signed by five justices. Chief Justice Alexander, who signed the majority opinion, also wrote separately to express his view that Martinez-Salazar properly states the law as applicable in Washington but that the basis for the decision should be Washington's common law, as opposed to article I, section 22. Fire, 145 Wn.2d at 167-68 (Alexander, C.J., concurring).

with different and greater contours. This argument fails.

A constitutional provision is read for its plain meaning. Anderson v. Chapman, 86 Wn.2d 189, 191, 543 P.2d 229 (1975). "'[T]he expression of one thing in a constitution may necessarily involve the exclusion of other things not expressed.'" State ex rel. Banker v. Clausen, 142 Wash. 450, 453, 253 P. 805 (1927) (quoting 6 Ruling Case Law Constitutional Law § 43, at 49 (1915)). Section 22 grants, in "plain and unambiguous" language, Chapman, 86 Wn.2d at 191, the right to an "impartial jury" in "criminal prosecutions." Wash. Const. art. I, § 22. Section 21, by contrast, contains no such language and grants no such right; therefore, Dasho's claim to the contrary must fail. Although section 21 confers the right to a jury trial, it does not supplant the clear language of article I, section 22 with regard to the right to trial by an impartial jury in a criminal case. Dasho's claim that a right is explicitly guaranteed in one section, and implicitly guaranteed in another, but that the implicit guarantee is inconsistent with the explicit guarantee and, in fact, in some respects operates to negate the applicability of the explicit guarantee, is supported neither by logic nor the law.

The right to an impartial jury in a criminal case is guaranteed by article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. These rights are co-extensive. Neither right was violated by any ruling of the trial court. Pursuant to the rule announced in Martinez-Salazar, because prospective juror 12 did not actually sit on his jury,

Dasho has no claim to appellate relief based upon the Sixth Amendment. Pursuant to our Supreme Court's decision in Fire, which adopted Martinez-Salazar as the rule in Washington, Dasho has no claim for relief under Washington law.[6] There was no cognizable error.

III

Dasho next asserts that the trial court erred by denying his request to instruct the jury on the lesser included offense of attempted assault in the third degree. We disagree.

A defendant may be found guilty and convicted of an offense lesser than that with which he or she is charged. RCW 10.61.006, .010. To warrant an instruction on a lesser included offense, the trial court must be satisfied that the two-prong test of State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), is satisfied. The "legal prong" requires that each element of the lesser included offense be a necessary element of the charged offense.[7] The "factual prong" requires that the evidence supports an inference that the defendant

[6] We further note that the trial court did not err by denying the challenge for cause as to prospective juror 12. A challenge for cause should be granted only when a juror exhibits a probability of actual bias such that the juror holds opinions or beliefs that he or she cannot put aside for the purpose of impartially deciding the merits of the case. State v. Noltie, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991). Here, the prospective juror repeatedly affirmed that he believed that he would be able to decide the case without relying on his own experiences. The proper standard for granting such a challenge is not met merely because the juror harbors opinions that may affect the determination of the issues. Instead, only when the juror cannot put aside those opinions, if any, and impartially decide the issues in the case should the challenge be granted. Here, prospective juror 12 swore that he could impartially decide the case. The trial court believed the juror. Thus, the trial court did not abuse its discretion by declining to dismiss prospective juror 12 for cause.

[7] The legal prong in this case is easily satisfied, and thus not at issue, because "[a]n attempted crime is a lesser included offense of the crime charged." State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37 (1992); RCW 10.61.010.

committed *only* the lesser offense. Workman, 90 Wn.2d at 447-48; State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In establishing the factual prong, the defendant must produce affirmative evidence or point to evidence adduced by the state; "[i]t is not enough that the jury might simply disbelieve the State's evidence." State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Washington recognizes three ways to commit an assault. State v. Godsey, 131 Wn. App. 278, 287, 127 P.3d 11 (2006). Based on the evidence in this case, the jury was instructed on two: (1) assault by attempting to inflict bodily harm on another while having the present ability to do so, and (2) assault by placing the victim in reasonable apprehension of bodily harm (apprehension-type assault). Here, as a matter of law, the first type of assault is not at issue because the court cannot instruct the jury on an "attempt to attempt." State v. Music, 40 Wn. App. 423, 432, 698 P.2d 1087 (1985). Therefore, to warrant the instruction requested, Dasho was required to point to evidence that he committed only the attempt counterpart of apprehension-type assault. He did not do so.

The State introduced evidence at trial demonstrating that Dasho fully committed apprehension-type assault.[8] Conversely, Dasho's sole evidence

[8] The evidence included materially consistent testimony from Wortman, Smith, and Breen, all of whom testified that Dasho ran toward the officers with the knife in his hand. Additionally, the State introduced evidence of neighbors reporting that they heard the police warning Dasho to "stop moving," "drop it," and "put it down."

rebutting the State's version of what happened in the apartment came from a ballistics expert, who testified based on the physical evidence at the scene of the shooting that at the time certain shots were fired at Dasho, he may have been facing away from the officers. Importantly, the expert admitted that he could only testify as to the people's positions *at the time of the shooting*. He provided no testimony regarding where people were located, nor what they were doing, before the shots were fired. Moreover, Dasho himself reported no memory of the events that transpired in the apartment. Consequently, the trial record is devoid of any evidence that Dasho took a substantial step toward committing the assault but stopped short of completing an assault by apprehension before the shots were fired.

Because no affirmative evidence refuting the State's version of events prior to the shots being fired was introduced, the trial court correctly declined to instruct the jury on attempted assault in the third degree. Godsey, 131 Wn. App. at 288. There was no error.

IV

Dasho next asserts that the trial court erred by declining to instruct the jury on the "no duty to retreat" doctrine. However, given that Dasho did not proceed under a theory of self-defense, he was not entitled to such an instruction.

Jury instructions must accurately state the law, State v. Benn, 120 Wn.2d

631, 654, 845 P.2d 289 (1993), and not mislead the jury. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A trial court's decision not to give a requested instruction, on the basis that the proposed instruction misstates the law, is reviewed de novo. State v. Walker, 136 Wn.2d 767, 722, 966 P.2d 883 (1998).

As set forth in the Washington Pattern Jury Instructions, the "no duty to retreat" doctrine provides that,

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that [he] [she] is being attacked to stand [his] [her] ground and defend against such attack by the use of lawful force.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.05, at 264 (3d ed. 2008) (WPIC). This doctrine has no applicability in this case. Dasho did not claim self-defense. Only in a self-defense case is the question of "no duty to retreat" at issue. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). In this case, such an instruction could only mislead the jury, Barnes, 153 Wn.2d at 382, as it would misstate the law by not exposing the jury to the instruction in its proper context, which is under a claim of self-defense. Benn, 120 Wn.2d at 654; see also, Redmond, 150 Wn.2d at 493 ("'[W]here a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given.'" (quoting State v. Williams, 81 Wn. App. 738, 744, 916 P.2d 445 (1996))); WPIC 17.05, Note on Use (explaining that no duty to retreat instruction "supplements"

instruction on self-defense). Dasho's proposed instruction would have misled the jury and misstated the law applicable to his case. The trial court did not err.[9]

V

Finally, Dasho asserts that the trial court erred by excluding evidence of his reputation for truthfulness in the community. Because the crimes in question do not contain an element of truthfulness (or lack thereof), and because Dasho's credibility as a witness was not attacked, the trial court's ruling was proper.

A defendant's reputation evidence for truthfulness is admissible in two instances: first, when truthfulness is relevant to an element of the charged crime,[1] ER 404(a)(1); City of Kennewick v. Day, 142 Wn.2d 1, 5-6, 11 P.3d 304 (2000), and, second, after a defendant testifies, if the prosecutor attacks his or her credibility, the defendant may introduce such reputation evidence to rebut the attack on credibility. ER 608(a); State v. Harper, 35 Wn. App. 855, 860-61, 670 P.2d 296 (1983).

Dasho testified at his trial. His primary defense consisted of his assertion that due to his extreme level of intoxication, he could not form the requisite mental intent to commit the charged offenses. In support of this assertion, Dasho testified that he had no memory of the events in question. The record is

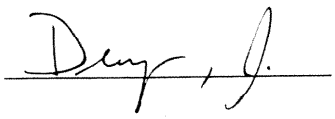
[9] Moreover, a claim of self-defense was unavailable to Dasho as a matter of law, because one may only assert a claim of self-defense against an unlawful aggressor. RCW 9A.16.020(3). Here, the police were responding to reports by neighbors, and they were allowed into the apartment by Jared. Clearly, they were not unlawful aggressors.

[1] The facts in this case do not implicate this allowance for evidence of truthfulness. Fraud is an oft-cited example of when such evidence would be admissible. See, e.g., State v. Harper, 35 Wn. App. 855, 860, 670 P.2d 296 (1983). Here, assault does not contain an element to which truthfulness is material.

devoid of any indication that the prosecutor proffered testimony to attack Dasho's credibility in response to his testimony. Thus, in light of the state of the record at

the time the trial court ruled, the trial court did not err in excluding the proposed reputation evidence.[11]

Affirmed.



We concur:

[11] Dasho asserts that the State attacked his credibility during closing argument. Even assuming that Dasho's credibility was attacked during closing argument, Dasho did not object to the prosecutor's argument. In any event, closing argument took place after the trial court's ruling at issue in this claim of error.

Moreover, viewed in context, the State's argument was intended to explain to the jury that Dasho's expert's testimony was premised upon the truthfulness of Dasho's own testimony. The State drew out a chain of inferences for the jury by explaining that the weight the jury should give to Dasho's expert's testimony regarding Dasho's intent may and should hinge on the weight that it gave to the truthfulness of Dasho's testimony itself. The prosecutor did not assert that Dasho lied or that Dasho told the truth. An essential jury function is to evaluate the credibility of witnesses. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The State did not err by pointing this out to the jury.

Schindler, J. Grosse, J.