71607-7

71607-7

NO. 71607-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HELMER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU AND
THE HONORABLE PATRICK OISHI

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Jury instructions are sufficient if they clearly and accurately convey the applicable law and allow the parties to argue their theories of the case. The pattern self-defense instruction used here has been held to sufficiently convey the law of self-defense, and permitted Helmer to argue that his actions were reasonable in light of his post-traumatic stress disorder. Was the instruction sufficient?

2. A defendant generally may not set up an error at trial and then complain of it for the first time on appeal. Helmer proposed the instruction he now claims was insufficient. Absent ineffective assistance of counsel, should this Court find that any error was invited and decline to address the claim?

3. To prevail on a claim of ineffective assistance of counsel, the appellant must show both deficient performance and resulting prejudice. Where defense counsel proposed a pattern instruction that had been expressly approved by this Court 20 years ago and never since called into doubt, and where the instruction allowed Helmer to argue his theory of the case resulting in acquittal on two charges, has Helmer failed to establish ineffective assistance of counsel?

4. When the trial court has properly instructed the jury, it has discretion whether to give further instructions in response to jury questions during deliberations. Here, the jury was properly instructed on the law of self-defense. Was the trial court within its discretion when, in response to questions from the jury, the court directed to review the instructions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged Michael Helmer with one count of Assault in the Fourth Degree, one count of Assault in the First Degree, and three counts of Assault in the Second Degree, with firearm allegations attached to each charge. CP 8-10. The State alleged that Helmer participated in the beating of Patrick Shandy outside of a West Seattle bar, shot Michael Hardin when Hardin attempted to stop the beating, and pointed his gun at three other individuals who tried to break up the fight. CP 4-5.

Following trial, a jury convicted Helmer of the three second-degree assaults as charged and the lesser-degree offense of second-degree assault for the shooting. CP 168, 170, 172, 174. The jury found by special verdict that Helmer was armed with a

firearm during the four crimes. CP 169, 171, 173, 175. The jury acquitted Helmer of the fourth-degree assault of Shandy. CP 167. Based on an offender score of 6, the trial court imposed a sentence of 33 months for each conviction, to be served concurrently, plus four mandatory and consecutive 36-month firearm enhancements, for a total sentence of 177 months. CP 187-94.

2. SUBSTANTIVE FACTS

On the night of August 18-19, 2012, Michael Helmer traveled from Kent to Seattle with several of his friends, including Chris Dahl, Keenan Williams, Tika Prasad, and Chase Ward. 10RP 13, 164, 189, 192.[1] Prasad drove to West Seattle, and the group walked along Alki Beach to the Bamboo Grill. 10RP 13, 164, 189, 192. Everybody in the group was drinking, and Helmer, Dahl, and Williams were drunk. 10RP 17, 33, 71, 113, 166, 174, 208-09. The Bamboo's server and bartender eventually cut off the whole group. 7RP 107-08, 136; 8RP 74-75. Helmer was wearing his Seahawks jersey. 13RP 50.

Patrick Shandy, Michael Hardin and several of their friends went to the Bamboo Grill on the same night. 5RP 89-90. Shandy and Hardin had already been drinking and continued to drink

[1] The State adopts the Appellant's citation convention for the verbatim report of proceedings. See Brief of Appellant at 2 n.1.

alcohol at the bar; they were intoxicated. 5RP 91-93, 115; 6RP 94-95. Upon their arrival, there was a minor altercation between them and Helmer's group. 7RP 59, 73, 75. Over the course of the night, Shandy became loud and somewhat rowdy, and he was eventually cut off too. 7RP 84; 11RP 23-24, 32, 93.

Shandy realized he had had too much to drink and decided to go home. 6RP 95-96. As he left the bar, another altercation erupted. Shandy, who had apparently approached Prasad earlier, approached again to invite her and her friends to his home. 10RP 44. Prasad's boyfriend, Dahl, objected and he and Shandy began fighting. 7RP 166, 168; 10RP 52, 75, 122, 205.

When Hardin went outside for a cigarette, he saw two men kicking Shandy on the ground. 5RP 94-95. Shandy was wedged between the curb and a car tire and the two men held onto the car while they kicked him and stomped on his face. 5RP 95-96; 6RP 40; 7RP 168. Hardin grabbed the closest man and pulled him away from Shandy. 5RP 96, 98. The other man then ran toward him with a gun in his hand, so Hardin released the first man. 5RP 98-99. Hardin walked back toward the bar, became dizzy, and noticed blood all over his body. 5RP 99. He had been shot in the

upper arm and the bullet traveled through his chest, permanently lodging in muscle. 5RP 103; 8RP 9.

Nick Miller was a Bamboo Grill patron who was at the bar when this happened. 5RP 27-29. Miller was with a group of regulars, including Michael "D.C." Lescault and Miller's roommate, Jake Washburn. 5RP 29; 6RP 35-36; 7RP 113; 11RP 14, 39. Miller noticed the fight in front of the bar, and he, Washburn, and Lescault decided to break it up. 5RP 31; 6RP 37-39; 8RP 73. Miller and Lescault saw two men hitting, kicking, and stomping Shandy.[2] 5RP 32, 63; 6RP 40. Washburn saw only one man kicking Shandy. 8RP 91-92.

When Miller, Washburn, and Lescault walked out of the bar to stop the fight, Helmer immediately pointed a gun at each of them in turn to keep them away from Shandy. 5RP 31-32, 34, 59; 6RP 41-43; 7RP 31; 8RP 73-75. Lescault testified that "it was completely clear to me at the time that it was a warning, and that if I had taken even one step further that he would have shot me right in the face." 6RP 66-67. The three men stopped, put their hands up, and backed away. 5RP 35; 6RP 42; 8RP 73. Washburn and

[2] Miller, Lescault, Washburn and Joshua Bass also noticed an older man trying to use a sandwich board to break up the fight, possibly by hitting someone with it. 5RP 35-36; 6RP 38-39, 78; 7RP 23, 54-55; 8RP 73. Washburn and/or Lescault took the sign away from the man. 6RP 38-39; 8RP 73.

Lescault went back into the bar, locked the front door, and helped usher the bar's panicked patrons out the back door. 6RP 50; 8RP 73.

Joshua Bass lived next door to the Bamboo Grill. 7RP 18. After he heard the gunshot that injured Hardin, Bass walked outside and saw one man kicking Shandy's head while a man in a green jersey stood by with a gun. 7RP 20, 22, 28. "It was a brutal attack. [Bass] thought that the guy was going to end up with permanent brain damage because he was getting his head stomped into the curb and into a car." 7RP 40. Bass called the police and spoke loudly so the assailants would know that the police were coming. 7RP 25. While he was speaking to 911, the two assailants started to walk away up the beach. 7RP 25-26.

As Helmer walked on the beach, Miller called 911 and followed in his car. 5RP 37-38; 6RP 167. Miller saw Helmer take off the jersey, wrap the gun in it, and hide it in the wheel well of Prasad's car. 5RP 44-45. Miller conveyed this information to police, and watched them arrest Helmer and recover the loaded semiautomatic and jersey. 5RP 45-46; 6RP 140, 143, 151, 180-81; 8RP 96-97. Helmer's shoes and jersey had fresh blood on them;

DNA from the blood on the jersey matched Shandy's profile. 8RP 109, 134.

The day after the incident, Dahl and Prasad told Helmer's sister, Desiree Burman, what had happened. 10RP 136-37; 12RP 138-39. About a month later, Burman called 911 to report that Dahl was the other assailant. 9RP 56, 80, 106, 109-10; 12RP 158. Burman also spoke with Helmer while he was in jail. 12RP 162. In one recorded phone call, she told him that the Bamboo Grill had a sophisticated video surveillance system that might have captured the events of the night.[3] 12RP 162. Helmer responded, "Yep, not good." 12RP 162.

Helmer testified at trial. 13RP 106. He explained that he has trouble controlling his anger when he drinks and has been in bar fights before. 13RP 180. He described a history of drug abuse. 13RP 124-25, 130. At the time of the incident, he had been up for two days. 13RP 183. He thought that he had last used methamphetamine "a couple days before" the incident. 13RP 183.

Helmer testified that he carries a firearm because it makes him feel more secure and in control. 13RP 181. On the day of the incident, Helmer took his gun when he went to a bar to watch

[3] Bamboo Grill's surveillance system was not operating at the time of the incident. 6RP 54, 56-57; 9RP 55.

football and to a casino, but in each case left the gun in the car when he went into the establishments. 13RP 180-81. When he and his friends went to the Bamboo Grill, however, he kept the gun with him. 13RP 181.

Despite claiming a spotty memory from that night, Helmer gave a detailed description of the events, including precisely where various people were at various times. 13RP 184-202. He claimed that he saw Dahl and Shandy fighting and tried to intervene, but Dahl swatted him away. 13RP 166-68. Once Shandy was on the ground and Dahl continued to kick him, Helmer again tried unsuccessfully to get Dahl to stop. 13RP 169. Helmer said he then began to walk away. 13RP 170. He took only a couple steps when he felt someone push him from behind and heard the person say, "Where do you think you're going?" 13RP 170. Helmer claimed he could not remember what happened next, but "[t]he next thing I know, my hand's up with the gun, and I turned around. And that had to have been when I shot." 13RP 170. On cross-examination, however, Helmer was able to give more details about pulling out his gun: it was after he stumbled and while he was trying to catch himself; it was in one fluid motion; the gun already had a round in the chamber and the safety was off. 13RP 188.

After shooting Hardin, Helmer remembered seeing Miller, Washburn, and Lescault come out of the bar, and he "kind of" remembered pointing the gun at them and telling them to back away. 13RP 171-72. On cross-examination, he further recalled that the three men were in a "bowling pin arrangement," that he held the gun at the level of their faces, and that he moved it from one person to the other. 13RP 190-91. He didn't see the men with any weapons. 13RP 190-91. He testified that he wrapped the gun up in his jersey and set it on the wheel well "cuz I knew the cops were coming" and he was not supposed to have a concealed firearm. 13RP 175-76.

Forensic psychiatrist Mark McClung testified for the defense. 13RP 3. Based on Helmer's self-report and interviews with Helmer's sister and grandmother, McClung diagnosed Helmer with post-traumatic stress disorder (PTSD) with some dissociative symptoms, depression, and substance dependence. 13RP 11-12. McClung opined that the PTSD had its genesis in Helmer's mother's murder by his father when Helmer was two or three years old, as well as Helmer's father's subsequent attempts to contact Helmer and his sister. 13RP 33. McClung related how Helmer had described the incident, including several short "black outs" that

happened to coincide with Helmer's use of the gun. 13RP 42-44, 69. McClung admitted that there was no way to know whether Helmer's account was genuine, that it is difficult to distinguish between memory lapses attributable to alcohol and those attributable to PTSD, and that Helmer's judgment was impaired by alcohol on the night of the shooting. 13RP 70, 73. McClung also acknowledged that Helmer never claimed that he felt scared during the incident or that he had to use the gun to protect himself. 13RP 77, 79-80.

C. ARGUMENT

Helmer claims for the first time on appeal that the trial court's instruction on self-defense misstated the law. Specifically, Helmer contends that the following portion failed to convey to the jury that it should consider his PTSD in determining whether his use of force was reasonable:

> The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

CP 157; WPIC 17.02. Helmer asserts that the court should have instructed the jury that it must consider the self-defense issue in

light of Helmer's prior "traumatic experiences and background, meaning the impact of [his] PTSD," not just the facts and circumstances known to him. Brief of Appellant at 25-26. Helmer further contends that the instruction was inadequate because it did not direct the jury to consider facts and circumstances known to him "prior to the incident." Brief of Appellant at 26. Helmer also argues that the trial court erred in its response to jury questions about self-defense during deliberations.

Because Helmer proposed the instruction he now challenges, he invited any error and is not entitled to review absent ineffective assistance of counsel. Helmer cannot establish ineffective assistance of counsel because the instruction properly informed the jury of the objective and subjective elements of self-defense, allowed Helmer to argue that his actions were reasonable in light of his PTSD, and caused him no prejudice. Finally, because the jury instruction was correct, the trial court properly responded to jury questions by directing the jury to review its instructions. This Court should affirm.

1. THE SELF-DEFENSE INSTRUCTION ACCURATELY CONVEYED THE APPLICABLE LAW.

Helmer contends that the pattern instruction on self-defense is constitutionally deficient when the defendant claims that PTSD contributed to his perception of or response to danger. His argument is based upon an unjustifiably expansive reading of our supreme court's decisions in State v. Allery, 101 Wn.2d 591, 682 P.2d 2312 (1984) and State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993), and invites this Court to abandon the objective component of self-defense. This Court should reject his invitation and affirm.

Jury instructions are sufficient if they permit the defendant to argue his theory of the case, are not misleading, and properly inform the jury of the applicable law. State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011). Challenged instructions are reviewed de novo. Id. Each instruction must be evaluated in the context of the instructions as a whole. State v. Sublett, 176 Wn.2d 58, 81, 292 P.3d 715 (2012).

Washington law recognizes that people's subjective abilities and experiences vary, and these subjective characteristics affect a defendant's perception and reaction to events. For this reason, the

law of self-defense in Washington incorporates both an objective and a subjective component.

> The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. . . By evaluating the evidence from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees, our approach to reasonableness incorporates both subjective and objective characteristics.

Janes, 121 Wn.2d at 238 (emphasis added) (citing Allery, 101 Wn.2d at 594).

In Allery, the defendant, a victim of severe spousal abuse, shot and killed her husband when he was in her home in violation of a restraining order. 101 Wn.2d at 592-93. The defendant testified that the victim said he was going to kill her and that she thought he was getting a knife from the kitchen. Id. The trial court instructed the jury that "[t]he slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the slayer at the time." Id. at 595. The supreme court held that the instruction was inadequate because "it does not instruct the jury to consider the conditions as they appeared to the slayer, taking into consideration all the facts and circumstances known to the slayer at the time and prior to the

incident." Id. Because the reasonableness of the defendant's fear of the victim depends on her history of abuse at his hands, the jury should have been instructed "to consider the self-defense issue from the defendant's perspective in light of all that she knew and had experienced with the victim." Id. (emphasis added).

Similarly, in Janes, a battered child shot his long-time abuser. 121 Wn.2d at 223. The question was whether the defendant was entitled to a self-defense instruction on the basis of this abuse. Id. at 236. The court noted that the subjective aspects of self-defense "ensure that the jury fully understands the totality of the defendant's actions from the defendant's own perspective," which is "especially important in battered person cases." Id. at 239. Even so, the court cautioned against discounting the objective component:

> The objective portion of the inquiry serves the crucial function of providing an external standard. Without it, a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions. In essence, self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs.

Janes, 121 Wn.2d at 239. Abandoning the objective standard "would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would

not and who blind themselves to opportunities for escape that seem plainly available." Id. at 240 (quoting Professor Estrich, Defending Women, 88 Mich.L.Rev. 1430, 1435 (1990)). The objective aspect of self-defense "also keeps self-defense firmly rooted in the narrow concept of necessity." Id.

The Janes court pointed out that "the existence of the battered child syndrome does not eliminate the defendant's need to provide some evidence that his or her belief in imminent danger was reasonable at the time[.]" Id. at 241. Thus, the court did not reverse Janes's conviction outright but remanded for the trial court to reconsider its denial of a self-defense instruction with proper consideration of both the subjective and objective aspects of self-defense. Id. at 242.

Helmer relies on Allery and Janes to argue that his jury should have been specifically instructed to consider his traumatic life experiences prior to the incident. But he neglects the obvious distinction between those cases and his – he did not assault his abuser; he assaulted innocent people who were trying to keep him and/or Dahl from beating Shandy to death. Unlike the defendants in Allery and Janes, Helmer had no prior experience with his victims that would bear upon the reasonableness of his perceptions and

conduct. To instruct the jury to consider Helmer's unrelated childhood trauma in evaluating his conduct would improperly signal the jury "to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions" and justify the assaults "so long as the defendant was true to his or her own internal beliefs." Janes, 121 Wn.2d at 239.

Moreover, the instruction given in this case already incorporates the supreme court's holding in Allery. Following that decision, the WPIC Committee modified the pattern instruction on self-defense to better reflect the subjective standard. State v. Goodrich, 72 Wn. App. 71, 77, 863 P.2d 599 (1993) (citing Comment to WPIC 17.02 (1986 supp.)) (abrogated on other grounds as recognized in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004)). The Committee addressed Allery by adding the language directing the jury to consider "all of the facts and circumstances known to the person." Comment to WPIC 17.02. This Court has held that "WPIC 17.02, as modified, correctly instructed the jury on the subjective standard of self-defense." Goodrich, 72 Wn. App. at 77. Helmer's jury received the correct modified instruction.

Further, nothing about the instruction deprived Helmer of the opportunity to introduce evidence of his traumatic past and resulting PTSD or to argue that the jury should consider his conduct in light of his PTSD. Indeed, Helmer's attorney made that very argument:

> Self-defense is, yes, I intended to go for my gun, but I did it in self-defense. I did it because I reasonably believed, me, not another person, but me, my person, in my shoes, with my circumstance, with my beliefs, with my post-traumatic stress disorder, what did I believe?
> ***
> And if you're someone like Mr. Helmer with post-traumatic stress disorder, then it's with you, with your disorder, believe the reasonableness of your fear. That's what self-defense is.

14RP 43.

Because the self-defense instruction accurately conveyed the law and allowed Helmer to argue his theory of the case, the instruction was sufficient. This Court should affirm.

2. HELMER INVITED ANY ERROR.

The doctrine of "invited error" provides that a "party may not request an instruction and later complain on appeal that the requested instruction was given." City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002) (quoting State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999)). Invited error prevents review of instructional errors even if they are of "constitutional magnitude."

Id. at 720. It applies when the trial court's instruction contains the same error as the defendant's proposed instruction. State v. Bradley, 96 Wn. App. 678, 681-82, 980 P.2d 235 (1999). It is undoubtedly a strict rule, but our courts have "rejected the opportunity to adopt a more flexible approach." Studd, 137 Wn.2d at 547. Failure to employ the invited error doctrine "would put a premium on defendants misleading trial courts; this we decline to encourage." State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Helmer acknowledges that he proposed the instruction he challenges in this appeal,[4] and that this "raises the prospect of invited error." Brief of Appellant at 31 n.7. Accordingly, he seeks refuge in a claim of ineffective assistance of counsel.

3. HELMER'S COUNSEL WAS NOT INEFFECTIVE.

Helmer argues that invited error does not bar his challenge because his attorney was constitutionally ineffective in proposing the pattern instruction. But "[b]y framing his argument this way, [Helmer] avoids one thicket only to become entangled in another." Studd, 137 Wn.2d at 551.

[4] Compare CP 70, 117 (defense-proposed self-defense instruction) with CP 157 (trial court's instruction).

To prevail on a claim of ineffective assistance of counsel, Helmer must establish both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show deficient performance, Helmer must show that his counsel's performance fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). In judging the performance of trial counsel, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

To show prejudice, Helmer must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Id. If an appellant fails to establish one prong of the Strickland test, a reviewing court need not consider the other prong. Id. at 697.

Here, Helmer's attorney proposed the pattern self-defense instruction, WPIC 17.02. Although Helmer contends that instruction fails to adequately convey the subjective component of self-defense, this Court held to the contrary in Goodrich, 72 Wn. App. at

77. Helmer identifies no case that has called that 20-year-old holding into question.

Helmer relies on State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009), and State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999), for the proposition that proposing pattern instructions can be deemed deficient "where counsel had reason to know the instruction was incorrect or inapplicable to the specific situation." Brief of Appellant at 31. But in Kyllo, counsel had reason to know the instruction was flawed because numerous cases had already so held. 166 Wn.2d at 866-69. And in Aho, counsel had reason to know the instruction was erroneous because it allowed the defendant to be convicted under a statute that did not even exist at the time of his offense. 137 Wn.2d at 745-46. Here, in contrast, the cases on which Helmer relies to argue the self-defense instruction was insufficient predate the modifications to the pattern instruction that this Court expressly approved long before Helmer's trial and never called into question.

This case is more like Studd, in which our supreme court affirmed Daun Bennett's conviction despite his counsel having proposed a pattern self-defense instruction that was subsequently held to be clearly erroneous. 137 Wn.2d at 541-42, 546. In holding

that Bennett's attorney had not rendered deficient performance, the court emphasized that no case had called the pattern instruction into doubt at the time of Bennett's trial. "[C]ounsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02." Id. at 551. The same is true here; Helmer's counsel was not deficient in proposing the long-approved pattern instruction.

Even if this Court concludes that Helmer's counsel was deficient for failing to propose a different self-defense instruction,[5] his claim still fails because he cannot establish any resulting prejudice. As noted above, the instruction that was given allowed Helmer to argue that the jury should consider PTSD in evaluating his conduct. 14RP 43. The prosecutor did not argue otherwise; she argued that Helmer did not act in self-defense because he was the first aggressor, he never said he acted in fear, and he used excessive force. 14RP 29-32.

The jury's verdicts also suggest that Helmer was not prejudiced. The jury found him not guilty of first-degree assault, despite uncontroverted evidence that he shot Hardin. The jury convicted him of second-degree assault against Lescault,

[5] Notably, Helmer does not suggest language that he would consider sufficient in this case.

Washburn, and Miller after Helmer admitted that he pointed a gun in each of their faces to scare them away. Yet Helmer never testified that he believed he was about to be injured by any of these men,[6] and he never told Dr. McClung that he was in fear of harm. 13RP 77.

To convict Helmer of the four counts of Assault in the Second Degree, the jury had to find that he committed assault with a deadly weapon. CP 150, 153, 154, 155. Assault was defined as, among other things, a shooting or any act intended to create a fear of bodily injury whether or not the actor actually intended to inflict injury. CP 143. The acts must be "with unlawful force," and the jury was instructed that force was lawful only when used by someone who reasonably believes that he is about to be injured. CP 157. There was no evidence that Helmer believed—reasonably or not—that he was about to be injured. Thus, there is no reasonable probability that the jury would have acquitted Helmer of the second-degree assaults if only it had been instructed to consider his "experience" in addition to "all of the facts and circumstances known to the [him]," or to consider those facts and

[6] The closest Helmer came to satisfying the requirement that the person using force believe he is about to be injured was that he "had to have been" afraid when he initially went for his gun. 13RP 170.

circumstances known to him "prior to" the incident in addition to what he knew "at the time of" the incident.[7]

Because Helmer can establish neither deficient performance of trial counsel nor resulting prejudice, this Court should reject his claim of ineffective assistance of counsel and affirm his convictions.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RESPONSE TO JURY QUESTIONS.

Helmer contends that the trial court was obliged to clarify the jury instructions in response to two jury questions, and that the failure to do so requires a new trial. Brief of Appellant at 28. But as argued above, the instructions correctly and adequately conveyed the law. The trial court did not abuse its discretion, therefore, by directing the jury to review its instructions. State v. Ng, 110 Wn.2d 32, 42-44, 750 P.2d 632 (1988); State v. Campbell, 163 Wn. App. 394, 402, 260 P.3d 235 (2011).

During deliberations, the jury sent out two questions. The first asked, "Is measurement of intent restricted to the actual event of pulling the gun's trigger, or can the defendant's mindset and

[7] Indeed, it is unclear why facts and circumstances known to a person "at the time of" the incident would not include those facts and circumstances known to the person "prior to" the incident. The optional bracketed language "prior to" seems most relevant in battered person cases, where the defendant's history of abuse by the victim is "especially important." Janes, 121 Wn.2d at 249.

events leading up to the pulling of the trigger also be considered in establishing intent?" CP 177. The second question related to PTSD: "Should the PTSD diagnosis be considered in deliberation as it relates to ones thought process and actions vs. someone not diagnosed with PTSD? Should the PTSD be taken into consideration when determining our verdict?" CP 179. The trial court conferred with the parties and proposed to answer both questions, "Please review your jury instructions." 15RP 2. Defense counsel argued that the court should instruct the jury, "Yes. You can," and refer them to the instructions already provided. 15RP 2. The State pointed out that the jury had already been instructed that it should consider all of the evidence, which included the evidence about Helmer's mindset and PTSD, and there was no need to give additional instructions. 15RP 3. The trial court agreed that the jury instructions accurately conveyed the law and there was no need to supplement them. 15RP 3.

The trial court has discretion whether to give further instructions to a jury after it has begun deliberations. Ng, 110 Wn.2d at 42; Campbell, 163 Wn. App. at 402. A question from the jury does not create an inference that the entire jury was confused or that any confusion was not clarified before the jury reached its

verdict. Ng, 110 Wn.2d at 43. While a trial court must issue a corrective instruction when the jury's question reveals an erroneous understanding of the law, a trial court does not abuse its discretion by referring the jury to instructions that correctly and adequately state the law. Ng, 110 Wn.2d at 42-44; Campbell, 163 Wn. App. at 402.

Here, the instructions correctly informed the jury that it should decide the case based upon "the testimony that you have heard from witnesses, stipulations and exhibits ... admitted during trial." CP 133. As argued above, the jury was also properly informed that when considering Helmer's claim of self-defense, it should consider the conditions "as they appeared to [Helmer], taking into consideration all of the facts and circumstances known to [him] at the time of the incident." CP 157. These instructions adequately conveyed that the jury could consider evidence of Helmer's "mindset and events leading up to the pulling of the trigger" as well as the impact that his PTSD may have had on his perceptions and actions. Accordingly, the trial court properly directed the jury to review the instructions already given. There was no abuse of discretion.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Helmer's convictions for Assault in the Second Degree.

DATED this 6th day of April, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David B. Koch (kochd@nwattorney.net), the attorney for the appellant, Michael Helmer, Jr., containing a copy of the Brief of Respondent, in State v. Helmer, Cause No. 71607-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

CU Brame
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Date

Done in Seattle, Washington