SUPREME COURT NO. 92304-3

NO. 71607-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HELMER, JR.,

Petitioner.

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

The Honorable Kimberly Prochnau, Judge
The Honorable Patrick Oishi, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Michael Helmer, the appellant below, asks this Court to review the Court of Appeals opinion referred to in section B.

B. COURT OF APPEALS DECISION

Helmer requests review of the Court of Appeals decision in State v. Helmer, COA No. 71607-7-I, filed July 27, 2015. The Court of Appeals denied the State's Motion to Publish on August 18, 2015.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Petitioner was charged with multiple counts of assault and claimed self-defense. He suffers from PTSD, which impacts his assessment of danger and his response. The self-defense instructions did not inform jurors they were to consider petitioner's prior experiences when assessing the reasonableness of his fear, and jurors submitted two questions asking about this very subject, including whether they could consider petitioner's PTSD. Did the Court of Appeals err when it found the current pattern instruction sufficiently apprised jurors of the evidence to be considered?

2. The Court of Appeals held that petitioner's PTSD was irrelevant to his self-defense claim and jurors could not properly consider

petitioner's actual life experiences leading to that disorder. In light of prior precedent from this Court establishing jurors are to "stand in the shoes of the defendant" and consider everything he knew and experienced prior to the charged conduct (including PTSD), did the Court of Appeals also err in this regard?

3. Did the trial court err when it refused to provide an answer to jurors' questions that would have made it clear they were to consider petitioner's prior experiences, including his PTSD diagnosis, when assessing his self-defense claim?

4. Was defense counsel ineffective for failing to request a self-defense instruction at the outset that informed jurors of their obligation to consider all of this evidence?

5. Is review warranted under RAP 13.4(b)(1) and (b)(3) where the Court of Appeals opinion conflicts with this Court's prior opinions and the case presents significant constitutional questions?

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[1] In its motion, the State noted that trial courts are divided on the legal issues raised in this petition. See Motion to Publish (filed 8/3/25), at 3-4.

D. STATEMENT OF THE CASE

1. Trial Proceedings

The King County Prosecutor's Office charged Michael Helmer with (count 1) Assault in the Fourth Degree, (count 2) Assault in the First Degree, and (counts 3 through 5) Assault in the Second Degree. CP 8-10. Helmer denied that he was involved in the misdemeanor assault and claimed self-defense as to each of the felony assaults. CP 157-160; 14RP 35-57.

Helmer was not quite 29 years old at the time of trial and has had a challenging life. 13RP 106. When he was a child, his father murdered his mother. 12RP 130-131; 13RP 108-109. With his mother dead and his father imprisoned, he and his younger sister were raised by extended family. 12RP 130; 13RP 107-110. Helmer began drinking alcohol when he was 13. 13RP 120-121. He eventually dropped out of high school, became addicted to painkillers in his late teens, and started experimenting with heroin and methamphetamine in his early twenties. 13RP 120, 124-125. Helmer used drugs to deal with his emotional issues and was unable to maintain sobriety. 13RP 124-125, 129-130.

The events leading to the charges occurred during the late night hours of August 18 and early morning hours of August 19, 2012, at West Seattle's Bamboo Bar & Grill. 5RP 29, 89-90. Helmer went to Bamboo

with longtime friend Chris Dahl and several others. 10RP 192; 13RP 150. Among the patrons that night was a second large group that included Patrick Shandy and Shandy's friend, Michael Hardin, both of whom had been drinking heavily. 5RP 89-93; 6RP 91-96.

Words were apparently exchanged outside the bar between Shandy and Dahl's girlfriend. Dahl stepped in, Shandy swung at him, and the two began to fight. 10RP 52-53, 74-75, 118-122, 204-205. Utter chaos ensued as patrons rushed out of the bar to watch – and some to encourage – the fray. 5RP 31, 56; 7RP 141-142; 8RP 175; 10RP 53. A half dozen people or more were fighting or trying to break up the fight. 5RP 63-65; 10RP 124-125. According to several witnesses, Dahl knocked Shandy unconscious and repeatedly kicked him as he lay on the sidewalk near the curb. 7RP 20, 28-29; 8RP 41-42, 91-93; 9RP 85; 13RP 169, 186-187.

Helmer was nearby, saw that a fight had broken out involving Dahl, and moved toward Dahl. 10RP 122-123; 13RP 168. As Helmer would later explain, he unsuccessfully attempted to pull Dahl away from Shandy when someone pushed him in the back from behind. 13RP 169. He was carrying a concealed .9 mm pistol, which he drew as he stumbled forward. 6RP 155; 13RP 145, 170, 187-188. Someone then grabbed his arm. 6RP 171. Events unfolded quickly, and although he did not have a clear memory of

everything that happened, he knew he used the pistol to ward off three men who were coming at him. 13RP 171-173, 189-192, 200.

Those three men – Jacob Washburn, Nick Miller, and Michael Lescault – had responded from inside Bamboo after a server saw what was happening outside and asked for assistance. 7RP 110-113; 8RP 73. All three men ran outside to the sidewalk intending to intervene, but stopped within about 10 feet of the fight when they saw Helmer pointing the handgun at each of their faces. 5RP 31, 33-34; 6RP 41-43; 8RP 73-74. All three men backed up, as did Helmer. 5RP 35; 6RP 43-45; 8RP 73; 13RP 173. To Lescault, it seemed that Helmer's intention was simply to warn them and not to shoot them. 6RP 65-67. Other witnesses also testified that it appeared Helmer was simply trying to get the men to back off. 10RP 206; 11RP 51, 60-61. After the three men did so, Helmer turned and walked away from Bamboo with gun still in hand. 13RP 173-174.

At some point during the fight, Shandy's friend, Mike Hardin, had stepped outside and noticed that Shandy was on the ground and being kicked. 5RP 94-95. Hardin grabbed a man he believed was kicking Shandy, pulled him toward the street, and tried to calm him down. 5RP 96-97. He let this person go, however, when he saw Helmer leaving the area with the gun in his hand. 5RP 98-99. As Hardin walked back toward Bamboo, he

became dizzy and then noticed blood on his body. 5RP 99. He had been shot in the arm, and the round had lodged in the muscles of his chest. 5RP 99; 103; 8RP 8-9. When precisely Helmer's pistol had fired is unclear, but several witnesses heard what sounded like a gunshot. 7RP 19, 110; 8RP 89, 151; 10RP 54, 125, 169-170, 205-206; 11RP 46.

Helmer was located and arrested without incident. 5RP 37-46; 6RP 140-146, 180. Unlike some involved – who reeked of alcohol and were obviously drunk – officers did not notice or report that Helmer smelled of alcohol or appeared under the influence. 6RP 146-147, 184-188; 8RP 116; 12RP 26.

Helmer's main trial defense – that he pulled and brandished the gun in self-defense – was supported by his testimony and that of Dr. Mark McClung, a psychiatrist.

Helmer described his history – including the murder of his mother, the incarceration of his father, his struggles with school, and his use of drugs and alcohol. 13RP 106-130. He also described the events of August 18 leading up to the incident at Bamboo. 13RP 136-145. Helmer sometimes carried a firearm for protection and did so that day for the trip into Seattle. 13RP 145-148.

Helmer testified that he became involved only to pull Dahl away from Shandy. 13RP 168, 185. Dahl punched Shandy, who fell to the ground, and Dahl was kicking him. 13RP 169, 186-187. As Helmer tried to stop Dahl, Dahl pushed Helmer away. 13RP 169. Almost immediately, someone pushed Helmer from behind and, as Helmer was stumbling forward, he reached for his gun and pulled it out of the holster. 13RP 170, 187-188. Helmer testified that he must have been scared when he reached for his gun. 13RP 170. Although uncertain – because his memory of events immediately thereafter is spotty and in flashes – Helmer believes this may have been when his gun discharged and struck Hardin. 13RP 170-171, 189, 202-205. He does not recall pulling the trigger. 13RP 198, 202.

Helmer testified that, although he now knows the three men coming at him were simply trying to break up the fight, he did not know their intentions when he pointed the gun at them and told them to back away. 13RP 171-172, 189-191, 200. As the three backed up, he did the same and then turned and walked away from the scene. 13RP 173, 191-192. When he put the gun back in the holster, it was warm and he knew it had fired. 13RP 173-175, 194.

Helmer described his memories from the incident, starting from the time someone pushed him from behind, as an interrupted series of

fragmented images and feelings. 13RP 201-205. According to Helmer, there was no time to think and he did not feel in control; there was only a series of quick reactions to what he was seeing. 13RP 199, 205-206.

Dr. Mark McClung evaluated Helmer, examined the Seattle Police Department's case file as well as historical documents concerning Helmer's past, and spoke to family members. 13RP 10-11. Dr. McClung concluded that Helmer suffers from Post Traumatic Stress Disorder (with related dissociative symptoms), a history of alcohol and drug dependence, and depression. 13RP 11-12.

McClung explained that PTSD is caused by prior traumatic experiences. 13RP 12. Current events can trigger feelings from the prior event, causing anxiety, fear, and a panic reaction. 13RP 12-16. When traumatic experiences happen at a very young age, people may have little or no memory of the event, but it still impacts them as adults. 13RP 16-18. Studies have shown subtle physical changes to the brains of children who have been traumatized. 13RP 23-24.

Disassociation is a coping mechanism for those with PTSD, which allows them to temporarily detach from the situation, making them feel more like observers than participants. 13RP 18. This can result in distortions in time and sensory perceptions. It can also result in spotty

amnesia during a frightening situation, where there is not a continuous narrative memory, but only snapshots or flashes. 13RP 18, 21. While most ordinary people disassociate to some degree, those with PTSD are more likely to experience severe symptoms even when the situation is not truly life-threatening or overwhelming. 13RP 19-20. Those with PTSD report being on high alert and continuously vigilant as if a warning signal is chronically on. This is both a biological and psychological experience. 13RP 23.

Dr. McClung noted that Helmer has a history of problems with anger and self-esteem as well as feeling on guard, vigilant, and afraid. 13RP 32, 36-37. These are tied to several past traumatic experiences, including the murder of his mother by his father and subsequent fear of his father. 13RP 32-36.

Consistent with McClung's testimony that PTSD and disassociation create memories that are more like a slide show than a continuous narrative, Helmer reported to Dr. McClung having no memory for certain brief segments of time during the fray outside Bamboo. 13RP 41-46, 53-54, 73-76. Helmer experienced periods of blackout – for which he had no memory – including from the time he was pushed and drew his gun to the time he found himself confronted by Miller, Lescault, and Washburn. 13RP 74-75.

McClung explained that PTSD symptoms can interfere with the ability to calmly assess a situation, and individuals may find themselves in the middle of an action without conscience recollection of how they got in that position. 13RP 53-54. Dr. McClung testified that Helmer's attempts to get everyone to back off could have been the product of fear. 13RP 95-96.

In closing argument, the State argued that Helmer was guilty of Assault in the Fourth Degree in count 1 because he assisted Dahl in attacking Shandy, guilty of Assault in the First or Second Degree in count 2 because he shot Hardin, and guilty of Assault in the Second Degree in counts 3 through 5 because he pointed his gun at Miller, Lescault, and Washburn. 14RP 17-23. Regarding self-defense, the State argued Helmer's participation in the misdemeanor assault on Shandy made him the first aggressor, thereby forfeiting his right to claim self-defense as to the subsequent felony assaults. 14RP 30-32. The State also argued that he had not pulled his weapon or fired it out of fear; rather, he had done so to effectuate his escape from the original assault. 14RP 22-23, 27-33. The prosecutor asked jurors to find that Helmer's conduct involved "an intentional set of actions toward an objective and a purpose and not to protect himself." 14RP 33.

Defense counsel argued Helmer was not guilty in count 1, and not a first aggressor, because he had not been involved in Shandy's beating. 14RP 36-42, 46-47. Regarding counts 2 through 5, counsel argued that Helmer had acted in self-defense – that it was a chaotic situation, it was impossible to know others' intentions, and that his only intent was to act in self-defense based on reasonable fear that had to be assessed in light of his undisputed PTSD. 14RP 42-46, 53, 56-57.

On the afternoon of the second full day of deliberations, jurors submitted two questions. 14RP 63-64; 15RP 2. The first asks:

> Intent – Question surrounds definition of intent with respect to timing.
>
> Is measurement of intent restricted to the actual event of pulling the gun's trigger, or can the defendant's mindset and events leading up to the pulling of the trigger also be considered in establishing intent?

CP 177. A second question asks:

> 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 court proposed that it simply answer, "Please review your jury instructions." 15RP 2. Defense counsel noted that jurors were confused whether they could consider Helmer's mental state and asked the court to

make it clear they could consider events leading up to the fray, including Helmer's PTSD. 15RP 2. The prosecutor conceded juror confusion, but the court refused to provide additional guidance, telling jurors, "Please review your jury instructions." 15RP 3; CP 178, 180.

Jurors acquitted Helmer on count 1. CP 167. For the felony charges in counts 2 through 5, however, jurors ultimately rejected his self-defense claim, convicted him of Assault in the Second Degree, and found that he was armed with a firearm for each count. CP 168, 170-176. Helmer was sentenced to 177 months. CP 190.

2. Court of Appeals

On appeal, Helmer argued the self-defense instructions were insufficient and denied him a fair trial.

First, citing State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984), and State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993), Helmer argued that the self-defense pattern instruction (WPIC 17.02) is insufficient for self-defense cases involving PTSD because it does not expressly inform jurors they are to consider the defendant's prior *experiences* (including PTSD and what led to PTSD), when assessing the reasonableness of his fears and actions. See Brief of Appellant, at 20-27; Reply Brief of Appellant, at 1-9.

Second, Helmer argued that, in light of the insufficient WPIC and jurors' questions regarding information they could consider – including expressly asking about PTSD – the trial court erred when it refused to clarify that jurors could consider all circumstances before the shooting when assessing the self-defense claim. See Brief of Appellant, at 27-29; Reply Brief of Appellant, at 7.

Third, Helmer argued that, assuming WPIC 17.02 could sufficiently instruct jurors to consider all prior experiences (including Helmer's PTSD) when assessing his self-defense claim, defense counsel was ineffective for failing to demand language from the WPIC itself directing jurors to consider circumstances "prior to the incident," which would have permitted consideration of this evidence. See Brief of Appellant, at 30-33; Reply Brief, at 7.

The Court of Appeals rejected all three arguments. The Court held that – unlike Allery and Janes – there was no history of abuse between Helmer and those he assaulted. Thus, Helmer's past experiences leading to his PTSD, and even the PTSD diagnosis, were irrelevant to his self-defense claim. Slip Op., at 6-10. The Court found WPIC 17.02 sufficient to alert jurors to the proper inquiry even without that portion telling them to consider circumstances "prior to the incident." Therefore, the trial court had

not erred in refusing to clarify what jurors could consider, and defense counsel had not been ineffective. See Slip Op., at 10-12.

E. ARGUMENT

REVIEW IS APPROPRIATE BECAUSE THE COURT OF APPEALS OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND HELMER'S CASE PRESENTS SIGNIFICANT CONSTITUTIONAL QUESTIONS.

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the State is obligated to prove all elements of a criminal offense beyond a reasonable doubt, including the absence of self-defense. State v. Acosta, 101 Wn.2d 612, 615-616, 683 P.2d 1069 (1984).

Jury instructions must allow the parties to argue their theories of the case and properly inform jurors of the applicable law. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Self-defense instructions "must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'" State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting State v. Allery, 101 Wn. 2d 591, 595, 682 P.2d 312 (1984)), abrogated on other grounds by O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

Helmer's trial defense for counts 2 through 5 was based on Washington's self-defense statute, RCW 9A.16.020(3), which deems the

use or threat of force lawful, "[w]henever used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary."

The statute contains both a subjective and an objective component. "[T]he jury is 'entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" State v. Wanrow, 88 Wn.2d 221, 135, 559 P.2d 548 (1977) (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)). Jurors then determine what a reasonably prudent person would have done in a similar situation. State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997); State v. Janes, 121 Wn.2d 220, 238-239, 850 P.2d 495 (1993); Allery, 101 Wn.2d at 595. For the subjective component, the rule that jurors must consider all circumstances relevant to the defendant's reactions includes those occurring substantially before the charged conduct; the focus cannot be limited to what immediately precedes the defendant's use of force. Wanrow, 88 Wn.2d at 234-236.

Despite these established principles, the Court of Appeals held that Helmer's jury had no right to consider the life events leading to his PTSD, the effects of his PTSD, their impact on his subjective fear the night of the shooting, or whether that fear was objectively reasonable in light of these

circumstances.

In Allery, the defendant suffered prolonged abuse at the hands of her husband. After her husband defied a restraining order and threatened to kill her, she shot and killed him as he lay on a couch. Allery, 101 Wn.2d at 592-593. At trial, the defendant offered evidence that she suffered from a form of PTSD (battered woman syndrome) and claimed self-defense. Id. The Allery Court found evidence of the syndrome admissible because it "may have a substantial bearing on the woman's perceptions and behavior at the time of the killing and is central to her claim of self-defense." Id. at 597.

The Court also found that the standard instruction on self-defense used at the time, although conveying a subjective inquiry, was inadequate because, without additional instructions from the trial court, it did not make it manifestly apparent jurors had to consider the impact of the defendant's traumatic history and background. Id. at 594-595. "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. at 594-595 (citing Wanrow). Allery's murder conviction was reversed. Id. at 599.

In Janes, this Court addressed a related form of abuse-induced PTSD – battered child syndrome. Janes, 121 Wn.2d at 222, 235. After ingesting marijuana and alcohol, the 17-year-old defendant shot his mother's boyfriend, who had subjected the defendant to acute physical and mental abuse. Id. at 222-225. Expert testimony established that the defendant suffered from PTSD, leaving him hypervigilant (on high alert and constantly monitoring for signals that suggest imminent danger). Id. at 230-231, 233-234. This Court held that such evidence is relevant and helpful to jurors in deciding whether a defendant's belief he was in danger was reasonable under the circumstances. Id. at 236. The Court explained:

> the jury is to inquire whether the defendant acted reasonably, given the defendant's experience of abuse. Expert testimony on the battered person syndromes is critical because it informs the jury of matters outside common experience. Once the jury has placed itself in the defendant's position, it can then properly assess the reasonableness of the defendant's perceptions of imminence and danger.

Id. at 239.

One line in the Court of Appeals opinion suggests PTSD is wholly irrelevant to a self-defense claim. See Slip op., at 10 ("the self-defense inquiry involves consideration of facts as they truly existed, not as they were perceived based on the defendant's mental health."). But, as just

discussed, Allery and Janes clearly establish the relevance of this diagnosis to self-defense.

The Court of Appeals focused on the fact that, in both Allery and Janes, the defendant had a history of abuse with the alleged victim. But neither case limits consideration of the defendant's PTSD and the experiences that led to PTSD to that narrow circumstance. Indeed, to do so would be inconsistent with this Court's approach dating back to Wanrow, which makes clear that the jury's focus cannot be limited to what immediately precedes the defendant's use of force. Wanrow, 88 Wn.2d at 234-236.

The Court of Appeals also erred when it found that WPIC 17.02 adequately informs jurors in cases involving a PTSD diagnosis. The current pattern instruction – used as the basis for the instruction at Helmer's trial – provides, in pertinent part:

> 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 *[and prior to]* the incident.

Washington Pattern Jury Instructions, WPIC 17.02 (West 2008).

Nowhere does this instruction require jurors to consider the defendant's prior *experiences*, which would include PTSD and the experiences causing it. Moreover, even if it did, it certainly did not in Helmer's case because defense counsel failed to include the "and prior to" language when requesting self-defense instructions. CP 117. This misled jurors into thinking their focus should be limited to the actual event and not prior relevant events. Indeed, the jurors' questions on this very subject, including asking whether they can even consider Helmer's PTSD, bear this out. It was for this reason the instructions were deficient, counsel was ineffective, and the court erred when it declined to answer the jurors' questions by informing them they should consider all circumstances, including PTSD, when assessing self-defense.

Finally, the Court of Appeals asserted that "Helmer does not allege that his experiences themselves informed the reasonableness of his fear. . . Rather, he argues that the experiences led to his current condition, the effects of which caused him to feel more fearful than the average person would." Slip Op., at 9-10. The Court of Appeals cites nothing for this assertion and it is not accurate. Both Dr. McClung and Helmer himself testified to Helmer's life history and its impact on his perceptions and fears. See 13RP 10-11, 32-38, 51, 106-130. It is most certainly Helmer's

position that these experiences – in addition to the resulting PTSD – should have been fully considered by jurors in assessing his self-defense claim.

The opinion in this case conflicts with Wanrow, Allery, and Janes, which establish the relevance of a defendant's prior experiences and PTSD diagnosis to his self-defense claim. Moreover, given the State's duty to disprove self-defense beyond a reasonable doubt, the case presents important constitutional issues. Review is appropriate under RAP 13.4(b)(1) and (b)(3).

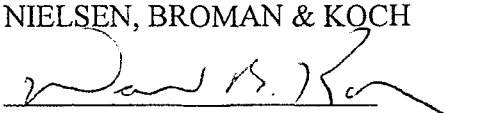
F. CONCLUSION

This Court should grant review and reverse.

DATED this 17th day of September, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL ALAN HELMER, Appellant.	No. 71607-7-I DIVISION ONE UNPUBLISHED OPINION FILED: July 27, 2015

APPELWICK, J. — Helmer appeals his conviction of four counts of second degree assault. He asserts that his self-defense instruction was deficient, because it did not make clear to the jury that it should consider his PTSD when deciding his culpability. In his statement of additional grounds, he argues that there is insufficient evidence to support his convictions. We affirm.

FACTS

On the night of August 18, 2012, Michael Helmer went to the Bamboo Bar & Grill in West Seattle with a group of people, including Helmer's friend Christopher Dahl. Helmer wore a green Seahawks jersey.

Patrick Shandy and Michael Hardin were also at Bamboo Bar that night. As Helmer's group was gathering to leave, Shandy and Dahl got into a fight outside the bar.

Helmer tried to pull Dahl out of the fight. At some point, Helmer felt a push from behind. Helmer pulled out the gun he was carrying on his right hip.

Hardin had come outside for a cigarette and he saw two men kicking Shandy on the ground. Hardin grabbed the man closest to him and pulled him away. He let go when he noticed that the other man had a gun. Hardin then walked towards the bar and started to feel very dizzy. He looked down and saw he had blood all over his body. He had been shot in the left shoulder.

Nicholas Miller was also at Bamboo Bar that night with his roommate, Jacob Washburn. Miller noticed two men, one in a green jersey, hitting someone on the ground outside. Miller, Washburn, and another Bamboo Bar patron, Michael Lescault, went out to break up the fight. 9When Miller, Washburn, and Lescault exited the bar, Helmer pointed his gun at their faces. The men put their hands up and backed away.

Joshua Bass, who lived next door to Bamboo Bar, came outside after he heard the gunshot. He saw a man kicking someone on the ground and another man in a green jersey holding a gun. As Bass called 911, he saw the two men walk away down the beach.

Miller also called 911 and spoke to the police as he followed Helmer down the beach. Miller saw Helmer take off his jersey, wrap the gun in it, and place it in the wheel well of a car. Officers soon recovered the gun and the jersey. They arrested Helmer on the beach.

Helmer was charged with fourth degree assault as to Shandy, first degree assault as to Hardin, and second degree assault as to Miller, Washburn, and Lescault.

At trial, Helmer argued that he acted in self-defense when he brandished his gun. His defense was largely supported by the testimony of Dr. Mark McClung, a psychiatrist who diagnosed Helmer with posttraumatic stress disorder (PTSD). Helmer's father killed his mother when he was a young child. Dr. McClung testified that, as a result of this and other traumatic experiences, Helmer has had problems with feeling on guard, vigilant, and afraid. Dr. McClung explained that PTSD can cause anxiety, fear, and panic reactions. He stated that it can also cause disassociation, where an individual feels detached rather than present in a situation; distortions of time sensation and sensory perception; spotty memory as to critical events; and hypervigilance. Dr. McClung explained that those with PTSD can experience flooding, where one becomes overwhelmed with emotions and fearfulness, which decreases the ability to calmly assess a situation and respond appropriately. He opined that Helmer's actions could have been the product of fear.

Helmer also testified in his own defense. Helmer had experienced blackouts and had an incomplete memory of the night. His testimony was as follows. He did not recall pulling the trigger, but knew that he must have. He must have been afraid when he pulled out his gun. He had been pushed immediately prior to pulling out his gun. There was chaos around him and people everywhere. Just before Miller, Washburn, and Lescault came out, someone pulled on his arm. Although he knew at the time of trial that the three men were not there to hurt him, he did not know it that night. At the time, he felt like strangers were coming after him. He felt like he did not have control and was only able to react to what was happening.

The trial court gave the self-defense instruction proposed by defense counsel. The instruction read, in relevant part,

> 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.

During deliberations, the jury submitted two questions. The first said, "Question surrounds definition of intent with respect to timing. Is measurement of intent restricted to the actual event of pulling the gun's trigger, or can the defendant's mindset and events leading up to the pulling of the trigger also be considered in establishing intent?" The second asked, "Should the PTSD diagnosis be considered in delib[e]ration as it relates to one[']s thought process and actions vs. someone not diagnosed with PTSD? Should the PTSD be taken into consideration when determining our verdict?" In response to both questions, the court instructed the jury to "[p]lease review your jury instructions."

The jury found Helmer not guilty of fourth degree assault as to Shandy and not guilty of first degree assault as to Hardin. It found Helmer guilty of the lesser included offense of second degree assault as to Hardin. It also found Helmer guilty of second degree assault as to Miller, Washburn, and Lescault.

Helmer appeals.

DISCUSSION

I. Self-Defense Instruction

Helmer argues that his self-defense instruction was constitutionally deficient, because it did not instruct the jurors to consider his PTSD when assessing the

reasonableness of his actions.[1] As a result, Helmer asserts, the trial court abused its discretion in declining to further instruct the jury that it could consider prior events and circumstances, including Helmer's PTSD. Helmer also alleges that the presentation of the instruction constituted ineffective assistance of counsel. Both of these challenges require us to first determine whether Helmer's self-defense instruction was deficient. See State v. Sublett, 156 Wn. App. 160, 184, 231 P.3d 231 (2010) (trial court did not abuse discretion in declining to further instruct jury where given instruction was not ambiguous and correctly stated the law), aff'd, 176 Wn.25 58, 292 P.2d 715 (2012); State v. Studd, 137 Wn.2d 533, 550-51, 973 P.2d 1049 (1999) (defendant may raise ineffective assistance claim based on erroneous jury instruction).

We review the sufficiency of jury instructions de novo. State v. Walker, 182 Wn.2d 463, 481, 341 P.3d 976 (2015). Jury instructions are sufficient if they allow both parties to argue their theory of the case, are not misleading, and, when read as a whole, properly inform the trier of fact of the applicable law. State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011).

Self-defense instructions must make the relevant legal standard "'manifestly apparent to the average juror.'" State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (quoting State v. Painter, 27 Wn. App. 708, 713, 6230 P.2d 1001 (1980)). The jury must assess evidence of self-defense "from the standpoint of the reasonably prudent person,

[1] The invited error doctrine prevents a defendant from presenting a jury instruction and then complaining about it on appeal. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). Helmer acknowledges that he presented the self-defense instruction. Accordingly, he does not argue that the instruction's insufficiency would itself warrant reversal or retrial; rather, he asserts that the instruction's insufficiency demonstrated that the trial court erred and that defense counsel's performance was deficient.

knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). In other words, the self-defense inquiry has both a subjective and an objective portion. Id. The subjective portion ensures that the jury fully understands the defendant's actions from the defendant's own perspective, while the objective portion allows the jury to determine what a reasonably prudent person similarly situated would have done. Id. The "justification of self-defense is to be evaluated in light of [a]ll the facts and circumstances known to the defendant, including those known substantially before the killing." State v. Wanrow, 88 Wn.2d 221, 234, 559 P.2d 548 (1977).

Helmer relies on Allery and Janes to argue that his self-defense instruction was inadequate. In Allery, the Washington Supreme Court considered a self-defense instruction in the context of a defendant who had suffered consistent physical abuse from the victim. 101 Wn.2d at 592-93. Allery came home one night to find her estranged husband in her house, in violation of a restraining order. Id. at 593. Her husband was lying on her couch and told her, "'I guess I'm just going to have to kill you sonofabitch. Did you hear me that time?'" Id. Allery tried to escape out a bedroom window. Id. She heard a metallic noise from the kitchen that she thought was her husband getting a knife. Id. She then took a shotgun from her bedroom and shot her husband, who was still lying on the couch. Id.

Allery's self-defense instruction stated, "The 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. The Supreme Court found that this was inadequate, because it did not instruct the jury to "evaluate self-defense in the light of all

circumstances known to the defendant, including those known before the homicide." Id. at 594. The court reasoned that Allery's "theory of the case was that her intimate familiarity with her husband's history of violence convinced her that she was in serious danger at the time the shooting occurred." Id. at 595. Thus, the jury should have been instructed to consider self-defense "from the defendant's perspective in light of all that she knew and had experienced with the victim." Id.

Likewise, in Janes, the court recognized that a history of abuse with a victim can inform the reasonableness of a defendant's belief that he or she is in imminent danger. 121 Wn.2d at 239. There, the victim was a father figure to Janes and had physically abused Janes for years. Id. at 223. The evidence suggested that the victim had threatened Janes the night before the incident, and Janes's mother told him the next morning that the victim was still angry. Id. at 223-24. That afternoon, Janes shot the victim in the head as he came through the front door. Id. at 225.

In support of Janes's request for a self-defense instruction, a child psychiatrist testified that Janes suffered from PTSD as a result of the years of abuse. Id. at 226-27. The psychiatrist explained that PTSD caused Janes to perceive that he was constantly in danger and to be fearful of the victim. Id. at 227. As a result, the psychiatrist concluded that Janes feared imminent harm when he shot the victim. Id. at 227. The trial court denied the request for a self-defense instruction, because it found the events "too remote and insufficiently aggressive." Id. at 227-28.

The Washington Supreme Court concluded that the trial court had not properly considered the defense in light of Janes's subjective knowledge and perceptions. Id. at 242. It stated that

> the jury is to inquire whether the defendant acted reasonably, given the defendant's experience of abuse. Expert testimony on the battered person syndromes is critical because it informs the jury of matters outside common experience. Once the jury has placed itself in the defendant's position, it can then properly assess the reasonableness of the defendant's perceptions of imminence and danger.

Id. at 239. The court cautioned that evidence of abuse does not itself ensure that the defendant's belief in imminent harm was reasonable—the defendant must also present some evidence to show that his or her belief was reasonable at the time of the incident. Id. at 240-41. It remanded for the trial court to reconsider its ruling denying the self-defense instruction. Id. at 242.

In 1986, the pattern instruction was amended to address Allery. See State v. Goodrich, 72 Wn. App. 71, 77, 863 P.2d 599 (1993. The current version states:

> 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 [and prior to] the incident.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.02, at 253 (3d ed. 2008) (WPIC). The Court of Appeals has since recognized that WPIC 17.02 "correctly instruct[s] the jury on the subjective standard of self-defense." Goodrich, 72 Wn. App. at 77.

Helmer's instruction stated, in relevant part:

> 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.

This tracks WPIC 17.02.

Nonetheless, Helmer argues that his self-defense instruction did not properly instruct the jury. Helmer identifies two particular deficiencies in the self-defense instruction. First, he observes that the instruction did not explicitly inform the jury that it should consider the facts and circumstances known to him at the time of and prior to the incident. Second, he notes that it did not explicitly inform the jury that it should consider his past experiences that led to his PTSD. He asserts that Allery and Janes support the inclusion of this omitted language.

However, Allery and Janes do not compel the result Helmer seeks. The reasonableness of Allery's belief in imminent harm was based on her special knowledge of the surrounding facts and circumstances. See Allery, 101 Wn.2d at 595. That knowledge was acquired through her past experience with said facts and circumstances—namely, her husband historically posing a threat of violence. See id. Helmer had no such history with his victims, and he did not know them to be particularly dangerous. Thus, prior facts and circumstances were not implicated. It could not have been error to omit reference to facts and circumstances known to Helmer prior to the incident.

Nor was it error to omit reference to Helmer's past experiences. Unlike Allery and Janes, Helmer does not allege that his experiences themselves informed the reasonableness of his fear. See Allery, 101 Wn.2d at 595; Janes, 121 Wn.2d at 227. Rather, he argues that the experiences led to his current condition, the effects of which

caused him to feel more fearful than the average person would. See In other words, Helmer's theory of self-defense was that he acted reasonably for a person under the influences of PTSD. But, "testimony that a defendant suffers from [PTSD], standing alone, does not ensure that the defendant's belief in imminent harm was reasonable." Janes, 121 Wn.2d at 240. A defendant must also produce evidence that he or she perceived imminent harm "based on the appearance of some threatening behavior or communication" by the victim. State v. Walker, 40 Wn. App. 658, 665, 700 P.2d 1168 (1985). This ensures that the subjective portion of the self-defense inquiry does not subsume the objective portion:

> 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. . . .
>
> "[I]f the reasonable person has all of the defender's characteristics, the standard loses any normative component and becomes entirely subjective."

Janes, 121 Wn.2d at 239-40 (alteration in original) (quoting Susan Estrich, Defending Women, 88 MICH. L. REV. 1430, 1435 (1990)). Thus, the self-defense inquiry involves consideration of facts as they truly existed, not as they were perceived based on the defendant's mental health.[2]

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[2] Helmer's theory would be more appropriate for a diminished capacity defense. See, e.g., State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997) (disassociation caused by PTSD relevant to whether defendant lacked mental capacity to form the intent to kill); State v. Hamlet, 133 Wn.2d 314, 318, 944 P.2d 1026 (1997) (evidence of PTSD-related disassociation admitted as relevant to mental capacity to form intent); State v. Bottrell, 103 Wn. App. 706, 716-18, 14 P.3d 164 (2000) (flashbacks caused by PTSD relevant to ability to act with intent).

Helmer's instruction was based on WPIC 17.02, which the Goodrich court affirmed as a correct statement of the self-defense standard. 72 Wn. App. at 77. Helmer maintains that, even if a WPIC is sufficient under typical circumstances, it can be insufficient under the particular facts of a case. As support, he cites State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000). In Irons, the appellant argued that a self-defense instruction failed to make the legal standard manifestly apparent, because it required the jury to find that "the defendant reasonably believed that the victim (rather than the victim and those whom the defendant reasonably believed were acting in concert with the victim) intended to inflict death or great personal injury." Id. at 546. The Irons court acknowledged that the instruction was substantially the same as the WPIC. Id. at 551. However, the court reasoned, simply because the instruction was "correct in the abstract, or correct as applied to one set of facts," was not determinative. Id. at 553. Under the facts of Irons' case, which involved multiple assailants, the court found that the WPIC could "easily be read to modify the portion of the charge that instructs the jury to consider all facts and circumstances as they appeared to the defendant." Id. at 552-53. As a result, the Court of Appeals found that the jury instructions were internally inconsistent and ambiguous. Id. at 553.

The present case is distinct from Irons. There, the instruction affirmatively misled the jury by instructing it to consider the defendant's belief that the victim, and only the victim, posed a threat of harm. See id. at 546. Here, there is no such confusion. This case is more like Goodrich, where the trial court rejected the defendant's more detailed proposed instruction in favor of WPIC 17.02. 72 Wn. App. at 77. Goodrich's proposed instruction told the jury to consider all factors bearing on the reasonableness of her

actions and apprehensions, including Goodrich's "past and present knowledge, her beliefs, the relative size and strength of the participants, [and her] words and actions prior to the incident." Id. at 74. The Court of Appeals found that WPIC 17.02 was sufficient, noting that the WPIC was "redrafted to take into account the subjective facts required by Allery" and that it "contains almost the same phraseology required by Allery." Id. at 77. It concluded that, "[w]hile Goodrich's proposed instruction is more detailed, the instruction given correctly states the law and allowed Goodrich to argue her case." Id.

Here, the self-defense instruction correctly stated the law. And, it was adequate on the particular facts of this case. The instruction was not constitutionally deficient. Accordingly, the trial court did not abuse its discretion in referring the jury back to its instructions in response to its questions. Nor did defense counsel provide ineffective assistance for proposing the instruction.

II. Statement of Additional Grounds

In his statement of additional grounds, Helmer argues that there was insufficient evidence to support the element of intent as to his second degree assault convictions. To prove second degree assault, the State must show specific intent either to cause bodily harm or to create apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995).

There is sufficient evidence to support a conviction if, when viewed in the light most favorable to the State, the evidence permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). When an appellant challenges the sufficiency of the evidence, he

admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Helmer was convicted of four counts of second degree assault: three counts for brandishing his gun at Miller, Washburn, and Lescault, and one count for shooting Hardin.

Miller, Washburn, and Lescault each testified about the incident. Washburn testified that he came out to help break up the fight and when he turned around, Helmer[3] was pointing a gun at him. Miller testified that Helmer looked Miller in the eye and held the gun about six inches from their faces for about five seconds. Lescault testified that Helmer pointed the weapon directly at Lescault's face, held it steady, and looked Lescault right in the eyes. Lescault continued,

> And then [Helmer] immediately pointed [the gun] to my left, and I imagine it was maybe where one of the other people were, and pointed it right there for a second, then immediately pointed it again. It wasn't like a wave. Just sort of waving it at a crowd. It was specifically the feeling I got was what he did to me right in the face that he was pointing it right in the face of people off in the flank that I couldn't see.

Lescault felt that "if [Helmer] pulled the trigger he was so close that he was not going to miss." He further 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." There was sufficient evidence for the jury to conclude that Helmer intended to create an apprehension of bodily harm by pointing his gun at Miller, Washburn, and Lescault.

There was likewise sufficient evidence for the jury to find that Helmer intentionally assaulted Hardin, either by causing bodily harm to Hardin or, at the very least, by creating

[3] Although Miller, Washburn, and Lescault did not refer to Helmer by name, Helmer testified that he was the person who pointed the gun at them.

an apprehension of such harm. Helmer testified that when he was trying to pull Dahl out of the fight, he felt someone push him from behind. He remembered going for his gun, and stated that the "next thing I know, my hand's up with the gun." When asked at trial if he pulled the trigger and shot Hardin, he responded, "Apparently, yes."

Hardin testified that he intervened in the fight, attempting to help Shandy. He stated that two men were assaulting Shandy, and Hardin grabbed the one closest to him. Hardin let go when he noticed that the other man had a gun. He felt dizzy and realized he had blood all over his body. He had been shot in the shoulder. The bullet traveled into his chest.

The testimony suggests that Helmer was in control of the gun directly following the gunshot. One onlooker testified that Helmer[4] initially pointed the gun in the direction of the fight on the ground and then pointed it at the people exiting the bar. Another onlooker testified that, after he heard a gunshot, he saw Helmer standing there holding a gun. When asked the position of the gun, Williams said "it wasn't at me and I wouldn't say it was up in the air. It was kind of like somewhere in between there I guess is the best way I can describe it." A third witness stated that after the gunshot he saw Helmer holding the gun "in a way to kind of get the crowd to back off." There was sufficient evidence for a jury to conclude that Helmer intended to cause bodily harm to Hardin or to create an apprehension thereof.

Helmer also asserts that findings of fact and conclusions of law have not yet been entered and thus he is entitled to a retrial. He does not elaborate on this assertion or cite

[4] The witness testified that the man with the gun was wearing a green jersey. Helmer testified that he had a green jersey on and that he pulled out his gun and pointed it at the people coming out of the door.

authority to support it. "Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review." State v. Stubbs, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), rev'd on other grounds, 170 Wn.2d 117, 240 P.3d 143 (2010); RAP 10.3(a)(6).

We affirm.

WE CONCUR:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 71607-7-I
	)	
MICHAEL HELMER, JR.,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL HELMER
DOC NO. 372618
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 9900

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF SEPTEMBER 2015.

X Patrick Mayovsky