Supreme Court No. 96574-9

Court of Appeals No. 35218-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

MICHAEL LEVI BACKEMEYER, Respondent

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

PETITION FOR REVIEW

LAWRENCE H. HASKELL
Spokane County Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court accept review of two issues from the Court of Appeals' published decision in *State v. Backemeyer*, No. 35218-8-III ("Opinion" hereafter).

II. ISSUES PRESENTED FOR REVIEW

1. Where the jury is properly instructed on the law, and before concluding deliberations, one or more jurors submits two questions to the trial court, may the appellate court impeach the subsequent unanimous jury verdict and divine that the jury as a whole misunderstood the instructions as given and, in fact, did not even read them?
2. May an appellate court change the review of ineffective assistance of counsel claims by establishing a heightened requirement of counsel's performance that requires counsel to provide more than complete jury instructions in a case based solely on a question to the trial court regarding an instruction?

III. STATEMENT OF THE CASE

Factual History.

Nicholas Stafford worked as a bouncer at Peking North, a restaurant and bar in Spokane, Washington. RP 156-58.[1] On December 16, 2016, he was not scheduled to work, but was called in by Ian Mack, the bartender, to help because the bar was busier than usual. RP 156, 159, 227. Stafford was dressed in his "basic clothes" that he normally wears to work – jeans and a t-shirt. RP 227. Stafford's job included checking identification at the door, cleaning up empty glasses, and monitoring to ensure that patrons did not leave with alcohol. RP 160. The bar did not allow its patrons to bring alcohol purchased elsewhere or drugs into the bar. RP 161.

The defendant, Michael Backemeyer, caught Stafford's attention, as Stafford believed he appeared to be "on some kind of drug" and because he noticed that Backemeyer was "bothering a lot of people at the bar." RP 227. During the course of the evening, Stafford went to the restroom, and observed the defendant "drinking a beer" that was not served by the bar, and rolling a marijuana cigarette. RP 229. Stafford took the beer away, and told the defendant he had to leave, as there were "no exceptions for bringing

[1] The Report of Proceedings is comprised of three consecutively paginated volumes.

outside alcohol" into the bar. RP 229. Immediately, the defendant became aggressive, and "got right up in [Stafford's] face." RP 230.

Backemeyer told Stafford that he had to find his possessions and then would leave; Stafford helped him look for five to ten minutes. RP 231. Stafford again told the defendant that it was time to leave, but Backemeyer began "bothering some girls." RP 232. The bartender, Ian Mack, did not observe Stafford act aggressively toward Backemeyer during this time. RP 163. Backemeyer, however, "kept putting his hands" on Stafford, pushing him aggressively, and telling Stafford to get out of his face. RP 233. Stafford pushed the defendant's hands away in response. RP 235. The final time Stafford pushed the defendant's hands away, Backemeyer "threw up his hands" and Stafford "went forward to push him away." RP 235. The two tripped and ended up on the ground. RP 235; P-2.[2]

Stafford did not punch Backemeyer during the fight. RP 240. The two wrestled on the ground until Stafford saw the defendant's hand reaching for his pocket. RP 236. Stafford observed the defendant pull out a knife, and, in response, he grabbed Backemeyer's wrist and pinned it to the ground. RP 236. However, he lost his grip on the defendant's wrist. RP 236. Stafford saw Backemeyer swing the knife and hit him in the head. RP 236-

[2] Exhibit P-2 is the surveillance video of the incident.

37. Mack did not see Backemeyer stab Stafford, nor did he see Stafford "throw any punches at Backemeyer's head or face." RP 164-65. Mack jumped into the fray, and attempted to pull the men apart. RP 165.

From Backemeyer's knife, Stafford sustained cuts to his ear, behind his ear, his shoulder, his back and his face.[3] RP 237, 327. Stafford's left eye suffered a "posterior vitreous separation," which increases the risk of posttraumatic glaucoma, cataracts, and potential vision loss. RP 322-23.

The jury was properly instructed. It received the use of lawful force instruction, Instruction 14 (WPIC 17.02; CP 19; RP 457); an instruction that a person is entitled to act on appearances, Instruction 15 (WPIC 17.04; CP 20; RP 457-58); and, at the defendant's request, a "no duty to retreat" instruction, Instruction 16. (WPIC 16.08; CP 21; RP 458).[4]

Regarding the "no duty to retreat" instruction, the State argued in closing:

> Did Mr. Backemeyer have the right to be where he was? The law in the State of Washington talks about a license. You

[3] The ear wound penetrated the cartilage. RP 237. Had the angle of the wound behind Stafford's ear been different, it could have cut Stafford's carotid artery. RP 331. Stafford's injuries required sutures. RP 247, 327-28.

[4] The trial court determined there was an issue of fact "as to what the defendant knew," and there was evidence that potentially demonstrated Stafford was not working, i.e., the 911 call in which Mack indicated Stafford was not working that night, but was at the bar. RP 447. In doing so, the trial court ruled that it would include the "no duty to retreat" instruction, and that the jury would have to determine the issue. RP 447.

> have a license to go into a business. But you've seen those signs, "No shirt, no shoes, no service," or "This establishment retains the right to refuse service to anyone." Peking North has the right to refuse service to anybody. Nicholas Stafford was an employee of Peking North. And when Mr. Backemeyer violated not only the house rules by bringing in beer and marijuana but admittedly smoking them in the bar in violation of state law, he lost that license, that limited license to be there. They had every right to remove him. And when they were going to remove him, he has no right to be there.
>
> … The State's position is [this instruction] does not apply to Mr. Backemeyer…
>
> If you're at Peking North and an individual comes in there and you're following the rules and doing what you're supposed to be doing in there and they threaten you, that would tell you that you have a right to defend yourself. But if you are [at a bar] and you've brought in alcohol that doesn't belong there, and you've brought a drug that doesn't belong there, and you're not allowed to have that drug in there, that right is revoked.
>
> Now that does not negate your obligation as jurors and as the Court read to you in the instructions, to consider these as a whole. It just tells you that at this point, **if you can't find that he has a right to be there, then you move onto the other instructions. And those are the other self-defense instructions, which would be, I believe, 14 and 15 that you will look at…**

RP 465-66 (emphasis added).

The prosecutor then contended the other two self-defense instructions were also inapplicable, arguing that the force the defendant used was unreasonable under the circumstances. RP 467-71.

As to the "no duty to retreat" instruction, defense counsel argued:

> The state said that, Well, that Jury Instruction 16, whether or not you agree he had a lawful right to be there or not and it just comes down to, I guess, whether or not you believe Mr. Stafford was on duty. I don't know what it comes down to. She was correct. That doesn't take away from the entire self-defense claim. That's one instruction. Self-defense is still there even if you think he didn't have a lawful right to be there. If you are trespassed from a store and you go back and someone's attacking, killing you, you do not have to stand there and let them kill you because you've been trespassed here. **The law gives you the right to defend yourself if you've been trespassed. It goes to that one specific instruction, self-defense still. The rest of the instructions are still here for you to consider**.

RP 501 (emphasis added).

This was not the only argument defense counsel made on the subject of self-defense. Counsel argued at length that Backemeyer was defending himself. RP 495, 497-500, 502. Counsel also argued that the surveillance video demonstrated that Backemeyer was retreating from Stafford. RP 495.

During deliberations, the jury asked two questions: "Instruction No. 16, re in a place that a person has a right to be. Does defendant's possession of marijuana, outside beverage, and/or being asked to leave negate his right to be there and therefore right to lawful self-defense?" and "During any event, does commission of an illegal act negate the right to use lawful force?" RP 512, 514. To both questions, the parties and the court

decided to respond by instructing the jury to again read the instructions. RP 512, 514.

After complying with the trial court's additional instructions to re-read the instructions, and after further hours of deliberation,[5] the jury delivered a unanimous guilty verdict to the sole assault charge. RP 516. The jury was polled with each individual juror answering that the verdict was both their personal verdict, and was also the verdict of the jury. RP 516-18. Thereafter, the defendant appealed and the verdict of the unanimous jury was reversed in a two-to-one decision by the Court of Appeals, Division III. (Opinion attached).

IV. WHY REVIEW SHOULD BE ACCEPTED.

A. THE APPELLATE COURT CANNOT IMPEACH A JURY VERDICT BY DIVINING THAT AN ENTIRE JURY WAS CONFUSED, AND NEVER READ THE COURT'S INSTRUCTIONS, WHERE THE JURY DELIBERATED AFTER RECEIVING ADDITIONAL INSTRUCTIONS AND RENDERED A UNANIMOUS VERDICT.

The jury delivered a verdict. The jury was properly instructed.[6] The jury was polled. Each individually polled juror answered that the verdict of

[5] The first additional instruction to "please re-read [t]he jury instructions" was given to the jury on March 23. CP 30. The second additional instruction from the trial court telling the jury to read their instructions was delivered to the jury at 11:03 a.m. on March 24. CP 31. The jury returned a verdict later in the afternoon on March 24. RP 516.

[6] The majority opinion does not take issue with the instructions given. All judges agreed that the jury was properly instructed. The reversal is based on

guilty, as to the sole count charged, was both their personal verdict and the verdict of the jury as a whole. In delivering the unanimous verdict, the jury expressed no confusion; however, in its review of the case, the appellate court failed to reach a unanimous decision.[7]

The appellate court majority arrogates to themselves the jury's non-delegable constitutional duty to decide the facts and apply the law.[8] In doing so, it has determined what it neither can nor may determine – the very thought processes of the jury, both individually, and, as a whole. The appellate majority determined, or, more properly, imagined,[9] what the jurors' thought processes were and, thereafter, impeached the unanimous jury verdict without any post-verdict input or verification[10] by any juror of a "failure to understand."

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the defense counsel's failure to have the trial court emphasize the self-defense instruction. "Here, defense counsel should have asked the trial court to tell the jury to review instruction 14. That instruction directly answered the jury's questions." Opinion at 10.

[7] KORSMO, J. (dissenting).

[8] "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. ART. IV, § 16.

[9] "Imagination is the beginning of creation. You imagine what you desire, you will what you imagine and at last you create what you will." George Bernard Shaw.

[10] Even had the jury issued post-verdict statements, affidavits regarding how they reached a verdict, such statements could not be used to impeach the verdict. *Breckenridge v. Valley Gen. Hosp*., 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003).

With nothing more than two jury questions regarding instructions that even the appellate court concludes were *correct in their entirety*,[11] the majority determines, out of thin air, that there was *manifest* confusion amongst the jurors; something that court could not determine without more facts and, legally, could not determine at all. An appellate court may not speculate regarding an individual juror's thought processes or difficulty in arriving at a verdict because that thought process clearly inures in the verdict and cannot be used to impeach it. As this Court declared in *State v. Ng*, 110 Wn.2d 32, 43-44, 750 P.2d 632 (1988):

> The individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. *State v. Crowell*, 92 Wn.2d 143, 594 P.2d 905 (1979); *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962). Here, the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached. "[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict." *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123 (citing *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984)), *review denied*, 104 Wn.2d 1010 (1985).

Here, the appellate majority has done exactly what it is not allowed to do under *Ng* or the latter case of *State v. Linton*, 156 Wn.2d 777, 787-88,

[11] Although, in his dissent, Judge Korsmo determined the "no duty to retreat" instruction should not have been given. Dissent at 1.

132 P.3d 127 (2006) (citing cases and reasons for the rule). It has improperly impeached the verdict, and, by sheer speculation, determined that the jury was confused; it has done so based on nothing other than two questions from the jury. Indeed, the appellate majority has determined that the *entire* jury was confused,[12] when it is as likely, or more likely, that only one of the jurors was responsible for both questions.[13]

The majority decision conflicts with the above decisions of this Court and is also in conflict with the published Court of Appeals decisions in *State v. Hatley*, 41 Wn. App. 789, 793-94, 706 P.2d 1083 (1985) (evidence concerning the mental processes of jurors, including their expressed opinions, and when they made up their minds inheres in the verdict); *State v. Miller*, 40 Wn. App. 483; and *State v. Bockman*, 37 Wn. App 474, warranting review under RAP 13.4(b)(1) and (2).

Furthermore, the decision usurps and arrogates unto the appellate majority the constitutional function of the jury under Washington Constitution article IV, section 16; the jury is to determine the facts and

[12] Opinion at 10: "It was obvious that the jury did not understand the law of self-defense, and instruction 14 set forth the entire law on that subject"; *and see* Opinion at 11: "The record is manifestly clear that the jury did not review instruction 14, which set forth the law of self-defense."

[13] Present counsel is as adept as most anyone at speculating what happened in the jury room.

apply the law to the facts, and not have those privileges and duties undercut by a subsequent tribunal. This intrusion into the basic function of juries warrants review under RAP 13.4(b)(3). It is an inescapable conclusion from the majority opinion[14] that the appellate court has decided, based solely on two questions posed during jury deliberations, that each juror necessarily disregarded his or her sworn oath to try the case according to the evidence and instructions.[15]

Trial courts will be confused by this published Opinion, and will face the dilemma of whether they will err by not giving additional instructions in response to *any* question, even where the original instructions are more than adequate; or whether they will err by giving additional direction, under circumstances that may be interpreted as though

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[14] "The record is manifestly clear that the jury did not review instruction 14, which set forth the law of self-defense." Opinion at 11.

[15] Following voir dire, jurors take an oath, solemnly swearing to try the case using the instructions given by the trial court. *See* WPIC 1.01 Advance Oral Instruction:

> Do each of you solemnly swear or affirm that you will fairly try the issues in this case according to the evidence and the instructions from the court [, so help you God]? [Did any of you answer "no" or not answer?]

While the oath administered in the instant case was not transcribed, it was noted. *See* RP 107:

> THE COURT: So if you folks would stand up, raise your right hand, my clerk will swear you in as our official jurors. (THE JURY WAS DULY SWORN.)

the court were commenting on the evidence, or siding with the State or the defense on the issue of the strength of the case. Importantly, such further direction to the jury may foreclose consideration of an issue that was for the jury's resolution alone.

Defense counsel will not know if the failure to re-emphasize an already submitted, correct statement of the law may result in an appellate court finding of ineffective assistance of counsel, even where they desire to not further instruct the jury, hoping that the "confusion" may result in a not guilty verdict for their client because the jury is unable to reach a verdict, or result in the conviction of a lesser offense. These questions raise issues of substantial public interest warranting review under RAP 13.4(b)(4).

B. THE MAJORITY OPINION CHANGES THE STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BY ESTABLISHING A REQUIREMENT THAT COUNSEL PROVIDE *MORE* THAN CORRECT AND SUFFICIENT JURY INSTRUCTIONS ON A CASE.

The well-known *Strickland* standards govern this case. To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 689-92, 104 S.Ct. 2052, 80 L.Ed.2d 67 4 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong, a court need not inquire further.

State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption of effective assistance, and the defendant bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Here, the appellate majority has determined, in hindsight,[16] that defense counsel performed deficiently by not requesting the trial court reemphasize one particular instruction, Instruction No. 14.[17] Logically, this holding assumes that trial court's second response, ordering the jury to "[re-]read" their instructions, was interpreted by the jury to mean "read all of your instructions but make sure you do not read Instruction No. 14." The Opinion also assumes that, after the second command to re-read their instructions was given, that the jury did not do as directed, and, instead, entered a guilty verdict without ever reading the instructions relating to self-

[16] *See State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689) ("[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

[17] Opinion at 9-10: "Because it was clear that the jury had not read instruction 14 after the court recently advised the jury to read the instructions, effective representation required defense counsel to do more than provide the same generic response that had failed to assist the jury. Here, defense counsel should have asked the trial court to tell the jury to review instruction 14. That instruction directly answered the jury's questions."

defense. This leap in logic is not supported by the record. Similarly unsupported by the record is the unspoken conclusion made by the appellate court, relating to the prejudice prong, that the jury would have followed a "special" instruction even where it allegedly refused to follow previous instructions.

The Opinion's overelaborate speculation on what occurred misses the mark. The jury was properly instructed. After receiving their second directive, the jury did just as they were instructed; they re-read the instructions, discussed the facts and the instructions with each other, and then, after further deliberations, rendered a unanimous verdict. The record does not establish otherwise. Informing the jury that the answer they seek is contained in the instructions already given is proper and cannot be a basis for an ineffective assistance of counsel finding in this case, where the instructions were both sufficient and correct under the law.[18] *Cf. People v. Dieguez*, 89 Cal. App. 4th 266, 280-81, 107 Cal. Rptr. 2d 160 (2001), *as modified on denial of reh'g* (May 22, 2001):

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[18] *See* Korsmo, J. (dissenting) at 1:

> There are three reasons appellant's challenge fails. First, the trial court did not err in giving the response that it did. Thus, the defense attorney could not have erred in failing to challenge a correct response, nor was it prejudicial error to fail to request a response that no authority required the trial judge to provide.

> With regard to counsel's failure to request an additional instruction on specific intent to defraud, there could be no deficiency in failing to request an unnecessary instruction. As seen, the instructions given by the trial court on the necessary findings for conviction under section 1871.4, subdivision (a)(1) were both correct and sufficient under the law. Thus, there was no ineffective assistance in trial counsel's failure to request this superfluous instruction on specific intent to defraud.

Finding no Washington case supporting their conclusion that counsel was ineffective, where a jury was properly instructed under the law and facts, the majority cites two cases from the federal system it believes supports its position that the *trial court* could not deny such a request. Both are inapt.

The first case, *Bollenbach v. United States*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946), deals with a trial court's error in giving instructions to the jury that were simply wrong. There, the jury informed the trial judge that it was "hopelessly deadlocked." *Id*. at 609. The jury had been stuck in the jury room for seven hours. *Id*. After a juror asked whether "any act of conspiracy [can] be performed after the crime is committed," the trial judge "made some unresponsive comments but failed to answer the question. No exception was noted immediately." *Id*. Minutes later, the jury again asked for further instruction; "the judge 'mistakenly replied,' as the lower court noted, 'that he had already told them that there could be no conspiracy after the object of the conspiracy had been attained.'" *Id*. After

an inaccurate supplemental jury instruction, the jury returned five minutes later with a verdict of guilty. *Id*. at 610.

The Supreme Court's holding was narrow: If a trial judge's supplemental jury instruction "is a specific ruling on a vital issue *and misleading*, the error is not cured by a prior unexceptional and unilluminating abstract charge." *Id*. at 612 (emphasis added). Further, as noted by the Court, the trial judge's instruction "was not even 'cursorily' accurate. He was simply wrong.' *Id*. at 613.

The second case, *State v. Hayes*, 794 F.2d 1348, 1350 (9th Cir. 1986), is even less supportive of the majority's Opinion. It involves a complicated indictment charging a doctor with not one, but 640 counts of prescribing Schedule II drugs to his patients in violation of the Controlled Substances Act. The indictment focused on Dr. Hayes's treatment of 20 patients over a three-year period; where each prescription constituted a separate count. After being convicted on 281 counts, the defendant complained that the district court's initial and supplemental instructions were improper. *Id*. at 1350. The deliberating jury submitted four complicated questions centered around the meaning of "good faith" as set forth in element 4 of the elements instruction; "[T]hat the prescription was issued by him *other than in good faith*, for a legitimate medical purpose, in

the usual course of his professional practice." *Id.* at 1351 (emphasis added).[19]

These four additional "good faith" questions laid out specific factually oriented questions dealing with Dr. Hayes's expertise on drug dependence, the prescription of medication for severe pain, but not for drug maintenance; prescribing medications to addicts with pain, and the solipsistic question of "how does one determine the pain present in another."[20] Before deciding that the instructions given were sufficient, the

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[19] The court instructed:

> [G]ood faith means an honest effort to prescribe for a patient's condition in accordance with the standard of medical practice generally recognized and accepted in the country. Mistakes, of course, are not a breach of good faith....
>
> You need not agree with or believe in a standard practice of the profession, but must only be concerned with a good faith attempt to act according to them. Good faith is not merely a doctor's sincere intention towards the people who come to see him, but, rather, it involves his sincerity in attempting to conduct himself in accordance with a standard of medical practice generally recognized and accepted in the country.

Hayes, 794 F.2d at 1351.

[20] *See* 794 F.2d at 1353, the jury's fourth question asked:

> The opinion has been expressed that our decision hinges on whether we can determine, beyond reasonable doubt, whether in fact pain existed. The conclusion based on this opinion is that since no human can determine the degree of another person's pain, we cannot rule on the exist[e]nce or nonexist [e]nce of pain.

appellate court noted that "[I]t is not error to refuse a proposed instruction so long as the other instructions in their entirety cover that theory. *United States v. Kenny*, 645 F.2d 1323, 1337 (9th Cir.), *cert. denied*, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981)." *Hayes*, 794 F.2d at 1351.

These two federal cases support the general principle that, if there is no dispute that the court's instructions are correct statements of the law and are not confusing, then there is no error in instructing a jury to re-read their instructions, especially where "[a] more precise explanation might have foreclosed consideration of an issue that was for the jury's resolution alone. The judge adequately responded to the jury's note and we assume that the jury followed the instruction." *United States v. McCall*, 592 F.2d 1066, 1068-69 (9th Cir. 1979).

In these circumstances, where the jury is correctly instructed, the defense attorney cannot be held ineffective by requesting that the jury re-read its correct instructions; this is not performance that falls below an objective standard of reasonableness. Nor is the trial court required to further instruct the jury to concentrate on one instruction. The majority

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The court answered this fourth question: "The existence of pain is not the only question involved. The jury must determine whether or not the Doctor in good faith believed that a painful condition existed that warranted the prescription of Schedule II drugs for the period of time and dosages involved."

opinion conflicts with this Court's jurisprudence commanding that reviewing courts be "highly deferential" in evaluating a challenged attorney's performance, *Strickland*, 466 U.S. at 689, and strongly presume that the appellant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Review is warranted under RAP 13.4(b)(1) and (2).

The majority Opinion also improvidently determines the existence of prejudice, that "the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. Here, this requires both a showing that the court would be required to direct the jury to a specific instruction, if requested by Backemeyer's counsel,[21] and that that one additional instruction would have resulted in a not guilty verdict. As above, this cannot be established. Moreover, in assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the

[21] In the dissent at page 3, Judge Korsmo correctly notes:

> The majority cites no authority that suggests a trial court has to give (an allegedly) more correct answer in lieu of the correct answer that was provided. As the trial judge had no mandatory duty to answer the question in the way the majority believes it should have been answered, there was no prejudice from the attorney's alleged failure to make the request.

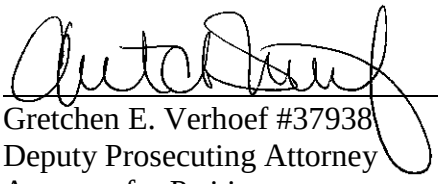
possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." *Strickland*, 466 U.S. at 694-95; *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). The majority Opinion has ignored this presumption. Out of thin air it has determined that the jury disregarded the trial court's final direction to re-read their instructions and would have rendered a different verdict if they had reviewed the instructions. Review is warranted under RAP 13.4(b)(1) and (2).

V. CONCLUSION

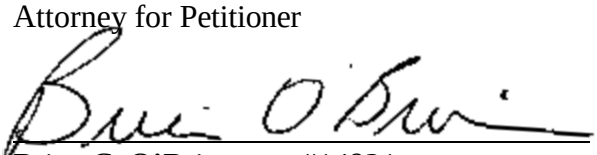
The Opinion begins, fraught with assumptions of what occurred, and continues, with equally unsupported conclusions – that the jury returned a unanimous verdict while in a state of confusion. Review by this Court is warranted under RAP 13.4(b).

Respectfully submitted this 20 day of November 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Petitioner



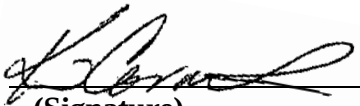
Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. MICHAEL BACKEMEYER, Appellant,	NO. 35218-8-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on November 20, 2018, I e-mailed a copy of the Petition for Review in this matter, pursuant to the parties' agreement, to:

David Gasch
gaschlaw@msn.com

11/20/2018 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

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