

FILED
Court of Appeals
Division III
State of Washington
11/13/2017 4:13 PM

NO. 34326-0

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

STATE OF WASHINGTON,

RESPONDENT,

V.

MICHAEL JOHN LEVASSEUR

APPELLANT.

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant claims that the trial court erred in finding that the defendant acted willfully.
2. Appellant claims that the trial court erred by improperly assuming that trial counsel was aware of the defendant's mental health treatment.
3. Appellant claims that the trial court erred in concluding that self-defense was a sound trial tactic.
4. Appellant claims that the trial court erred in concluding that the defendant's clear memory left no place for a diminished capacity or other mental defense.
5. Appellant claims that the trial court erred in concluding that the defendant's case was distinguishable from State v. Fedoruk, 184 Wn. App. 866 (2014).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Appellant received ineffective assistance of counsel at trial where there is insufficient evidence to rebut the presumption that defense counsel's conduct is not deficient?
2. Whether the Appellant received ineffective assistance of counsel at sentencing where there is insufficient evidence to rebut the presumption that defense counsel's conduct is not deficient?
3. Whether the Appellant received due process?
4. Whether the trial court erred in denying Appellant's motion for a new trial?

III. STATEMENT OF THE CASE

Defendant Michael Levasseur was convicted of assault in the second degree after he knocked victim Johnny Hawkins unconscious with one punch and then continued to pummel Mr. Hawkins' face so badly that Mr. Hawkins' eyes were completely swollen shut, his facial bones broken and several teeth knocked out. At trial, the jury heard testimony from several witnesses who were present at the time of the assault. The defendant testified that he willingly engaged in an altercation with Mr. Hawkins, who was heavily intoxicated, not thinking that Mr. Hawkins would be able to hit him in his inebriated state, but that he eventually did punch Mr. Hawkins in self-defense after Hawkins began to pose a threat by backing him up against a car, lighting his hair on fire, and coming at him with a "sucker punch".

Mr. Hawkins' Testimony

Johnny Hawkins and his wife, Sally Wilson, have lived at 1021 South Adams in Republic, Washington, for about four years. RP 373-74. The couple met defendant Michael Levasseur through a mutual friend between two and three years ago. RP 374-75. The defendant began to park his camper at the Hawkins/Wilson residence intermittently, so that he would have a place to stay, shower, and eat. RP 375. Occasionally, the defendant would have different people

stay with him in his RV, including his sometime romantic partner, Isabelle Sailor. RP 164; 375-76. In May of 2015 the defendant was once again living in his RV parked outside the Hawkins/Wilson residence. RP 376. Ms. Sailor had been residing with him in the RV until she was asked to leave by Mr. Hawkins due to her unstable mental health and a prior incident of self-harm which necessitated them to call 911. Id.; RP 389-90. Ms. Sailor's bout of self-harm was precipitated by finding out that the defendant was "fooling around" with another woman, Torrie Wright. RP 389-90.

On May 20, 2015, the defendant, Mr. Hawkins, and several of their friends had been having a good time. Id. They had gone to the lake earlier in the day and returned back to the Hawkins/Wilson residence where they were sitting on the front porch and drinking heavily. Id. In addition to the defendant, Mr. Hawkins, and Ms. Wilson, also present were neighbor Harvey Guertin and Mr. Hawkins' distant relation, Jazz Brisbane. RP 386. Throughout the afternoon, the defendant repeatedly "challenged" Mr. Guertin and Mr. Brisbane, making comments like "I want you to come towards me. If we were to fight I want to see how you'd come towards me if we wanted to fight". RP 387. "It was like he was fishing for a fight all day long after

we got back from the lake”, stated Mr. Hawkins¹. RP 387-88. No one accepted the challenge, instead telling the defendant to “settle down” and “knock it off.” RP 388. Eventually, both Mr. Guertin and Mr. Brisbane left. RP 377.

Meanwhile, Ms. Sailor had snuck back on to the property and gone to the RV with the defendant. RP 377. Later on, Torrie Wright also arrived. RP 377. When the defendant returned from the RV to the porch, Mr. Hawkins asked the defendant and Ms. Sailor to leave because he was tired of “all this drama stuff going on” at his house, referring to the tension between Ms. Sailor and Ms. Wright, and because of the defendant’s disrespect towards the women. RP 377; 379; 386; 392. In response, the defendant invited Mr. Hawkins to fight, asking him to “go out in the yard”. RP 379; 386; 393. Mr. Hawkins, who was self-admittedly “three sheets to the wind” and in a boot cast from a prior injury, followed the defendant into the yard, thinking that they were going to just “wrestle” a little bit to “throw off some steam”, but subsequently woke up, spitting out his teeth and blood. RP 379-80; 382-83; 393-94. Mr. Hawkins has little memory of the time between the assault and getting to the hospital. RP 381;

¹ Defendant also “bragged about being in combat training, fight with his hands, fight with weapons, all this other stuff, you know. He told me all his background, it was military training and all that stuff....He brags about it quite often”. RP 383.

383. He suffered six or seven fractures to his facial bones, and had to have several more teeth pulled as a result of his injuries. RP 385; 403.

Defendant's Testimony

The defendant testified that his roughly two-year relationship with Johnny Hawkins was characterized by "mostly barbeques and drinking". RP 407. They'd had "drunken arguments" in the past, but nothing that lasted any length of time. Id. He stayed on Mr. Hawkins' property and Mr. Hawkins helped him out. RP 430.

The defendant testified that despite his drinking, he had a pretty good memory of the events of May 20, 2015. RP 430. The defendant had come back from the lake and was hanging out on the front porch of the Hawkins residence. RP 407-08. At some point, he went to his RV to look for something, and ended up staying in the RV for about 45 minutes to "have relations" with Isabelle Sailor. RP 408. Upon returning from the RV, he found Mr. Hawkins sitting on the porch, drunk and taking shots. RP 409. Mr. Hawkins was mad at the defendant for having Isabelle over and told the defendant that he didn't like what he [defendant] was "doing to the girls". RP 409-10. The defendant laughed at Hawkins and said that he had to get his "stuff", referring to his clothes and wallet. RP 410. Mr. Hawkins told

him to go again, and it came down to them going out in the yard. RP 411. On the way out to the yard, the defendant repeatedly told Mr. Hawkins “Hey dude, you don’t want to do this, like this is going to be a bad decision. Don’t, don’t do this.” RP 416.

The defendant stated that Mr. Hawkins never hit him because of his agility, Mr. Hawkins’ uncoordinated movements, and because he was feeling “refreshed” after leaving the RV. RP 416-17. The defendant stated that he was not only faster than Johnny [Hawkins] in a boot cast, but that he was “much faster than Johnny any day”. RP 431. The defendant was too fast for Mr. Hawkins, ducking and moving away from Mr. Hawkins’ five or six swings. Id. He arrogantly told Mr. Hawkins “you’re not going to hit me, like just give up.” Id. Eventually, however, Mr. Hawkins backed the defendant up against a vehicle and flicked a lit cigarette into defendant’s hair, using the opportunity to throw a “sucker punch” at him. Id. Defendant stated that he acted in self-defense when he hit Mr. Hawkins with a “very heavy overhand right [punch]” so he could avoid being hit by Mr. Hawkins. RP 411-12. “When you’re on fire and the debate between putting out your hair and taking a massive sucker punch against a truck, there are no other options but to fight back.” RP 439.

After that, Mr. Hawkins attempted to throw another punch,

which the defendant blocked with a scroll block, and Mr. Hawkins ended up grabbing the defendant's shoulder and shirt and pulling him down. RP 412. As defendant was landing, he had his forearm across Mr. Hawkins' face and landed on him very rigidly and "used the same kinetic energy to just push myself up and that was the end of the fight." Id. The defendant then commenced treating Mr. Hawkins until EMS arrived. Id., RP 421. When Officer Marcuson arrived, the defendant told him that they were wrestling around and fell, leaving out "the punchy part" and that his hair allegedly caught on fire. RP 423; 434-35. According to the defendant, he and Mr. Hawkins later "hugged it out" before they split directions and he left to go rent a hotel [room]. RP 420.

The defendant denied picking a fight with anyone that day, including Mr. Guertin, Mr. Brisbane, or Mr. Hawkins. RP 415. He stated "I wanted to play" and "just because I was antsy it doesn't mean that anyone else had to come and play with me." Id. Of Mr. Hawkins, the defendant stated that "he just doesn't fight well" and "Johnny couldn't get his hands on me." RP 436-37. He also later told Torrie Wright that Mr. Hawkins was a "shitty person" and he would "beat [Johnny] in court and make him looks like the biggest asshole ever." RP 441-43.

Other Trial Testimony

Harvey Guertin testified that he has known the defendant for about two years and that he first met the defendant when the defendant moved in two doors down on his street. RP 261. The defendant would have big parties and Guertin would go to his house and hang out with him and his friends. RP 262. Every time the defendant drank he would start bragging about his military training and always wanted to show off his combat training. RP 269-70.

Mr. Guertin also got to know Mr. Hawkins and Ms. Wilson as neighbors, when they lived a few doors down from him. Id. Mr. Guertin stated that he knew Mr. Hawkins and Ms. Wilson to help the defendant out a lot, giving him food, shelter, and transportation. RP 263. Mr. Guertin frequently spent time with the defendant and Mr. Hawkins together. Id.

By May 20, 2015, Mr. Guertin had moved out of town and had swung by Mr. Hawkins' house to say "hi". RP 264. When he first showed up, the defendant and Mr. Hawkins were both drinking and Hawkins was "pretty intoxicated", sitting on the porch making jokes and having a good time. Id., RP 266. Mr. Guertin noticed a lot of aggression, with Sally Wilson at one point telling the defendant to "get off my porch and leave my man alone." Id. When Jazz Brisbane

arrived, the defendant then challenged him to a fight. RP 264. Mr. Brisbane declined, and defendant continued getting antagonistic “like he really wanted to fight someone.” RP 265. “There was a lot of bullying going on and it was getting pretty negative”. Id. At one point, the defendant was even acting intimidating towards Mr. Sailor’s 16-17 year-old son. RP 267. “You could just tell there was a confrontation brewing in him and he just wanted it bad.” Id. Mr. Guertin left about 15 minutes later because he didn’t want to hang out until things had settled down. RP 265; 270. Mr. Guertin never saw Mr. Hawkins “challenging” anyone. RP 274.

Jazz Brisbane testified that Mr. Hawkins is his cousin and that he used to be friends with the defendant. RP 314-15. The defendant lived at Johnny’s for a long time, so when he would go see his cousin, he would also hang out with the defendant. RP 315. The defendant bragged about his military experience a lot, for example, telling people different things he could do to knock them down or certain spots he could hit them in order to paralyze them. RP 320.

On the afternoon of May 20, 2015, he was at Mr. Hawkins’ house hanging out with Mr. Hawkins, Ms. Wilson, the defendant, Mr. Guertin, Torrie [Wright], and some other friends. RP 316-17. The defendant was talking about his experience with the military and

asked Mr. Brisbane how he would come at him if he was going to fight him. RP 317. He also asked Mr. Brisbane's friend, Cameron, how he would come at him if he were going to wrestle him. Id. Everyone was getting along, but the defendant kept wanting to wrestle people and Mr. Brisbane felt it was as if the defendant was "plotting something" by asking about people's fighting techniques. RP 318. However, no one engaged with the defendant while Mr. Brisbane was there, and he left shortly after the defendant continued to ask questions about fighting. RP 320. Before he left, he noticed Mr. Hawkins getting upset because the defendant was yelling at his girlfriend in the RV and because Mr. Hawkins didn't want any violence on his property. RP 321. Mr. Hawkins told the defendant that if he was going to continue his behavior, he would need to leave and take his RV with him. RP 322.

Torrie Wright testified that she had known the defendant for a few months after meeting him through mutual friends John Hawkins and Sally Wilson. RP 327-28. Ms. Wright and the defendant were engaged in a romantic relationship both before and after the assault on Mr. Hawkins. RP 329.

On the afternoon of May 20, 2015, Mr. Wright had gone to the Hawkins/Wilson residence. RP 330-31. Ms. Wright was inside the

kitchen with Ms. Wilson while Mr. Hawkins was sitting on the porch drinking. RP 331-32. Mr. Hawkins was upset that Isabelle was back on the property and was ranting that he didn't like the way the defendant treated women on his property. RP 332-33. When the defendant came around the corner from the camper, Mr. Hawkins told him that he didn't like the way he treated women, and in response, the defendant asked him if he wanted to "take it out in the yard". RP 333; 343-44; 361. At this time, Ms. Wright stepped back inside to tell Ms. Wilson that they were possibly going to fight, while still maintaining a view out the door. RP 333-34. Ms. Wright heard the sound of a punch and saw Mr. Hawkins hit the ground. RP 334-36. She observed the defendant on top of Mr. Hawkins – who was out cold – punching him in the face multiple times with both hands. RP 334; 336.

After yelling at Ms. Wilson that Mr. Hawkins was bleeding in the yard, Ms. Wright ran out in the yard, noticing that the defendant was gone. RP 337. She observed that blood running from all different places on Mr. Hawkins' face and head. Id. The defendant had gone to the backyard, and Ms. Wright yelled at him to come help her turn Mr. Hawkins on his side because he was staring to snort blood and make choking noises. RP 337-38. Mr. Wright called 911

on her phone and gave the phone to the defendant to talk to 911. RP 338. She did not see any marks whatsoever on the defendant. Id. After a few minutes, Mr. Hawkins rolled over and began spitting out his teeth, causing Ms. Wright to throw up. RP 339. She later picked up at least one of Mr. Hawkins' teeth from the ground. RP 366.

Sally Wilson testified that she and Mr. Hawkins had been friends with the defendant and had tried to help him. RP 277. The defendant spent multiple summers living in his RV on the Hawkins/Wilson property. RP 278. The defendant frequently had women stay with him, including Isabelle Sailor. RP 279. However, in May of 2015, Ms. Wilson and Mr. Hawkins had told Ms. Sailor that she was not welcome back. Id. Nevertheless, she continued to sneak back to their property. Id.

On May 20, 2015, Harvey Guertin, Jazz Brisbane, Torrie Wright, Isabelle Sailor, and the defendant were at the Hawkins/Wilson residence with Mr. Hawkins and Ms. Wilson. RP 279-80. They had gone to the lake earlier in the day and returned to the residence. RP 280. Mr. Wilson then went back to the lake with her mother and kids. Id. Upon her return, she found the parties somewhat heated with "attitudes going on". Id.; RP 291. Mr. Hawkins was drunk on the porch and had asked the defendant a

couple of times to leave because he was tired of the way he was treating women. RP 284; 295. She then went into the kitchen to make them some food. RP 280. Whilst in the kitchen, Ms. Wilson heard the defendant say “do you want to go rounds? Do you want to step out in the yard?” RP 301. Shortly thereafter, Ms. Wright came into the kitchen and told her that something was happening in the yard. RP 280.

When Ms. Wilson went out in the yard, she observed her husband laying on the ground with blood coming out of his nose and mouth, his eyes were swollen and the whites were red, his teeth were on the ground, and she thought he was dead. RP 281. The defendant was trying to leave, but Ms. Wright called 911 and handed him the phone, and told him not to leave. RP 281-82; 305.

Isabell Sailor testified that she has known the defendant for almost two years in a friendly and also romantic relationship. RP 164. She felt very safe with him. RP 177. In May of 2015, she and the defendant were in a romantic relationship and were staying on the Hawkins/Wilson property as guests. RP 165. On May 20, 2015, Ms. Sailor was in the process of moving to a shelter. RP 168. Earlier in the day she had checked in at the shelter, then she returned to the Hawkins/Wilson residence to “hang out”. Id. She and the defendant

had gone to the RV for 30-45 minutes. RP 169-70. The Defendant left the RV first, was gone a few minutes, then returned to say that Mr. Hawkins was “down” and to call 911. RP 170-71; 183. Both Ms. Sailor and the defendant assisted in treating Ms. Hawkins, who was passed out with blood on him. RP 171; 174; 184. After the incident, Ms. Sailor returned to the shelter and the defendant went to get a hotel room. RP 175. The defendant told Ms. Sailor that he only hit Mr. Hawkins once and then “fell on him”. Id. The defendant never mentioned Mr. Hawkins flicking a cigarette on him. Id.

Republic Police Officer Ken Marcuson testified that when he arrived at 1021 Adams St., he observed Mr. Hawkins who was intoxicated and appeared to have been “beaten up fairly well”. RP 112; 115. The defendant, who has no injuries and who also appeared intoxicated, told Officer Marcuson that they’d been drinking, had gotten into a wrestling match, and that he had fallen on Mr. Hawkins, causing his injuries. RP 114-15; 132; 139-41. Officer Marcuson did not observe any single marks on the defendant. RP 121. He did not notice any other unusual behavior by the defendant, such as frenzy, extreme agitation, or anxiety. RP 139. When questioned, Mr. Hawkins stated that he hit the ground and that was all he remembered. RP 116. Officer Marcuson believed that it

appeared to have been more than a wrestling match. RP 120; 135. Officer Marcuson later followed up with Mr. Hawkins in a trauma room at the hospital where he spoke to a nurse to ascertain the seriousness of the injuries. RP 121; 144.

Nurse Carol Leach testified that on May 20, 2015, Johnny Hawkins came into the emergency room with his wife, Sally. RP 91-2. Mr. Hawkins had a swollen face with quite a bit of blood on his head, shoulders, and mouth, was missing teeth, and reported that he had been beaten up. RP 93-4; 9-76. He was diagnosed with a facial fracture in the cheekbone area around the eye as well as complex fractures to the jaw, and soft tissue injuries. RP 100-01.

Procedural History

On May 17, 2015, the State charged the defendant Michael Levasseur with one count of assault in the second degree (intentional assault and reckless infliction of substantial bodily harm). CP 4-5. The defendant was arraigned on May 29, 2015 and was given a trial date of July 8, 2015. CP 15; RP 4.

At arraignment, the defendant was appointed Public Defender Dennis Morgan and entered a plea of not guilty. RP 6; 8-9. The Court inquired as to conditions of release and the State requested that the defendant remain subject to the conditions as previously set,

including the \$5000 bail amount. RP 10. Defense counsel requested that he be released, highlighting that he did have a place in which to live – his RV – and that he was working with a Veteran’s Outreach group to find a place to park it. Id. Also at arraignment, defense counsel advised the Court and the State that it was going to be a “self-defense case”. RP 11. The Court inquired why the State was requesting bail and the State responded that it had concerns based on the defendant’s criminal history, which included robbery in the 5th degree, assault in the 5th degree, and terroristic threats convictions from Minnesota. RP 13. He also had some driving-related and drug paraphernalia convictions, as well as a fugitive warrant from another state. Id. The State concluded that it had concerns because his residence was a mobile residence and because of the seriousness of the particular injuries in the current case. RP 14. The Court concluded that there had not been a change in circumstances to justify changing the bail requirement. Id. The Court, however, did state that if there were a Veteran’s organization that could provide a space for the defendant’s RV, the Court would reconsider bond. RP 14-15. The Court, admitting that it did not really know the particular facts that were alleged in the case at hand, also stated that it was concerned about the *potential* for some untreated mental health

issues and indicated that a mental health evaluation could lead to reconsideration of the conditions of release and elimination of the requirement of bond. RP 15; 18.

The trial date was subsequently continued to September 2, 2015 at the defendant's request. CP 27. The trial date was continued again at the defendant's request to November 2, 2015. CP 32. At the October 9, 2015 trial status conference, the defendant was present with counsel and Defense Counsel represented that they had gone through all the discovery, talked about the case, and that the defendant's position was that he still wanted to go to trial. RP 27. However, the trial date was once again continued at defendant's request to January 4, 2016, for reasons of witness availability. CP 36; RP 33-34. On December 4, 2015, defendant appeared with counsel at a trial readiness hearing and declared ready for trial. RP 37. However, the Court set another interim status conference. RP 38. At the next status conference on December 18, 2015, defendant appeared with counsel and again declared ready for trial. RP 44. A hard trial date of January 6, 2016 was set. RP 47.

The matter proceeded to trial on January 6, 2016. RP 51. During pretrial motions, the defense made it abundantly clear that the theory of the case was self-defense and that they planned on

presenting evidence that the victim, Mr. Hawkins, was an aggressive person. RP 53-59. "The position is that Mr. Hawkins is the aggressor, yes." RP 67. The defense also proposed self-defense jury instructions 17.02 and 16.05. RP 350-51. After hearing testimony from twelve witnesses, including the defendant, the jury found the defendant guilty of assault in the second degree. RP 562; CP 95. The defendant was taken into custody pending sentencing, but later posted bond. RP 568; 571. A sentencing hearing was held on March 4, 2016 and the Court imposed a midrange sentence of nine months in jail with twelve months of community custody, despite the State's recommendation of 12 months. RP 603-04. The court denied the State's request for a mental health assessment as a condition of community custody because it did not find a basis for such a requirement. RP 608-09.

On May 13, 2016, post-trial Defense Counsel argued to stay the sentence pending appeal. RP 626. The Court denied the motion based on the victim's continuing fear of the defendant (community safety) and also so as not to diminish the deterrent effect of the penalty imposed by the Court. RP 633; 642-43. On July 22, 2016, more than 6 months after the Jury convicted the defendant, Defense Counsel moved the Court to order a new trial based on ineffective

assistance of trial counsel. RP 645. The Defense argued that trial counsel was ineffective because the defendant's mental health history was not developed or used as a defense at trial. RP 645-46. Defense Counsel argued that the defendant was "functionally incapable of forming the intent that's required for an assault two charge." RP 652. Defense Counsel further argued that there was no way that self-defense could be established as a legitimate trial strategy. RP 656. The State opposed the motion for new trial and the Court agreed, finding:

- A. that the file was absent of any information as to communications between the defendant and his trial attorney;
- B. that the defense at trial was self-defense, as put forward at Omnibus;
- C. that the defendant testified in detail about his altercation with the victim, describing his maneuvers to render the victim unconscious and his efforts to treat the victim;
- D. that the defendant's actions to defend himself were conscious and willful and he at no point lost consciousness.

CP 633-37. The Court concluded that the defendant had the burden of showing that his trial counsel's performance was deficient. The Court found that, given the defendant's testimony, self-defense was a sound trial tactic, and therefore there was insufficient evidence to rebut the presumption that trial defense counsel's performance was

not deficient. Id. Defendant now appeals the denial of the motion for new trial and argues that the conviction must be overturned based on ineffective assistance of counsel. For the reasons below, the State disagrees and asks that this Court deny defendant's motions.

IV. ARGUMENT

A. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

An appellate court reviews an ineffective assistance of counsel claim de novo as they present mixed questions of law and fact. State v. Yarborough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009); State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). To establish ineffective assistance of counsel, the defendant must show that (1) defense counsel's performance was deficient and (2) this performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the Court finds either prong has not been met, it need not address the other prong. In re Pers. Restraint of Cross, 180 Wn.2d 664, 693, 327 P.3d 660 (2014). To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. Id. The reasonableness of a particular action is evaluated by examining the circumstances at the time of the act, and

a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, and to evaluate the conduct from counsel's perspective at the time. Id. at 694. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A reviewing court presumes that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The presumption is rebutted if there is no possible tactical explanation for counsel's action. In re Pers. Restraint of Cross, Id. at 694. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for the claim that the defendant received ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). With these principles in mind, the State addresses Appellant's specific claims of ineffective assistance of counsel roughly in the order they occurred pretrial and at trial.

1. The Trial Court did not direct an investigation into the defendant's mental health.

Appellant contends that trial counsel was ineffective for failing to conduct appropriate investigations, specifically into the defendant's

mental health history. Appellant contends that the trial court directed trial counsel to investigate the defendant's mental health and that trial counsel's alleged failure to do so prejudiced defendant's right to a fair trial.

The only mention of a mental health evaluation occurred at the defendant's arraignment on May 29, 2015. At that time, the defendant was being held in jail on \$5000 bail and the State requested that the conditions of release remain in place because the victim was scared of the defendant and because the defendant presented a flight risk based on his homeless situation: he had been living in an RV on the victim's property, which was clearly not an option if released. Any time a defendant lacks a physical address, the risk of future non-appearance is increased and it decreases the State's ability to subsequently go out and find the defendant should he fail to appear. In response to the State's concerns, defense counsel argued that the defendant was working with a veteran's organization to find a lot on which to park his RV.

The trial court's concerns were clearly related to the defendant's risk of non-appearance: what the trial court requested was verification that the veteran's organization was going to provide the defendant a place to park his RV. The language on which

appellant hangs its argument is as follows:

I have no desire to hold Mr. Levasseur in custody; I'm concerned about what I understand from last time to be *potentially* some untreated, some untreated mental health issues, whether that's PTSD or some other thing, so if you can get to the bottom of that with the veteran's organization, indicate that they're prepared to, you know, monitor treatment or otherwise assure the stability of a residence and assure that he's able to get treatment, if that's what he needs, at least be evaluated, *I'll absolutely reconsider bond.*

RP 15. This is the only passage, only paragraph, only mention of the defendant's mental health by the trial court during 10 months and ten-plus hearings. Moreover, it is clear that the trial court's concern during this hearing was directed at the defendant's risk of non-appearance. The trial court wanted assurances that the defendant was stable before it was willing to consider release on personal recognizance.

What is also clear is that the trial court's concerns were allayed by the defendant's posting of \$5000 bond. The trial court never again inquired into defendant's mental stability, competence, or sanity. In fact, when the defendant did not appear for subsequent hearings, the court specifically found that he was *not* a risk, and declined to issue the warrant requested by the State. Finally, the trial court also declined to impose a mental health evaluation as a

condition of sentencing, finding that there was “no basis” for it.

Clearly, throughout the life of the case, the trial court did not see anything that would indicate that mental health was an issue. Moreover, appellant’s characterization of the trial court’s comments as a “directed investigation” into the defendant’s mental health is not supported by the record. The trial court gave the defendant the *option* of doing certain things – including working with a veteran’s organization and obtaining an evaluation *if needed* – in lieu of posting bail. The trial court stated that *if* these things were done, he would reconsider bond. What the trial court did *not* do was direct an investigation by defense counsel into the defendant’s mental health history. The suggestion of a mental health evaluation was clearly made in the context of conditions of release and nothing more. Therefore, appellant’s argument that defense counsel was *per se* ineffective for allegedly failing to follow the trial court’s “directive” is not persuasive.

2. Defense Counsel’s trial strategy was reasonable.

Appellant contends that trial counsel’s decision to focus on self-defense was neither reasonable, nor a legitimate trial stratagem. Appellant relies heavily upon State v. Fedoruk, 184 Wn.App. 866, 339 P.3d 233 (2014) to support this contention. In Fedoruk, the

appellate court did find ineffective assistance of counsel when defense counsel for Fedoruk failed to present evidence of defendant's lengthy history of mental illness, despite knowing that Fedoruk had previously been found not guilty by reason of insanity on several felony charges, had been committed involuntarily following threats to blow up the man he was later charged with murdering, was on an LRA [least restrictive alternative], and had to be forcibly administered antipsychotics in jail by court order. Id. at 872; 874. In Fedoruk, defense counsel initially denied putting forward an affirmative defense of diminished capacity, but then sought a continuance to pursue a NGRI defense the night before trial was to begin, which request was denied. Id. at 875-76.

The appellate court found that, under the above circumstances, the decision not to retain an expert to evaluate the defendant until the day before trial fell below an objective standard of reasonableness. Id. at 883. The appellate court found that Fedoruk was prejudiced by defense counsel's performance because he had already been found NGRI on a number of felony charges, his history of mental illness was well documented, his behavior on the night of the killing was "bizarre by any yardstick, and that the State conceded that had Fedoruk raised the mental health defense, it could change the outcome of the

trial. Id. at 885.

While an attorney's failure to adequately investigate the merits of the State's case and possible defenses may constitute deficient performance, the degree and extent of investigation required will vary depending on the issues and facts of each case. Id. at 880. This case is factually distinguishable from Fedoruk for a number of reasons.

First, although Mr. Levasseur does appear to have a documented history of mental health treatment, his history is far from comparable to that of Mr. Fedoruk. Unlike Fedoruk who had been found NGRI on several felonies, defendant had no prior instances of being found NGRI, despite being convicted of several offenses postdating his injury, suggesting that mental health was not issue in prior cases.

Secondly, in Fedoruk, defense counsel *wanted* to assert a mental health defense, but foolishly waited until the eve of trial to do so, leading to the court denying his motion for a continuance. By contrast, neither defense counsel nor defendant ever requested leave to pursue a mental health defense. Third, Fedoruk had a past history of involuntary commitment after threatening the victim, and after he behaved bizarrely on the night of the killing, leading the court to

conclude that defense counsel's trial strategy of general denial without investigating a mental health defense was unreasonable. Here, the defendant had no such similar history with the victim, and at no point presented as anything other than calm and rational to either law enforcement or the court. In fact, the defendant's assertion of self-defense was consistent with his and his witnesses' characterization of the victim as "aggressive". Therefore, the self-defense theory was well-founded, despite being ultimately unsuccessful.

Next, unlike Fedoruk whose pretrial behavior was inescapably indicative of mental health problems (having to be forcibly administered antipsychotics by court order), Mr. Levasseur did not present with any mental health issues during the pendency of the trial: he was allowed to be released on relatively low bail of \$5000, he was respectful and calm in court, and the court could not even find a basis after the trial to require mental health treatment as a condition of the sentence. Finally, unlike Fedoruk, who attempted to assert a mental health defense the night before trial, the defense and defendant were committed to the defense of self-defense since arraignment and throughout the entirety of the case, which never changed, even at trial. Based on the above, it is clear that Mr.

Levasseur's case is factually distinguishable from Fedoruk both in the severity of the mental health issues, and in the soundness of defense counsel's trial strategy. Unlike Fedoruk, the facts in the case at hand do not demonstrate a probability of a more favorable result "sufficient to undermine confidence in the outcome" as required by Strickland. Strickland, 466 U.S. at 693-94.

3. Defense counsel was not obligated to argue mental health.

While it is correct that a defendant can overcome the presumption of effective representation by demonstrating that counsel failed to conduct appropriate investigations if there is a question as to the defendant's competency, there is not duty to argue specific injuries. In re Pers. Restraint of Cross, 180 Wn. 2d at 687. In Cross, appellant argued that trial counsel's failure to develop evidence of his childhood brain damage was both deficient and prejudicial. Id. at 686-87. The Washington Supreme Court held that defense counsel was not obligated to argue the childhood brain injury evidence because there was no evidence suggesting that the defendant suffered the effects of the injury at the time he committed the murders for which he was convicted, thus, trial counsel could reasonably have made a strategic trial determination to focus on other evidence. Id. at 687.

Similarly, there is no evidence in the record that Mr. Levasseur was suffering the effects of his prior injuries at the time he assaulted Mr. Hawkins, as was made clear by his detailed testimony regarding his reasons for reacting the way he did. The defendant was clear that he was not acting out of rage, or loss of control, but rather that he made a conscious and calculated decision to avoid being “sucker punched” by Mr. Hawkins. Given the defendant’s version of events, trial counsel could have reasonably made a strategic determination to focus on aspects of the case other than the defendant’s mental health, namely his claim of self-defense.

While it is possible that the medical records are *sufficient* “to articulate a diminished capacity defense” as argued by appellant, there is no evidence that this strategy would have provided a more favorable result given that the defendant’s own testimony does not support a diminished capacity defense and *does* support a self-defense claim. It was not prejudicial for defense counsel not to argue a defense theory that was at odds with the defendant’s own testimony.

4. There is no evidence in the record that trial counsel failed to conduct a proper investigation.

The final problem with appellant’s argument is that there is no

information in the record below to support appellant's contention that trial counsel failed to investigate the defendant's mental health history. The record reflects that the defendant was present in court with defense counsel many times for pretrial hearings during the 10 month pendency of the case. At several of those hearings, trial counsel represented that it was meeting with the defendant and going over discovery and working on trial preparations, which reflects that trial counsel was engaging with and talking to the defendant. What is not reflected in the record is any statement, affidavit, or testimony from trial counsel about what was included in his trial preparations and what conversations he may have had with his client about different trial strategies or defenses. What *is* clear from the record is that the defendant was claiming self-defense from the outset of the case. At defendant's arraignment, the defense proclaimed that it would be a "self-defense case". At Omnibus, this was reiterated. During pre-trial motions the defense once again reiterated that their position was that the victim was the primary aggressor and that defense planned on introducing evidence of the victim's reputation for aggressiveness. The defendant's proposed jury instructions also included instructions pertaining to self-defense and the defense presented witnesses at trial to testify to the victim's reputation for

aggressiveness. Therefore, it is clear that the strategy of self-defense was not a last-minute trial tactic tossed out by unprepared trial counsel, but rather a theory and a strategy that was developed over the entire life of the case after consultation with the defendant. After all, there is no way defense counsel could have known about the defense witnesses without consulting with the defendant.

While the defendant's commitment to the self-defense strategy is apparent from the record below, there is no competent evidence to support the contention that trial counsel failed to discuss or investigate other options, such as a mental health defense, with the defendant. Neither the State nor the trial court nor the appellate court can know what passed between the defendant and his trial counsel. There is no evidence that trial counsel did *not* consider and/or investigate the defendant's mental health and that trial counsel did *not* determine that self-defense was the sounder trial tactic. What there is evidence of is that the defendant was committed to claiming self-defense, and that is what the defendant and the defense witnesses testified to.

**B. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE
OF COUNSEL AT SENTENCING.**

To establish prejudice in a penalty phase, defendant must

show that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balancing of the aggravating and mitigating circumstances did not warrant the sentence received. In re Pers. Restraint of Davis, 152 Wn.2d 647, 702, 101 P.3d 1 (2004).

The standard range for the defendant's sentence based on his criminal history was 6 to 12 months. The State argued for 12 months based on the defendant's history and the severity of the assault and the effects on the victim and his wife. Defense counsel argued for the low end of the range, based on his argument that the victim initiated the conflict, as well as the defendant's commendable combat record and some letters of recommendation. The defendant himself spoke at the sentencing, apologizing for what happened but again reiterating that he acted in self-defense. The trial court sentenced the defendant to a midrange sentence of 9 months based on the severity of the injuries and based on the defendant's history. The trial court referenced the excessive use of force and that the defendant's fear of the victim was not reasonable, given the victim's inebriation and the defendant's own combat skills.

Appellant now claims that defense counsel prejudiced him by not presenting evidence of the defendant's mental health history as a

mitigating factor. The first question is whether it was deficient for defense counsel not to raise the defendant's mental health as a mitigating factor. It was not deficient for defense counsel not to raise the defendant's mental health where defense counsel could legitimately focus on other factors as a tactic at sentencing. Here, a focus on the defendant's mental health would have been inconsistent with the defense strategy at trial and so it was a sound tactic not to focus on it at sentencing, especially given the defendant's own testimony at trial and at sentencing that he was defending himself.

Secondly, appellant cannot show prejudice where trial counsel *did* request the low end of the range and did present other mitigating factors, namely the defendant's good reputation in the community, letter of recommendation from two individuals, statements from Robert Hanson regarding the victim's history for aggressiveness, and the defendant's decorations for valor in combat.

The final question is whether the defendant would have received the same sentence had defense counsel presented evidence of his mental health history. Given the court's analysis at sentencing, even had the defense presented evidence of defendant's mental health history, there is no reasonable probability that the sentence would have been different. As mentioned above, the Court

believed that the defendant knew what he was doing and was in control of himself. This is further evidenced by the Court's finding that a mental health assessment was not warranted as a condition of the sentence. The court also focused on the severity of the injuries, and the effect on the victim, which would remain the same regardless of the defendant's mental health. Therefore, appellant cannot show a reasonable probability that the sentence would have been different.

C. THE TRIAL COURT'S DENIAL OF A NEW TRIAL WAS NOT AN ABUSE OF DISCRETION.

The grant or denial of a motion for new trial is within the sound discretion of the trial court and will be reversed only for abuse of discretion. State v. Cardenas, 146 Wn.2d 400, 413, 47 P.3d 127 (2002). An abuse of discretion occurs only when the decision of the court is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Appellant contends that the trial court's conclusion that the defendant's conduct was willful is unsupported by the record. However, the defendant testimony cannot characterize his conduct as anything other than willful where he testified that he willingly engaged in combat with the victim in the yard, where he even taunted

the victim, saying “just give up, you can’t hit me”, and where he gave a detailed and thorough description of the events leading up to his decision to throw a punch at the victim in order to prevent himself from being “sucker punched”. Therefore, the trial court did not err by concluding that the defendant’s conduct was willful.

Next, the appellant argues that the trial court erred by concluding that defendant has the burden of showing that his attorney ignored his mental health treatment. Conclusion of Law A properly states that the defendant bears the burden of showing ineffective assistance of counsel. Because defendant was claiming that trial counsel was deficient for not presenting mental health evidence, the defendant, to succeed on a motion for new trial, needed to present some evidence of what passed between defendant and defense counsel to show that defense counsel’s decisions were not just merely a trial tactic, but fell below the objectively reasonable standard. As the State argued above, there is no evidence in the lower record to show what defense counsel did or did not do or what passed between the defendant and defense counsel during trial preparations. Therefore, it was not erroneous for the trial court to conclude that the record is absent any communication between the defendant and his trial counsel, or to conclude that the defendant on

appeal bears the burden of showing that defense counsel was deficient.

Appellant next argues that it was error for the trial court to conclude that self-defense was a sound trial tactic to the exclusion of a mental health defense. As argued at length above, the defendant's own testimony and that of his witnesses, demonstrates that self-defense was a sound trial tactic. Not only was it a sound trial tactic, but it was the tactic the defendant wanted as he reiterated at every turn that he was claiming self-defense.

Finally, appellant argues that the trial court engaged in a "flawed analysis of Fedoruk", claiming that the factors identified by the trial court are "eerily similar" to those of Fedoruk. As previously discussed, supra, the case at hand is easily distinguished from Fedoruk for a plethora of reasons (see above). The trial court's analysis correctly noted these distinctions in determining that Fedoruk was not controlling. Although appellant may disagree with the result of the trial court's analysis, neither the findings of fact or conclusions of law were manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons and therefore, the appellant cannot show that the trial court abused its discretion in declining to grant a new trial.

E. CONCLUSION

The trial court did not abuse its discretion in denying the defendant's motion for a new trial where the court's findings of fact and conclusions of law are supported by the record, where there was no competent evidence that the defendant's mental health was not addressed deliberately or as a tactical issue, and where the affirmative defense of self-defense was supported by the defendant's testimony and that of the defense witnesses.

The defendant was not denied effective assistance of counsel at trial where the court never directed an investigation in the defendant's mental health, where the trial strategy of self-defense was reasonable given the defendant's testimony and version of events, where defense counsel was not obligated to argue defendant's mental health, and where there is no evidence in the lower record that trial counsel *did not* conduct an inquiry into the defendant's mental health history.

The defendant was not denied effective assistance of counsel at sentencing where again, defense counsel had no obligation to argue the defendant's mental health history, where such an argument would have been inconsistent with the defendant's trial strategy and trial testimony, and where there is no evidence to support a

reasonable probability that the trial court's sentence would have differed had the trial court been aware of the defendant's mental health history.

For the foregoing reasons, the State respectfully requests that this Court deny Defendant's motions reverse the defendant's conviction or to remand for a new trial or sentencing.

Dated this 13 day of November, 2017

Respectfully Submitted by:


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FERRY COUNTY PROSECUTORS OFFICE

November 13, 2017 - 4:13 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Michael John Levasseur
Superior Court Case Number: 15-1-00035-7

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