

NO. 34853-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

BILLY TEMPLE,

Appellant.

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

The Honorable Annette S. Plese, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Defense counsel was ineffective and denied appellant a fair trial when he failed to raise appellant's obvious self-defense claim and instead pursued a defense destined to fail as a matter of law.

Issue Pertaining to Assignment of Error

Appellant was charged with assault. He admitted intentionally striking the alleged victim, but both he and his girlfriend consistently maintained he had acted in self-defense, only using force after being attacked. Unaware of the correct standards for raising self-defense, defense counsel failed to raise the claim. Instead, defense counsel asked jurors to acquit because, although appellant admitted his responsive acts were intentional, appellant had not intended to commit any crime. The prosecutor properly pointed out this was not a legal defense to the charge. Was appellant denied his constitutional right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Charge and Motions

The Spokane County Prosecutor's Office charged Billy Temple with one count of Assault in the Second Degree, alleging

that while in the company of girlfriend Jamie Cook, Temple assaulted Jamie's father, Carey Cook.<sup>1</sup> CP 1-5.

When interviewed by police, Temple admitted using physical force against Cook, but explained to both an officer and a detective that he had done so in self-defense after Cook assaulted him. CP 3-4. Similarly, Jamie told police that her father was the aggressor, CP 3, and expressed her opinion that Temple had acted in self-defense. RP 113-114.

At a CrR 3.5 hearing to determine the admissibility of statements Temple made to law enforcement, Spokane Police Detective Randy Lesser testified that Temple claimed Cook attacked him and that he had responded in self-defense. RP 57. The court ruled Temple's statements to Lesser admissible. RP 64. Before Temple was in custody, he also had initiated a discussion with Spokane Police Officer Mark Zimmerman. RP 61-62. The defense agreed that Temple's statement to Zimmerman – in which he again claimed self-defense – was admissible and not subject to the CrR 3.5 inquiry. RP 61-62. The prosecution concurred, but

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<sup>1</sup> Since Jamie and Carey Cook share the same last name, and to avoid confusion, this brief will refer to Jamie Cook as "Jamie" and Carey Cook as "Cook."

noted it had no plans to use this statement in its case-in-chief. RP 62, 64-65.

After trial had begun, the State moved to prevent Jamie from stating her opinion that Temple had acted in self-defense. Defense counsel agreed that would be inappropriate. RP 113-114. In fact, defense counsel announced that he “d[id] not plan on eliciting any testimony that Mr. Temple acted in self-defense. That’s not our theory.” RP 114. True to his word, and discussed more thoroughly below, defense counsel did not raise a self-defense claim.

## 2. Trial Evidence, Jury Instructions, and Conviction

In May of 2016, Carey Cook, his brother David Jordan, Jamie Cook, and Billy Temple resided in Cook’s Spokane home. RP 89, 125. Cook typically slept in a trailer on the property, Jordan slept on a daybed in a front room of the home, and Jamie and Temple – along with Jamie’s young daughters – stayed in a small back bedroom. RP 92, 125-126.

There was tension in the household, which was on display May 15. RP 90. Cook didn’t think Temple and his daughter were properly supervising his 18-month-old granddaughter and Cook expressed his disapproval by yelling, prompting Jamie to tell him to mind his own business. RP 90-91.

That evening, Jamie and Temple almost let Cook's dogs escape from the home as they used the front door. Although the dogs did not in fact get out, Cook was upset because the two were not listening to him as he yelled at them to close the front door. RP 91-92.

Things finally boiled over at about 1:00 a.m., when Cook entered the home to use the bathroom. RP 92. His brother (Jordan) was looking out the front window and informed him that Jamie and Temple had let the dogs out of the house. RP 92-93. Cook began screaming and slammed the bathroom door after he entered. RP 93, 127, 136. While in the bathroom, he heard Jamie and Temple talking in the bedroom and heard his name mentioned. RP 93, 127. Cook exited the bathroom and stood in the bedroom doorway, where Jamie and Temple were now arguing about where they were going to stay. RP 93, 127, 135-136.

What happened next was disputed at trial.

Cook testified that after he entered the bedroom and leaned against a crib, he thought Temple was going to leave the room. Instead, Temple said, "you are going to call the police" and headbutted Cook without any provocation. RP 93. Cook testified he was instantly dazed, thinks he may have reached out to push

Temple away, and Temple then punched him, knocking him unconscious and to the floor. RP 93-94, 96.

Jamie and Temple provided a very different version of the incident and Cook's role in it. According to Jamie, her father stood at the threshold of the bedroom and yelled profanities at Temple because the dogs had escaped. RP 127-129. Temple attempted to leave through the bedroom door, but Cook "got in Billy's face," grabbed him by the neck, and headbutted him. RP 128-129, 132. Temple responded in kind and headbutted Cook. RP 129. While the two pushed and struggled, Jamie's uncle entered the room and began hitting Temple. RP 130. Jamie separated her father and Temple, and her father stumbled to the ground. She and Temple left the house shortly thereafter. RP 130.

Similarly, Temple testified that Cook arrived at the bedroom door aggressive and upset. RP 137. Temple wanted to simply walk out of the room, but Cook is a "big guy" and filled the doorway.<sup>2</sup> RP 137. When Temple tried to walk out, Cook grabbed him by the throat and headbutted him. RP 137. Temple headbutted Cook back, and the two struggled. RP 137-138. Cook would not let go of Temple's throat even though Temple repeatedly

told him to stop. RP 138. Temple hit Cook once and then a second time, but Cook still would not let go of his throat and was screaming. RP 138. Cook eventually became wedged between a crib, the closet, and a bed and went down to the ground. RP 138. At one point during the fray, Temple felt someone hit him from behind, but he did not know if that someone was Jamie's uncle because he did not turn around. RP 138. Temple left the room after Cook let go of him. RP 138. And because he had previously been in trouble with the law, and feared going to jail on this occasion, Temple left rather than wait for police to arrive. RP 139-140.

During defense counsel's examination of Temple, counsel asked if Temple admitted headbutting Cook. Temple said yes. Counsel then asked if Temple admitted punching Cook. And Temple again said yes. Counsel also asked, "did you intentionally assault Carey Cook"? Temple said he did not. RP 139. Counsel asked Temple why he "would not have intended to assault Mr. Cook that night" and Temple responded that he liked Cook and appreciated that he had opened his home to him. RP 140.

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<sup>2</sup> A police incident report indicates Cook weighs 250 lbs., which is 70 lbs. more than Temple weighs. RP 86-87.

On cross-examination, the prosecutor had Temple repeat his admissions that he had intentionally headbutted and intentionally punched Cook. RP 141-142, 144. When Temple protested that he did not intend to assault Cook or do him harm, the prosecutor replied that the court would define what constituted an assault. RP 142.

David Jordan was not in the bedroom at the outset of the fight between his brother and Temple. RP 109-110. By the time he entered the bedroom, he saw Cook being shoved and went to get something with which to hit Temple on the head. RP 110. He returned empty handed, however, and saw that his brother was now on the floor. He testified that he "tapped" Temple on the back of the head to make him stop and Temple responded by hitting him in the arm. RP 110. Temple and Jamie then left as he called 911. RP 111.

Cook was treated for his injuries at a hospital. RP 118. The headbutt and/or punches resulted in injuries to his left eye and multiple fractures to the small bones of the left orbit, which extended into his left sinus cavity and "ovular bridge" – an area below the eye and above the top teeth. RP 119-120. Cook also complained of blurry vision. RP 121.

After both sides had rested, the attorneys and judge discussed jury instructions. RP 150-151. The prosecutor was concerned because, although testimony from defense witnesses indicated Temple was claiming self-defense, defense counsel was not asking for instructions on that defense. RP 151. The prosecutor indicated his intent to tell jurors during closing argument that they were not to consider self-defense, but wanted to make certain counsel was not raising that defense. RP 152.

Defense counsel responded:

Your Honor, I guess I would have to look up self-defense instruction whether or not I will – I believe that I elicited sufficient testimony if I wanted to offer it that I could.

You know, I don't know. I'm really not sure what the State's – it would appear that the State wanted to argue this isn't self-defense even if I'm not arguing it. If they want to argue self-defense and they put the instructions in, I'll ask for it so the jury's not confused about what the instructions say.

Because I anticipated the State stands up and says this isn't self-defense, you're going to have jurors looking through the instructions saying where does it talk about self-defense. He talked about self-defense.

If we're going to go down that road, I would offer the instruction. At this point, you know, that's probably where I'm most comfortable then is if we're going down that road, I believe there's sufficient evidence proffered that it can be established as an

affirmative defense, and the State can argue it accordingly in its closing, but to say they can't talk about it, but I want to talk about what it isn't is somewhat misleading to the jury.

So if the State's wanting to say that this wasn't self-defense, then I would ask for the instruction.

RP 152-153.

In response, the prosecutor complained that defense counsel never notified the State it would be raising self-defense.<sup>3</sup>

RP 153. He argued that jurors should not be instructed on self-defense, and he should be permitted to tell jurors self-defense is not an issue in this case. RP 153-154.

Defense counsel replied:

Your Honor, self-defense is an affirmative defense, and I totally agree that in the anticipation of trial if I was – if our theory was self-defense, I would have offered self-defense.

As the Court is well aware, oftentimes what's in a police report what happens in an interview and what happens in testimony, things develop. So it would be entirely prejudicial for the State to be able to say, and there's not that they would say it this way or how this is, how it would be said. There's this defense out there, and it's not that don't even talk about that. Just look at your instructions.

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<sup>3</sup> CrR 4.7(b)(2)(xiv) merely says a trial court "may require" a statement of the "general nature of the defense." It is not automatically required. In any event, the prosecutor knew Temple claimed self-defense. The State's own "affidavit of facts" mentions the claim. See CP 3-4. And, as previously mentioned, the prosecutor himself moved pretrial to prevent Jamie Cook from sharing her opinion that Temple had acted in self-defense. RP 113-114.

I would submit that the State says look at your instructions or I would proffer the self-defense instruction. I believe that the testimony elicited would provide a substantial evidence that we have proven by a preponderance of the evidence that this could be self-defense.

This Court heard my opening statement. This Court heard the trial up to this point. The fact that facts developed in Ms. Jamie Cook's testimony and into Mr. Billy Temple's testimony creating the possibility this was his defense the State can argue in their closing argument that Mr. Reid said this was all an accident, and now he's here saying it's self-defense.

That's a whole separate issue for the State to present to the jury, but for the State to say we want to say what it isn't and not tell them what that means is prejudicial to Mr. Temple.

So if the State's going down this isn't self-defense, I'm asking for the instruction.

RP 154-155.

The prosecutor then indicated he would forgo mentioning self-defense during closing argument to avoid jurors being instructed on the defense. RP 156. The judge asked defense counsel if he was "okay with that" and defense counsel said, "yes." RP 156. Thus, jurors never received any instructions on self-defense. See CP 6-22. Defense counsel offered no jury

instructions whatsoever and had no exceptions to those given. RP 105, 156, 158.

During closing arguments, the prosecutor emphasized that Temple had admitted intentionally headbutting and punching Cook and explained why his conduct satisfied the elements of Assault in the Second Degree. RP 167-173.

Defense counsel responded that Temple merely intended to leave the bedroom when Cook entered, Cook was extremely angry at the time, and his claim of an unprovoked attack by Temple did not make sense and was inconsistent with what both Jamie and Temple had described. RP 176-178.

Defense counsel then focused on the defense he had chosen over self-defense. Counsel quoted from jury instruction 9, which provides, "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." RP 178 (quoting CP 17).

Initially, it appeared defense counsel understood what this instruction means. He told jurors, "It's not just that they act with intent or intentionally, but what they have to do and what they have to intend when they do it has to be a crime . . . ." RP 178. But it quickly became apparent that defense counsel interpreted this

instruction to mean that Temple could only be convicted if he *intended to commit a crime* (as opposed to intentionally acting to accomplish a result that *is* a crime).

Defense counsel argued that Temple simply intended to leave the bedroom and, although he admitted headbutting Cook and punching him twice, "what he was doing was not intending to commit a crime." RP 179. Counsel continued:

If in your deliberation you conclude that his intention was not to commit a crime, but was to leave and that this physical confrontation occurred, but it was not his intent to commit a crime, it's your duty to return a verdict of not guilty because the State will have not met one of the elements, which is that they have to establish beyond a reasonable doubt that what he intended when he went to leave the room was to assault Carey Cook, and you heard testimony that that's not what his intent was, and you not only heard it from Billy Temple. You heard it from Jamie Cook, and you heard it from Carey Cook because that's what he said he did. He went to leave. That was his intent.

So while it's understandable that the injury that Mr. Cook suffered was no doubt painful and no doubt had an impact on him, your analysis and what you're going to be deliberating about is what he was thinking when he went to leave because he was trying to leave, and he was stopped, and it's at that moment that the analysis breaks down, and you return a verdict of not guilty.

RP 179-180 (emphasis added).

In his rebuttal argument, the prosecutor immediately focused on the obvious: defense counsel's argument was incorrect as a matter of law:

Ladies and gentleman, as you heard in your instructions, what the lawyers say is not evidence, and it's not the law. The Judge gives you the law, and [defense counsel] did not accurately represent what the law [is] as given to you by the judge. That is not what the State has to prove.

RP 180. The prosecutor then pointed out (correctly) that – regardless whether Temple wanted to leave the room – the proper focus under instruction 9 was on whether he intended to head butt Cook and intended to punch Cook. RP 181-182. Because Temple himself had admitted on the witness stand intentionally committing these acts, and because these acts were intentional assaults, Temple was guilty of the charged crime. RP 181-185.

Jurors convicted Temple. CP 23. At sentencing, Temple's mother voiced frustration that jurors had not been permitted to consider her son's self-defense claim, although she placed blame squarely on the prosecution. RP 201. The trial court imposed a standard range 84-month sentence, and Temple timely filed his Notice of Appeal. CP 33, 44-60.

C. ARGUMENT

DEFENSE COUNSEL'S FAILURE TO RAISE AND ARGUE  
TEMPLE'S SELF-DEFENSE CLAIM DENIED TEMPLE HIS  
RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR  
TRIAL.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691); see also In re Pers. Restraint of Davis, 152 Wn.2d 647, 744, 101 P.3d 1 (2004) ("defense counsel has a duty to investigate all reasonable lines of defense"). Counsel's failure to find and apply legal authority relevant to a client's defense, without any legitimate tactical purpose, is constitutionally deficient performance. In re

Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

Moreover, a defendant is entitled to a jury instruction supporting his theory of the case when supported by the evidence at trial. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). Counsel's failure to request a necessary instruction can constitute ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). When assessing counsel's failure to request a jury instruction, this Court determines whether (1) the defendant was entitled to the instruction, (2) failure to offer the instruction was a legitimate tactic, and (3) if the defendant suffered prejudice. Powell, 150 Wn. App. at 154-158.

Defense counsel's failure to ensure that the State was required to prove beyond a reasonable doubt that Temple did not act in self-defense was ineffective and denied Temple a fair trial.

First, Temple was entitled to self-defense instructions. To raise a claim of self-defense, the defense need only produce "some evidence" tending to establish it. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). This threshold burden is "low," and the defense evidence need not be sufficient to create a reasonable doubt in jurors' minds. Id. A "trial court is justified in denying a request for a self-defense instruction only where no credible

evidence appears in the record to support a defendant's claim of self-defense." State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). And the evidence is viewed in the light most favorable to the defendant. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). Once the defense presents "some evidence," the State bears the burden to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473-474, 932 P.2d 1237 (1997); see also State v. Acosta, 101 Wn.2d 612, 615-619, 683 P.2d 1069 (1984) (because self-defense negates an element of the State's proof for assault (unlawful force), due process requires the State to disprove self-defense beyond a reasonable doubt).

Under WPIC 17.02, defense counsel's self-defense instruction would have provided:

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured or in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.

The person using 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.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty to this charge.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4<sup>th</sup> ed. 2016).

The defense certainly provided “some evidence” supporting this defense. In the light most favorable to the defense, if jurors believed Jamie and Temple’s version of events, Cook attacked Temple by grabbing him and head butting him. Temple responded with reasonable defensive force of his own – head butting Cook in the same manner he had been head butted. When Cook would not release his hold on Temple’s neck (leaving Temple vulnerable to additional assaults to his head and face), Temple struck Cook. And when Cook still did not let go, Temple struck him again. But as soon as Cook released his grip on Temple, Temple ceased using force and simply left the room. Had defense requested instructions on self-defense, the trial court would have been obligated to give them.

Second, there was no legitimate tactical reason for defense counsel not to demand self-defense instructions. Counsel's failure to raise self-defense appears to be the consequence of several mistakes on his part.

Defense counsel mistakenly believed Temple had a valid defense to the charged assault because Temple's overall intent was to leave the bedroom rather than to commit a crime. RP 179-180. Of course, as the prosecutor pointed out, the relevant inquiry is whether the defendant intended acts that constitute a crime and – by Temple's own admissions on the stand – he had intended to head butt and hit Carey Cook. When deciding not to raise self-defense, defense counsel's decision-making process was skewed by his mistaken belief that Temple had another valid defense. He did not.

Defense counsel could hardly be surprised that Jamie and Temple testified that Temple had acted in self-defense. As previously mentioned, both had made this same claim well prior to trial when speaking to police officers. CP 3-4; RP 57, 62, 113-114. But it appears defense counsel did not understand the requirements for self-defense, including the low threshold for obtaining an instruction. He repeatedly described self-defense as

an “affirmative defense” and indicated – following the testimony of Jamie and Temple – his belief their testimony established the defense by a preponderance of the evidence. RP 153-154. Self-defense, however, is not technically an affirmative defense and certainly does not require proof from the defense by a preponderance of the evidence. See State v. Wiebe, 195 Wn. App. 252, 256-257, 377 P.3d 290 (distinguishing between an “affirmative defense,” which the defendant must establish by a preponderance of the evidence, and a “negating defense,” which negates one or more elements of the crime and must be disproved by the State beyond a reasonable doubt), review denied, 186 Wn.2d 1030, 385 P.3d 122 (2016).

Had counsel recognized this distinction, he also would have recognized that the defense burden for acquittal was far easier than he knew. See State v. W.R., Jr., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014) (“Creating a reasonable doubt for the defense is far easier than proving the defense by a preponderance of the evidence.”). Although not entirely clear, in adopting a preponderance standard for himself, counsel may have been confusing the proper standards with those found in RCW 9A.16.110(2), which authorizes reimbursement to the defendant of

all reasonable costs where a jury acquits the defendant and the “claim of self-defense was sustained by a preponderance of the evidence.” Whatever the source of counsel’s confusion, however, it likely contributed to his decision prior to trial not to raise self-defense.

Regardless of counsel’s pretrial motivations, however, there certainly was no legitimate justification for counsel’s failure to raise self-defense at trial once the defense witnesses had testified. Although he apparently thought the defense had to establish self-defense by a preponderance of the evidence, he believed even that heightened standard had been met based on Jamie and Temple’s testimony on the stand. See RP 152-154. Yet, still, he chose not to request jury instructions on this self-defense claim (much less argue the claim). Instead, he agreed to forgo self-defense instructions if the prosecutor agreed not to point out during closing arguments that self-defense was not an issue for jurors’ consideration. See RP 156. This makes no sense.

Although legitimate strategy cannot form the basis for an ineffective assistance claim, the strategy must be just that – legitimate. Strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in the

particular area of the law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); see also Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”). Defense counsel’s decision making – the product of pursuing a defense destined to fail as a matter of law and a misunderstanding of self-defense standards – was unreasonable.

Third, Temple suffered prejudice. Prejudice in this context is some reasonable probability that the trial outcome would have differed had jurors been instructed on self-defense. A “reasonable probability” is one sufficient to undermine confidence in the outcome. Powell, 150 Wn. App. at 153. Without self-defense instructions, the prosecutor was absolutely correct when he told jurors that because Temple himself had admitted on the witness stand intending the charged acts, because there was no conflicting evidence on this point, and because the intended acts resulted in the crime of assault, Temple was guilty. RP 181-185. While defense counsel argued Temple could not be convicted unless the State proved he intended to commit a crime, the prosecutor properly advised jurors this was incorrect.

Based on the trial evidence, self-defense was Temple's only plausible defense. And in light of his testimony, and Jamie's, there is a reasonable probability one or more jurors would have declined to convict him had the State been required to prove the absence of self-defense defense beyond a reasonable doubt.

D. CONCLUSION

Ineffective assistance of counsel denied Temple his only plausible trial defense. He respectfully asks this Court to reverse his conviction and remand for a new and fair trial.

DATED this 30<sup>th</sup> day of June, 2017.

Respectfully submitted,

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State V. Billy Temple

No. 34853-9-III

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