

34853-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BILLY SAMUEL TEMPLE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Whether trial counsel was ineffective for failing to argue self-defense where that claim was not fully supported by the facts of the case?

2. Whether trial counsel was ineffective for pursuing alternative arguments at trial, rather than pursuing the self-defense claim, where those arguments were supported by the evidence elicited at trial, but ultimately failed?

III. STATEMENT OF THE CASE

Substantive Facts Presented at Trial.

Carey Cook owned a residence at 2107 East 6th Avenue, in Spokane, Washington. RP 89. On May 15, 2016, Mr. Cook lived at the residence in an RV in the backyard, while his daughter, Jaime Cook, her boyfriend, the defendant, Billy Temple, and Mr. Cook's brother, Dave Jordan, resided inside the home. RP 89-90, 92. Mr. Cook and Mr. Temple did not get along well with each other, and Mr. Cook was upset and angry with how Mr. Temple and Ms. Cook were caring for their child, as well as their

propensity to allow his dogs to escape the home, and their failure to listen to him. RP 90, 92, 97.

On the evening of May 15, 2016, Mr. Cook went to sleep in his RV, but returned to the residence to use the restroom in the early morning hours of May 16. RP 92. Upon entering the home, Mr. Jordan informed Mr. Cook that Mr. Temple or Ms. Cook had let the dogs out of the home. RP 93. Mr. Cook became angry, and began to yell. RP 93, 96. Mr. Cook used the restroom, and while doing so, he heard Mr. Temple and Ms. Cook speaking or arguing with each other, mentioning Mr. Cook's name. RP 93, 102.

Mr. Cook walked into the bedroom, and leaned against a crib in the room.¹ At that time, he believed Mr. Temple was going to leave the room; however, Mr. Temple instead stated: "you are going to call the police," and "came up and instantly head butted" Mr. Cook. RP 93. Dazed from the "vicious attack," Mr. Cook attempted to reach out and shove Mr. Temple away from him, but, instead, he was met with a blow of Mr. Temple's fist, across his eye, causing him to fall to the floor, unconscious. RP 93-94, 102.²

¹ Mr. Cook testified that the bedroom was 11 feet by 13 feet, and that he was just inside the door to the right. RP 99-100. Mr. Cook did not believe it was possible that it could be believed that he was blocking the door to the room. RP 100.

² Mr. Jordan testified that he observed some of the incident occurring in Mr. Temple's bedroom: "When I went into the bedroom, all I saw was shoving Carey [Cook], pushing Carey [Cook], and I went out of the room to get something, and I wanted to hit Billy [Temple] on the head, but I didn't bring nothing in." RP 110. Mr. Jordan wanted to hit Billy Temple "to stop the fight." RP 110.

When Mr. Cook came to, his eye and nose were bleeding. RP 94. Unable to see out of his bloodied eye, Mr. Cook yelled “you blew my eye out. Call 911.” RP 94. To his plea, Ms. Cook said, “if you call the police, “we’re going to tell them that you head butted him.” RP 94.

Mr. Cook summoned aid for himself, RP 94, but Mr. Temple and Ms. Cook left the residence before police or aid arrived. RP 95, 111. According to Mr. Jordan, Mr. Temple did not have any visible injuries at the time he left the home. RP 111. Mr. Cook sought medical treatment for the orbital fracture³ and fracture to his sinus cavity, and received stitches for an injury to his lip. RP 95. He had suffered blunt force trauma to the face, and the physician who attended to his injuries was concerned that he had suffered a possible “globe rupture”⁴ of the eye. RP 118-119. The physician agreed that the injuries could be due to a “head butt” or fist blow. RP 123.

Mr. Jordan “tapped Billy [Temple] on the back of the top of the head to stop” when he saw Mr. Cook “laying on the floor with a bloody eye.” RP. Mr. Temple attempted to strike Mr. Jordan, but Mr. Jordan deflected the blow with his arm. RP 110.

³ Dr. Anthony Mueller testified that Mr. Cook suffered “blow up fractures” to the left orbit, which are fractures of the small bones that hold the eye in place. RP 120. Mr. Cook also suffered minimal displacement to the left maxillary and ethmoid sinuses and a fracture to the anterior wall of the left maxillary sinus that extended to the ovular bridge. RP 120.

⁴ Dr. Anthony Mueller testified that a globe rupture occurs when the sack that holds the eye breaks. RP 119. Mr. Cook also suffered definite vision changes in his left eye. RP 120.

Officer Zimmerman responded to the residence at approximately 2:30 a.m., prior to Mr. Cook seeking treatment at the hospital, and observed Mr. Cook's significant eye injury. RP 80. The blood from Mr. Cook's facial injuries had dripped down his body. RP 82; Ex. 1-4. At the time Officer Zimmerman arrived at the house, neither Mr. Temple nor Ms. Cook were present. RP 83. Ms. Cook contacted Officer Zimmerman approximately an hour after he "cleared" the residence, and Mr. Temple called Officer Zimmerman at approximately 6:00 a.m., three and a half hours after Officer Zimmerman initially responded to the 911 call. RP 84.

At trial, Jaime Cook recalled that on the evening of the incident, her father entered the home screaming, and yelling profanities.⁵ Ms. Cook allegedly observed Mr. Cook get into Mr. Temple's face and grab him and head butt him, at which point the two men began pushing each other back and forth.⁶ RP 129. Ms. Cook indicated that Mr. Temple only head butted Mr. Cook after Mr. Cook head butted Mr. Temple. RP 129. Ms. Cook observed Mr. Temple also punch her father. RP 132. According to

⁵ Ms. Cook also indicated that "he's going to kill us." RP 127. Whether Mr. Cook ever said he wanted to kill Ms. Cook or Mr. Temple, or whether this statement was merely Ms. Cook's perception or hyperbole is unknown. This statement was also objected to and the objection was sustained by the court. RP 128. However, the State did not move to strike the testimony.

⁶ On cross-examination, Ms. Cook testified that Mr. Temple had been trying to go around Mr. Cook in the door frame of the bedroom at the time the incident occurred. RP 132-133.

Ms. Cook, the two men pushed and shoved each other until Mr. Jordan and herself intervened. RP 130. Her father then stumbled to the floor. RP 130. She and Mr. Temple stayed in the residence a few more minutes, and then left, each going to different places. RP 130-131. Ms. Cook later called law enforcement and called Mr. Temple to encourage him to do the same. RP 131.

Mr. Temple testified on his own behalf. Mr. Temple recalled arguing with Ms. Cook on the evening of the incident, stating that he was trying to leave. RP 135. He heard Mr. Cook enter the back door of the residence screaming. RP 136. After Mr. Cook used the bathroom, he came to the bedroom door, and was “aggressive” and upset. RP 137. Mr. Temple:

wanted to leave, but he’s a big guy. So the doorway’s not that big. He took up the doorway pretty much.

I tried to walk out the door, we had got into a confrontation right then and there. He had reached up and grabbed me by the throat. I had two necklaces on and a black hoodie. He reached up and grabbed my throat, and he head butted me like that, and I head butted him back, and then we got into an altercation...

He wouldn’t let go of my throat, and I kept telling him to quit, and I hit him once, and we kind of got into the doorway, and I said enough’s enough, and I hit him again, and he kept screaming at the top of his lungs, and he wouldn’t let go of my throat, and by that time, he got wedged in because of the baby’s crib and the closet, and the bed. He got wedged into between there, and he went down.”

RP 137-138.

After the two men were separated, Mr. Temple “went right out the door” and drove to his brother’s house. RP 139.

The defendant admitted that he had punched and head butted Mr. Cook, but denied intentionally assaulting him: “I liked [Mr. Cook] ... he’s always done nice things for me. He was letting me stay there. I just didn’t want to do any harm to him. I didn’t want to. That’s my kids’ grandpa. You know what I mean? He just doesn’t like me, so.” RP 140. The defendant explained that he left the house because he felt as though if he did not immediately leave, he was going to go right to jail because of “prior experience.” RP 140. On cross-examination, the defendant agreed that he had intentionally head butted and punched the victim, as he was head butted first, but maintained that he did not intentionally try to assault or harm Mr. Cook. RP 141-142.

Additionally, on cross-examination, Mr. Temple stated: “He was in the doorway. I knew Mr. Cook was going to call the cops.” RP 143. And, on redirect, he stated, “I was trying to get out the door. I didn’t want any confrontation...” RP 147.

Q. When you head butted him, your testimony was that he had grabbed you by the collar, the necklaces and he had head butted you, and that you responded in kind in an effort to get out the door?

A. Yes, sir.

Q. Were you trying to injure him?

A. No.

RP 147.

The officer's report documented height and weight for the defendant was 5'7," 180 pounds, and for Mr. Cook, 5'7," 250 pounds. RP 87.⁷ Mr. Temple was at least 10 to 12 years younger than Mr. Cook, and in better physical shape. RP 145; Ex. 1-4.

Defense counsel repeatedly indicated that he was not pursuing a self-defense theory, and the trial court understood that self-defense was not the theory of the case. RP 114, 154, 156.

IV. ARGUMENT

A. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 205, 280 L.Ed.2d 674 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel"

⁷ However, these heights and weights were not personally taken by Officer Zimmerman, and Officer Zimmerman testified he never met Mr. Temple, nor did he know whether those figures accurately reflected the defendant's weight. RP 87.

guaranteed the defendant by the Sixth Amendment’ and their errors were ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel’s performance is highly deferential and 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”; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound, reasonable, trial strategy. *Strickland*, 466 U.S. at 689; *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). In order to rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

The first element of ineffectiveness is met by showing counsel’s conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). That a defense strategy “ultimately proved

unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 34.

B. LAW ON SELF-DEFENSE.

It is a defense to a charge of assault that the force used was lawful. The use of force is lawful "[w]henever used by a party about to be injured ... in case the force is not more than is necessary." RCW 9A.16.020(3).⁸ Thus, to prove self-defense, there must be evidence: (1) that the defendant subjectively feared that he was in imminent danger of harm; (2) that this belief was objectively reasonable, (3) the defendant exercised no greater force than was reasonably necessary, and (4) the defendant was not the aggressor. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993); *State v. Hendrickson*, 81 Wn. App. 397, 400, 914 P.2d 1194 (1996); *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). This reasonable self-defense standard incorporates both objective and subjective considerations: "the subjective portion requires the jury to stand in the defendant's shoes and consider all the facts and circumstances known to the defendant, while the objective portion requires the jury to determine what a reasonably prudent

⁸ "Necessary' means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended." RCW 9A.16.010.

person similarly situated would do.” *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007) (citing *Janes*, 121 Wn.2d at 238). Thus, evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. *Janes*, 121 Wn.2d at 238. “A jury may find self-defense on the basis of the defendant’s subjective, reasonable belief of imminent harm from the victim.” *State v. LeFaber*, 128 Wn.2d 896, 889, 913 P.2d 369 (1996). Put differently, the person relying on a claim of self defense must have had a reasonable apprehension of bodily harm.⁹ *See, Janes*, 121 Wn.2d at 237.

Because self-defense rebuts the “unlawful” element of assault, it is only after the defendant raises credible evidence tending to prove self-defense that the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Graves*, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999).

⁹ The imminent threat of bodily harm does not actually have to be present, so long as a reasonable person in the defendant’s situation could have believed that such a threat was present. *LeFaber*, 128 Wn.2d at 900-01.

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR INTENTIONALLY NOT PURSUING A SELF-DEFENSE THEORY.

Defendant contends that trial counsel's failure to pursue a self-defense theory at trial constituted deficient, prejudicial performance. Under the standard above, the defendant would need to demonstrate (1) that the claim of self-defense was supported by the evidence produced at trial, and therefore, that the claim of self-defense would have been permitted by the court, (2) the absence of any conceivable, reasonable trial strategy by defense counsel and (3) that there is a reasonable probability that the result of the defendant's trial would be different. Contrary to the defendant's claims, counsel's express decision to not pursue a claim of self-defense is attributable to the lack of credible evidence that the defendant was acting in self-defense.

Defendant claims that after he and Jaime Cook testified, allegedly providing sufficient evidence of a claim of self-defense, defense counsel should have requested the court instruct on the law of self-defense. However, to properly raise the claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. A lawyer need not raise a defense not adequately supported by the facts. *King*, 24 Wn. App. at 501 (holding that counsel's failure to propose a self-defense instruction was not deficient representation where not warranted by the

facts). After all, a jury instruction must be supported by substantial evidence. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993).

The defendant bases his argument on his testimony that the victim was yelling at him and allegedly “head butted” him before he, the defendant, responded *in kind* by head butting and striking the victim. As demonstrated by the record, however, the defendant’s actions went beyond any plausible self-defense claim, and lacked evidence of a reasonable, and subjective fear of harm, and a showing that the force was no greater than necessary. The defendant admitted that he not only “head butted” the victim in response, but also subsequently struck him two more times, until “enough was enough.” RP 137-138. This statement alone evinces an attitude from the defendant that he was engaging in an offensive or retaliatory assault, rather than a defensive assault. At a minimum, the defendant’s actions constituted greater force than reasonably necessary to defend himself. In either case, the evidence as presented demonstrated not that the defendant was acting in true self-defense, but rather vindictively, to even the score for the victim’s alleged initial attack.

Additionally, the defendant did not present any evidence or testimony that he was in fear of the victim, or that he was attempting to avert a more serious threat of harm. The words “fear,” “afraid,” “concern,” “fright,” “distress,” “apprehension,” “scared” or any similar word do not

appear in the record in the context of how the defendant felt when the victim allegedly head butted him, was yelling at him, or was acting “aggressively”¹⁰ toward him. The record is similarly devoid of any evidence that the alleged head butt from Mr. Cook resulted in any injuries to Mr. Temple, which theoretically could bolster a claim that Mr. Temple felt it necessary to return the same amount of force used by Mr. Cook to prevent additional injury to himself. Mr. Jordan testified that Mr. Temple had no injuries, whatsoever, after the confrontation. Neither Mr. Temple nor Ms. Cook claimed that Mr. Temple was injured in any way, or was attempting to prevent additional harm. Additionally, because the defendant failed to remain at or near the scene of the incident, and did not meet with police until 10 days after the incident, law enforcement was unable to document any injuries to the defendant’s person.¹¹ Therefore, there was no physical, documented evidence that the defendant was injured by the victim.

Given the lack of evidence supporting any claim that the defendant felt threatened by Mr. Cook or that Mr. Temple was subjectively attempting to avoid bodily injury, presumably, competent defense counsel would have discussed with his client, with Ms. Cook, and any other witnesses in

¹⁰ A cat may hiss at its owner, but the owner does not always fear bodily injury.

¹¹ This information was not presented to the jury, but was obviously known to defense counsel, and was elicited during the CrR 3.5 hearing. RP 53.

anticipation of trial. Hearing no evidence that Mr. Temple was, in fact, in any fear of Mr. Cook, a defense attorney would be justified in pursuing an alternative theory of the case.^{12, 13}

Furthermore, based on Mr. Temple's testimony, a jury could simply not find that the use of force was reasonable in this case, and therefore, had counsel proffered an instruction, the result of the proceeding would not have been different. Mr. Temple only testified that he used force against Mr. Cook (force great enough to break several facial bones), to induce Mr. Cook to let go of his neck and necklace, and apparently to get even for Mr. Cook's alleged head butting attack on Mr. Temple. However, Mr. Temple never testified that Mr. Cook's grasp was injurious, painful, or even threatening. Mr. Temple was uninjured. A jury would not have found Mr. Temple's use of force was subjectively or objectively reasonable in light of these facts and circumstances presented. The jury had the opportunity to observe Mr. Temple's physical appearance and fitness, and

¹² Indeed, even in the defendant's interview with law enforcement, which was not introduced at trial, the defendant never claimed that he was in fear of Mr. Cook, although he claimed he was defending himself and attempting to exit the room.

¹³ Certainly, this court would not require defense counsel to coach his client or any other witness to testify that he was in fear of the victim, when no such fear existed in fact. *See* RPC 3.4(b) ("A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely...").

compare Mr. Temple to Mr. Cook.¹⁴ Mr. Temple agreed that he was younger and in better physical shape than Mr. Cook. RP 145; Ex. 1-4. While Mr. Cook may have been heavier than Mr. Temple, his weight alone would be insufficient for a jury to determine that Mr. Cook posed an actual threat of harm to Mr. Temple, or that Mr. Temple's response was objectively or subjectively reasonable, and no greater than necessary.

Accordingly, Mr. Temple's trial counsel did not request a self-defense instruction, or rely on it as his theory of the case because it was not supported by sufficient credible evidence. This is the very reason why the court should give deference to defense counsel's actions, and should avoid the distorting effects of hindsight. This court does not have defense counsel's knowledge and familiarity with the defendant (and the privileged information he undoubtedly shared during interviews with his attorney) nor did it conduct pretrial interviews with the witnesses in this case.¹⁵ This court

¹⁴ No photographic evidence of the defendant on the evening of the incident was admitted into evidence because the defendant did not remain at the residence to talk with police. However, the defendant was present for all of the trial and testified at the trial, giving the jury the opportunity to view his physique.

¹⁵ The record makes clear that defense counsel diligently interviewed the witnesses prior to trial. RP 6-7 (Defense counsel interviewed victim regarding methamphetamine use); RP 8 (Information developed in the course of an interview that Mr. Cook had told a relative that the next time Mr. Temple assaulted his daughter, Mr. Cook hoped Mr. Temple would put her in the hospital); RP 10 (Defense counsel questioned victim about 2013 conviction for manufacturing methamphetamine); RP 17 (Defense counsel asked about domestic violence assaults in interviews); RP 19 (one defense interview was an hour and a half or two hours long); RP 21 (Defense counsel asked Mr. Cook in defense interview

likewise has no ability to view the defendant, the victim, or any of the other witnesses testify, and cannot fully judge their credibility from a written record.¹⁶ Perhaps the defendant and his girlfriend presented as unreliable witnesses in both defense interviews and at trial. Perhaps the victim presented as particularly vulnerable or frail (although heavy-set), and genuine in his testimony. This court cannot and should not second guess trial counsel's actions as requested by the defendant in his instant appeal, but rather, it should give counsel's actions the deference that is due without the distorting effects of hindsight.¹⁷

D. DEFENSE COUNSEL'S THEORY OF THE CASE, UNLIKE THE THEORY OF SELF-DEFENSE, WAS GROUNDED IN THE EVIDENCE ACTUALLY PRESENTED AT TRIAL.

Defendant claims that trial counsel erred in opting to “pursue a defense that was bound to fail.” However, Mr. Temple's complaint that defense counsel's argument was “bound to fail” does not demonstrate error

whether his dogs were licensed to determine why he was upset about them being let out of the house); RP 25 (Defense counsel learned that Mr. Jordan filed a DSHS complaint against his brother, Carey Cook).

¹⁶ Even if it were in a position to effectively do so, the Court of Appeals does not reweigh the evidence or determine the credibility of the witnesses at all; that is the jury's prerogative. *State v. McCreven*, 170 Wn. App. 444, 284 P.3d 793 (2012) (citing *State v. Green*, 94 Wn.2d, 216, 221, 616 P.2d 628; *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533(1992)).

¹⁷ Defense counsel, Derek Reid, was admitted to the Washington State Bar in 2003. See, https://www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr_ID=34186 (last accessed 10/18/17).

by his trial attorney simply because the argument “did fail.” Only *meritorious* issues which counsel *fails* to raise may form the basis of an ineffective assistance of counsel claim because in such instances, the defendant is able to demonstrate that the result of his trial would have been different. As discussed above, the defendant neither is able to demonstrate sufficient evidence to sustain a self-defense claim, nor is able to demonstrate the result of his trial would have been different had a self-defense theory been presented to the jury.

Here, the defense attorney reasonably determined that the evidence did not support a self-defense instruction. Having determined that self-defense was unsupported by any credible evidence at trial, the defense attorney proffered an alternative, reasonable defense. This case presents no evidence of alibi, duress, mental defect, but does reasonably present an argument that Mr. Temple was only attempting to exit the room when the confrontation occurred. Furthermore, defense counsel not only elicited testimony that this was the reason for the confrontation, but also that the testimony from all of the witnesses was inconsistent. The defense attorney did not solely rely on the argument that, because Mr. Temple did not intend to injure, assault, or commit a crime, no assault actually occurred. Defense counsel also argued that the witnesses’ statements were inconsistent, and

that, because of those inconsistencies, the jury should be left with a reasonable doubt that an assault occurred.

Mr. Temple testified that he head butted and struck Mr. Cook with his fist twice only after Mr. Cook head butted him and grabbed his neck first. Ms. Cook testified that Mr. Temple head butted and struck Mr. Temple one time after Mr. Cook head butted Mr. Temple first. Both Mr. Temple and Ms. Cook testified that Mr. Cook was angry and was yelling at them. Mr. Cook, on the other hand, testified that Mr. Temple claimed Mr. Cook was going to call the police, and then rushed at him and head butted him without provocation, and continued the assault by striking him at least two more times. Mr. Jordan did not see all of the incident, stating that he saw Mr. Temple “pushing” and “shoving” Mr. Cook.

Defense counsel argued in closing:

[A]s I said in my opening statement,¹⁸ about five seconds, three witnesses, three different stories. Now, there’s some

¹⁸ Defense counsel carried the theme of inconsistencies in the witnesses’ testimony throughout trial. In opening, defense counsel stated:

A lot of what the State just talked about is uncontested. What is contested and what you will hear evidence of is about five seconds of information, and that five seconds of information will come based on the contact in the bedroom.

Opening Statement RP 4.

You will hear the testimony from the doctor about the degree of injury, but what you will not hear is that Mr. Temple intended to injur[e] Mr. Cook, and at the end of the case, the sole issue is what happened in that bedroom during that five seconds. Did he intend or was he trying to walk out the door?

common threads and a little differences, but three distinct stories, and I think it is important that we look at each story and determine whether or not that's proof beyond a reasonable doubt because if you put each story up against each other, you run into conflicts or you run into discrepancies, and it's those discrepancies that are the start of reasonable doubt.

...

There's some drastically different stories because we heard from the three people who were in the room.

RP 176.

Defense counsel then argued that the victim's testimony was unreasonable and did not make sense:

Now the confrontation at this point was verbal, but he confronted them, but at the end of his testimony, when I asked him you walked in. You didn't say anything to Mr. Temple. You didn't say anything to your daughter, and Mr. Temple just head butted you and left? Yes.

That doesn't make sense. You're angry. You're angry all day. You go inside. You're in the bathroom. You don't really hear what's going on, but you think they're talking about you. So you go in looking to have a discussion, and the testimony was I didn't say anything. He just head butted me.

RP 177.

Ladies and gentlemen, I submit to you that at the end of the evidence, you won't know. There will not be proof beyond a reasonable doubt, and I will respectfully request that you return a verdict of not guilty.

Opening Statement RP 6.

And, defense counsel argued that there were common threads in the testimony that supported the defendant's version of events:

There were some common threads. We heard from all three witnesses that Mr. Temple wanted to leave. When Mr. Cook came into the room, he made for the exit – he made for the door. At that point, he was positioned physically where Mr. Cook stood between him and the door.

So what Mr. Cook's intention was and what you heard his testimony was that I wanted to leave. I wanted to exit, and he was contacted.

RP 178.

Given the anticipated evidence at trial, and the evidence actually admitted at trial, defense counsel's tactic of (1) calling the victim's credibility into question, (2) calling attention to the discrepancies in the testimony, and (3) arguing that the defendant did not intend to commit a crime, but rather simply exit the room, were all reasonable arguments to make. Each of these arguments was supported by the evidence, unlike the self-defense claim discussed above. The fact that these arguments ultimately failed does not render counsel's performance deficient.

V. CONCLUSION

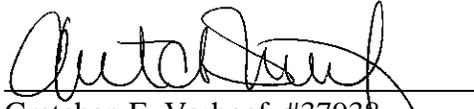
Defense counsel was not ineffective for intentionally declining to proffer a self-defense claim. Such a claim was not adequately supported by

the record, and the defense attorney was in the best position to judge his client's testimony and credibility in light of the physical evidence.

The mere fact that counsel's arguments failed does not mean that counsel was ineffective. The State respectfully requests this Court affirm the trial court and jury verdicts.

Dated this 23 day of October, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

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

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

STATE OF WASHINGTON,

Respondent,

v.

BILLY S. TEMPLE,

Appellant.

NO. 34853-9-III

CERTIFICATE OF MAILING

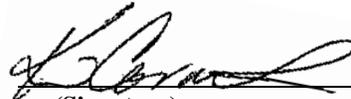
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David B. Koch

kochd@nwattorney.net; sloanej@nwattorney.net

10/23/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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