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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL BACKEMEYER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

Mr. Backemeyer was denied his constitutional right to effective assistance of counsel.

II. ISSUES PRESENTED

1. Was defense counsel ineffective for proffering as a jury instruction, a legally correct statement of the law, that complied with the Washington Pattern Jury Instruction on the issue of “no duty to retreat.”
2. Was defense counsel ineffective for failing to propose a clarification to the jury’s questions regarding the “no duty to retreat” instruction where defendant has failed to demonstrate that, if such a clarification had been proffered, the court would have given such an instruction?
3. Was defense counsel ineffective by not arguing in closing that the victim failed to identify himself as a bar employee and appeared to be a patron, when, he did, in fact, do so, and, in any event, argued that even if the jury found the “no duty to retreat” instruction inapplicable, that did not negate the defendant’s right to defend himself?

III. STATEMENT OF THE CASE

The defendant, Michael Backemeyer, was charged in the Spokane County Superior Court with one count of first degree assault with a deadly weapon from an incident occurring on December 16, 2016. CP 1. His case proceeded to a jury trial before the Honorable Maryann Moreno.

Factual History.

Nicholas Stafford worked as a bouncer at Peking North, a restaurant and bar. RP 156-58.¹ On December 16, 2016, he was not scheduled to work, but was called in by Ian Mack, the bartender, to help because the bar was busier than usual. RP 156, 159, 227. Stafford was dressed in his “basic clothes” that he normally wears to work – jeans and a t-shirt. RP 227. Stafford’s job included checking identification at the door, cleaning up empty glasses, and monitoring to ensure that patrons did not leave with alcohol. RP 160. The bar did not allow its patrons to bring alcohol purchased elsewhere or drugs into the bar. RP 161.

The defendant caught Stafford’s attention, as Stafford believed he appeared to be “on some kind of drug” and because he noticed that Backemeyer was “bothering a lot of people at the bar.” RP 227. During the course of the evening, Stafford went to the restroom, and observed the

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

defendant “drinking a beer” that was not served by the bar, and rolling a marijuana cigarette. RP 229. Stafford took the beer away, and told the defendant he had to leave, as there were “no exceptions for bringing outside alcohol” into the bar. RP 229. Immediately the defendant became aggressive, and “got right up in [Stafford’s] face.” RP 230.

Backemeyer told Stafford that he had to find his things and then would leave; Stafford helped him look for five to ten minutes. RP 231. Stafford again told the defendant that it was time to go, but Backemeyer began “bothering some girls.” RP 232. The bartender, Mack, did not observe Stafford act aggressively toward Backemeyer during this time. RP 163. Backemeyer, however, “kept putting his hands” on Stafford, pushing him aggressively, and telling Stafford to get out of his face. RP 233. Stafford pushed the defendant’s hands away in response. RP 235. The final time Stafford pushed the defendant’s hands away, Backemeyer “threw up his hands” and Stafford “went forward to push him away.” RP 235. The two tripped and ended up on the ground. RP 235; P-2.²

Stafford did not punch Backemeyer during the fight. RP 240. The two wrestled on the ground until Stafford saw the defendant’s hand reaching for his pocket. RP 236. Stafford observed the defendant pull out a knife,

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

and, in response, he grabbed Backemeyer's wrist and pinned it to the ground. RP 236. However, he lost his grip on the defendant's wrist. RP 236. Stafford saw Backemeyer swing the knife and hit him in the head. RP 236-37. Mack did not see Backemeyer stab Stafford, nor did he see Stafford "throw any punches at Backemeyer's head or face." RP 164-65. Mack jumped into the fray, and attempted to pull the men apart. RP 165.

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

The defendant fled. RP 239. Mack called 911 for assistance. RP 169-70. Mack told the 911 operator that the victim was an employee at the restaurant, but "he wasn't working today but he's here." RP 173; Ex. P-20.⁴

Luke Runkel, a patron of the Peking North restaurant on the evening in question, was "under the impression" that Stafford was "kind of a bouncer" for the restaurant. RP 137. On the evening in question, Runkel testified that Stafford was wearing "personal clothes" rather than a uniform,

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

⁴ Exhibit P-20 is a recording of the 911 call placed by Ian Mack.

and was “out on the floor” of the bar. RP 149. Runkel described the defendant as appearing “high,” “crazy,” or “possessed.” RP 139.

Tiffany Tart was also a patron. RP 408. She believed Stafford was another patron, who was “there with his friends.” RP 413. Based on her observations, Tart did not believe Stafford was an employee. RP 413. Tart observed Stafford was “friendly” with the group of people around him, and was drinking a beverage. RP 413. Tart denied that Backemeyer appeared to bother any patron other than Stafford. RP 412-13. Tart observed Stafford and Backemeyer engaging in a loud conversation, RP 411, and, as Backemeyer walked toward the bar, Stafford shoved him into the bar. RP 414. Backemeyer fell, got to his feet, and Stafford shoved him again. RP 414. Then Tart observed both men on the ground, with Stafford on top of Backemeyer, and she could not say “who was hitting who.” RP 414.

Law enforcement officers investigated. A copy of the surveillance video from the bar was collected by police and admitted at trial. RP 221; Ex. P-2.

The defendant testified that he was visiting relatives for Christmas in Spokane, RP 334, and, on the evening of the incident, went to the gas station, bought cigarettes and a beer, and started drinking the beer as he walked to meet friends, RP 337. He decided to stop at the Peking North, where he set down his bag, and went to the restroom. RP 339. At that time,

his beer was “pretty much empty” and he was looking for a trash can to throw it away. RP 339. He set the beer can down, and rolled a marijuana joint. RP 340. Stafford walked into the bathroom and told Backemeyer that he was “not supposed to drink beers at this bar.” RP 342. Backemeyer advised Stafford that the can was empty; because Stafford was wearing street clothes, Backemeyer could not understand why Stafford was upset. RP 343. Stafford never announced himself as an employee of the bar. RP 343. Stafford took the can and walked out of the restroom. RP 343.

When Backemeyer exited the restroom, another individual named “Michael” told him that his bag had been placed behind the bar. RP 345. “Michael” then bought Backemeyer a beer and they went to the smoking patio where Backemeyer smoked his marijuana joint. RP 345-46. When Backemeyer returned to the bar, Stafford started following him, telling him, “Hey, you’re not welcome here ... you need to leave,” and “we don’t want you here.” RP 348-49. Backemeyer questioned why he needed to leave, who Stafford was, and insisted he had not done anything wrong. RP 349. Stafford began assertively “pushing up on” Backemeyer, “invading his space.” RP 349-50. Backemeyer told Stafford to stop touching him, stay away, and to quit walking toward him. RP 352. He also stated that he would leave after he grabbed his belongings. RP 352.

Backemeyer then began to look for his things. RP 352. However, his belongings were not where he had left them. RP 354. Although Backemeyer advised Stafford that he could not find his belongings, Stafford continued to follow him, as if he was “herding” him. RP 354-55. Backemeyer again requested Stafford leave him alone. RP 355. Backemeyer put his hands up as Stafford aggressively walked into him. RP 357-58. Stafford then hit Backemeyer’s arm “real hard.” RP 358. Backemeyer “retreated” “a few more feet,” Stafford knocked his hand again, and then Stafford attacked Backemeyer, pushing him down into some tables and bar stools. RP 358-60. Backemeyer was unable to get up because Stafford jumped on top of him, and elbowed him, knocking out some of Backemeyer’s teeth. RP 362. “Just want[ing] to get [Stafford] off [him]”,⁵ and fearing for his life, Backemeyer reached into his pocket for his knife, and used it on Stafford. RP 364-366. Thereafter, Stafford let him go, and Backemeyer ran away, leaving his belongings behind. RP 367-68.

Procedural History.

Defense counsel requested the trial court give Washington Pattern Jury Instruction (WPIC) 17.05, which states: “It is lawful for a person who is in a place where that person has a right to be and who has reasonable

⁵ In 2013, Backemeyer was seriously assaulted in Lincoln, Nebraska, leaving him in a coma with brain trauma. RP 364.

grounds for believing that he is being attacked to stand his ground and defend.” CP 21; RP 437-38. The State objected to the instruction’s inclusion, arguing the defendant’s license to be in the bar had been revoked, and he was, therefore, a trespasser. RP 437-38, 440, 445-46. Defense counsel argued that “he believed it was a fact in question [as the court] heard testimony from at least one other patron who was also under the impression that Mr. Stafford was just another patron and not an employee, and that was certainly not the testimony from Mr. Backemeyer.” RP 446.

The trial court determined there was an issue of fact “as to what the defendant knew,” and there was evidence that potentially demonstrated Stafford was not working, i.e., the 911 call in which Mack indicated Stafford was not working that night, but was at the bar. RP 447. In doing so, the trial court ruled that it would include the instruction, and that the jury would have to determine the issue. RP 447.

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

Did Mr. Backemeyer have the right to be where he was? The law in the State of Washington talks about a license. You have a license to go into a business. But you’ve seen those signs, “No shirt, no shoes, no service,” or “This establishment retains the right to refuse service to anyone.” Peking North has the right to refuse service to anybody. Nicholas Stafford was an employee of Peking North. And when Mr. Backemeyer violated not only the house rules by bringing in beer and marijuana but admittedly smoking them

in the bar in violation of state law, he lost that license, that limited license to be there. They had every right to remove him. And when they were going to remove him, he has no right to be there.

... The State's position is [this instruction] does not apply to Mr. Backemeyer...

If you're at Peking North and an individual comes in there and you're following the rules and doing what you're supposed to be doing in there and they threaten you, that would tell you that you have a right to defend yourself. But if you are [at a bar] and you've brought in alcohol that doesn't belong there, and you've brought a drug that doesn't belong there, and you're not allowed to have that drug in there, that right is revoked.

Now that does not negate your obligation as jurors and as the Court read to you in the instructions, to consider these as a whole. It just tells you that at this point, if you can't find that he has a right to be there, then you move onto the other instructions. And those are the other self-defense instructions, which would be, I believe, 14 and 15 that you will look at...

RP 465-466.

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

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

The state said that, Well, that Jury Instruction 16, whether or not you agree he had a lawful right to be there or not and it just comes down to, I guess, whether or not you believe Mr. Stafford was on duty. I don't know what it comes down to. She was correct. That doesn't take away from the entire self-defense claim. That's one instruction. Self-defense is

still there even if you think he didn't have a lawful right to be there. If you are trespassed from a store and you go back and someone's attacking, killing you, you do not have to stand there and let them kill you because you've been trespassed here. The law gives you the right to defend yourself if you've been trespassed. It goes to that one specific instruction, self-defense still. The rest of the instructions are still here for you to consider.

RP 501.

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

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

The jury found the defendant guilty of first degree assault and further returned a special verdict finding the defendant was armed with a deadly weapon during the commission of the offense. RP 516. At

sentencing, defense counsel lamented having proposed the “no duty to retreat” instruction, surmising that the instruction had “tripped up the jury.” RP 538-39. However, the court posited that the jury convicted the defendant because the force he used was not reasonably necessary under the circumstances. RP 541-42. The trial court sentenced the defendant to a standard range sentence of 140 months in prison, with mandatory legal financial obligations. RP 544. The defendant timely appealed.

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 2052, 80 L.Ed.2d 674 (1984). “To prevail on this claim, the defendant must show his attorneys were ‘not functioning as the “counsel” 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 trial strategy. *Strickland*, 466 U.S. at 689.

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). Furthermore:

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted).

Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. 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).

B. COUNSEL WAS NOT INEFFECTIVE FOR PROPOSING THE “NO DUTY TO RETREAT” INSTRUCTION THAT COMPORTED WITH THE WASHINGTON PATTERN JURY INSTRUCTION WHERE IT WAS POTENTIALLY SUPPORTED BY THE EVIDENCE; COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PROPOSE A RESPONSE TO THE JURY’S QUESTIONS; COUNSEL WAS NOT INEFFECTIVE IN CLOSING ARGUMENT.

Defendant claims three reasons counsel was ineffective. First, he claims that counsel proposed an inadequate “no duty to retreat” instruction. Second, he claims that counsel failed to propose a response other than “read your instructions” when the jury presented the court with two inquiries regarding the “no duty to retreat” instruction. Lastly, he claims counsel failed to argue in closing that Stafford failed to identify himself as an employee and appeared to be a patron. Appellant’s Br. at 10. Each argument will be addressed individually.

1. Adequacy of “No Duty to Retreat” Instruction.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. *See e.g., State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999). Jury instructions on self-defense, when read as a whole, must make the relevant legal standard “manifestly apparent to the average juror.” *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

There is “no duty to retreat” when a person is assaulted in a place where she has a right to be. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). The trial court should instruct the jury to this effect when sufficient evidence supports it. *State v. Allery*, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). Failure of a court to give this instruction where it is warranted is reversible error. *State v. Williams*, 81 Wn. App. 738, 744, 916 P.2d 445 (1996), *review denied*, 140 Wn.2d 1001 (2000). Thus, if the facts could lead a reasonable jury to conclude that the defendant could reasonably have fled instead of using force, the trial court should give the jury a “no duty to retreat” instruction. *Id.* However, the “no duty to retreat” instruction need not be given where it is unnecessary to the defendant’s case or where the instruction would be superfluous because the facts showed that the defendant was in retreat. *State v. Frazier*, 55 Wn. App. 204, 207-09, 777 P.2d 27 (1989) (the primary issue was the identity of the initial aggressor and no evidence was presented that raised the retreat issue); *State v. Thompson*, 47 Wn. App. 1, 5-6, 733 P.2d 584 (1987) (the defendant testified he was retreating).

In conformity with the law on the “no duty to retreat,” WPIC 17.05 instructs:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that [he] [she] is being attacked to stand [his] [her]

ground and defend against such attack by the use of lawful force.

[The law does not impose a duty to retreat.]
[Notwithstanding the requirement that lawful force be “not more than is necessary,” the law does not impose a duty to retreat. Retreat should not be considered by you as a “reasonably effective alternative.”]

Defense counsel proposed this instruction and the trial court used the pattern instruction in its entirety when instructing the jury. CP 21. However, now on appeal defendant claims counsel was ineffective for (1) proposing the instruction (“defense counsel could have avoided this confusion had he not offered the instruction in the first place”) and (2) by failing to add language to the approved WPIC to indicate “even if you find the defendant was not in a place where he had a right to be, he may still claim self-defense if the criteria are met as set forth in the other instructions.” Appellant’s Br. at 14-15.

Thus, it is unclear whether defendant maintains that counsel’s error was in proposing the instruction at all, or whether the defendant concedes that the facts of this case potentially raise “no duty to retreat” but that counsel should have requested additional language to be included in the instruction.

As to the claim that the instruction should not have been given at all, and, therefore counsel’s performance was deficient, the facts of this case

potentially raise an argument that the defendant had a duty to retreat, rather than stand his ground and defend. If the jury were to find that the defendant was in a place he had a lawful right to be, as evidenced by the question of fact posed to them regarding whether Stafford was actually on duty and working at the time of the altercation (and therefore, could legally eject Backemeyer from the premises or revoke his license to be there), then the jury could conceivably conclude that Backemeyer had no duty to retreat, and the instruction would be appropriate. At the time of the instruction conference, counsel could not predict that the prosecutor would not argue in closing that the defendant had a duty to retreat.

Furthermore, had counsel *not* proposed the instruction, or had the trial court *not* instructed the jury as to the “no duty to retreat” upon defendant’s request, the defendant would now be claiming error in that regard. Failure of a court to give this instruction where it is warranted is reversible error. *Williams*, 81 Wn. App. at 744. Although the defendant testified he was “retreating” from Stafford, which could obviate the need to give a “no duty to retreat” instruction, the facts of the case would indicate that the defendant was not truly in retreat. The video surveillance shows Backemeyer putting his hands on Stafford’s chest. Ex. P-2. It does not show Backemeyer making any attempt to leave the premises. Ex. P-2. Stafford

testified that he followed the defendant through the bar for five to ten minutes, attempting to remove him.

On appeal, defendant agrees there was “ample evidence” to support an argument that Backemeyer was in a place where he had a right to be. Appellant’s Br. at 15-16. As such, those facts cited by the defendant would give rise to the “no duty to retreat” instruction. *See* Appellant’s Br. at 16. And, as above, because the necessity of the instruction is at least debatable, it may have been error for the trial court *not* to give the instruction, as the jury could have surmised that the force the defendant used to protect himself was *not reasonable* in light of his ability to retreat from the bar.

As to the second claim, that counsel should have proposed additional language to be included in the instruction, defense counsel would have no way of divining what questions a juror or jurors might raise during deliberations. Furthermore, defense counsel argued in closing, as did the prosecutor, that the jury must be guided by *all* of the instructions, which also included the standard instructions on self-defense and acting on appearances. CP 19-20. And, defense counsel argued in closing that, even

if the defendant did not have the right to be in the bar, he still had the right to defend himself against an attack from another person. RP 501.⁶

The jury is presumed to read the trial court's instructions as a whole, in light of all other instructions. *State v. Hutchinson*, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999). When read as a whole, Instructions 14, 15 and 16, make it "manifestly apparent" that the defense of self-defense is available to a defendant who uses lawful force that is reasonable under the circumstances to defend against injury or his belief that he is about to be injured, may claim the defense if he believes in good faith that he is in actual danger of injury even if this belief is mistaken, and that retreat from an attack is not to be considered as a reasonably effective alternative to the use of force when a person is attacked in place where he has a right to be. CP 19-21. These instructions comport with the Washington Pattern Jury Instructions on self-defense. WPIC 17.02; WPIC 17.04; WPIC 17.05. They

⁶ As was conceded by the State in its closing argument:

Now that does not negate your obligation as jurors and as the Court read to you in the instructions, to *consider these as a whole*. It just tells you that at this point, if you can't find that he has a right to be there, then *you move onto the other instructions. And those are the other self-defense instructions, which would be, I believe, 14 and 15 that you will look at...*

RP 466 (emphasis added).

are an accurate statement of the law. Defendant offers no legal authority in support of the supplemental language he now argues trial counsel should have added to the instruction. It was not error for counsel to propose these instructions or for counsel to not request they be modified.

2. Response to Jury Inquiries.

The trial court has discretion whether to give further instructions to a jury after it has begun deliberations. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). In *Ng*, the defendant argued that the trial court's robbery instructions were ambiguous as evidenced by the jury's inquiry during deliberations. *Id.* The Supreme Court rejected this argument, stating:

The individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. *State v. Crowell*, 92 Wn.2d 143, 594 P.2d 905 (1979); *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962). Here, the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached. "[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict." *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123 (citing *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984)), review denied, 104 Wn.2d 1010 (1985). ... The jury's verdict was clear and complete. Ng has shown no abuse of discretion in the court's decision to refer the jurors to the instructions as given.

Ng, 110 Wn.2d at 43-44.

If Ng was unable to demonstrate that the trial court abused its discretion in declining to provide the jury with additional instructions after deliberations began, then Backemeyer's current claim must also fail because he is unable to demonstrate that, even if counsel *had* proposed a clarification to the jury instructions, the trial court would have used that clarification to provide further instruction to the jury. Thus, even assuming counsel was deficient in this regard, the defendant is unable to demonstrate prejudice, i.e., that the result would have been different.

3. Defense Counsel's Closing Argument.

Defendant claims that trial counsel did not adequately argue that Backemeyer rightfully believed he was in a place where he had a right to be because Stafford failed to identify himself and because other evidence was admitted at trial that could demonstrate Stafford was not working during the incident. Appellant's Br. at 16.

Defense counsel's closing arguments are entitled to deference, and the court does not view those arguments through the lens of 20/20 hindsight. Here, defense counsel strenuously argued that, even if the jury found that Backemeyer was a trespasser, he was still able to assert a claim of self-defense:

Self-defense is still there even if you think he didn't have a lawful right to be there. If you are trespassed from a store and you go back and someone's attacking, killing you, you

do not have to stand there and let them kill you because you've been trespassed here. The law gives you the right to defend yourself if you've been trespassed. It goes to that one specific instruction, self-defense still. The rest of the instructions are still here for you to consider.

RP 501.

As stated above, the State conceded this point – that even if the defendant was a trespasser, the jury was still able to consider the court's other instructions on self-defense. RP 466.

Furthermore, in ineffective assistance of counsel cases, the court should look at *all* of the arguments counsel made, rather than the absence of one argument the defense potentially could have made. Here, defense counsel represented a man who was described as looking “high” and “creepy” when he entered the bar. He was representing a man who was covered in tattoos, making him appear more noticeable, and, the object of others' negative attention. RP 347-48. The defendant was found by police “squatting” in a vacant residence to which the defendant had his personal mail addressed. RP 373.

Defense counsel was cognizant of all of these issues, and cautioned the jury not to be distracted from the true issues in the case by perceived personal attacks on Backemeyer. RP 484-87. Counsel discussed the credibility of each of the witnesses, placing special emphasis on the reasons that Backemeyer's testimony was more credible than the testimony of other

witnesses. RP 488-97. During this discussion on credibility, counsel used the testimony of Stafford, Mack, and Runkle to argue that Stafford was *not on duty* that evening, and was socializing with friends, and took it upon himself, as an employee in off-duty capacity to “get [Backemeyer] out of there because he’s just making people nervous by his appearance.” RP 491-93. Defense counsel spent time arguing the significance of the surveillance video, and how the video comported with the defense theory of the case. RP 494-97. Defense counsel discussed self-defense at length, including Backemeyer’s history of being seriously assaulted which would make his subjective belief of fear of bodily injury more reasonable, and why his use of a knife was reasonable under the circumstances. RP 498-99. Defense counsel argued that the law of self-defense applied equally to the crime of first degree assault, and the lesser included offense of second degree assault. RP 502. And, in concluding his argument, defense counsel asked the jury to hold the State to its burden of proof, and its burden to disprove self-defense beyond a reasonable doubt. RP 502-03.

Counsel’s arguments were tactically sound. Defendant has failed to demonstrate how anything counsel did or did not say relieved the State of its burden of proof. Defendant has likewise failed to demonstrate that but for counsel’s alleged ineffective argument, the jury would not have found Backemeyer guilty. As the trial court surmised at sentencing, the jury

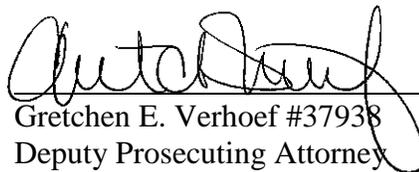
determined that Backemeyer's use of force was not reasonable under the circumstances. RP 541-42. The ultimate question, whether it was reasonable for Backemeyer to bring a knife to a wrestling match and stab another repeatedly in the head, was answered by the jury in the negative. There was no error in counsel's argument; the jury determined the State had met its burden of proof. In this regard, the defendant has failed to demonstrate that counsel's arguments were deficient, or that the result of the proceedings would have been different had counsel made different arguments.

V. CONCLUSION

The defendant has failed to demonstrate that counsel's performance was deficient, or that the result of the proceedings would have been different but for counsel's alleged deficiencies. He, therefore, fails to demonstrate counsel was ineffective. For these reasons, the State requests this Court affirm the lower court and jury verdicts.

Dated this 5 day of March, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BACKEMEYER,

Appellant,

NO. 35218-8-III

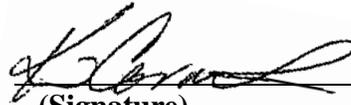
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 5, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David Gasch
gaschlaw@msn.com

3/5/2018
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

March 05, 2018 - 10:29 AM

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