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NO. 71607-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HELMER, JR.,

Appellant.

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

The Honorable Kimberly Prochnau, Judge
The Honorable Patrick Oishi, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The jury instructions on self-defense were constitutionally deficient and violated appellant's right to due process.

2. The trial court erred when it refused to correct the deficient instructions in response to jury questions aimed directly at those deficiencies.

3. Defense counsel was ineffective for failing to ensure the self-defense instructions were correct at the outset.

Issues Pertaining to Assignments of Error

1. Appellant was charged with assault and claimed self-defense. A critical aspect of this defense was appellant's diagnosis of PTSD, which impacted his perceptions and reactions to the threats he perceived. The pattern self-defense instruction is proper for most self-defense cases, but insufficient where, as here, jurors must consider the appellant's past experiences when assessing the reasonableness of his current actions. Were the self-defense instructions constitutionally deficient?

2. During deliberations, jurors posed two questions targeted at the very deficiency just discussed and asking whether they could consider appellant's PTSD when deciding his culpability.

Although the answer was clearly “yes,” the trial court refused defense counsel’s request that the matter be clarified for jurors. Was this reversible error?

3. Although the trial court missed the opportunity to fix the defective jury instructions, defense counsel should have submitted correct instructions at the outset. Where defense counsel created the error in the instructions, was appellant denied his Sixth Amendment right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor’s Office charged Michael Helmer with (count 1) Assault in the Fourth Degree, (count 2) Assault in the First Degree, and (counts 3 through 5) Assault in the Second Degree. All but count 1 included a firearm sentencing enhancement. CP 8-10.

Helmer’s defenses at trial were that he was not involved in the misdemeanor assault and that he acted in self-defense as to each of the felony assaults. CP 157-160; 14RP¹ 35-57. As discussed more

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 9/16/13; 2RP – 9/17/13; 3RP – 9/19/13; 4RP – 9/23/13; 5RP – 9/24 and 9/26/13; 6RP – 9/25/13; 7RP – 9/30/13; 8RP – 10/1/13; 9RP – 10/2/13; 10RP – 10/3/13; 11RP – 10/7/13; 12RP – 10/8/13; 13RP – 10/9/13; 14RP – 10/10/13; 15RP 10/14/13; 16RP – 10/15/13; 17RP – 1/21/14; 18RP – 2/21/14.

thoroughly below, during deliberations, jurors asked two questions aimed at discerning the proper legal approach to determining Helmer's intent and whether he acted in self-defense. CP 177-180. The court rejected defense counsel's request to provide further guidance. 15RP 2-3.

Jurors acquitted Helmer on count 1. CP 167. For the felony charges in counts 2 through 5, however, jurors ultimately rejected his self-defense claim, convicted him of Assault in the Second Degree, and found that he was armed with a firearm for each count. CP 168, 170-176.

Following their verdicts, when jurors learned the length of the sentence Helmer faced -- particularly in light of mandatory consecutive firearm enhancements -- they were upset. CP 185-186; 17RP 6. Prior to sentencing, several jurors sent letters of support for Helmer and asked for leniency on his behalf. Supp. CP ____ (sub nos. 115, 117-118, 125, Letters From Jurors Regarding Sentencing).

One complaint in particular, articulated by a juror at sentencing, was that the panel had expressly asked for additional guidance on the instructions, but the court had refused to provide any. 18RP 21-22.

The Honorable Patrick Oishi² imposed a low-end standard range sentence of 33 months. CP 188, 190. With the firearm enhancements, however, Helmer was sentenced to 177 months. CP 190. He timely filed his Notice of Appeal. CP 196-198.

2. Substantive Facts

a. Trial testimony

Michael Helmer, who was not quite 29 years old at the time of trial, has had a challenging life. 13RP 106. When he was a young child, his father murdered his mother. 12RP 130-131; 13RP 108-109. With his mother dead and his father imprisoned, he and his younger sister were raised in Kent by a grandmother and uncle. 12RP 130; 13RP 107-110.

Helmer began drinking alcohol when he was 13. 13RP 120-121. He eventually dropped out of high school, became addicted to painkillers in his late teens, and started experimenting with heroin and methamphetamine in his early twenties. 13RP 120, 124-125. Helmer used drugs to deal with his emotional issues and was unable to stay clean beyond relatively brief periods. 13RP 124-125, 129-130.

² The Honorable Kimberley Prochnau presided at trial, but health issues rendered her unavailable to sentence Helmer. See 18RP 8-9.

The events leading to the charges occurred during the late night hours of August 18 and early morning hours of August 19, 2012, at West Seattle's Bamboo Bar & Grill. 5RP 29, 89-90.

Helmer and his longtime friend, Chris Dahl, had worked together the previous night at Safeway, getting off work around 8:00 a.m. the morning of the 18th. 13RP 117-118, 136-137. After getting paid, Helmer went home and put on his green Seahawks jersey. Another friend – Keenan Williams – picked him up, and the two met Dahl at a local bar to watch football. 13RP 118, 139-140. The three then drove to a Kent casino, where they spent the afternoon and made a plan to meet up with other friends at Helmer's house. 13RP 140-141. Once back at the house, the three were joined by Tika Prasad (Dahl's girlfriend), Chase Ward (another longtime friend), and a woman named Heather (Ward's date). 10RP 192; 13RP 142.

The group headed to Seattle for a night of entertainment, and Prasad drove everyone in her Dodge Durango. 10RP 15; 13RP 142-143. The group ended up in West Seattle, where they parked and walked on Alki Beach. Dahl was drinking alcohol as the group walked. Eventually, they came upon the Bamboo Bar & Grill – which was full of people and music – and decided to spend some time there. 5RP 51; 13RP 143-145, 148-150.

Among the patrons that night was a second large group that included Patrick Shandy, a bartender at Duke's Chowder House on Alki Beach, and his friend and co-worker, Michael Hardin. Shandy and Hardin had several drinks at Duke's before heading to Bamboo, and they had several more at Bamboo. 5RP 89-93; 6RP 91-96. Hours later, Hardin's blood alcohol would measure approximately .22 (approaching three times the legal limit) and Shandy's would measure approximately .25 (exceeding three times the legal limit). 12RP 12-13, 17.

Shandy's evening was not going as he had hoped. He was tired from work, it was apparent one of the girls in the group did not share his affection, he had spent money buying drinks for someone else, and he had too much to drink himself. 6RP 95, 134. Bamboo staff had noticed Shandy being a bit rowdy, obnoxious, and flirting with female customers. 5RP 47-48; 11RP 16-17, 23-24, 32-35. The bar finally cut him off. 7RP 83-85; 11RP 16, 23-24, 32-35, 93.

Tika Prasad and Chase Ward's date (Heather) had just used the restroom in preparation for their group's departure from the bar when Shandy and another male member of the other group approached them. 10RP 48-49, 52, 202-203. Shandy put his arm around Prasad and said, "you are my new girlfriend" while the other

man spoke to Heather. 10RP 38. Prasad pushed Shandy away and made her disinterest clear. 10RP 38-44. Ward then interrupted, said it was time to leave, and the two women followed him out of the bar to where their group was assembling to leave. 10RP 43-44, 203-204.

In what would turn out to be a major mistake, Shandy and the other man followed them outside. 10RP 204. Shandy and his male companion were acting as if the girls had offended them. 10RP 204. Although what happened next is not precisely clear, words were apparently exchanged outside between Shandy and Prasad. Prasad's boyfriend, Dahl, saw this, stepped in, and told Shandy to back off. Shandy swung at Dahl and the two began to fight.³ 10RP 52-53, 74-75, 118-122, 204-205.

Utter chaos ensued as patrons rushed out of the bar to watch – and some to encourage – the fray. 5RP 31, 56; 7RP 141-142; 8RP 175; 10RP 53. A half dozen people or more were fighting or trying to break up the fight. 5RP 63-65; 10RP 124-125. According to several witnesses, Dahl knocked Shandy unconscious and repeatedly kicked him as he lay on the sidewalk near the curb. 7RP

³ Although Bamboo has a security surveillance system with 21 cameras, including some outside, it was turned off during the incident. 11RP 160-162.

20, 28-29; 8RP 41-42, 91-93; 9RP 85; 13RP 169, 186-187.

Michael Helmer was nearby, saw that a fight had broken out involving Dahl, and moved toward Dahl. 10RP 122-123; 13RP 168. As Helmer would later explain, he unsuccessfully attempted to pull Dahl away from Shandy when someone pushed him in the back from behind. 13RP 169. He was carrying a concealed .9 mm pistol, which he drew as he stumbled forward. 6RP 155; 13RP 145, 170, 187-188. Someone then grabbed his arm. 6RP 171. Events unfolded quickly, and although he did not have a clear or complete memory of everything that happened, he knew he used the pistol to ward off three men who were coming at him. 13RP 171-173, 189-192, 200.

Those three men had responded from inside Bamboo after a server saw what was happening outside and asked for assistance. 7RP 110-113. They were: Jacob Washburn, Nick Miller, and Michael Lescault. Washburn lived next to Bamboo and was a bartender there, although he had already clocked out for the evening. 8RP 73, 76-77, 80. Miller is Washburn's roommate and a regular at the bar. 5RP 27-28. Lescault is a former bouncer who assisted Bamboo with its security needs. 6RP 33-34.

All three men ran outside to the sidewalk intending to

intervene, but stopped within about 10 feet of the fight when they saw Helmer pointing the handgun at each of their faces. 5RP 31, 33-34; 6RP 41-43; 8RP 73-74. All three men backed up, as did Helmer. 5RP 35; 6RP 43-45; 8RP 73; 13RP 173. To Lescault, it seemed that Helmer's intention was simply to warn them and not to shoot them. 6RP 65-67. Other witnesses also testified that it appeared Helmer was simply trying to get the men to back off. 10RP 206; 11RP 51, 60-61. After the three men backed off, Helmer then turned and walked away from Bamboo with gun still in hand. 13RP 173-174.

At some point during the fight, Shandy's co-worker from Duke's – Mike Hardin – had stepped outside and noticed that Shandy was on the ground and being kicked. 5RP 94-95. Hardin grabbed a man he believed was kicking Shandy, pulled him toward the street, and tried to calm him down. 5RP 96-97. He let this person go, however, when he saw Helmer leaving the area with the gun in his hand. 5RP 98-99.

As Hardin walked back toward Bamboo, he became dizzy and then noticed blood on his body. 5RP 99. Although he did not know it at the time, he had been shot in the arm, and the round had lodged in the muscles of his chest. 5RP 99; 103; 8RP 8-9. When precisely

Helmer's pistol was fired is unclear, although several witnesses heard what sounded like a gunshot at some point during the melee. 7RP 19, 110; 8RP 89, 151; 10RP 54, 125, 169-170, 205-206; 11RP 46.

Helmer walked back to where the Dodge Durango was parked, placed his Seahawks jersey and the pistol in a wheel well, and then sat on a nearby bench. 5RP 37-45. Police arrived quickly and witnesses identified Helmer as being involved. 5RP 45-46; 6RP 140-146, 180. He was cooperative and taken into custody without incident. 6RP 146. A pat down revealed a small holster clipped to his shorts. 6RP 182; 8RP 96.

Unlike some involved – who reeked of alcohol and were obviously drunk – officers did not notice or report that Helmer smelled of alcohol or appeared under the influence. 6RP 146-147, 184-188; 8RP 116; 12RP 26. A later investigation by the Liquor Control Board concluded that Helmer had not appeared “highly intoxicated.” 11RP 94-95. An expert in pharmacology estimated Helmer's blood alcohol at .1 grams or less at the time of the fight. 12RP 24.

An officer retrieved the loaded pistol and the Seahawks jersey from the Durango's wheel well. 6RP 151-157; 8RP 96-97. One .9

mm shell casing was retrieved from the sidewalk near Bamboo. 6RP 160-162, 165. Shandy's blood was found on Helmer's jersey as well as the pistol. 8RP 131-140. The safety on the gun was inoperable. 11RP 117-118. And testing of the trigger mechanism revealed that as little as five and a half to six pounds of force could fire the weapon, which is less than that required, for example, to expel air from a can of Dust-Off compressed air. 11RP 118-121, 143.

Shandy and Hardin were taken to the hospital. 8RP 8; 12RP 71-84. Despite being shot, Hardin did not require surgery and was discharged the following day. 5RP 103; 8RP 24. Shandy was combative and unable to provide information given his extreme level of intoxication. 8RP 8; 12RP 80-82, 105. Even sober, Shandy remembered nothing about the fight. He conceded he may have said "hello" to some women at the bar. He recalled walking outside and then nothing else until he regained consciousness. 6RP 97-100, 111. Due to a previous head injury, Shandy has trouble "reading people" and would sometimes mistake others' innocuous comments for rude behavior. He did not know if this played a role in the fight at Bamboo. 6RP 132-133.

Like much of the evidence at trial, testimony was divergent on how many individuals had kicked Shandy and whether Helmer had

been one of them. Some witnesses testified that Helmer (identifiable by his Seahawks jersey) had participated in kicking Shandy. 5RP 32-33, 98. Other witnesses only saw someone else kicking Shandy or could not tell who was doing the actual kicking. 7RP 20, 28-29, 111; 8RP 41-42, 91-93, 168-170; 9RP 58, 85; 11RP 26, 58.

Helmer's main trial defense – that he pulled and brandished the gun in self-defense – was supported by his testimony and that of Dr. Mark McClung, a psychiatrist.

Helmer described his history and circumstances – including the murder of his mother, the incarceration of his father, his struggles with school, and his use of drugs and alcohol. 13RP 106-130. He also described the events of August 18 leading up to the incident at Bamboo. 13RP 136-145. Helmer sometimes carried a firearm for protection and did so that day for the trip into Seattle. 13RP 145-148.

Helmer explained that, just before the fight, as their group was getting ready to leave, he was standing just outside the entrance to Bamboo talking to his cousin, whom he had not expected to see that evening. 13RP 158-165, 184. Tika Prasad became upset and pushed Patrick Shandy. Dahl intervened and accused Shandy of touching Prasad. Dahl and Shandy then started to fight. 13RP 166-

168, 185.

Helmer testified that he did become involved, but only in an attempt to pull Dahl away from Shandy. 13RP 168, 185. Dahl punched Shandy, who fell to the ground, and Dahl was kicking him. 13RP 169, 186-187. As Helmer tried to stop Dahl, Dahl pushed Helmer away. 13RP 169. Almost immediately, someone pushed Helmer from behind and, as Helmer was stumbling forward, he reached for his gun and pulled it out of the holster. 13RP 170, 187-188.

Helmer testified that he must have been scared when he reached for his gun. 13RP 170. Although uncertain – because his memory of events immediately thereafter is spotty and in flashes – Helmer believes this may have been when his gun discharged and struck Hardin. 13RP 170-171, 189, 202-205. He does not recall pulling the trigger. 13RP 198, 202. The scene was chaotic and confusing, with events happening quickly and people everywhere. 13RP 171. Just before he saw Washburn, Miller, and Lescault coming at him, someone was grabbing his arm. 13RP 171.

Helmer testified that, although he now knows the three men coming at him were simply trying to break up the fight, he did not know their intentions when he pointed the gun at them and told

them to back away. 13RP 171-172, 189-191, 200. As the three backed up, he did the same and then turned and walked away from the scene. 13RP 173, 191-192. When he put the gun back in the holster, he could feel that it was now warm and knew then that the gun had fired. 13RP 173-175, 194. He heard sirens, was scared, and decided to wrap the gun in his Seahawks jersey before placing it in the wheel well of Tika Prasad's SUV. 13RP 175-176, 196-197. He then sat down on a nearby bench and put his hands up as soon as officers approached. 13RP 176-177, 197-198.

Helmer described his memories from the incident, starting from the time someone pushed him from behind, as an interrupted series of fragmented images and feelings. 13RP 201-205. According to Helmer, there was no time to think and he did not feel in control; there was only a series of quick reactions to what he was seeing. 13RP 199, 205-206.

Dr. Mark McClung evaluated Helmer, examined the Seattle Police Department's case file as well as historical documents concerning Helmer's past, and spoke to family members. 13RP 10-11. Dr. McClung concluded that Helmer suffers from Post Traumatic Stress Disorder (with related dissociative symptoms), a history of alcohol and drug dependence, and depression. 13RP 11-12.

McClung explained that PTSD is caused by prior traumatic experiences. 13RP 12. Current events can trigger feelings from the prior event, causing anxiety, fear, and a panic reaction. 13RP 12-16. When traumatic experiences happen at a very young age, people may have little or no memory of the event, but it still impacts them as adults. 13RP 16-18. Studies have shown subtle physical changes to the brains of children who have been traumatized. 13RP 23-24.

Disassociation is a coping mechanism for those with PTSD, which allows them to temporarily detach from the situation, making them feel more like observers than participants. 13RP 18. This can result in distortions in time and sensory perceptions. It can also result in spotty amnesia during a frightening situation, where there is not a continuous narrative memory, but only snapshots or flashes. 13RP 18, 21. While most ordinary people can disassociate to some degree, those with PTSD are more likely to experience severe symptoms even when the situation is not truly life-threatening or overwhelming. 13RP 19-20.

Those with PTSD report being on high alert and continuously vigilant as if a warning signal is chronically on. This is both a biological and psychological experience for them. 13RP 23. They also have been known to self-medicate, although the use of drugs

and alcohol can actually increase anxiety and magnify consequences of the disorder. 13RP 24-27. Certain drugs can help treat PTSD symptoms. 13RP 27-28. Indeed, following their own evaluation of Helmer, mental health professionals at the jail had prescribed these very drugs to treat Helmer's symptoms. 13RP 52, 130-134.

Dr. McClung noted that Helmer has a history of problems with anger and self-esteem as well as feeling on guard, vigilant, and afraid. 13RP 32, 36-37. These are tied to several past traumatic experiences, including the murder of his mother by his father and subsequent fear of his father. 13RP 32-36.

Consistent with McClung's testimony that PTSD and disassociation create memories that are more like a slide show than a continuous narrative, Helmer reported to Dr. McClung having no memory for certain brief segments of time during the fray outside Bamboo. 13RP 41-46, 53-54, 73-76. Helmer experienced periods of blackout – for which he had no memory – including from the time he was pushed and drew his gun to the time he found himself confronted by Miller, Lescault, and Washburn. 13RP 74-75. McClung explained that PTSD symptoms can interfere with the ability to calmly assess a situation, and individuals may find

themselves in the middle of an action without conscience recollection of how they got in that position. 13RP 53-54. Dr. McClung testified that Helmer's attempts to get everyone to back off could have been the product of fear. 13RP 95-96.

Helmer conceded trouble controlling his anger when he drinks and that this was not the first bar fight with which he had been involved. 13RP 180. Dr. McClung considered whether Helmer suffers from Antisocial Personality Disorder and concluded he does not. 13RP 38-39. McClung also used the Structured Inventory of Reported Symptoms and concluded Helmer was not malingering. 13RP 48-49.

b. Closing arguments and jury inquiries

In closing argument, the State argued that Helmer was guilty of Assault in the Fourth Degree in count 1 because he assisted Dahl in attacking Patrick Shandy on the sidewalk, guilty of Assault in the First or Second Degree in count 2 because he shot Michael Hardin, and guilty of Assault in the Second Degree in counts 3 through 5 because he pointed his gun at Nicholas Miller, Michael Lescault, and Jacob Washburn. 14RP 17-23. Regarding self-defense, the State argued Helmer's participation in the misdemeanor assault on Shandy made him the first aggressor, thereby forfeiting his right to

claim self-defense as to the subsequent felony assaults. 14RP 30-32. The State also argued that he had not pulled his weapon or fired it out of fear; rather, he had done so to effectuate his escape from the original assault. 14RP 22-23, 27-33. The prosecutor asked jurors to find that Helmer's conduct involved "an intentional set of actions toward an objective and a purpose and not to protect himself." 14RP 33.

Defense counsel argued Helmer was not guilty in count 1, and not a first aggressor, because he had not been involved in Shandy's beating. 14RP 36-42, 46-47. Regarding counts 2 through 5, counsel argued that Helmer had acted in self-defense – that it was a chaotic situation, it was impossible to know others' intentions, and that his only intent was to act in self-defense based on reasonable fear that had to be assessed in light of his undisputed PTSD. 14RP 42-46, 53, 56-57.

On the afternoon of the second full day of deliberations, jurors submitted two questions. 14RP 63-64; 15RP 2. The first asks:

Intent – Question surrounds definition of intent with respect to timing.

Is measurement of intent restricted to the actual event of pulling the gun's trigger, or can the defendant's mindset and events leading up to the pulling of the trigger also be considered in establishing intent?

CP 177. A second broader question asks:

Should the PTSD diagnosis be considered in deliberation as it relates to ones thought process and actions vs. someone not diagnosed with PTSD? Should the PTSD be taken into consideration when determining our verdict?

CP 179.

The court proposed an answer to both questions that did not provide additional guidance and simply stated, "Please review your jury instructions." 15RP 2. The prosecutor concurred. 15RP 2. Defense counsel noted that jurors were confused whether they could consider Helmer's mental state and asked the court to respond to both questions in a fashion making it clear they could consider events leading up to the fray, including Helmer's PTSD. 15RP 2. The prosecutor conceded juror confusion and suggested the court could indicate, "You can consider the evidence in trial." 15RP 3. The court refused to provide additional guidance, telling jurors, "Please review your jury instructions." 15RP 3; CP 178, 180.

Approximately 24 hours later, after another full day of deliberations, jurors reached their verdicts. 16RP 2.

C. ARGUMENT

THE SELF-DEFENSE INSTRUCTIONS WERE INSUFFICIENT AND DENIED HELMER A FAIR TRIAL.

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the State is obligated to prove all elements of a criminal offense beyond a reasonable doubt, including the absence of self-defense. State v. Acosta, 101 Wn.2d 612, 615-616, 683 P.2d 1069 (1984).

Jury instructions, including self-defense instructions, must allow the parties to argue their theories of the case and properly inform jurors of the applicable law. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Self-defense instructions "must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'" State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting State v. Allery, 101 Wn. 2d 591, 595, 682 P.2d 312 (1984)), abrogated on other grounds by O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). This Court reviews instructions de novo. Clausing, 147 Wn.2d at 626-627.

Helmer's trial defense for counts 2 through 5 was based on Washington's self-defense statute, RCW 9A.16.020(3), which deems the use or threat of force lawful, "[w]hen used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary."

The statute contains both a subjective and an objective component. Jurors are to "stand in the shoes of the defendant" and consider everything he knew and had experienced. Jurors then determine what a reasonably prudent person would have done in a similar situation. State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997); State v. Janes, 121 Wn.2d 220, 238-239, 850 P.2d 495 (1993); Allery, 101 Wn.2d at 595. For the subjective component, the rule that jurors must consider all circumstances relevant to the defendant's reactions includes those occurring substantially before the charged conduct. The focus cannot be limited to what immediately precedes the defendant's use of force. State v. Wanrow, 88 Wn.2d 221, 234-236, 559 P.2d 548 (1977).

The defense evidence, including Dr. McClung's expert testimony, established that Helmer suffers from PTSD, which impacted his perception of events just outside Bamboo and his

reactions to those events. Two seminal Washington cases on self-defense also involved PTSD: State v. Allery and State v. Janes. And both are instructive in Helmer's case.

In State v. Allery, the defendant suffered prolonged abuse at the hands of her husband. After her husband defied a restraining order and threatened to kill her, she shot and killed him as he lay on a couch. Allery, 101 Wn.2d at 592-593. At trial, the defendant offered evidence that she suffered from a form of PTSD (battered woman syndrome) and claimed self-defense. Id. The Allery Court found evidence of the syndrome admissible because it "may have a substantial bearing on the woman's perceptions and behavior at the time of the killing and is central to her claim of self-defense." Id. at 597.

The Court also found that the standard instruction on self-defense, although conveying a subjective inquiry, was inadequate because, without additional instructions from the trial court, it did not make it manifestly apparent jurors had to consider the impact of the defendant's traumatic history and background.⁴ Id. at 594-595.

⁴ The deficient instruction provided, in pertinent part, "The slayer may employ such force and means as a reasonable prudent person would use under the same or similar circumstances as they appeared to the slayer at the time." Id. at 593.

“The jury should have been instructed to consider the self-defense issue from the defendant’s perspective in light of all that she knew and had experienced with the victim.” Id. at 594-595 (citing Wanrow). Defendant’s murder conviction was reversed and the case remanded for a new trial with adequate instructions. Id. at 599.

In the second case, State v. Janes, the Supreme Court addressed a related form of abuse-induced PTSD – battered child syndrome. Janes, 121 Wn.2d at 222, 235. After ingesting marijuana and alcohol, the 17-year-old defendant shot his mother’s boyfriend, who had subjected the defendant to acute physical and mental abuse. Id. at 222-225. Expert testimony established that the defendant suffered from PTSD, leaving him hypervigilant (on high alert and constantly monitoring for signals that suggest imminent danger). Id. at 230-231, 233-234. The Supreme Court held that such evidence is relevant and helpful to jurors in deciding whether a defendant’s belief he was in danger was reasonable under the circumstances. Id. at 236. The Court explained:

the jury is to inquire whether the defendant acted reasonably, given the defendant’s experience of abuse. Expert testimony on the battered person syndromes is critical because it informs the jury of matters outside common experience. Once the jury

has placed itself in the defendant's position, it can then properly assess the reasonableness of the defendant's perceptions of imminence and danger.

Id. at 239. The Supreme Court remanded for consideration whether the defendant had been entitled to a self-defense instruction, which the trial court had refused. Id. at 242.

In neither Allery nor Janes did the Supreme Court set out to define precisely what an adequate self-defense instruction would look like in cases where the defendant was suffering from PTSD and claimed self-defense. But following Allery, the WPIC was modified to clarify that jurors are to consider "all the facts and circumstances" known to the defendant at the time. See State v. Goodrich, 72 Wn. App. 71, 77, 863 P.2d 599 (1993) (noting new language based on Allery), review denied, 123 Wn.2d 1029, 877 P.2d 695 (1994), partially abrogated on other grounds as noted in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004).

The current pattern instruction provides, in pertinent part:

The person *[using][or][offering to use]* 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.

Washington Pattern Jury Instructions, WPIC 17.02 (West 2008).

Counsel for Helmer proposed an instruction based on WPIC 17.02, which was adopted by the trial court as instruction 22 and used by jurors during deliberations.⁵ See CP 117, 157.

There are two problems with the instruction used at Helmer's trial. First, WPIC 17.02 is perfectly adequate when jurors are merely being asked to consider "the facts and circumstances known to the person."⁶ Indeed, that language comes from Allery itself. But this is not the only language found in Allery. The Allery Court also said, "The jury should have been instructed to consider the self-defense issue from the defendant's perspective in light of all that she knew and had experienced with the victim." Allery, 101 Wn.2d at 595 (emphasis added). Janes contains similar language. See Janes, 121 Wn.2d at 239 ("the jury is to inquire whether the

⁵ Instruction 22 reads:

The person using or offering to use 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 the incident.

CP 157.

⁶ Classic examples of relevant "facts and circumstances" known to the defendant would be a location's historic reputation or the alleged victim's reputation for violence. See Wanrow, 88 Wn.2d at 235 (citing, as an example, the "the reputation of the place . . . for lawlessness"); State v. Cloud, 7 Wn. App. 211, 217, 498 P.2d 907 (recognizing relevance of alleged victim's reputation for "violence and quarrelsome nature"), review denied, 81 Wn.2d 1005 (1972).

defendant acted reasonably, given the defendant's experience of abuse") (emphasis added).

Thus, it is apparent under Supreme Court precedent that – in cases based not just on knowledge of facts and circumstances, but also on experiences of abuse – jurors also must understand that those experiences are to be considered in evaluating the reasonableness of the defendant's fears and actions. Yet neither the current WPIC nor the instruction used in Helmer's case – both of which focused solely on the defendant's knowledge of facts and circumstances – indicates this, much less makes it manifestly apparent. As in Allery, Helmer's jurors would not have clearly understood they had to consider the impact of the defendant's traumatic experiences and background, meaning the impact of Helmer's PTSD. The jurors' questions during deliberations substantiate this failure of understanding.

The second problem is that, even if WPIC 17.02 were otherwise sufficient in Helmer's case, i.e., made it manifestly apparent jurors were to consider his experiences (including the effects of his PTSD), defense counsel failed to request that portion of the WPIC telling jurors to consider facts and circumstances known "prior to the incident." Compare WPIC 17.02 (italicized

language “*and prior to*”) with CP 157 (no such language). Thus, the instruction used at trial limits jurors’ consideration to the facts and circumstances known to Helmer “at the time of the incident” and not before. Id.

The impact of these instructional deficiencies came to light with the jurors’ questions. Defense counsel had argued Helmer’s only intent was to defend himself. 14RP 42-43. Both of the jurors’ questions were aimed at understanding duties directly relevant to that very issue:

Intent – Question surrounds definition of intent with respect to timing.

Is measurement of intent restricted to the actual event of pulling the gun’s trigger, or can the defendant’s mindset and events leading up to the pulling of the trigger also be considered in establishing intent?

CP 177. The second question asks:

Should the PTSD diagnosis be considered in deliberation as it relates to ones thought process and actions vs. someone not diagnosed with PTSD? Should the PTSD be taken into consideration when determining our verdict?

CP 179.

The trial court missed the perfect opportunity to rectify the deficiencies in instruction 22 when it refused defense counsel’s request that jurors be instructed they could consider prior events

and circumstances, including Helmer's PTSD. This missed opportunity requires a new trial.

During jury deliberations, trial courts are authorized to supplement instructions on the law in response to jury questions. State v. Becklin, 163 Wn.2d 519, 529-530, 182 P.3d 944 (2008). Where the original instructions accurately state the law, the trial court is not obligated to do so. See State v. Ng, 110 Wn.2d 32, 42-44, 750 P.2d 632 (1988) (no abuse of discretion where original instructions answered question posed); State v. Sublett, 156 Wn. App. 160, 184, 231 P.3d 231 (2010) ("Because the instruction at issue is not ambiguous and . . . is a correct statement of the law, the trial court did not abuse its discretion by refusing to further clarify the instruction for the jury."), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012); see also State v. Etheridge, 74 Wn.2d 102, 110, 443 P.2d 536 (1968) ("The refusal to give a requested instruction is not error when the subject matter is adequately covered in the court's other instructions.").

"However, where a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction." State v. Campbell, 163 Wn. App. 394, 402, 260 P.3d 235 (2011) (citing

State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)), review granted, remanded on other grounds, 175 Wn.2d 1021, 288 P.3d 1111 (2012). This duty applies when the jury's question reveals an ambiguity in the instructions. Campbell, 163 Wn. App. at 401-402. Thus, where the original instructions do not fully and properly inform jurors of the applicable law, a trial court abuses its discretion when it fails to issue a clarifying instruction in response to a specific jury inquiry on that very subject. Id. at 402.

There can be no doubt Helmer suffered prejudice from the court's refusal to supplement instruction 22. Instructional error is presumed prejudicial unless it affirmatively appears to be harmless. Clausing, 147 Wn.2d at 628 (citing Wanrow, 88 Wn.2d at 237); LeFaber, 128 Wn.2d at 900. Helmer's PTSD diagnosis and its potential impact on him during the incident (hypervigilance, disassociation, distortions in time and sensory perceptions) were major subjects at his trial. Jurors should have considered this evidence in deciding not only whether Helmer subjectively feared for his safety, but also whether that fear was objectively reasonable in light of his particular history and circumstances. The jury questions indicate that whether jurors could use this history was an important issue for them.

If this Court nonetheless declines to order a new trial based on the trial court's failure to supplement instruction 22, reversal is still required based on defense counsel's failure to ensure jurors were properly instructed at the outset.

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, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

Competent counsel conducts research and stays abreast of current happenings in the law. Bush v. O Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (an attorney unquestionably has a duty to investigate the applicable law), review denied, 115 Wn.2d 1020, 802 P.2d 125 (1990); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make

reasonable investigations").

The failure to propose a proper and necessary instruction is deficient performance. See State v. Thomas, 109 Wn.2d 222, 226-229, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where intent a critical trial issue). So is the proposal of an instruction – even a pattern instruction – where counsel had reason to know the instruction was incorrect or inapplicable to the specific situation. State v. Kylo, 166 Wn.2d 856, 865-869, 215 P.3d 177 (2009) (counsel deficient for proposing WPIC where proper research of case law would have indicated pattern instruction flawed); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering WPIC that allowed client to be convicted under a statute that did not apply to his conduct).

As previously discussed, Helmer's counsel made two mistakes when proposing instruction 22.⁷ First, she failed to recognize that WPIC 17.02 – adequate for most factual scenarios – is inadequate where evidence of past experiences (such as PTSD) is

⁷ That counsel proposed the deficient instruction raises the prospect of invited error. Even if invited, however, the instruction can be challenged in the context of ineffective assistance of counsel. See Aho, 137 Wn.2d at 744-745 ("Review is not precluded where invited error is the result of ineffectiveness of counsel.").

relevant to the issue of self-defense. Comparing Allery and Janes (seminal self-defense cases involving PTSD) with the pattern instruction makes this apparent. This would not have been an issue had counsel simply lifted language from Allery indicating jurors were required to consider self-defense from Helmer's full perspective, including all that he knew and all that he had experienced. Allery, 101 Wn.2d at 595. Second, even assuming WPIC 17.02 were otherwise sufficient, counsel's failure to request language – expressly included as an option under WPIC 17.02 – directing jurors to consider circumstances “prior to the incident” also was deficient, since it focused jurors only on facts and circumstances during the incident.

As a result of these failures, Helmer was prejudiced because there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94). While an individual not suffering the effects of PTSD may not have been as fearful as Helmer, and may have exercised greater restraint in response to that fear, jurors should have evaluated the reasonableness of Helmer's conduct in light of

his PTSD. Yet, they were never instructed to do so. Alone, and in combination, counsel's failures prevented jurors from considering the significant impacts of PTSD on Helmer's self-defense claim, thereby making it more likely jurors would find the claim disproved.

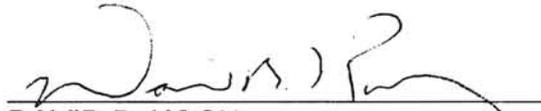
D. CONCLUSION

Errors by counsel and the trial court denied Helmer a fair trial. His convictions should be reversed, his sentences vacated, and his case remanded for a new trial with proper jury instructions.

DATED this 19th day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71607-7-I
)	
MICHAEL HELMER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL HELMER
DOC NO. 372618
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 9900

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF DECEMBER 2014.

X *Patrick Mayovsky*