
IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CORINA M. KERR,
Appellant.

STATE OF WASHINGTON
BY _____
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COURT OF APPEALS, DIVISION II
300 N. 34TH ST.
TUMWATER, WA 98501

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 4

 A. Assignments of Error 4

 1. The superior court erred in allowing the issue of Ms. Kerr’s guilt to go to the jury when the evidence was insufficient to convict as a matter of law. 4

 2. The superior court erred in allowing Ms. Kerr to be tried in violation of her constitutional rights to competent counsel. 4

 B. Issue Pertaining to Assignment of Error . . . 4

 1. Should Ms. Kerr’s convictions be reversed for insufficiency of the evidence when the State failed to prove a) that Ms. Kerr used unlawful force, when the touchings occurred while she merely struggled and flailed about; b) that the touching occurring in this case would be offensive to an ordinary police officer processing a resistant individual; and c) that Ms. Kerr intended to cause any of the touchings? 4

 2. Should Ms. Kerr’s convictions be reversed when, but for the deficient performance of her trial in failing to consult with a specialist in PTSD, there is a reasonable probability she would have been acquitted? 5

III. STATEMENT OF THE CASE	5
A. Procedural History	5
B. Substantive Facts	7
1. Corina Mae Kerr	7
2. The Forensic Psychologist's Diagnosis	9
3. Ms. Kerr's Arrest	11
4. Events at the Police Station.	13
5. Jury Instructions	19
IV. ARGUMENT	19
Point I: The Evidence Was Insufficient to Prove the Three Counts of Assault In the Third Degree	19
A. The evidence failed to establish Ms. Kerr used unlawful force	20
B. Given the circumstances surrounding the touching, the State failed to establish the touching was harmful or offensive.	22
C. The evidence failed to establish Ms. Kerr intended to touch another person	26
Point II: Ms. Kerr's Counsel Was Ineffective for Failing to Consult with a PTSD Specialist	29
V. CONCLUSION	34
CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

Table of Cases

Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 145 P.3d 371 (2006) 21

State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010) 21

State v. Botrell, 103 Wn. App. 706, 14 P.3d 164 (2000) 32

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed.2d 482 (2006) 30

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 21

State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006) 20

State v. Krup, 36 Wn. App. 454, 676 P.2d 507 (1984) 23

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 30

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 20

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) 30

Statutes

RCW 9A.36.031(1)(g) 5, 20

Constitutional Provisions

U.S. Const. amend. VI 29-30
Wash. Const. art. 1 § 22 29-30

Other Authority

Restatement (Second) of Torts § 19 23
WPIC 35.50 Assault-Definition 23-24

I. INTRODUCTION

The defendant-appellant in this Case, Corina M. Kerr, appeals her three convictions for Assault in the Third Degree committed against a law enforcement officer. She argues there was insufficient evidence to convict when the State failed to prove that 1) she used unlawful force to commit the touchings; 2) the touchings were offensive to law enforcement officers processing a resistant individual; and 3) she touched the officers with the requisite intent.

Ms. Kerr, a veteran of the U.S. Navy, suffers from Post Traumatic Stress Disorder (PTSD) and a pathological fear of the police and incarceration. While staying at a friend's house following a period of homelessness, an altercation erupted; he called the police and alleged she assaulted him. Three police officers were sent to the house. When Ms. Kerr refused to speak or cooperate with them, they arrested her for malicious mischief and domestic violence.

Ms. Kerr was never charged with these crimes. Instead she was charged with assaulting three police officers who processed her at the police station.

At the station, Ms. Kerr was in an apparently hysterical state: highly agitated, yelling, flailing about, and cursing at the officers. In fact, her extreme agitation caused her heart rate to soar to 187 beats per minute, creating a medical emergency which prompted police to call the fire department. Paramedics transported her to the hospital.

Before going to the hospital, with her hands cuffed behind her back, Ms. Kerr scratched an officer as he grabbed her handcuffs to obtain control over her. Then, after being pushed into a room for searching, Ms. Kerr kicked back behind her. The kick landed on the police officer's thigh; he grabbed her leg between his and swung her to the ground. These actions constituted the first alleged assault.

The second alleged assault happened while the first officer, a 200-plus pound man, had her pinned to the floor with his knee in her back. Another officer

held down her legs. While Ms. Kerr struggled and flailed, her foot made contact with the calf of a third officer, knocking the officer briefly off balance.

The final alleged assault occurred when Ms. Kerr was shackled to the floor of the isolation cell. The supervisor on duty knew Ms. Kerr was not well because, from sixteen feet away, he could see her pulse beating in the distended veins of her neck. Nevertheless, he decided she needed to wear a spit hood. As he attempted to put it on, she resisted, grabbing his wrist and causing a laceration with her nails.

On appeal, Ms. Kerr argues the State failed to prove that she used unlawful force, that the touchings were offensive given the time and place in which they occurred, and that she intended to touch the officers.

In addition, Ms. Kerr argues her trial counsel was ineffective when he failed to consult prior to trial with a psychologist specializing in PTSD.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in allowing the issue of Ms. Kerr's guilt to go to the jury when the evidence was insufficient to convict as a matter of law.

2. The superior court erred in allowing Ms. Kerr to be tried in violation of her constitutional rights to competent counsel.

B. Issue Pertaining to Assignment of Error

1. Should Ms. Kerr's convictions be reversed for insufficiency of the evidence when the State failed to prove a) that Ms. Kerr used unlawful force, when the touchings occurred while she merely struggled and flailed about; b) that the touching occurring in this case would be offensive to an ordinary police officer processing a resistant individual; and c) that Ms. Kerr intended to cause any of the touchings?

2. Should Ms. Kerr's convictions be reversed when, but for the deficient performance of her trial in

failing to consult with a specialist in PTSD, there is a reasonable probability she would have been acquitted?

III. STATEMENT OF THE CASE

A. Procedural History

On February 21, 2008, the State filed an information charging Ms. Kerr with Assault in the Third Degree committed against a law enforcement officer who was performing his official duties, in violation of RCW 9A.36.031(1)(g) and occurring on or about February 16, 2008. Clerk's Papers on Appeal (CP) 37-38.

On April 4, 2008, the trial court ordered a forensic mental health evaluation regarding Ms. Kerr's mental state at the time of the alleged offense. That evaluation was sealed by court order on August 8, 2008. The State forensic psychologist found no insanity or diminished capacity at the time of the alleged offense. Sealed Forensic Mental Health Report (SMHR) at 7-8.

Trial was set for February 2009. Ms. Kerr did not appear and the trial was rescheduled. The case went to trial in July/August 2009, resulting in a hung jury.

Following that trial, the State filed an amended information changing the date of the alleged acts to February 15, 2009. CP 39. Several months later, the State filed a second amended information adding to the charges two counts of Assault in the Third Degree committed against other law enforcement officers. CP 14-15.

A year after the first trial, the case again went to trial, the Honorable Gordon Godfrey presiding. See Verbatim Report of Proceedings for June 9, 2010 (RP) 4-156.¹ Following a jury trial, Ms. Kerr was convicted of three counts of Assault in the Third Degree on June 9-10, 2010. RP 4-156.

At sentencing on June 21, 2010, the superior court determined a sentence below the standard range was warranted. The standard range in this case was four to twelve months. CP 28. The court sentenced Ms. Kerr to 62 days in custody, with credit for 62 days' time

1. Three volumes of Verbatim Reports of Proceedings were filed in this case. However, Ms. Kerr relies in this appeal only on the volume containing a transcript of the June 9, 2010 trial, referred to herein as RP.

served. CP 29. Costs, fees and assessments were imposed. CP 31.

Appeal was timely filed on June 28, 2010. CP 35-36.

B. Substantive Facts

1. Corina Mae Kerr

Corina Kerr has survived a life of Dickensian proportions, but without the happy ending. Traumatic events, including an abusive childhood, being raped while serving in the Navy and being beaten by the police in Anchorage, Alaska, have resulted in diagnoses of PTSD, a long history of severe depression, two suicide attempts, multiple psychiatric hospitalizations and a pathological fear of the police. SMHR at 2-4.

When Ms. Kerr was a child, her father, a lumber-industry worker, drank heavily. Both he and her mother physically abused her on a weekly basis. At age 17, the physical abuse by both parents was so intense she left home and moved in with a friend's family to escape the violence. Despite these obstacles, Ms. Kerr

managed to graduate from high school in 1979 with honors. SMHR at 2.

Shortly after high school, Ms. Kerr joined the U.S. Navy. She served for five years, from January 1981 through January 1986. She was meritoriously promoted and honorably discharged. She then joined the U.S. Army Reserves, serving as a sergeant in the Reserves for three years, from 1986 through 1989. While in the military, Ms. Kerr experienced sexual trauma and was raped on multiple occasions. SMHR at 2-3.

For the next several years following her discharge from the Reserves, Ms. Kerr lived a fairly peripatetic life, holding a series of jobs in Florida, Grays Harbor and Virginia. In 1997, following hospitalization for depression, Ms. Kerr moved to Anchorage to be near her parents. There she attended the University of Alaska in Anchorage, where she likely earned enough credits to graduate. SMHR at 3.

Ms. Kerr's life took a turn for the worse, however, in 2002, when she endured an assault by

Anchorage police officers. The violence at the hands of law enforcement resulted in a diagnosis of PTSD. The assault caused Ms. Kerr to experience intrusive recollections and nightmares. It also created a tremendous fear of law enforcement officers and of incarceration. SMHR at 3-4.

2. The Forensic Psychologist's Diagnosis

The psychologist who evaluated Ms. Kerr is a doctor of psychology and a licensed psychologist employed by the Program for Forensic Evaluations in Corrections and the Community Center for Forensic Services at Western State Hospital. His report acknowledged her documented, pathological fear of law enforcement officers: "The available information suggested that, at the time of the alleged incident, Ms. Kerr's behavior was influenced by her traumatic history, which was documented before this event . . . to have led to 'a great deal of fear of law enforcement officers and incarceration.'" SMHR at 7. In the psychologist's opinion, Ms. Kerr's reaction at the police station was influenced by her past trauma:

[Ms. Kerr's] reaction to the officers on 2/15/08 was extreme, and probably related to the ongoing influence of her past trauma. It didn't appear that at the time of this incident that she was experiencing psychotic thought processes, and she probably retained the ability to accurately perceive reality, although her perception of the role of law enforcement and correctional officers was idiosyncratic and probably different from that of most people in society. Ms. Kerr viewed her actions at the time as being defensive, and this view is almost certainly related to the influence of past trauma.

SMHR at 7.

The psychologist diagnosed Ms. Kerr with PTSD and Major Depression but found her to be sane at the time of the charged offenses, concluding: "[A]lthough it appeared that Ms. Kerr was experiencing symptoms of a mental disorder that influenced her actions at the time of the arrest, the specific nature of her symptoms didn't appear to influence her thinking in a way that she would fulfill the statutory description of insanity." Id.

Regarding Ms. Kerr's capacity to form intent, the psychologist opined, "Despite the severity of her agitation it appeared that Ms. Kerr retained the

capacity to act with the objective to achieve a specific results [sic].” Id. at 8.

3. Ms. Kerr's Arrest

Ms. Kerr was arrested for obstructing a police investigation and malicious mischief. However, she was never charged with these crimes.

In November 2007, following a period of homelessness, Ms. Kerr moved in with an acquaintance, Byron Hixson. The living situation was difficult due to his verbal abuse, substance abuse and nonpayment of bills. Ms. Kerr slept on the couch. SMHR at 5.

On February 15, 2008, she and Hixson had an argument about financial matters and her refusal to have sex with him. Ms. Kerr decided to leave, but Mr. Hixson prevented her departure. Id. The argument escalated and Hixson called the police, alleging she had kicked a hole in his door. RP 11. According to Ms. Kerr, the hole was made by a prior tenant. RP 125.

Three Aberdeen police officers, John Snodgrass, Steve Timmons and Ron Bradbury, responded to Hixson's complaint about a disorderly person. RP 9-11. Because

this was an incident involving two people living together, it was treated as a domestic violence situation. RP 18-19.

Officer Snodgrass contacted Ms. Kerr to question her. Ms. Kerr refused to comply with any verbal commands, including giving her name. She was angry, cursing, argumentative and upset. The police determined her behavior was grounds for arrest for obstructing a police investigation and malicious mischief. RP 11-12; 18 & 75.

Officer Timmons was also on the scene, interviewing Hixson in another room. When he heard Ms. Kerr yelling at Snodgrass, he went toward them. Ms. Kerr had a box of personal belongings and was trying to leave the house. Timmons observed Snodgrass grab Ms. Kerr's arm and tell her she was not free to leave. RP 41-42.

Timmons handcuffed Ms. Kerr; she did not resist. RP 44. She did resist being led down the sidewalk toward the patrol car. With her hands cuffed behind her back and one officer holding her by the arm on

either side, Ms. Kerr was pulled toward the car. Ms. Kerr was swearing, yelling at the officers, demanding her rights and telling them to "watch out." However, she was not assaultive. RP 12-14; 22-23 & 33.

At one point, the officers believed she was going to spit at or kick them, so they forced her face-down over the hood of the car. RP 13-14 & 33-34. Then, when she resisted entering the patrol car by putting a foot in the door jamb, the officers forced her in with one officer performing a hair hold and the other two pushing and pulling her into the vehicle. RP 25; 33 & 76-77. In the car, Ms. Kerr calmed down enough to ask if she could lock the trailer she kept on the property. The police refused, but later locked it for her. Ms. Kerr remained upset for the duration of the drive to the jail, where she got out of the car without incident. Snodgrass put her in the temporary booking cell and returned to Hixson's home. RP 14-15; 21-22.

4. Events at the Police Station.

At the jail, Ms. Kerr continued to be uncooperative. Officer Bradbury booked her into the jail. She cussed at him and the other officers,

refused to answer questions, demanded a phone call and demanded the officers' badge numbers. RP 77-78. Ms. Kerr's hands remained cuffed behind her back throughout these incidents. RP at 81.

Bradbury called Corporal Darrin King for assistance with Ms. Kerr. King explained to Ms. Kerr she could make a phone call once the booking process was complete, but that did not calm her. RP 95-97. When Bradbury and King told Ms. Kerr she needed to move from the booking area to another part of the jail, Ms. Kerr refused to go until she could make a phone call. Bradbury stepped into the booking area, where Ms. Kerr had retreated into a corner, and grabbed her arm. Ms. Kerr pulled away, turned out of his grasp and demanded not to be touched. At that, Bradbury grabbed her left upper arm with his left hand and her handcuffs with his right. King also grabbed hold of Ms. Kerr. As Bradbury grabbed the handcuffs, Ms. Kerr's fingernails scratched him. The scratches caused neither pain nor injury. RP 79-82; 88-89 & 99-100.

Bradbury and King pushed Ms. Kerr forward toward the changing room for a search. As they pushed her,

she kicked backwards. In the changing room, she lifted her right leg and kicked backwards, striking Bradbury in the left thigh. RP 82 & 100-01. Bradbury trapped her leg between his thighs and swung her to the floor. He then put his knee into her back to secure her to the floor. Bradbury weighed about 200 to 210 pounds at the time. RP 91-92. Bradbury stated that the touchings did not hurt, although they did not feel good and he did not want to be touched. RP 81-83.

Officer Timmons was also present at the station at this point. He witnessed Animal Control Officer Kristina Sidor attempt to search Ms. Kerr. As Sidor approached her, Ms. Kerr was on her stomach pinned to the floor by Bradbury and King. RP 34-35 & 52. While Bradbury had his knee in her back, holding her down, King was holding her legs. RP 49-50. Ms. Kerr was yelling, flailing and struggling, shouting that the officers were hurting her. RP 35-36 & 102-03.

Sidor approached near Ms. Kerr's feet. Ms. Kerr, flailing around, landed a kick to Sidor's calf as Sidor approached. Timmons then helped secure Ms. Kerr's legs and Sidor completed the search. RP 35-36; 50; 53-54 &

102-03. The kick caused Sidor to fall off balance, but did not cause any injury. Sidor did not want to be kicked and it did not feel good. See RP 56-57.

Once the search was completed, Ms. Kerr was put in a crisis, or isolation, cell, where she was strapped down. RP 37 & 103. When someone is put in the crisis cell, a supervisor is called in. In this case, Sergeant Ross Lampky arrived at the station shortly after midnight. When he arrived, Ms. Kerr was still highly agitated, yelling and screaming. One of the officers reported she had a medical issue, so Lampky went in to check on her. RP 63 & 58-59.

The crisis room is about eight by fifteen feet with a mattress on the floor and medical posts on each side of the floor. Ms. Kerr was on the floor with her legs "shackled to one hand and the hands . . . shackled to the other." RP 65.

By this time, Ms. Kerr was in such a state the officer could not approach her, stating, "I did not want to cause her any more grief." RP 59-60. He could see clearly something was wrong. "Her face was flushed, the color was changing. The veins on the side

of her neck were visible to me, were distended, showing a high pulse rate." RP 59-60. In fact, Ms. Kerr's exceedingly rapid pulse was visible in her neck from about 16 feet away, leading Lampky to believe "there was definitely a medical issue that she needed some assistance with." RP 64. Her heart rate was 187; a normal heart rate is between 60 and 90 beats per minute. RP 67.

Based on his training, Ms. Kerr's agitation, her aggressive responses to the officers and her rapid heart rate, Lampky suspected Kerr suffered from excited delirium. As he explained that condition, it occurs when an event causes a person's heart rate to rise to an uncontrollable rate. The condition can be fatal without medical intervention and usually requires emergency medical care. RP 64-65 & 105. Accordingly, Lampky called the Aberdeen Fire Department. RP 60.

In the meantime, despite the medical situation and his concern about causing "more grief," Lampky decided to put a spit hood on Ms. Kerr, "[b]ecause she had been reportedly spitting at the other officers involved. And I was not focused on her medical condition." RP

60. When he tried to put the hood on, she latched onto his left wrist and would not let go for three to four minutes. RP 60-61; but see RP 38 (Timmons testified the hold did not last very long). Her fingernails caused a small laceration. RP 60-61; 37-38 & Pl. Exh. 1. No medical treatment was required; Lampky "treated [the laceration] with alcohol and called it good." RP 67.

The Fire Department transported Ms. Kerr to the hospital. RP 104-05.

Ms. Kerr retained only fragments of memories from that night. She testified the police assaulted her at Hixson's house and at the police station. She did not intend to assault anyone. RP 123-33. She sustained a torn ligament in her left knee, a torn rotator cuff in her right shoulder, bulging disks and a neck injury at the police station, although she did not bring to court the records documenting these injuries. RP 120 & 127-33.

The only charges filed in this case concern Ms. Kerr's behavior at the jail; she was never charged with malicious mischief or domestic violence - the events

for which the officers arrested her in the first place.
RP 11-12.

5. Jury Instructions.

The court's jury instructions defined assault as follows: "An assault is an intentional touching of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive." CP 22 (Instruction No. 13). Neither the State nor the defense objected to the instructions. RP 133-34.

IV. ARGUMENT

Point I: The Evidence Was Insufficient to Prove the Three Counts of Assault In the Third Degree

The evidence at trial was insufficient as a matter of law to prove Ms. Kerr assaulted the law enforcement officers. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a

reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, ¶ 9, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8, ¶ 9; Salinas, 119 Wn.2d at 201.

To establish the crime of conviction in this case, the State was required to prove beyond a reasonable doubt that Ms. Kerr, "under circumstances not amounting to assault in the first or second degree: . . . Assault[ed] a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g).

A. The evidence failed to establish Ms. Kerr used unlawful force.

The State failed to prove Ms. Kerr touched the police officers with unlawful force. In defining assault, the trial court instructed: "An assault is an

intentional touching of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person.” CP 22 (Instruction No. 13). Although “unlawful force” is not normally an element of the charged crime, since it was included without objection in the court’s jury instructions, it became an element the State was required to prove. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (holding State assumes burden of proving otherwise unnecessary elements of an offense when added elements are included without objection in the “to convict” jury instruction); see Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 522-23, 145 P.3d 371 (2006) (Madsen, J., concurring) (rule extends to definitions included in jury instructions); State v. Atkins, 156 Wn. App. 799, 811, 236 P.3d 897 (2010) (in third degree assault against law enforcement officer case, holding State required to prove defendant knew person allegedly assaulted was law enforcement officer when such requirement was included, without objection, in jury instruction).

In this case, the State failed to prove Ms. Kerr's scratching and kicking about at the police station amounted to unlawful force. Instead, the evidence showed merely that Ms. Kerr flailed about and scratched the officers as she resisted being processed. Her actions amounted to the type of behavior that must routinely occur with a noncompliant arrestee -- or among argumentative children on a playground. Unpleasant, but not obviously amounting to unlawful force.

For these reasons, the State failed to prove all the elements of the charged crimes and this Court should reverse Ms. Kerr's convictions.

B. Given the circumstances surrounding the touching, the State failed to establish the touching was harmful or offensive.

The State failed to prove the touching in this case was harmful or offensive. "A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive." CP 22 (Instruction No. 13). "An ordinary person who is not unduly sensitive" is defined according to "the time and place at which [the touching] is inflicted." WPIC

35.50 Assault—Definition; comment, quoting Restatement (Second) of Torts § 19. Thus, a touching that would be offensive to a juror shopping in a Wal-Mart, to use the State's example from its closing argument, would not necessarily be offensive to a police officer processing an upset and resisting individual. In this case, the time and place of the touchings rendered them inoffensive under the circumstances.

Because "assault" is not defined in the criminal code, courts rely on common law to define the crime. State v. Krup, 36 Wn. App. 454, 457, 676 P.2d 507 (1984) (citations omitted). The portion of the jury instruction quoted above defines assault by battery and was adapted from the Second Restatement of Torts. WPIC 35.50 Assault—Definition; comment. The comment to that Restatement explains that the term "offensive" is defined according to the ordinary person "in the time and place at which [the unwanted touch] is inflicted":

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social

usages prevalent at the time and place at which it is inflicted.

WPIC 35.50 Assault—Definition; comment, quoting Restatement (Second) of Torts § 19.

In other words, the offensiveness of a touching is determined according to an ordinary person in the situation where the touching occurred. This restriction seemingly prevents, for example, football players from being charged with assault for tackling an opponent. For similar reasons, an arrestee who struggles and scratches and flails about cannot be convicted of assault unless the contact rises above the normal touchings that happen to police officers under similar circumstances.

In this case, all the touchings occurred in the police station as the officers processed Ms. Kerr, a noncompliant arrestee. All the touchings were within the spectrum of what must be expected from a resisting person: flailing legs, scratching fingernails. The hard truth about being a police officer is that one is confronted by greater conflict than the ordinary person. While the police should clearly not be

expected to tolerate violence, they regularly encounter more rough contact than a layperson in, for example, a retail or office work environment.

While the State established that the officers in this case did not like or want the touchings, it did not establish that the touchings would be offensive to the ordinary police officer dealing with a resisting individual. Indeed, whether someone likes a touching is a different issue than whether a touching is offensive enough to amount to an assault. A person may not like a hearty slap on the back by an acquaintance, for example, but unless the slap is "unwarranted by the social usages prevalent at the time and place at which it is inflicted," the slap is not an assault.

Bradbury stated that the touchings did not hurt, although they did not feel good and he did not want to be touched. RP 81-83. Sidor stated she did not want to be kicked and it did not feel good. RP 57. Lampky suffered a small laceration that he "treated with alcohol and called it good." RP 60-61 & 67. Only the touching to Lampky left a mark. None of the officers suggested that the touchings were out of the ordinary

under the circumstances or offensive given the situation.

Under these circumstances, the State failed to prove that any of the charged touchings was offensive to "an ordinary person who is not unduly sensitive." CP 22 (Instruction No. 13). Accordingly, this Court should reverse Ms. Kerr's convictions.

C. The evidence failed to establish Ms. Kerr intended to touch another person.

Finally, the evidence also did not establish Ms. Kerr's intent to touch a police officer. The jury instructions defined intent as follows: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 22 (Instruction No. 11). Ms. Kerr's behavior did not meet that definition.

First, it is undisputed that Ms. Kerr was in a highly agitated, irrational state while at the police station. See, e.g., RP at 137-38 (State argues in closing that Ms. Kerr was "completely irrational"). Indeed, each of the testifying officers agreed Ms. Kerr was in an highly-agitated state when they interacted

with her. Although her heart rate was not documented until she was in the crisis room, its extremely high rate and the suspected excited delirium could not have happened in an instant - the physical effects of her agitation were building throughout the police encounters. A person suffering from this kind of rapid heart rate and fight-or-flight mind set is not acting with the kind of intentionality of an ordinary rational person. Thus, her extreme agitation indicates she lacked the requisite intent.

Moreover, Ms. Kerr's actions themselves do not demonstrate an intent to do the physical act that produced the result, as a close look at each of the purported assaults demonstrates. With regard to the alleged assault on Bradbury, the State first argues Ms. Kerr assaulted him by scratching him. But Bradbury's testimony belies this claim. Bradbury was grabbing Ms. Kerr's handcuffs and her fingernails scratched him in the process:

Q: Now, at that point [after grabbing Ms. Kerr's handcuffs] did you feel any pain?

. . .

A: No, just scratching fingernails.

Q: How was that accomplished?

A: By her fingers went back around,
scratched the skin on my hand.

. . .
Q: Were you injured?

A: Just minor red marks, no injury.

RP 81-82. This evidence does not establish any intentional act by Ms. Kerr.

Similarly, when Ms. Kerr kicked out behind her with her leg and hit Bradbury in the thigh, the act does not evidence the intention to make contact with someone. Ms. Kerr was merely kicking out blindly behind her, resisting being moved to the changing room and resisting a search.

The alleged assault against Sidor was similarly lacking intention. Ms. Kerr was struggling against a search while pinned on her stomach to the floor of a cell, with Bradbury on her back and King holding down her legs. According to the testimony, she was "flailing" and telling the officers they were hurting her. RP 36; 50 & 102-03. Her flailing foot made contact with Sidor's calf. This act reveals no intent to strike Sidor.

Finally, the charged assault against Lampky similarly evidences no intent to cause a harmful

touching. At the time Lampky decided to put a spit hood on Ms. Kerr, she was clearly in a critical medical condition and not capable of acting with intent. First, she was on the floor with her legs and hands shackled together behind her back. RP 65. Moreover, as Lampky approached Ms. Kerr, it was evident she was not well. "Her face was flushed, the color was changing. The veins on the side of her neck were visible to me, were distended, showing a high pulse rate." RP 59-60. In this state, Ms. Kerr merely grabbed the officer's wrist as he put a dark hood over her head.

For all these reasons, the evidence failed to establish Ms. Kerr acted with the intent necessary to find her guilty of the charged crimes. Accordingly, this Court should reverse her convictions.

Point II: Ms. Kerr's Counsel Was Ineffective for Failing to Consult with a PTSD Specialist

Ms. Kerr's State and federal constitutional rights to effective counsel were violated by her attorney's failure to consult with an expert on PTSD. The right to counsel includes the right to effective counsel.

See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995).

Further, the Court starts with a strong presumption of counsel's effectiveness. McFarland, 127 Wn.2d at 335, 899 P.2d 1251. Finally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled on other grounds by Carey Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L.Ed.2d 482 (2006). In this case, counsel's performance was both deficient and prejudicial and can in no way be viewed as tactical.

Trial counsel's performance was deficient in this case when he failed to obtain an specialist in PTSD.

Ms. Kerr suffered from PTSD, an anxiety disorder which can cause flashbacks to the traumatic event triggering the disorder. It was undisputed that Ms. Kerr's PTSD was caused by a 2002 assault by law enforcement officers. The forensic report indicated she suffered intrusive recollections from that event. At the police station on February 15, 2008, she was irrational and hysterical. The events of that night could plainly have triggered PTSD-type intrusive recollections. Yet Ms. Kerr's counsel never consulted with an expert on PTSD regarding Ms. Kerr's reactions at the police station.

This Court recognized the relevance of a PTSD diagnosis in the criminal context back in 2000. The Court noted the disorder can cause flashbacks, disassociation from reality, and loss of control of one's actions:

One hallmark of PTSD is flashback, a condition "during which components of the [traumatic] event are relived and the person behaves as though experiencing the event at that moment." . . . When a person has a flashback, he or she undergoes an "alteration in the perception or experience of the self in which the usual sense of one's own reality is temporarily lost or changed." . . . While

in this state, the person experiences "[v]arious types of sensory anesthesia and a sensation of not being in complete control of one's actions, including speech." . . . So, a person who truly suffers from PTSD could experience a flashback and during that flashback might be unable to control his or her actions. As one commentator stated:

Ordinarily, persons with PTSD are in contact with reality and do not display any symptoms of psychosis such as hallucinations or delusions. PTSD is essentially an anxiety disorder. However, some patients, especially those who are subsequently subjected to extreme stress, develop a transient dissociative reaction with episodes of depersonalization or derealization. Most of the time, these feelings of unreality pass without incident, but occasionally criminal behavior may erupt. The question of criminal responsibility, therefore, is pertinent since a person's cognitive or volitional state may be impaired during a dissociative reaction.

State v. Botrell, 103 Wn. App. 706, 14 P.3d 164 (2000)
(citations omitted).

Given that PTSD can cause both flashbacks to the underlying traumatic event and a dissociative reaction, that the underlying traumatic event in this case was an assault by police officers, and that Ms. Kerr was

irrational at the police station on February 15, 2008, trial counsel's performance was deficient when he did not obtain the expert services of a psychologist specially trained to work with those dealing with PTSD. As it is, the State forensic psychologist recognized the disorder, but did not explore whether Ms. Kerr could have been suffering from a flashback at the police station. See SMHR at 7-8.

Further, but for this deficient representation, there is a reasonable probability Ms. Kerr would have been acquitted of the charges. All the hallmarks of a dissociative episode were present the night of the alleged assaults: Ms. Kerr was in a situation of extreme stress, it was a situation that was similar to the traumatic event triggering her PTSD, she had a fragmented recollection of her time at the police station, and her soaring heart rate was consistent with an extreme fear reaction. Under these circumstances, a psychologist specializing in PTSD would likely have determined Ms. Kerr was experiencing a flashback on the night in question and was incapable of forming the requisite intent to commit the crimes.

For all these reasons, trial counsel was ineffective in failing to consult an expert in PTSD prior to the trial and this Court should reverse Ms. Kerr's convictions.

V. CONCLUSION

For all of these reasons, Corina Mae Kerr respectfully requests this Court to reverse her convictions.

Dated this 11th day of April, 2011.

Respectfully submitted,

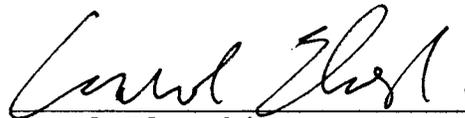

Carol Elewski, WSBA # 33647
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CERTIFICATE OF SERVICE

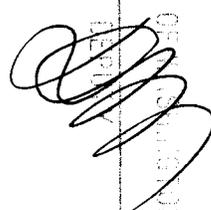
I certify that on this 11th day of April 2011, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail on:

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