FILED
Court of Appeals
Division II
State of Washington
5/14/2019 8:00 AM

NO. 51051-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent

v.

K.A.B.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAY'S HARBOR COUNTY

REPLY BRIEF OF APPELLANT

Robert C. Boruchowitz WSBA 4563
Attorney for K.A.B.

Seattle University School of Law
901 12th Avenue Seattle, Washington 98122
206 398 4151
Boruchor@seattleu.edu

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. SUMMARY OF ARGUMENT IN REPLY 1

II. STATEMENT OF FACTS 1

A. The facts of the incident. 1

B. The facts relating to the failure to provide effective assistance of counsel. 2

III. ARGUMENT. 4

A. The decision should be reversed because the judge misapplied the law on capacity. 5

B. The decision should be reversed because of ineffective assistance of counsel. 5

1. The trial lawyer did not do a "significant amount of work". 9

2. The ineffective use of the expert psychiatrist was ineffective assistance of counsel. 10

3. The state concedes that failure to view the video likely was deficient conduct. It also was prejudicial. 14

4. The excessive workload of the defense lawyer led to her ineffective assistance. 17

5. Failure to introduce the detention facility manual was not tactical 21

6. The February 24, 2017 hearing was an example of the breakdown in the adversarial proceeding. 23

7. The defense letter to the prosecutor reflects the lawyer's ineffective representation. 28

8. Failure to interview the teacher was ineffective assistance. 31

9. Failure to seek disqualification of the judge was ineffective assistance of counsel; even without a defense motion, the judge should have recused himself. 34

C. The trial court erred in dismissing the diminished capacity defense and in finding criminal intent beyond a reasonable doubt. 40

D. The officer was not acting within her official duties when she restrained K.A.B. 41

E. The court should have considered self-defense. 42

IV. CONCLUSION 43

TABLE OF AUTHORITIES

United States Supreme Court

Strickland v. Washington, 466 U.S. 668 (1984)..... 7, 8, 33, 43

Tumey v. State of Ohio, 273 U.S. 510 (1927)..... 35, 39, 40

Washington Supreme Court

In re Crace, 174 Wn.2d 835 (2012)..... 7, 8

In re Pers. Restraint of Brett, 142 Wn.2d 868 (2001)..... 12

Sherman v. State, 128 Wn.2d 164 (1996)..... 35

State v. A.N.J., 168 Wn.2d 91 (2010) 29

State v. Bradley, 141 Wn.2d 731 (2000) 42, 43

State v. Mierz, 127 Wn. 2d 460 (1995) 41

State v. Ramer, 151 Wn.2d 106 (2004) 5

State v. Thomas, 109 Wn.2d 222 (1987)..... 19, 34

Washington Court of Appeals

City of Mt. Vernon v. Weston, 68 Wn. App. 411 (1992)..... 20

Francis v. Washington State Dept. of Corrections, 178 Wn. App, 42 (2014) 41

In re Pers. Restraint of Stockwell, 160 Wn. App. 172 (2011)..... 43

Smith v. Smith, 1 Wn. App.2d 122 (2017)..... 38

State v. Aguilar-Rivera, 83 Wn. App. 199 (1996)..... 44

State v. Button, 183 Wn. App. 1004 (2014) 37

State v. D.E.D., 200 Wn. App. 484 (2017) 42

State v. Fedoruk, 184 Wn. App. 866 (2014) 12, 33

State v. Hamilton, 179 Wn. App. 870 (2014) 7

State v. Jury, 19 Wn. App. 256, 263 (1978) 34

State v. Leon, 133 Wn. App. 810 (2006) 37

State v. Mitchell, 102 Wn. App. 21 (2000) 41

State v. Osman, 192 Wn. App. 355 (2016) 10

State v. Visitacion, 55 Wn. App. 166 (1989) 33

Tatham v. Rogers, 170 Wn. App. 76 (2012) 35, 36

Decisions of Other Courts

Caro v. Calderon, 165 F.3d 1223 (9th Cir.1999) 12

Delgado v. Lewis, 223 F. 3d 976 (9th Cir. 2000) 19

Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981) 33

U.S. ex rel. Thomas v. O'Leary, 856 F.2d 1011 (7th Cir. 1988) 19

Young v. Washington, 747 F. Supp. 2d 1213 (W.D. Wash. 2010) 43

Statutes

RCW 28A.600.485 ..... 23, 42

RCWA 9A.36.100 ..... 10, 17

Rules

CJC Canon 3 35

JuCR. 9.2 13

RAP 2.5 36

RPC 1.1 20

Constitutional Provisions

Const. art. I, sec. 22 8

Const. art. I, sec. 3 36

U.S. Const. amend. VI 8, 19

Other Authorities

Cassens Wesis, Debra, "Public defender with 110 post-conviction cases gets stayed suspension for neglecting clients" ABA Journal (September 17, 2017) 20

National Alliance of Mental Illness, Intersection between Mental Health and the Juvenile Justice System (July, 2017) 27

Performance Guidelines for Juvenile Offense Representation (WSBA) 5, 6, 30

Standards for Indigent Defense 30

Ten Principles of a Public Defense Delivery System, American Bar Association 20

The National Juvenile Defense Standards (2012) 19

U.S. Department of Justice Statement of Interest, filed March 13, 2015 in *N.P., et al. vs. The State of Georgia, et al.,* Superior Court of Fulton County No. 2014-CV-241025 6

Valentine, CeCelia, Meet 'Em and Plead 'Em: Is This the Best Practice?, Champion 18 (2013) 30

WSBA Performance Guidelines for Criminal Defense Representation, WSBA (2011) 30

I. SUMMARY OF ARGUMENT IN REPLY

This Court should reverse the judgment herein because of the failure to provide effective assistance of counsel and because of the series of judicial errors, as outlined below.

II. STATEMENT OF FACTS

A. The facts of the incident.

Juvenile detention facility staff removed from a classroom and handcuffed an 11-year old child to a wall and left her alone because she did not do the homework the detention teacher wanted her to do. RP 70 et.seq. This child had emotional and mental health issues and was on medication which aggravated her emotional issues. CP 52. She had been detained for about 30 days without a capacity hearing required to be held in 14 days. The underlying charge was dismissed shortly after the incident. RP5-12.When the detention officers took her to the "cuffing bar", the child did not resist until, after she had wriggled out of the handcuff and walked around the nearby storage room for several minutes, the guards came in to restrain her to the wall again. See video link in Appendix. With adults pushing her down and tying her hands behind her, she allegedly spit, conduct she had seen her father do. The guards put her in a restraint chair with a hood over her head.

The prosecutor's "counter statement of the case", Respondent's Brief 1 et.seq, is well titled, as it is counter to the full facts of the case and ignores the facts documented in the PRP concerning the detention of K.A.B. prior to her being charged in this case. It also ignores the substance of the expert declarations of both Dr. Eric Trupin[1] and the treating psychiatrist Dr. John Holttum, who state that K.A.B. was not able to form the intent to commit a felonious custodial assault. Appendix C, Appendix D. [2] And it completely ignores the expert declaration of Seattle University Law Professor John Strait who concluded that the defense attorney failed to provide effective assistance of counsel. [3] Appendix A.

B. The facts relating to the failure to provide effective assistance of counsel.

The defense attorney failed to investigate the case fully. She failed to present to the trial court a video recording that showed the initially calm response of the child and the violence of the detention staff, and she failed to interview the teacher who started the incident that led to handcuffing

---

[1] Dr. Trupin is a psychologist and director of Public Behavioral Health and Justice Policy at the University of Washington and vice chair and professor of UW Psychiatry and Behavioral Sciences. His clinical and research interests include child and adolescent psychology, evidence-based behavioral health practices and outcomes for children and youth.

[2] References to the Appendix are to the Appendix filed with the Personal Restraint Petition herein November 19, 2018.

[3] As outlined in the PRP, the Washington Supreme Court has relied on Professor Strait's expert opinion in several cases, including State v. A.N.J., 168 Wn.2d 91, 110–12 (2010).

the child to a wall. Appendix P. During the entire time that she represented K.A.B., she had more than 100 juvenile court cases pending, plus some adult misdemeanor cases. Appendices U,V,W. This left little time for each client. In addition, the ineffective assistance included the following:

*The defense attorney failed to present to the court any evidence concerning the facility policies regarding restraint of children that the guards violated.

* Contrary to the assertion of the prosecutor, the defense attorney did not prepare the psychiatrist whom she called as a witness in a poorly presented effort to demonstrate diminished capacity.

*She failed to present sufficient evidence of the impact of the child's improperly prescribed medication to establish either diminished capacity or lack of criminal intent of her client.

*She failed to present any briefing on the impact on the child of the improper conduct by the guards or on the case law on diminished capacity, criminal intent, and self-defense.

*She failed to learn from the child's grandmother/adoptive mother that the child had seen her father spit at people and to present that evidence to the state's psychologist who prepared reports on capacity and competence or to the trial court.

*The defense attorney failed to challenge the ability of the trial judge to be fair and impartial in the case, even though the judge was the de facto supervisor of the state's witnesses.

*The defense attorney failed to make a record that the judge was the county's main witness in a lawsuit brought against the county for misconduct in the juvenile facility.

*The defense attorney failed to object to the trial judge's order that the child's paternal grandfather visit the child "to facilitate a resolution of the criminal matters" before capacity had been determined and only one day after the assault charge had been filed.

*The defense attorney failed to make a record that the grandfather was a former senior deputy prosecutor who had appeared in the judge's court and had defended his ruling in an appellate case.

*When the prosecutor and the judge and she herself were exploring sending the child to live with the grandfather, the defense attorney failed to make a record that the grandfather was living with the child's father whose parental rights had been terminated.

The defense lawyer was not familiar with the rules requiring a capacity hearing within 14 days. She did not present to the court the video recording that would have illuminated for the court the behavior of her client and of the detention facility guards. The attorney did not file the court rule-required statements of compliance with defender standards for 2016 and 2017 until after PRP counsel filed a public records request for them. Appendix X. Although her defense contract also required maintaining on a case-by-case basis a record of time and expenses incurred, she did not do so. That made it impossible for her to comply fully with PRP counsel's request for information on her work on the case.

III. ARGUMENT

The disposition in this case should be reversed because of ineffective assistance of counsel. It should be reversed because the judge misapplied the law on capacity. It should be reversed because the record reflects that the trial judge was not impartial. And it should be reversed and the charge dismissed because the evidence did not support the finding that K.A.B.

had criminal intent and the finding that the complaining witness was acting in the scope of her official duties.

A. The decision should be reversed because the judge misapplied the law on capacity.

The judge erroneously held: "…criminal intent has nothing to do with capacity findings…." RP 39, App. Op. Br. 18-19.

The state cited State v. Ramer, 151 Wn.2d 106,115 (2004), Resp. Br. 13, but has ignored the *holding* of the Supreme Court:

> Capacity requires the actor to understand the nature or illegality of his acts. 43 CJS Infants Sec.197 (1978). In other words, he must be able to entertain criminal intent. *Id.* A "sense of moral guilt alone, in the absence of knowledge of legal responsibility, is not sufficient," although actual knowledge of the legal consequences is not necessary. *Id.*

Without the ability to form criminal intent, the child does not have capacity. As Dr. Trupin and Dr. Holttum have made clear, K.A.B. did not have that ability. The defense attorney argued, "it's unclear on whether she did have the required intent to commit the act in general." RP 33. The judge rejected any discussion of intent, RP 39, so his misapplication of the law should result in reversal.

B. The decision should be reversed because of ineffective assistance of counsel.

The Preface to the Washington State Bar's *Performance Guidelines for Juvenile Offense Representation* includes the following exhortation:

> Lawyers for children must be aware of their clients' individual and family histories, their schooling, developmental disabilities, mental and physical health, and the client's status in their communities in order to assess their capacities to proceed and to assist in their representation. [4]

The defense counsel did not meet these requirements.

The prosecutor responds to K.A.B.'s claim of ineffective assistance by asserting without explanation or support that "the case at bar was not a complex case." Resp. Br. 16. The prosecutor misunderstands both the concept of ineffective assistance and the nature of this case. A lawyer can provide ineffective assistance in a "simple" case. While the more complex the case the more skill and experience are required, complexity is not the only factor to consider. This case was complex because it involved issues of capacity, competency, the need to challenge the neutrality of the trial judge, the effect of improperly prescribed medication, a history of mental and emotional disturbance and of ineffective treatment by the detention staff, and the conduct of the complaining witness that was in clear violation of the detention facility's policies regarding restraining children.

---

[4] U.S. Department of Justice Statement of Interest, filed March 13, 2015 in *N.P., et al. vs. The State of Georgia, et al.*, Superior Court of Fulton County No. 2014-CV-241025, at page 11. The Performance Guidelines are available at https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-juvenile-offense-representation.pdf?sfvrsn=f0207f1_6.

By the prosecutor's own statement to the court, K.A.B. was facing going to juvenile prison. Calling the case "simple" distorts the reality of the challenges facing representation of children facing felony charges. See discussion *infra* of the February 24 hearing.

This Court reversed a conviction in a "simple" case of unlawful possession of a controlled substance, because the defense lawyer failed to file a suppression motion. State v. Hamilton, 179 Wn. App.870, 879 (2014).

The U.S. Supreme Court has made clear that

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding …. the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process ….

Strickland v. Washington, 466 U.S. 668, 696 (1984).

What happened in K.A.B.'s case was simply not fair and the adversarial process broke down. As the Washington Supreme Court has written, "…*Strickland* suggests that a petitioner who shows there is a reasonable probability that his trial lacked one of the crucial assurances of fairness also necessarily shows actual and substantial prejudice." In re Crace, 174 Wn.2d 835, 842 (2012). The Court added:

> If there is a reasonable probability that had counsel not been deficient, the result of the proceeding would have been different, then that necessarily requires a finding that counsel's error had a

substantial and injurious effect on the proceedings.

In re Crace, 174 Wn.2d 835, 843.

If counsel had obtained the video and shown it to the court, if counsel had interviewed and effectively cross-examined the teacher, if counsel had cross-examined the detention officers about their own policies, if counsel had obtained and prepared an expert witness to explain the impact of the 30 days in detention and the denial of visits with the child's counselor and adoptive mother, and the impact of the medication and of the post-traumatic stress suffered by the child, and why her client did not have the requisite intent to commit a crime, there is more than a reasonable probability that the result of the proceeding would have been different. Of course, if counsel had challenged the failure of the court to hold a capacity hearing within 14 days before she finally did at 36 days into the detention RP 5,12, K.A.B. might not even have been in the detention facility on the day of the incident. Professor Strait concluded:

> Reasonable competence under the Sixth Amendment (Strickland prong1) and Article I Section 22 requires adequate understanding and knowledge of the procedural and jurisdictional law applicable to a defendant's case. In my opinion, trial counsel breached the standard of care by allowing her client to remain in custody for 35 days prior to filing the mandatory request for a hearing on capacity.
> Appendix A at 12.

1. The trial lawyer did not do a "significant amount of work".

The state dismisses K.A.B.'s ineffective assistance claim without addressing a single point of Professor Strait's 22 page expert opinion in which he concluded that the trial counsel failed to provide effective assistance of counsel and that those deficiencies likely affected the reliability of the trial court's finding. Resp. Br. 16-23; Appendix A.

The state's basic argument is that the trial lawyer did a significant amount of work, Resp. Br. 40, and made tactical or strategic decisions not to introduce evidence of the guards' violation of their own policies, Resp. Br. 21, not to seek a different judge, Resp.Br. 22, and to conduct an abbreviated and incomplete direct examination of Dr. Holttum. Resp. Br. 21. All of these assertions are inconsistent with the record.

As evidence of the "significant amount of work" the prosecutor claims trial counsel did, Resp.Br 40, the state lists nine pleadings that she filed. Resp. Br. 18-19. These included motions for a continuance, a motion to shorten time, a witness list, the notice of appeal, and the order of indigency. The only substantial pleading was a Memorandum in Opposition to a Finding of Capacity CP 61-64. This single pleading does not support a conclusion of a "significant amount of work".

The prosecutor notes that trial counsel met with either her client or her grandmother at least five times. Resp. Br. 18. Given that her

representation began in early February 2017 and went until disposition more than seven months later, this level of in-person communication with an 11-year old child and her adoptive mother does not indicate effective representation. It appears that trial counsel did not meet with her client at all between April 25, 2017, and June 12, 2017. Appendix O.

Instead of facilitating good communication with her client and the client's family, the trial lawyer, at a hearing when K.A.B. was not present, sought a "gag order" to keep the client's grandmother and counselor from talking with the client and counseling her about her decisions in the case. Appendix J. See discussion, infra, at p.24. Counsel has provided a link to an audio recording of this hearing, at https://www.dropbox.com/h.

2. *The ineffective use of the expert psychiatrist was ineffective assistance of counsel.*

Given K.A.B.'s documented mental health history and the requirement that the state prove intent,[5] the presentation of expert

---

[5] RCWA § 9A.36.100 (West)

(1) A person is guilty of custodial assault if that person is not guilty of an assault in the first or second degree and where the person:

(a) Assaults a full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any juvenile corrections institution or local juvenile detention facilities who was performing official duties at the time of the assault;…

" 'Assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury.'"

testimony, including on the defense of diminished capacity, was critical. The trial judge recognized this when he told the defense attorney that she needed to get a declaration from the doctor that addressed an element of the crime. RP 59. The judge said this on May 11, 2017, when the prosecutor sought a continuance because she had just received from the defense the doctor's declaration. RP 57-58. The doctor was a treating psychiatrist located by K.A.B.'s adoptive mother, Ms. D., and had begun seeing K.A.B. April 4, 2017. In the first visit, he diagnosed K.A.B. as suffering from post-traumatic stress disorder and attention deficit hyperactivity disorder. Appendix D. On March 10, 2017, Ms. D advised the judge in open court that she had found Dr. Holttum. RP 16.

The state argues that the trial lawyer's "choice of Dr. Holttum and how to utilize his expertise is clearly a matter of trial strategy." Resp. Br. 21. This contention is totally without merit and is unsupported in the brief. There is no trial strategy that supports not preparing the doctor, not providing him any of the existing reports to review, not learning that he had written an opinion the day before trial about the effect of the medication, and to conduct a direct examination without addressing the

---

State v. Osman, 192 Wn. App. 355, 378 (2016), citation omitted.

key elements that the judge had indicated weeks earlier would be required to establish a defense. Appendix D, RP 106.

Other than baldly stating that the actions of the defense counsel were strategy, the state has provided no explanation of what strategy the lawyer was pursuing. Professor Strait's declaration outlines the deficiencies in the defense conduct. Appendix A.

Contrary to the picture painted by the prosecutor, the defense never obtained an expert report that the judge told the lawyer she needed if she wanted the treating psychiatrist to be permitted to testify.

Despite the trial attorney's claim in an email that she talked with the doctor, Dr. Holttum signed a declaration that he did not recall ever talking with the lawyer before trial. She never sent him the Child Study and Treatment (CSTC) reports. Appendix D.

Washington's Supreme Court has adopted the approach set forth by the Ninth Circuit Court of Appeals:

> Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert.

In re Pers. Restraint of Brett, 142 Wn.2d 868, 881 (2001) (quoting Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir.1999)), cited in State v. Fedoruk, 184 Wn. App. 866, 881 (2014).

Defense counsel did not comply with this obligation.

Because she did not talk with the doctor before his testimony, the defense counsel did not know that on the day before he testified, Dr. Holttum saw K.A.B. and her adoptive mother and wrote: "We now have reasonable evidence that fluoxetine was contributing to her volatile and expansive mood states." Id.[6] There is no strategy for failing to ask the doctor to testify to that.

The prosecutor's reliance on the statements of trial counsel that she talked with the doctor "several times", Resp. Br. 20, is misplaced. The prosecutor is relying for this "fact" on an email that the trial counsel sent to appellate counsel in which she admitted that she does not record her time and she did not recall when she talked with the doctor. Appendix P.[7]

With proper preparation, Dr. Holttum could have testified about CSTC's report that K.A.B.'s "childhood was marred by her parents'

---

[6] Counsel has provided a discussion of this drug in the PRP:
The British manufacturer of Fluoxetine notes the following concern about its medication:

Patients under 18 have an increased risk of side-effects such as suicide attempt,

suicidal thoughts and hostility (predominantly aggression, oppositional behaviour and anger) when they take this class of medicines. PRP at 19.

[7] The trial lawyer did not file her certificates of compliance required by JuCR. 9.2 Stds. in Grays Harbor for two years. She was not filing the monthly reports required by her contract with the County and she was not keeping time even though the contract required it. This inattention to her contractual and court rule requirements supports a conclusion that her caseload made it difficult for her to comply with her obligations and undercuts her unsworn recollection about talking with the doctor. Appendix X.

problems with mental illness, substance abuse and domestic violence" and about her hospitalization following threats of suicide. CP 52.

Critical to this case, he could have testified that CSTC reported that the day before the alleged assault incident K.A.B. had been told that she would be moving to live with her paternal grandparents and her biological father, CP 53, and he could have testified about the emotional stress this placed on K.A.B. He could have agreed with Dr. Trupin's opinion[8] that "this was likely a major factor in K's resistance to doing the homework the teacher wanted her to do. The teacher and the detention staff should have been aware of this emotional stress on K." Appendix C.

With proper defense preparation, including Dr. Trupin's report, Dr. Holttum could have testified that he agreed with Dr. Trupin's conclusions that K.A.B. had a mental disorder that impaired her ability to form the intent to commit a felonious custodial assault and that she was not able to form the criminal intent required under the statute. Appendices C, D.

No strategy or tactics would support failing to provide the doctor the information he needed to reach and testify about those conclusions.

3. The state concedes that failure to view the video likely was deficient conduct. It also was prejudicial.

---

[8] Appellate counsel obtained Dr. Trupin's expert opinion. Had trial counsel sought that opinion, it could have been available before trial.

The prosecutor concedes that "It is likely" that failure to view the video was deficient conduct by the trial lawyer. Resp. Br. At 20. But the state, arguing that the video recording was not exculpatory, misapprehends the impact of the video and what it shows. The video demonstrates that K.A.B. did not struggle as the guards escorted her to be handcuffed to the wall, and that they left her alone, despite the facility's policies about not leaving restrained children unmonitored.[9]*See,* Appendix R.[10]It also shows a somewhat different series of events than the guards remembered. For example, one officer testified that a supervisor, Debbie Fry, came in while they were restraining K.A.B., RP 89, but the video does not show that.

---

[9] See video at https://www.dropbox.com/s/ts3dajb9kheb9ek/video%20of%20incident.mp4?dl=0.

[10] The policy states, "Ensures youth are closely monitored while restrained." Appendix R, page 11-33. The three guards left K.A.B. tied to the wall at 11:05 a.m. She wriggled out of the handcuff at 11:06:47. She wandered around, much of the time with her hands behind her back, until the guards returned at 11:09 a.m. to drag her back to the wall.

K.A.B. walked quietly around the room and the adjacent storage room until the guards came back. The video dramatically shows the guards' dragging K.A.B. back to the cuffing bar and pushing her down on

the bench, tying her hands behind her back, eventually putting a black hood over her head, and then restraining her in a chair, with her hands still tied behind her back.

This video shows a child being pulled and pushed by three adults. If defense counsel had made an effective record, the judge would have seen this in the context of the 11-year-old child having been traumatized, both before she was detained and during her detention. It is clear that the initial restraint and the second handcuffing, which led to the assault charge, did not comply with the facility's policy that restraint is only to be used as a last resort. Appendix R. When the three guards found K.A.B. in the storage room, they could have accompanied her back to her room or to a quiet place to talk with a counselor. She was not doing anything that

justified restraint. But the guards were focused on using their "cuffing bar" and not on providing proper treatment to a traumatized child.

The complaining witness was not acting within her official duties as required by RCW 9A.36.100(a)(1). As Dr. Trupin wrote in his declaration: "In my opinion, both incidents of the detention staff handcuffing KB to the wall were improper and unprofessional conduct and escalated the interaction with KB." Appendix C.

The failure to obtain and use the video was ineffective assistance.

4. The excessive workload of the defense lawyer led to her ineffective assistance.

The prosecutor states, with no citation to the record or case authority: "The Appellant makes a highly speculative assessment of trial counsel's workload and availability to her clients" Resp. Br. 23. The state has ignored the facts as presented in the PRP, which document an excessive caseload and very little time per month for individual clients. In the year that she represented K.A.B., trial counsel had 67 Elma Municipal Court misdemeanor cases, 16.75 per cent of a full annual caseload. Appendix U. She also reported being assigned 356 Grays Harbor juvenile cases. Appendix W. The Supreme Court juvenile offender caseload limit is 250 per year. JuCR 9.2 Stds., Standard 3.4.

The reason for caseload standards is what the WSBA Blue ribbon Task Force identified in 2004: the lack of enforceable standards, especially caseload standards, "jeopardizes the ability of even the most dedicated defenders to provide adequate representation." [Cited in Barbara Madsen, "Enacting standards for public defenders is a difficult but necessary balancing act", Full Court Press, July 2012.]

In March 2017, when the custodial assault case was filed, the defense counsel had 111 unfinished juvenile cases pending. One way of understanding the impact of that workload, which does not count her adult misdemeanor cases, is that if trial counsel worked on her cases 8 hours a day, five days a week, in March 2017, when there were 23 work days, she would have had 184 available hours for client work. With 111 pending cases, she would have had only 1.65 hours on average per case that month, again not counting her Elma cases.

When the lawyer filed in Elma Municipal Court her certification of compliance with standards for the first quarter of 2017, she said that 95% of her time was devoted to indigent defense. This indicates that she had a private practice that would have taken time away from her juvenile defender cases. Appendix U.

In April 2017, she had 116 unfinished pending juvenile cases. In May 2017, she had 159 unfinished cases pending. In June 2017, she had

140 unfinished juvenile cases. Appendix W. She would have had barely more than one hour per client that month. Trial began June 16, 2017.

With that workload, it is understandable that she did not have time to prepare Dr. Holttum's testimony or to meet with her client more than once in the weeks before trial.

It appears that trial counsel did not meet with her client between April 25, 2017, and June 12, 2017. Appendix O. She could only recall meeting with her client on five occasions during a four month period. Id. The National Juvenile Defense Standards (2012) state:

> Counsel must anticipate that a young client, due to his or her developmental immaturity, may require frequent contact between court dates. Counsel must also assume that young clients will often not understand the language of court officers, even if they have been in court previously. …If the client is detained, counsel, or someone from counsel's office, should visit the client in detention regularly, including regular visits in between court dates. [11]

As the Seventh Circuit has written:

> The Sixth Amendment right to counsel, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings; an accused is entitled to an attorney who plays a role necessary to ensure that the proceedings are fair.

U.S. ex rel. Thomas v. O'Leary, 856 F.2d 1011, 1015 (7th Cir. 1988), cited with approval in Delgado v. Lewis, 223 F. 3d 976,980 (9th Cir. 2000).

---

[11] National Juvenile Defender Center, p. 41, available at https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf.

With the caseload that the trial lawyer had, she was not able to ensure that the proceedings were fair.

The American Bar Association's Ten Principles of a Public Defense Delivery System, Principle 5, states in part:

> Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.[12]

Washington's appellate courts have not ruled precisely on the impact of an excessive caseload on effective assistance of counsel. In City of Mt. Vernon v. Weston, 68 Wn. App. 411, 416, (1992), the Court found that the trial judge abused his discretion in denying a motion to withdraw and substitute new counsel when it was uncontested that the defender had an excessive caseload.

The Missouri Supreme Court suspended (and stayed the suspension of) a public defender for neglecting his cases, despite his argument that he had too many cases to meet deadlines.[13]

The Commentary to RPC 1.1 Competence states in part:

---

[12] Available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf.

[13] In re: Karl William Hinkebein, Supreme Court of Missouri Case No. SC96089, September 12, 2017, available at https://www.courts.mo.gov/page.jsp?id=117575; "Public defender with 110 post-conviction cases gets stayed suspension for neglecting clients", by Debra Cassens Wesis, ABA Journal, September 17, 2017, at http://www.abajournal.com/news/article/public_defender_with_110_post_conviction_cases_gets_stayed_suspension_for_n.

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

The advent of the Supreme Court Rules setting caseload limits reinforces the common sense understanding that a lawyer with too many cases cannot provide effective representation. Trial counsel's workload interfered with the rendering of effective representation.

5. *Failure to introduce the detention facility manual was not tactical.*

The prosecutor contends that not introducing the detention facility policy manual was a reasonable tactical decision. Resp. Br. 21. The state refers to only one part of the manual, that physical restraint is only to be used as a last resort. The state suggests that K.A.B.'s refusal of "reasonable requests" justified "physical contact or restraint". Id.

But the state has misapprehended the importance of the policy manual. There is a major difference between contact and restraint. If the guards were justified in escorting K.A.B. out of the class room, which the appellant does not concede, they were not justified in handcuffing her to a wall. They should have taken her to her room or to a quiet place to talk with a counselor. It was not their "official duties" to handcuff a child to the wall for not doing homework.

The policies make clear that there are to be no degrading or humiliating actions. Appendix R, 7-8. Watching the video makes clear that the guards violated this policy. Physical restraint is not to be used unless it is a self-harm situation. Id. Declining to do the homework assigned by the teacher was not a self-harm situation.

Once the guards had started cuffing K.A.B., according to one of the detention officers, K.A.B. made general threats of self-harm, yet they left her alone restrained to the bar. RP 76-77. The facility policy requires that a youth who expresses suicidal ideation is to receive a suicide evaluation, an interview which clearly did not take place at the cuffing bar. See Policy at page 10-9, Appendix R.

The defense should have used the policies to establish that the guards were acting in violation of their policies and to undermine the credibility of the state's witnesses.

In assessing the import of the policies, it is helpful to review the Legislature's findings regarding restraint of students:

> **Finding—2015 c 206:** "The legislature finds that there is no educational or therapeutic benefit to children from physically restraining or isolating them as part of their public school programs when not necessary for immediate safety. The use of seclusion or restraints in nonemergency situations poses significant physical and psychological danger to students and school staff. The legislature declares that it is the policy of the state of Washington to prohibit the planned use of aversive interventions, to promote positive interventions when a student with disabilities is determined to need

> specially designed instruction to address behavior, and to prohibit schools from physically restraining or isolating any student except when the student's behavior poses an imminent likelihood of serious harm to that student or another person." [2015 c 206 § 1.]

The Legislature has outlawed the restraint the facility used on K.A.B. to take her out of her classroom and tie her to the wall:

> (b) Restraint or isolation of any student is permitted **only when reasonably necessary to control spontaneous behavior that poses an imminent likelihood of serious harm,** as defined in *RCW 70.96B.010. Restraint or isolation must be closely monitored to prevent harm to the student, and **must be discontinued as soon as the likelihood of serious harm has dissipated**. Each school district shall adopt a policy providing for the least amount of restraint or isolation appropriate to protect the safety of students and staff under such circumstances.

RCW 28A.600.485 (3). [Emphasis added.]

The detention facility school is a school. See, web page at https://www.publicschoolreview.com/grays-harbor-juvenile-detention-profile.

K.A.B. wanting to do a crossword puzzle and not wanting to go to her room did not pose an imminent likelihood of serious harm. Once she was out of the cuff and was walking around peacefully, any likelihood had dissipated. The guards' own violence led to K.A.B.'s resistance.

6. The February 24, 2017 hearing was an example of the breakdown in the adversarial proceeding.

The proceeding on the defense oral motion to keep K.A.B.'s counselor, who had been seeing her for five years, including in the

detention facility, from visiting her in the detention facility, was an example of the court's inattention to due process and the defense attorney's failure to provide comprehensive representation informed by understanding the client and her family. See Appendix T and Link to Audio Recording February 24, 2017.

The trial lawyer did this hearing deliberately without her client present. The reason she gave for the motion, supported by the prosecutor, was that the lawyer did not want the counselor to advise her client about the decisions she had to make in the case. This was before the court had made any determination on capacity. It was before the March 3, 2017, incident that led to the assault conviction. Both the prosecutor and the defense lawyer insisted that K.A.B.'s "guardian", her adoptive mother/grandmother, under no circumstances could see K.A.B. or talk to her on the phone until the case was resolved. At this point, they had kept the child and her adoptive mother apart for three weeks.

The prosecutor told the judge that K.A.B. was "looking at JRA time" and so the counselor should not be developing plans for K.A.B. to live in the community. The prosecutor stated that her offer was contingent on K.A.B. going to Arizona to live with her other grandparents and if she were to stay in Grays Harbor she would be facing JRA time.

The judge, who was not the regular juvenile court judge, granted the motion until the next court hearing. He was unwilling to change a "no-contact order". But no one discussed the reasons for a no-contact order, which seemed to have no purpose whatsoever in keeping a detained child from talking with her adoptive mother. No-contact orders are imposed for the protection of the "victim". In this case there was no such reason, as the child was in custody and the "victim" wanted to talk with her child.

The state argues that this hearing "is not relevant to the case at bar" because it happened before the instant case. Resp.Br.22. But this hearing is indicative of how the court and the attorneys on both sides were treating this 11-year-old child, who at that point had been in custody for three weeks without being able to see her family. It is indicative of how the normal adjudicative and adversary process failed K.A.B. The judges and the lawyers all were ignoring the statutory requirement to hold a capacity hearing and they were ignoring or disregarding the fact that the Arizona living situation included the father whose parental rights had been terminated. K.A.B. was discussing the case with the only person whom she trusted with whom she was allowed to meet, and the lawyers and the court together decided to keep her from doing that.

Ms. D. on February 6 had called the defense attorney asking for help in being able to see K.A.B. Appendix S. Instead, the lawyer worked to keep both the grandmother and the counselor from seeing the child.

It could be that one reason the prosecutor did not want the child's adoptive mother to talk with her child about the case is that the prosecutor knew that the mother wanted K.A.B. to come home, not go to Arizona. The adoptive mother had told this to the prosecutor on the telephone before the February 24 hearing. See Declaration of Ms. D., Appendix E.

On February 8, 2017, the detention teacher had written a memo documenting her concern about K.A.B. Appendix H. K.A.B. had been unresponsive when it was time to go to class, and was curled up on her bed. The teacher talked with her privately when she did go to class and learned that K.A.B. was upset about another girl threatening her and that K.A.B. had a voice talking to her in her head. Id. The teacher asked the child to write down her concerns, and in her note, in addition to the threat and voice reference, K.A.B. said, "I just miss my brothers so much." Id.

The lawyers and the judge were paying no attention to the impact of incarceration on a child with diagnosed mental and emotional problems. Dr. Trupin has written that "Incarceration has also been found to aggravate existing behavioral health conditions, which is likely to have a far reaching impact…." Appendix C, 7.

A recent publication of the Office of Juvenile Justice and Delinquency Prevention noted:

> ... at some juvenile justice contact points, as many as 70 percent of youths have a diagnosable mental health problem. …
> Juvenile detention and correctional facilities may impact youths with mental health issues due to overcrowding, lack of available treatment/services, and separation from support systems (such as family members and friends). [14]

The National Alliance on Mental Illness adds: "Yet while in custody, many don't receive the treatment they need. They end up getting worse, not better. While detained, these adolescents are kept from their families who they need the most."[15]

The state argues that K.A.B. not being present at the February 24 hearing did not affect the outcome of the custodial assault case. Resp.Br. 22. Had she been there, the child could have talked directly with the judge. Had her adoptive mother been allowed to be present and speak, they both could have told the judge that there was no reason for a no-contact order, and that they wanted to have a family meeting with K.A.B.'s brother, as the counselor had arranged. The judge, confronted with an 11-year-old child who wanted to talk with her mother, could have acted in a way to

---

[14] Intersection between Mental Health and the Juvenile Justice System, pp. 1,5, July 2017, available at https://www.ojjdp.gov/mpg/litreviews/Intersection-Mental-Health-Juvenile-Justice.pdf.

[15] Web page available at https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Juvenile-Justice, last checked May 11, 2019.

alleviate the trauma that K.A.B. was facing in the detention facility. That could have prevented the March 3 incident.

Is it a surprise that an 11-year-old child, held in custody for more than a month without being able to see her family, denied the opportunity to meet with her counselor of five years, who suffered from post-traumatic stress and whose medication dosage was improper, who felt threatened by other children in the facility and was hearing voices, might wriggle out of a handcuff and seek to avoid being tied to a wall and left alone? Was it reasonable to put such a child in a handcuff in the first place when she wanted to do a crossword puzzle?

7. *The defense letter to the prosecutor reflects the lawyer's ineffective representation.*

Because no guilty plea was entered, the state finds no prejudice resulting from the defense lawyer's inappropriate attempt to plea bargain without investigating the case. Resp. Br. At 22-23. The state does not address the deficient performance issue. It ignores Professor Strait's opinion that the defense's March 6, 2017, letter did not meet reasonably competent standards. Professor Strait also stated that the letter indicated that the defense lawyer either did not know or did not consider that K.A.B.'s father, whose parental rights had been terminated, lived with his

father in Arizona, which the defense lawyer suggested would provide "stability" to K.A.B. Appendix A.

The failure of the lawyer is demonstrated by her suggestion that her client could have "stability" by being sent to live with a parent whose abuse and neglect had led to a diagnosis for her client of possible post-traumatic stress disorder. *See*, CSTC Evaluation at CP 51,52.

The lawyer offered several options for resolution, none of which included having a capacity hearing or providing the defense time to investigate the case and to obtain an expert evaluation to support the defense statement that her client was "in need of help". Appendix G. The lawyer did offer one option of "you can ask for a diagnostic to be done." Id. At this point, the court had made no capacity determination despite the child being in detention for more than 30 days.

The Washington Supreme Court has held that thoroughness and preparation are required to provide competent representation. "Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." State v. A.N.J., 168 Wn.2d 91, 110–12 (2010). Counsel must evaluate the state's evidence before properly evaluating the merits of a plea offer. Id., at 109. Particularly with a child, defense counsel must spend considerable

time with the client to determine what the client wants and to advise on the consequences of a guilty plea.[16]

The letter also did not comply with the WSBA Performance Guidelines for Criminal Defense Representation (2011), which state:

> Advising the Accused.
>
> 1. *After informing himself or herself fully on the facts and the law*, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid evaluation of the probable outcome.
>
> Emphasis added. [17]

The lawyer's letter supports the conclusion that her performance prejudiced K.A.B. because it was consistent with the lawyer's failure to identify and raise legal issues, including capacity, her failure to understand the context of her client's family situation and history despite having

---

16 *See,* CeCelia Valentine, Meet 'Em and Plead 'Em: Is This the Best Practice?, Champion 18, 19–22 (2013):

> What seems like a short amount of time in jail or on probation can lead to a lifetime of regret and consequence. It is important that defense attorneys, as advocates and counselors for clients, be aware of how important the decision to plead guilty is and what may result. Sometimes these consequences may only come to light after a good client interview. For that reason, a good deal of time should be spent with the client to find out what is important to him personally and how a guilty plea may affect him later.

[17] Available at https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/perf-guidelines-for-criminal-def-rep-060311.pdf?sfvrsn=c2e43cf1_2. Counsel was obligated to be familiar with these Guidelines as required by Standard 14.1 of the Standards for Indigent Defense in JuCR 9.2 Stds.

represented her for more than a month, and her failure to provide thorough preparation to her client's case. Instead of asking the prosecutor for a guilty plea offer, the lawyer should have demanded dismissal of the existing charges for failure to hold a capacity hearing and advocated for release of her client to live with her adoptive mother.

Even though no guilty plea resulted from the letter, it indicates the trial lawyer's lack of understanding and lack of preparation.

8. Failure to interview the teacher was ineffective assistance.

The state argues that because the teacher was not present for the alleged assault, K.A.B. cannot show that failing to interview her "gives a reasonable probability that the result of the proceeding would have been different." Resp. Br. 19. Again, the state has misapprehended the issue.

It was the teacher's decision to remove K.A.B. from the classroom rather than let her do the same homework as the other children that began the incident. RP 70 et.seq. The lawyer should have asked the teacher in a pre-trial interview what the harm would have been in letting the child do the same crossword puzzle that the other children were doing. How did it make sense for the teacher to order the child to leave the classroom?

This was the same teacher who had written a memo several weeks earlier, documenting her concern about K.A.B., and the lawyer should have cross-examined her about the child's fear and hearing voices. It is

likely, given the failure of the defense lawyer to obtain the video and to provide mental health records to Dr. Holttum, that she did not ask for detention records or obtain the February 8 memo.

The lawyer (or, preferably an investigator) should have asked the teacher what impact being in detention for more than three more weeks after she wrote the memo would have had on the child's emotional and mental health. She should have asked her whether she understood that K.A.B. had had special education services since the second grade. CP 54. She should have asked whether she knew that based on testing at Seattle Children's Hospital, K.A.B. had scores indicating a mild deficit for following directions and below average for recalling sentences. CP 56. She should have asked whether the teacher knew that CSTC had concluded that K.A.B. was "living in an environment of stress and persistent uncertainty." CP 56.

She also should have explored with the teacher her understanding of K.A.B.'s diagnosis of ADHD and post-traumatic stress and the impact of those conditions particularly given the failure to provide the treatment that Dr. Trupin declared was essential to be associated with the medication she was receiving. Appendix C at 7.

Contrary to the prosecutor's argument, failing to interview the teacher, to prepare for cross-examination and to be able to offer evidence of the child's mental state, was ineffective assistance.

This Court has emphasized the importance of investigation in a case reversing a murder conviction for failure to investigate a mental health defense.

> Where an attorney makes strategic choices "after less than complete investigation," however, a reviewing court will consider them reasonable only "to the extent that reasonable professional judgments support the limitations on investigation."*Strickland,*466 U.S. at 690–91, 104 S.Ct. 2052. Thus, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Fedoruk, 184 Wn. App. at 880–8.

K.A.B.'s attorney did less than complete investigation and made no strategic choice not to interview the teacher or investigate her prior writings about her client.

The Court of Appeals, finding defense counsel deficient for not interviewing witnesses, found persuasive an 8th Circuit case that found that failure to investigate the facts was deficient performance. State v. Visitacion, 55 Wn. App. 166 (1989). The 8th Circuit wrote: "…ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses." Hawkman v. Parratt, 661 F.2d 1161, 1168 (8th Cir. 1981).

The Supreme Court held, "the presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations. State v. Jury, 19 Wn. App. 256, 263 (1978)." State v. Thomas, 109 Wn.2d 222, 230 (1987).

There was no reason not to interview the teacher, and failure to do so was both deficient and prejudiced K.A.B.

9. Failure to seek disqualification of the judge was ineffective assistance of counsel; even without a defense motion, the judge should have recused himself.

The state has misapprehended the defense failure to seek disqualification of the judge, framing it as a tactical decision by the defense attorney not to file an affidavit of prejudice against the judge. Resp. Br., 22. The state ignores the defense attorney's statement to appellate counsel that she could not recall why she decided not to file a motion to recuse the judge, even after counsel for Ms. D. had sent her a draft motion. Appendix P.

Without citation of authority, the state simply argues that a different judge would not have reached a different result. That is not the determining factor. In reversing a conviction from a court in which the judge had a "direct pecuniary interest in the outcome" and, as mayor, had an "official motive to convict and to graduate the fine to help the financial needs of the village," the U.S. Supreme Court wrote of the accused, "No

matter what the evidence was against him, he had the right to have an impartial judge." Tumey v. State of Ohio, 273 U.S. 510, 535 (1927).

The failure of trial counsel to raise the issue was ineffective assistance of counsel. While the defense attorney should have moved to recuse the judge because of his relationship with the former prosecutor and his role as supervisor of the detention facility, and because he sought to "facilitate a resolution of the criminal matters", the judge should have recused himself. This is not a statutory affidavit of prejudice issue, but a due process fairness issue resulting from a breach of the Code of Judicial Conduct (CJC). See PRP at 25, et.seq.

Even a mere suspicion of partiality can require recusal. The Supreme Court wrote, in remanding a case to a different judge:

> The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. The CJC provides in relevant part: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned...." CJC Canon 3(D)(1) (1995).

Sherman v. State, 128 Wn.2d 164, 205–06 (1996).

When a reasonably prudent and disinterested person would conclude that K.A.B. did not obtain a fair, impartial, and neutral hearing, the appearance of fairness is violated. See Tatham v. Rogers, 170 Wn. App. 76 (2012), PRP 26 et.seq. A reasonably prudent and disinterested

person would conclude that the judge wanted the prosecutor who defended his decision in the appellate court to persuade an 11-year-old child to plead guilty before the judge had determined that the child had capacity.

The state argues that because the trial counsel did not file a motion for recusal, the issue has not been preserved for appeal. Resp. Br. 36. If the issue has not been preserved, it is ineffective assistance of counsel.

The state acknowledges that a claim may be raised for the first time on appeal if it is a manifest error affecting a constitutional right, citing RAP 2.5(a)(3). This is a due process issue, involving fundamental fairness. *See*, Const. art. I, sec. 3:" No person shall be deprived of life, liberty, or property, without due process of law." *See,* e.g., Tatham, 170 Wn. App. at 94: "…the Supreme Court has characterized a judge's failure to recuse himself or herself when required to do so by the judicial canons as a violation of the appearance of fairness doctrine."

The state rejects the recusal issue also because it claims that the record does not support that the trial judge had a personal relationship with the paternal grandfather former prosecutor. Resp.Br. 38. It cites a Court of Appeals opinion to support its argument that "The fact that he [the grandfather prosecutor] once practiced in front of the court is not enough to support a requirement of recusal." Resp. Br. 37. But it does not include this statement by the Court: "However, to the extent that the issue is

raised, the trial court has a duty to examine the issue and determine whether partiality exists." State v. Leon, 133 Wn. App. 810, 812, (2006).

The judge made so such determination here. In Leon, the Snohomish County judge said he had no special relationship with the prosecutor. Leon, 133 Wn. App. at 812. Grays Harbor County has a smaller prosecutor's office and fewer judges than Snohomish County. Grays Harbor County has three superior court judges. [18] As explained in the appellant's opening brief (footnote 1), Mr. B. had been a prosecutor in that court from at least 1997 until at least 2014, when he defended Judge Edwards' ruling in State v. Button, 183 Wn. App. 1004 (2014). The judge took the bench in January 2008. Appendix I.

The relationship became even more troubling when the judge ordered the grandfather to visit the child in detention to "facilitate resolution of the criminal matters". Appendix F.

The state's characterization of the judge's order as relating to the custody status of the child, Resp. Br. 38, strains language interpretation beyond reason. The judge did not write, "to facilitate a decision on placement pending trial". *Resolution* of a criminal matter is one of three things—dismissal, acquittal, or conviction. The common understanding

[18] See, Grays Harbor Superior court web page at http://www.co.grays-harbor.wa.us/government/superior_court/judges_and_court_staff.php.

among judges and trial lawyers is that *resolution* in this context means *conclusion*. See, e.g., Smith v. Smith, 1 Wn. App.2d 122, 138 (2017).

This March 9, 2017, order was before the court had made any determination on capacity and only one day after the prosecutor had filed the custodial assault charge. CP 1, CP 25.

Another example of the ineffective assistance of counsel is that the trial lawyer made no objection either to the former prosecutor going to "facilitate resolution of the criminal matters" or to the court's consideration of sending her client to Arizona to live with the grandparents and the father whose parental rights had been terminated.

The state sees no bias in or conflict in the judge's "administrative role over the Juvenile Department". Resp. Br.39. The state avers that K.A.B. has made no citation to the record to support the conflict of interest that the judge had. Yet in her PRP, K.A.B. has documented both the supervisory role that the judge had over the key state's witnesses and his personal role in being the designated Fed. R. Civ. P. 30 (b)(6) deposition witness in defending the lawsuit against the county for misconduct in the facility that the judge supervised. See, Appendix I. The judge was deposed May 17, 2017, regarding his role in setting policies and in firing staff at the facility. Id. He presided at K.A.B.'s trial in June 2017, hearing testimony from staff who in effect worked under his supervision.

A recent article in The Daily World documented that the judge continues to have complete control over the personnel matters at the facility, which, as outlined in the article, was the subject of complaints about the treatment of children.[19]

The U.S. Supreme Court has held:

> But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

Tumey, 273 U.S. at 523.

The state argues that the judge's role was a "tenuous connection". Resp. Br. 39. Yet the judge was deposed on the detention staff's treatment of children, exactly the type of issue he was judging in K.A.B.'s case. While the judge may not have been personally financially liable to the plaintiff in the case in which he was deposed, he certainly had a direct and personal interest in how the facility he supervised was going to be judged in federal court and in his reputation as an elected official. If he were to conclude that the detention staff had acted outside of their official duties, it would have been additional fodder for the plaintiffs. The lawsuit was

---

[19] "Juvenile center director back on job after staff complaints", The Daily World, February 20, 2019, at http://www.thedailyworld.com/news/juvenile-center-director-back-on-job-after-staff-complaints/.

settled in November 2017, with the County paying $45,000 and agreeing to change its policies regarding placing children in isolation.[20]

Citing English common law cases, the Tumey court wrote: "it is very clear that the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable." Tumey, 273 U.S. 510, 524.

C. The trial court erred in dismissing the diminished capacity defense and in finding criminal intent beyond a reasonable doubt.

The state argues that "there was no testimony that would let a fact finder determine that the Appellant could not form the basic mental state required for the crime at bar." Resp. Br. 34. Yet the court heard testimony that K.A.B. suffered from PTSD, that her psychiatrist thought that the improper dosage of her medication affected the intensity of her actions, and that she had been suicidal in the detention facility. The court also had before it a complete report from Child Study and Treatment Center documenting the extensive trauma that K.A.B. had experienced.

As the Washington Supreme Court has written:

> …it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at

[20] Gene Johnson, "Grays Harbor County settles ACLU lawsuit over teen solitary confinement", The Spokesman Review, November 14, 2017, at http://www.spokesman.com/stories/2017/nov/14/grays-harbor-county-settles-aclu-lawsuit-over-teen/.

> the time in question—only that it could have, and if so, how that disorder operates.

State v. Mitchell, 102 Wn. App. 21,27 (2000).

It was error for the judge to find that Dr. Holttum's testimony had "no relevance or materiality at all." RP 122.

D. The officer was not acting within her official duties when she restrained K.A.B.

K.A.B. has outlined why the two restraints violated every state and national policy, including Grays Harbor's, regarding restraint of children. App.Op.Br. 22 et.seq. If K.A.B. had been sent after sentencing to a state juvenile institution, she would not have been handcuffed or treated the way she was in Grays Harbor when she was presumed innocent, and the alleged spitting incident never would have occurred.

K.A.B. recognizes case law that holds that an officer's good faith performance of job-related duties is seen to be "official duties". State v. Mierz, 127 Wn. 2d 460, 479 (1995). But negligence or gross negligence can be evidence of bad faith. Francis v. Washington State Dept. of Corrections, 178 Wn. App, 42, 57 (2014).

The state has not addressed K.A.B.'s analysis of case law regarding the arbitrariness of the guards' actions or the violation of her 14th and 8th Amendment rights. App.Op.Br.29-36. The state argues that the restraint, even if improper procedure, was not a "crime of violence".

K.A.B. urges the Court to watch the video and determine that the guards' acts constituted violent assault on K.A.B. and were not official duties.

In assessing this question, it is helpful to consider the narrow holding in State v. D.E.D., 200 Wn. App. 484, 496 (2017), "which is simply that resisting handcuffing when a suspect is not under arrest does not constitute obstructing a public servant." The K.A.B. recognizes that the facts in this case are different, as K.A.B. was in detention, not walking down the street as was the juvenile in D.E.D. But she was simply walking around the facility when the guards forced her back to the cuffing bar. That restraint was completely unjustified, and not official duty.

K.A.B. also asks this Court to take into consideration RCW 28A.600.485 (3), discussed supra, that prohibits the kind of actions taken by the detention staff herein.

The evidence did not support the guilty finding.

E. The court should have considered self-defense.

K.A.B. recognizes the holding in State v. Bradley, 141 Wn.2d 731 (2000), cited by the state, Resp.Br. 26 et.seq., and by K.A.B., App.Op.Br. 41 et.seq, that excludes self-defense against corrections officers unless there is actual danger of serious injury as a result of unlawful force by the officer. This 5-4 decision pre-dated the Legislature's finding in 2015 that "The use of seclusion or restraints in nonemergency situations poses

significant physical and psychological danger to students and school staff." 2015 c 206 § 1.

When the alleged spitting occurred, the guards were pinning K.A.B. down to a bench and restraining her arms and legs. This was an 11-year-old child who already had post-traumatic stress. K.A.B. asks the Court to consider that Bradley not be applied to exclude self-defense in this case.[21]

IV. CONCLUSION

As the Federal District Court wrote in granting habeas corpus relief on an ineffective assistance claim, "In sum, where counsel error leaves a defendant without any real or effective defense, courts find prejudice, satisfying the second prong of *Strickland.*" Young v. Washington, 747 F. Supp. 2d 1213, 1221 (W.D. Wash. 2010).

This Court should grant the PRP without further hearing because the petitioner has proved ineffective assistance that led to actual prejudice and a miscarriage of justice. In re Pers. Restraint of Stockwell, 160 Wn. App. 172, 176-77 (2011). If the Court determines that a hearing is necessary to establish the prejudice, the Petitioner requests that the Court

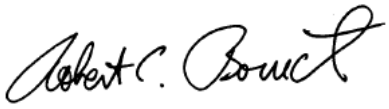
[21] As the State has noted, failure to raise self-defense can be grounds for ineffective assistance of counsel. Resp. Br. 25.

order that the hearing be before a different judge than the trial judge herein. The appearance of fairness requires that.[22]

The judgment should be reversed because the court misapplied the law on capacity and because the judge should have recused himself.

The charge against K.A.B. should be dismissed because the evidence did not support a finding beyond a reasonable doubt of criminal intent or a finding that the officer was acting in her official duties.

Respectfully submitted,



Robert C. Boruchowitz WSBA 4563
901 12th Avenue
Seattle, Washington 98122
206-398-4151

May 14, 2019

---

[22] *See*, e.g., State v. Aguilar-Rivera, 83 Wn. App. 199, 203 (1996):

> We hold that the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send the defendant before a different judge for a new sentencing hearing.

SEATTLE UNIVERSITY SCHOOL OF LAW

May 14, 2019 - 6:47 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51051-1
Appellate Court Case Title:	State of Washington, Respondent v. Kayla A. Baker, Appellant
Superior Court Case Number:	17-8-00023-8

The following documents have been uploaded:

- 510511_Briefs_20190514064425D2706025_8220.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was RB KAB Reply Brief FINAL.pdf
- 510511_Motion_20190514064425D2706025_6862.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was motion for additional pages.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- ksvoboda@co.grays-harbor.wa.us

Comments:

Sender Name: ROBERT BORUCHOWITZ - Email: rcboru@aol.com
Address:
901 12TH AVE
SEATTLE, WA, 98122-4411
Phone: 206-398-4151

Note: The Filing Id is 20190514064425D2706025

FILED
Court of Appeals
Division II
State of Washington
5/14/2019 8:00 AM

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
Division II

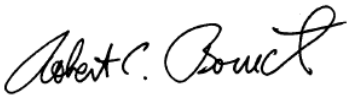
State of Washington, Respondent. v. K.A.B. Appellant	**NO. 51051-1-II** PROOF OF SERVICE

Robert C. Boruchowitz declares as follows:

1. I am the attorney for appellant K.A.B.
2. On May 14, 2019, I served a copy of the appellant's reply brief herein on the appellant by sending a copy of the brief and a link to the brief by email to her adoptive mother. The appellant is 13 years old. I communicate frequently with my client's adoptive mother by email and she shares the communication with K.A.B.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington
May 14, 2019.



Signature of Declarant Robert C. Boruchowitz

Robert C. Boruchowitz WSBA 4563
Attorney for K.A.B.
Seattle University School of Law
901 12th Avenue Seattle, Washington 98122
206 398 4151
Boruchor@seattleu.edu

SEATTLE UNIVERSITY SCHOOL OF LAW

May 14, 2019 - 6:57 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51051-1
Appellate Court Case Title:	State of Washington, Respondent v. Kayla A. Baker, Appellant
Superior Court Case Number:	17-8-00023-8

The following documents have been uploaded:

- 510511_Affidavit_Declaration_20190514065617D2224120_0308.pdf
  This File Contains:
  Affidavit/Declaration - Service
  The Original File Name was proof of service on kab 51419.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- ksvoboda@co.grays-harbor.wa.us
- Robert Charles Boruchowitz (Undisclosed Email Address)

Comments:

Sender Name: ROBERT BORUCHOWITZ - Email: rcboru@aol.com
Address:
901 12TH AVE
SEATTLE, WA, 98122-4411
Phone: 206-398-4151

Note: The Filing Id is 20190514065617D2224120