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

STATE OF WASHINGTON,
Respondent,
v.
K.A.B.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT



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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The trial court's finding of capacity was proper.**
- 2. The Appellant received effective assistance of counsel.**
- 3. Detention Officer Georgia Peterson was performing her official duties at the time of the alleged assault.**
- 4. The Appellant was not acting in self-defense.**
- 5. The trial court's finding regarding the asserted diminished capacity of the Appellant was correct.**
- 6. The judge had no duty to recuse himself.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Procedural facts

On March 9, 2017, the State filed an Information charging the Appellant with one count of Custodial Assault against Detention Officer Georgia Peterson. CP 1. This same day, the Appellant had her first appearance in this matter, and Amanda Kleespie was appointed as defense counsel. CP 8. The Respondent requested the matter be set for a capacity hearing, and an order to have the capacity evaluation completed was entered. RP 2-3. The capacity hearing was scheduled for March 23, 2017. CP 11, RP 3.

Defense counsel requested the Appellant be released from detention since capacity had not yet been determined. RP 5. Defense

counsel stated that the Appellant's grandfather, Mr. B., from Arizona was present and could be a placement for the Appellant. RP 6. Defense counsel also said another option could be the Appellant's grandmother, who was also present. *Id.* The Appellant's grandfather stated logistically it was not possible for him to have the Appellant released to him. RP 9. Defense Counsel then asked for the Appellant to be released to her grandmother, Colleen Davison. RP 10. The Court denied release to Ms. Davison because of the nature of the offense and the fact Ms. Davison was the victim in an Assault in the Second Degree case the Appellant had pending. *Id.*

On March 10, 2017, the State made a motion to have the Assault in the Second Degree case against the Appellant dismissed, to which defense counsel had no objection. RP 11-12. Defense counsel renewed her request to have the Appellant released from detention. RP 13. The Court denied that request, but stated this matter was to be expedited if capacity were to be found. RP 18-19.

On March 23, 2017, the parties were in court for the capacity hearing; however, the evaluation was scheduled to take place that afternoon. RP 20. Defense counsel requested a *Decker* order. *Id.* The State objected based on the fact defense counsel was seeking both use and derivative use immunity, which was not appropriate. RP 21. However, the

State agreed to not use any of the statements the Appellant may make regarding the offense at hand. RP 22.

Defense counsel renewed her request to have the Respondent released to Ms. Davison. RP 23. The Court denied the request because the Appellant had recently made statements that she intended to kill her family. *Id.*

On April 6, 2017, a capacity hearing was held. RP 26. Both parties had submitted briefing on the matter and agreed that the Court should make a decision on capacity based on the briefing and the report from Dr. Lexcen. *Id.* The Court heard argument from both parties, and the Court found the Appellant had capacity. CP 65; RP 26-41.

The Court reiterated the legal test for capacity. RP 39-40. The Court noted in Dr. Lexcen's evaluation she specifically identified seven factors that intended to assist the Court in determining whether a child appreciated the wrongful quality of his or her act. *Id.* The Court stated there were some findings in Dr. Lexcen's report that were worth noting, including the Appellant's thought process. RP 40. The Court remarked on Dr. Lexcen's opinion that the Appellant had the capacity to understand the nature of her behavior and to know that her conduct was wrong. *Id.*

The Court found Dr. Lexcen's report to be persuasive and found by clear and convincing evidence that the Respondent possessed the capacity to commit a crime. RP 41.

On April 7, 2017, arraignment was to be held, however, first, defense counsel requested a competency evaluation be conducted. RP 43.

The Court ordered defense counsel and the Respondent to schedule a telephone conference with Dr. Lexcen to determine her availability to conduct a competency evaluation, whether she needs additional time with the Appellant, and whether she is going to provide any kind of a basis for the Court to find there is a reason to doubt competency. RP 45.

Arraignment was then held, and the Appellant entered a plea of not guilty. RP 46.

On April 20, 2017, a competency hearing was held. RP 48. Both parties agreed, based on Dr. Lexcen's updated report that the Appellant was competent to proceed. *Id.* It was then noted that the Appellant's behavior in detention had deteriorated, that there were issues with her medication, and that she had made a suicidal gesture. RP 49-54. The Court noted it had the same concerns as before regarding releasing the Appellant; however, it felt she would likely become more stable at home and released her. RP 55.

On April 27, 2017, defense counsel made a motion to continue fact-finding, which was granted. On May 11, 2017, the State made a motion to continue fact-finding based on the Deputy Prosecutor's pre-arranged vacation for which airline tickets had been purchased in December 2016. RP 57. Defense counsel objected to the continuance, however, she had only provided the contact information and declaration from her expert witness to the State that morning. RP 57-58. The Court reviewed the expert's declaration and found it did not express any opinions that would be admissible at trial. RP 58. The Court requested defense counsel obtain a report from him where he states opinions that would be admissible at trial, that in some relevant way, address an element of the crime RP 59. The Court found good cause to continue the fact-finding. RP 59-60.

On June 7, 2017, defense counsel made a motion to continue fact-finding. 6/7/17 RP 2. Defense counsel stated her expert witness was not available this week and the following two weeks counsel was unavailable. *Id.* The Court set the fact-finding to Tuesday, June 13, 2017, to arrange for the expert, Dr. Holttum to testify. *Id.* at 5.

On June 8, 2017, the State made a motion to continue the special set fact-finding. RP 61. The State contacted her witnesses to inform them

of the new date, and learned a material witness would be on a pre-scheduled vacation through Thursday, June 15, 2017. *Id.* The Court continued to fact-finding to Friday, June 16, 2017. *Id.* Defense counsel stated Dr. Holttum was not in his office on Mondays or Fridays and renewed her request to continue the fact-finding to July 13, 2017, which the court denied. *Id.*

On June 14, 2017, defense counsel made a motion to continue the fact-finding that was set for June 16, 2017. RP 63. Defense counsel stated that Dr. Holttum's staff stated he was not available on June 16. *Id.* The Court noted that defense counsel had filed a declaration that said Dr. Holttum was going to be unavailable on June 8 and June 15. RP 64. The Court said it was told that Dr. Holttum does not see patients on Fridays, so fact-finding would proceed as scheduled. *Id.*

On June 16, 2017, fact-finding began. RP 67. The State finished its case in chief, and defense began to put on their case. RP 67-95. Defense counsel's first witness was able to testify in full, however, Dr. Holttum would not be available until Wednesday, June 21. RP 95-102.

On June 21, 2017, fact-finding resumed and defense counsel finished her case. RP 103. The court noted there were two decisions that needed to be made under the circumstances of the case. RP 121. The first

is whether an assault occurred, which was not in dispute. *Id.* There was no testimony that disagreed with the testimony of Detention Officer Peterson or Detention Officer Dick regarding what happened. *Id.* The Appellant intentionally spit in the face of Detention Officer Peterson, which is an assault. *Id.*

The second question was the defense of diminished capacity. RP 122. There was an assertion that the Appellant suffered from diminished capacity on the day that the assault occurred, which prevented her from forming the requisite intent to commit the crime. *Id.* The Court found the testimony of Dr. Holttum was not in support of diminished capacity. *Id.* He was unable to state with reasonable certainty prevented the Appellant from forming a criminal intent, and he did not address whether or not the Appellant had diminished capacity. RP 122-123. The Court found the testimony of Dr. Holttum highly speculative. RP 123. The Court found the Appellant guilty of the crime of custodial assault. *Id.*

On July 13, 2017, the court imposed sentence. RP 136. Administrative sealing of this matter was set for January 11, 2024. CP 153. However, if the Appellant has no further criminal cases, she will be eligible to have her case sealed in July 2019. RCW 13.503260(4)(b). Defense counsel filed a notice of appeal. CP 155.

The trial court entered Findings of Fact and Conclusions of Law on August 28, 2017. CP 165-168.

Substantive facts

Linda Hayes is a teacher at the Juvenile Detention Center located at 103 Hagara in Aberdeen, Washington. RP 69. She has degrees in special education, psychology, and a master's degree in school development. *Id.* She has taught school for 25 years, including 15 years at the detention center school. *Id.*

Ms. Hayes reported that March 3, 2017, at approximately 11:00 a.m., the Appellant was in class and refused to do her work. RP 70. The Appellant stated she did not want to do her online classes and was going to drop out of school. *Id.* Ms. Hayes stated she gave the Appellant a few minutes so she could make a good decision. *Id.* However, the Appellant started writing curse words on her paper and when asked to stop she became angry. RP 70-71. Ms. Hayes told the Appellant to leave the room, but she refused. RP 71. Ms. Hayes tried a few more times to get the Appellant to leave the room; however, she continued to ignore directions. *Id.*

Ms. Hayes said she called detention staff to come to the classroom and remove the Appellant because Ms. Hayes was concerned the

Appellant would continue to get more upset. *Id.* Ms. Hayes reported the Appellant was swearing, refused to leave, and her tone of voice was angry. *Id.*

Ms. Hayes explained that the Appellant's anger continued to increase, and she became more and more agitated as people tried to get her to do what she needed to do. RP 72.

Georgia Peterson is a detention officer (DO) who was on duty on March 3, 2017 and was performing her official duties as a DO. RP 84, 91. She was informed there was an issue with the Appellant in the classroom, and she and another officer immediately went to the classroom to assess the situation. RP 86. The officers gave the Respondent numerous chances to exit the classroom on her own accord, but she refused to do so. RP 86-87.

Eventually, the officers took a hold of the Appellant, placed her in an escort position and escorted her out of the classroom and into the intake room where there is a bench and a cuff bar. RP 87. DO Peterson reported the Appellant was physically resisting and trying to get away from the officers on the way from the classroom to the intake room. RP 92-93. The Appellant was placed in a cuff onto the cuff bar. RP 87.

A short time later DO Peterson checked the camera and noted the Appellant was no longer cuffed to the bench, but was across the room. RP 88. DO Peterson and DO Joshua Dick went into the intake area. *Id.* The detention officers gave the Appellant verbal directives to return to the bench. *Id.* However, the Appellant refused and walked further away from the officers. *Id.* The DOs went to the Appellant and placed her in an escort hold. *Id.* They returned her to the bench, cuffed her behind her back, and cuffed her to the bench. *Id.*

The Appellant was kicking and resisting the officers. RP 89. So, in an effort to prevent the Appellant from harming herself or others, the officers began to apply leg restraints. RP 89. While DO Dick was applying the leg restraints, DO Peterson held the Appellant's legs by the knees so she could not kick DO Dick. *Id.* DO Peterson was approximately one-and-a-half feet from the Appellant's face. *Id.*

The Appellant looked directly at DO Peterson and spit into her eye, which then dripped down into her mouth. RP 91. DO Peterson explained the Appellant was laying back, and DO Peterson was above her. *Id.* DO Peterson said the Appellant had to spit upward to hit the DO in the face. *Id.* DO Peterson did not take it as the Appellant accidentally spit on her, and she found the spitting on her offensive. *Id.*

Once the Appellant was secured, DO Peterson was free to go wash out her eye and mouth. RP 90. DO Peterson was immediately sent to the hospital to be checked out. *Id.* She reported her blood was drawn and tested for a few different things, such as HIV, hepatitis, and herpes. *Id.*

Joshua Dick is a detention officer who was on duty on March 3, 2017 and was performing his official duties. RP 74-75. DO Dick stated he became involved when the Appellant had wiggled out of her cuff and responded to the intake room with DO Peterson. RP 77. DO Dick testified as to what happened as described above in DO Peterson's testimony. RP 77-80.

DO Dick reported the Appellant made a number of threats during this time. RP 78. The Appellant threatened self-harm and stated she wanted to kill DOs Dick and Peterson. The Appellant stated she wanted to kill herself, wanted her grandfather to die, and wanted DO Peterson to die slow and suffer. *Id.*

At trial, the Appellant admitted that she was refusing to do her work and was angry. RP 96-97. She stated the officers were speaking to her "nicely." RP 100. She agreed that she was given multiple chances to do her work or go to her room. *Id.* She also testified that she gets angry

when she's told what to do, and she slipped out of the cuff because she didn't want to be in it. *Id.* 100-101.

ARGUMENT

1. The trial court's finding of capacity was proper.

In the case at bar, the Appellant was 11 years old and only eight months from being per se capable of committing a crime at the time of the capacity hearing. The trial court considered the briefs filed by both the State and defense counsel along with the evaluation of Dr. Lexcen. RP at 26; CP 41-49, 50-60, 61-64. Based on this record, the trial court found that the Appellant had the capacity to be tried for Custodial Assault. CP 65. As presented in the procedural history, the trial court properly applied the capacity factors and the decision to find capacity is supported by clear and convincing evidence.

Pursuant to RCW 9A.040.050, children between the ages of 8 and 12 years old are presumed to be incapable of committing a crime.

This RCW in part provides:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

The statute codifies what is known as “the infancy defense.” The purpose of the infancy defense is “to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior. *State v. Ramer*, 151 Wn.2d 106, 114, 86 P.3d 132 (2004), quoting, *State v. Q.D.*, 102 Wn.2d 19, 23, 685 P.2d 557 (1984).

The presumption that a person between eight and 12 years old is incapable of committing a crime can be overcome with clear and convincing evidence that the child had sufficient capacity to understand the act charged and to know that it was wrong. *Ramer*, 151 Wn.2d at 114, citing, *State v. J.P.S.*, 135 Wn.2d 34, 37, 954 P.2d 894 (1998).

The burden of proof rests upon the State to prove capacity. *State v. T.E.H.*, 91 Wn. App. 908, 913, 960 P.2d 441 (1998). A finding of capacity will be upheld provided there is evidence from which a rational finder of fact could find capacity by clear and convincing evidence. *Id.* at 914.

Capacity determinations are to be made in light of the specific act charged. *Q.D.*, 102 Wn.2d at 26. The nature of the behavior charged is an important factor in determining capacity. *J.P.S.*, *supra*,

at 37. In order to prove capacity, it is not necessary to establish that the child knew the offending action was illegal or would be punished as a crime. *J.P.S.*, 135, Wn.2d at 37. The inquiry is whether the child had sufficient capacity to (1) understand the act and (2) know that it was wrong. *Id.*

The more intuitively wrong the conduct is, the more likely the child will be aware that the conduct is inappropriate and will result in consequences. *State v. J.F.*, 87 Wn. App. 787, 790, 943 P.2d 303 (1997). Admission of wrongfulness is a factor to consider, however, an admission of wrongfulness after the act alone will not be sufficient unless the child admits knowing it was wrong at the time they committed the act. *State v. Linares*, 75 Wn. App. 404, 416 (1994). If such evidence is available, the court may consider prior conduct by the child that was similar to the offense in question. *J.P.S.*, *supra* at 39.

J.P.S. dealt with a child accused of a sex offense, and the Court noted that “it may be more difficult to prove that a child understood a sexual offense than a crime such as stealing or setting a fire.” *Id.* at 43. The Court reasoned that “[m]ost young children are taught very young not to steal or set fires or injure other people, but

often young children have little, if any, instruction regarding prohibitions on sexual conduct.” *Id.*

The conduct at bar, spitting in another person’s face, is exactly the type of conduct that the Court expects most, if not all, children to be instructed is not acceptable. The Appellant’s understanding of this premise is evident in her responses to Dr. Lexcen. The Appellant detailed that she had been suspended for spitting on a teacher and acknowledged it was probable she would get in trouble for spitting on someone. CP 59.

J.P.S. sets forth several factors that may assist the court in determining whether a child knew the offending action was wrong, though no one factor is required or determinative;

- (1) The nature of the crime;
- (2) The child’s age and maturity;
- (3) Whether the child showed a desire for secrecy;
- (4) Whether the child admonished the victim not to tell;
- (5) Prior conduct similar to that charged;
- (6) Any consequences that attached to the conduct; and
- (7) Acknowledgment that the behavior was wrong and could lead to detention.

As stated above, the list in *J.P.S.* is simply a set of factors that could help the court in making the determination as to whether or not

the respondent has capacity to proceed with the criminal proceedings. It should be noted that the list is not exhaustive, nor does each of the factors listed have to apply to the case at hand in order for the court to find capacity.

The Appellant wants to expand this to include a requirement that the trial court find specific criminal intent. Appellant's Brief at 19. However, "[c]apacity must be found to exist separate from any mental element of the offense. Capacity is not an element of the crime; rather it is a general determination the child understood the act and its wrongfulness." *Id.* 38.

In this case, the evidence clearly shows that the Appellant knew that spitting on another person was wrong and would result in punishment. This court should not disturb the trial court's finding of capacity.

2. The Appellant did not receive ineffective assistance of counsel.

The Appellant now claims that she received ineffective assistance of counsel. However, the case at bar was not a complex case and the record shows that defense counsel provided effective assistance as required by case law.

The Washington State Supreme Court adopted a two prong

test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel’s performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689. In analyzing the first prong, the court must decide whether defense counsel’s actions constituted a tactical decision which was part of the normal process of formulating a trial strategy. *See, e.g., Tarica*, at 373, 798 P.2d 296.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

In this case, defense counsel met with the Appellant or her grandmother on at least five occasions. PRP Appendix O. She interviewed the detention officers involved in the case, DO Peterson was apparently interviewed twice. PRP Appendix P. She also retained Dr. Holttum as an expert and spoke with him “several times.” *Id.*

Through the pendency of the case, counsel filed multiple written pleading. These included: Motion for Appointment of Expert (CP 22-23), Motion for *Decker* Order (CP 28-30), Memorandum in Opposition to a Finding of Capacity (CP 61-64), Motion to Shorten Time (CP 85-86),

Witness List (CP 95-97), Motion to Continue/Allow Expert to Testify by Phone (CP 101-103), Motions to Shorten Time/Continue Fact Finding (CP 120-123), Notice of Appeal (CP 155) and Order of Indigency (CP 157-158).

Trial counsel made a number of oral motions: Motions for Release 3/9/17(CP 12), 3/10/17 (CP 20-21), 3/23/17 (CP 40), 4/6/17 (CP 66), 4/20/17 (CP 84), objection to order for blood testing (CP 40), request for a competency evaluation (CP 69), motion to continue (CP 89).

At trial, counsel cross examined all of the State's witnesses and put on a defense case, including expert testimony to establish a diminished capacity defense. CP 127-128, 130.

a. Failure to adequately investigate the case

Appellant claims trial counsel was deficient because she did not interview the school teacher prior to trial, and she did not obtain the video of the event. PRP at 35. However, as detailed above, counsel did extensive investigation and interviewed the material witnesses. The teacher was not present for the alleged assault and the Appellant cannot show that a failure to conduct this interview gives a reasonable probability that the result of the proceeding would have been different.

The same is true of the video. It is likely deficient conduct to not view the video. However, the Appellant makes no claim that the video was exculpatory in nature. As discussed below, the actions depicted do not negate that DO Peterson was acting in her official capacity nor does it support a claim of self-defense. Thus, she again fails on the second prong of *Strickland*.

b. Capacity evaluation

Appellant now claims that counsel was ineffective as it relates to the capacity evaluation. She complains that “she did not seek appointment of an independent expert.” PRP at 32. However, the Appellant offers no facts or authority that show that the evaluation done by Child Study and Treatment was improper. The evaluator was properly qualified and the opinion of Dr. Trupin, presented by the Appellant, does not disagree with these findings. PRP Appendix C.

c. That trial counsel failed to obtain expert testimony and to prepare Dr. Holttum.

These claims are simply not supported by the record. Trial counsel retained Dr. Holttum as an expert in this case. Her statement is that she spoke to him “several times” prior to trial. Simply because there may have been a different expert or additional testimony that could have been elicited does not make trial counsel deficient.

Her choice of Dr. Holttum and how to utilize his expertise is clearly a matter of trial strategy. While reasonable minds could disagree, her actions were not such that would support a finding under either prong of *Strickland*.

d. Failure to offer evidence in support of a self-defense claim

As discussed below, self-defense was not a legally available claim for the Appellant in this case. Therefore, the decision to not waste time on a bogus defense was a matter of sound trial strategy.

e. Failure to introduce detention facility policy manual

Failure to introduce the detention facility policy manual was not deficient under *Strickland*. In his declaration, Dr. Trupin quotes Section 11.11(B) of the manual: “Use of force and physical restraint is only used as a last resort. It is a means to temporarily control a youth when no other means has been successful or practical.” PRP Appendix C.

The facts of this case show that the Appellant was given a multitude of verbal requests and commands that she refused. It was only due to her refusal to comply with reasonable requests that led to any physical contact or restraint. This is consistent with the policy addressed by the Appellant. To not introduce this manual was a reasonable tactical decision.

f. Failure to recuse the judge

Whether or not to file an affidavit of prejudice against a judge is certainly a matter of trial strategy. Trial counsel practiced extensively in front of this judge and was in the best position to determine whether or not he should hear the case. Based on the overwhelming evidence against her, the Appellant cannot show that the result of the proceeding would have been different with another judge.

g. 2/24/17 Hearing without Appellant Present

This hearing occurred in another case and is not relevant in the case at bar. The Appellant cannot show that her not being present at this hearing affected the outcome of her custodial assault case.

h. 3/6/17 Letter to Prosecuting Attorney

The Appellant claims that trial counsel's letter was an inappropriate attempt to plea bargain prior to investigating the case. PRP at 34. However, the letter clearly shows that trial counsel was very aware of the pertinent issues: the seriousness of a felony conviction, her client's young age, and her mental health issues. PRP Appendix G. At the time this was written, the Appellant was still charged with two counts of Assault in the Second Degree.

There is no evidence that trial counsel would have entered such an agreement prior to completing her review of the case, and, in fact, no

guilty plea was entered. Thus, the Appellant cannot succeed on the second prong of the *Strickland* test.

i. Trial counsel’s workload

The Appellant makes a highly speculative assessment of trial counsel’s workload and availability to her clients. However, the record here clearly reflects that trial counsel dedicated a significant amount of time to meeting with her client and litigating the case. Thus, she cannot prevail under *Strickland*.

3. Detention Officer Georgia Peterson was performing her official duties at the time of the alleged assault.

The Appellant asserts that DO Peterson was not performing her official duties at the time of the alleged assault because Ms. Peterson “was far outside the scope of what a detention officer should do in the situation in this case.” Appellant’s Brief 22. However, assuming *arguendo*, that the restraint employed was improper, Ms. Peterson was still acting in her official capacity.

In *Hoffman*, the Washington State Supreme Court held that:

Whether an officer may have made an incorrect judgment regarding one or more of a suspect's myriad constitutional rights in no way determines whether that officer was killed while doing his or her job, i.e., when “performing his official duties”. If it did, then anytime an officer infringed upon a suspect's rights in any fashion whatsoever, however

technical, the officer would have to be considered as not “performing his official duties”. That is not the law.

State v. Hoffman, 116 Wash. 2d 51, 99–100, 804 P.2d 577, 602–03 (1991).

The Court went even further, acknowledging that “[a]n officer, even if effecting an arrest without probable cause, may still be engaged in “official duties”, provided the officer is not on a frolic of his or her own, and the officer is entitled to be protected by the law from assault.” *State v. Hoffman*, 116 Wash. 2d at 100; *United States v. Martinez*, 465 F.2d 79, 82 (2nd Cir.1972); *United States v. Simon*, 409 F.2d 474, 477 (7th Cir.), cert. denied, 396 U.S. 829, 90 S.Ct. 79, 24 L.Ed.2d 79 (1969); *United States v. Beyer*, 426 F.2d 773, 774 (2nd Cir.1970).

In *State v. Mierz*, the Court again affirmed “a liberal view of ‘official duties.’” *State v. Mierz*, 127 Wash.2d 460, 473 (1995). The Court specifically declined to adopt a more restrictive view of “official duties” finding that “[o]fficers would be subject to attack if their allegedly unlawful entry onto property or improper arrest forecloses admission of evidence of assaults upon them.” *State v. Mierz*, 127 Wash.2d at 473.

As detailed above, the Appellant was in custody at the time of the alleged assault against DO Peterson. The Appellant was asked to comply with requests of the teacher and she repeatedly refused to do so. The

Appellant's behavior escalated the situation to a point where the experienced teacher felt she needed assistance from the detention officers.

When the officers came to the classroom, the Appellant was again given several opportunities to comply with verbal commands. When she refused to do as she was asked, the officers had no option other than using physical restraint to obtain her compliance.

The restraint used in this case was not of the type that would render DO Peterson outside of the law's protection. Even if the Appellant could prove improper procedure, it is far from "a crime of violence" that would prevent DO Peterson from being protected from assault. *Hoffman* at 603. Instead, DO Peterson was acting in good faith to obtain the Appellant's compliance and acted well within the scope of her official duties.

4. The Appellant was not acting in self-defense.

The Appellant did not assert self-defense at trial and cannot not claim this a defense. However, as failure to assert the defense could be grounds for ineffective assistance of counsel, the State will address the claim.

The Washington Supreme Court has considered the proper test for use of force by a person in self-defense to the actions of a corrections

officer. The Court found the circumstances of individuals using force in self-defense against correctional officers as analogous to the situation of persons resisting arrest, and held a person may claim self-defense and use force to resist only when that person is in actual, imminent danger of serious injury. *State v. Bradley*, 141 Wash. 2d 731, 733, 10 P.3d 358, 358 (2000).

In *Bradley*, the Defendant was detained at the King County Jail for probation violations on felony drug charges, assault in the second degree, investigation of assault, failing to appear on a resisting arrest charge, and telephone harassment. *State v. Bradley*, 141 Wash. at 733. On the night in question, Bradley refused repeated requests to return to his cell and the corrections officer escalated the force used. *Bradley* at 734. Eventually, a sergeant used pepper spray on Bradley, even using his thumb to rub the spray into Bradley's eye. *Id.* Bradley then took a swing at the sergeant and bit him on the wrist. *Id.*

At trial, Bradley presented a vastly different account of what happened. He stated to the jury he had been handcuffed *before* Snodgrass sprayed him with the pepper spray. Bradley said the officers then jumped on him and were crushing him so he could not breathe. He also claimed a

hand covered his mouth and nose, further preventing his breathing and, in an attempt to get air, he bit someone on the wrist. *Id.* 734–35.

Bradley was ultimately convicted of Custodial Assault pursuant to RCW 9A.36.100 in regards to his biting of Snodgrass. *Id.* 735. Bradley appealed, arguing that the trial court employed an incorrect self-defense instruction. *Id.* The Court of Appeals specifically determined the trial court properly employed the “actual danger” standard for self-defense because “the dangers to law enforcement officers and the needs for security are heightened in both the arrest setting and the custodial setting.” *State v. Bradley*, 96 Wash.App. 678, 684, 980 P.2d 235 (1999).

The Supreme Court provided an analysis of self-defense in Washington noting that “It has long been the law in Washington that self-defense may be justified by apparent danger to the person claiming the benefit of the defense, as opposed to actual danger.” *Id.* at 736. However, the Court held that:

A different rule applies, however, if one seeks to justify use of force in self-defense against an arresting law enforcement officer. Numerous cases have held a person may use force to resist arrest only if the arrestee actually, as opposed to apparently, faces imminent danger of serious injury or death.

Id. at 737.

The policy rationale for this rule originated in *State v. Westlund*, 13 Wash.App. 460, 467, 536 P.2d 20, 77 A.L.R.3d 270 (1975). The *Westlund* court held:

The arrestee's right to freedom from arrest without excessive force that falls short of causing serious injury or death can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom. However, in the vast majority of cases, as illustrated by the one at bar, resistance and intervention make matters worse, not better. They create violence where none would have otherwise existed or encourage further violence, resulting in a situation of arrest by combat. Police today are sometimes required to use lethal weapons for self-protection. If there is resistance on behalf of the person lawfully arrested and others go to his aid, the situation can degenerate to the point that what should have been a simple lawful arrest leads to serious injury or death to the arrestee, the police or innocent bystanders.

Id.; *Bradley* at 737–38.

In *State v. Holeman*, 103 Wash.2d 426, 430, 693 P.2d 89 (1985) (quoting *Westlund*, 13 Wash.App. at 467, 536 P.2d 20) the Court specifically adopted the *Westlund* court's analysis: “Orderly and safe law enforcement demands that an arrestee not resist a lawful arrest ... unless the arrestee is actually about to be seriously injured or killed.” *Accord State v. Ross*, 71 Wash.App. 837, 843, 863 P.2d 102 (1993) (actual danger is standard for self-defense in assault on law enforcement officer).

While *Holeman* and *Westlund* involved lawful arrests, the Court found “orderly and safe law enforcement” to be of such importance that the rule was extended even to allegedly unlawful arrests. *State v. Valentine*, 132 Wash.2d 1, 20-21, 935 P.2d 1294 (1997).

The Defendant in *Bradley* urged the Court to not adopt the *Holeman* rule for custodial assaults because “the policy reasons behind *Holeman*—prevention of the escalation of violence—do not apply to correctional officers in jails.” *Bradley* at 740. Instead, the Defendant asked the Court to adopt “a more permissive standard for using physical force against correctional officers than the standard we have adopted for using physical force against arresting officers.” *Id.*

The Court soundly rejected this argument, finding that the “assertion that jails are inherently less volatile than the circumstances of a street arrest simply defies common knowledge and common sense.” *Id.* at 741. Instead, the *Bradley* Court found that “the use of force against correctional officers should have the same status as the use of force against arresting officers, and should generally be discouraged as a matter of public policy.” *Id.* at 743. The Court again stated the preference that “persons resort to the processes of law rather than the self-help violence of the street.” *Id.*

The Appellant “urges that the holding of *Bradley*...not be applied to a pre-trial 11-year-old in a juvenile detention facility.” Appellant’s Brief at 41. However, this issue has been decided by the court.

Just a year after *Bradley*, the Court of Appeals addressed whether or not the same rationale applies to the juvenile setting. In May 1998, Javier Garcia was an inmate at a maximum security juvenile correctional facility when he participated in a food fight and was ordered to leave the cafeteria. *State v. Garcia*, 107 Wash.App. 545, 547, 27 P.3d 1225, 1226 (2001). Garcia refused staff orders and had to be physically restrained. Several witnesses testified that Garcia was cursing a staff member, Kory Malone, and swinging his hands or fists while backing away. Garcia and Malone managed to put each other in headlocks; Malone eventually prevailed and forced Garcia to the ground with the help of other security staff members. *State v. Garcia*, 107 Wash.App. at 547.

The State charged Garcia with two counts of custodial assault. He claimed self-defense and argued that he needed only to have reasonably perceived an apparent need to prevent an offense against himself. *Id.* at 547-548. While the Court acknowledged the inherent differences between juvenile and adult prosecutions and juvenile and adult incarceration facilities, it also found that none of the cases cited by Garcia support an

argument that juvenile prisoners pose different risks to security staff than adult prisoners. *Id.* at 548.

The *Bradley* Court relied, in part, upon the fact that prisons are volatile places entirely populated by criminals. The *Garcia* court found that “[j]uvenile detention facilities are no different, and there is no policy reason to permit juvenile criminals to forcefully defend themselves absent actual, imminent danger if adult criminals cannot.” *Id.* at 548–49.

At trial, the Appellant admitted that she was refusing to do her work and was angry. RP 96-97. The officers were speaking to her “nicely.” RP 100. At no time did the Appellant state she felt that she was in any danger. There is certainly no evidence that would support a claim of “actual, imminent danger.” Thus, any claim of self-defense must fail in this case.

5. The trial court’s finding regarding the asserted diminished capacity of the Appellant was correct.

Inherent in the crime charged is that the Appellant acted with intent. “An assault is an intentional touching or striking of another person...” WPIC 35.50 Assault—Definition, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th Ed). “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a

result that constitutes a crime.” WPIC 10.01 Intent—Intentionally—
Definition, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.01 (4th Ed).

In the case at bar, there is no argument that the Appellant acted unintentionally. Her spitting was not accidental or inadvertent. The record shows that the Appellant was angry at being told to what to do and she responded by intentionally spitting in DO Peterson’s face. At trial, the Appellant asserted that her medication prevented her from forming this intent. However, the evidence does not support such a finding.

Diminished capacity may be raised as a defense when either specific intent or knowledge is an element of the crime charged. If specific intent or knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state. *State v. Thomas*, 123 Wn.App. 771, 779, 98 P.3d 1258 (2004).

In this case, Dr. Holttum testified that the Appellant’s medication appeared to have made her “rage episodes much more severe and frequent.” RP 106. Although he believed her reduced dosage was responsible for fewer outbursts, he testified “that the conclusion is still not absolutely firm.” RP 107.

When asked if it was possible that the medication had nothing to do with the Appellant's outbursts in detention, he responded:

...The trigger is different than the reason that they are so intense and irrational. As I said, Fluoxetine and all the SSRI's make explosiveness, agitation, mood swings, those sorts of things worse in about ten percent of kids. **I am not saying it's entirely responsible for it.** She had a history of oppositional behavior and PTSD symptoms extending back before the Prozac was ever started. My hypothesis is that it was making it worse, more frequent, and more intense.

RP 110-111. The doctor admitted that he could not opine that the medication caused Appellant's actions. RP 114-115.

In order for a jury to be instructed on diminished capacity, the defendant must meet the following three requirements: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001); *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *State v. Griffin*, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983); *State v. Guilliot*, 106 Wn.App. 355, 363, 22 P.3d 1266 (2001). If evidence on any element is lacking, the instruction should not be given. *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995).

An expert does not have to testify with reasonable medical certainty that the mental disorder actually caused diminished capacity at the time of the crime, but the expert must be able to testify based on reasonable medical certainty that the defendant suffers from a mental disorder that impairs the defendant's ability to form the requisite intent to commit the crime. *State v. Thomas*, 123 Wash. App. at 773.

Emotions like jealousy, fear, anger, and hatred are not considered mental disorders. *State v. Moore*, 61 Wash.2d 165, 377 P.2d 456 (1963); *State v. Edmon*, 28 Wash.App. 98, 103, 621 P.2d 1310 (1981). They have been viewed as acting upon the individual's capacity to control his behavior, causing an “irresistible impulse”, which differs from the capacity to form an intent, and has been rejected as a form of diminished capacity. *State v. Moore*, 61 Wash.2d at 172; see *State v. White*, 60 Wash.2d 551, 589–93, 374 P.2d 942 (1962).

In this case, 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. At best, the doctor’s testimony established that the Appellant may be more prone to angry outbursts, but he offered no testimony that would support a finding of diminished capacity.

The trial court correctly noted that “[t]here was no testimony from Dr. Holttum that the dosage of Fluoxetine that [K.A.B.] was taking prevented her from forming a criminal intent...” RP 123. Thus, the trial court’s finding of intent and declining to find diminished capacity was correct and should be affirmed.

6. The judge had no duty to recuse himself.

In a personal restraint petition, the Appellant argues that the trial judge “should have disqualified himself...” PRP at 25. She bases this argument on an alleged bias towards her paternal grandfather, that the judge was “de facto supervisor of the supervisor of the detention officer who was the accuser,” and an alleged interest in the case due to a pending lawsuit. PRP 25-26, 28

Generally speaking, judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. Model Code of Judicial Conduct Canon 3(D)(1) (1999). The party moving for recusal must demonstrate prejudice on the judge's part. *In re Marriage of Farr*, 87 Wash.App. 177, 188, 940 P.2d 679 (1997). Recusal is within the sound discretion of the trial court and will be reviewed for an abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash.App. 836, 840, 14 P.3d 877 (2000).

In this case, the Appellant could have filed an affidavit of prejudice against Judge Edwards pursuant to RCW 4.12.050; however, she failed to do so. She also failed to make any motion for recusal. Thus, the issue has not been preserved for appeal.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007). A limited exception is that a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. *Id.*; RAP 2.5(a)(3). This is not such a case. The right to peremptory removal of a judge without substantiating a claim of actual prejudice is not of constitutional dimension, but statutory, flowing from RCW 4.12.040. *See In re Welfare of McGee*, 36 Wash.App. 660, 661, 679 P.2d 933 (1984); *In re Marriage of Lemon*, 59 Wash.App. 568, 572, 799 P.2d 748 (1990), *rev'd* on other grounds, 118 Wash.2d 422, 823 P.2d 1100 (1992).

Further, the United States Supreme Court has identified several bases when a judge's appearance of partiality violated due process. Judges must recuse themselves to avoid such violations when they have "a direct, personal, substantial pecuniary interest" in a case. *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927). The Court has also

identified three additional grounds when due process requires recusal: financial interests falling short of what would be considered personal or direct; when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case; and criminal contempt cases or other cases where the judge determined that a defendant should be charged. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Otherwise, most matters relating to judicial disqualification do not rise to a constitutional level. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. at 876, 129 S.Ct. 2252.

However, even if a motion were timely made, there is no basis for the trial court to have recused itself.

The Appellant alleges that the court showed a bias by hearing from Mr. B. regarding pre-trial release and not hearing from her grandmother, Colleen Davison. *Id.* She also claims that the March 9, 2017 order entered allowing Mr. and Mrs. B to visit her was done to “see if [Mr. B.] could persuade her to plead guilty.” PRP at 25-26. These claims are not supported by the record.

In the case at bar, there is no evidence to support that the trial judge had a personal relationship with Mr. B. The fact that he once practiced in front of the court is not enough to support a requirement of recusal. In *State v. Leon*, the court held that “[f]requency of appearance by an attorney before a judge is not in and of itself sufficient to create an appearance of partiality such that the judge would be required to recuse himself from a matter in which that attorney’s testimony is at issue.” *State v. Leon*, 133 Wash. App. 810, 812, 138 P.3d 159, 160 (2006).

At the March 9, 2017 hearing, the court did hear from Mr. and Mrs. B. regarding potential release of the Appellant to their custody. RP 5-10. The court did not hear from Ms. Davison, because it had already been determined that, as the alleged victim of a pending second degree assault, she was not a suitable supervisor at that time. RP 10.

The second issue regarding the March 9, 2017 order is also not supported by the record. The Appellant alleges that this order was entered in some attempt to obtain a guilty plea. However, the transcript shows that the “resolution of the criminal matters” addressed by the court was in regards to the Appellant’s custody status. RP 5-10. At no time does the court speak to the notion of any kind of a plea in the cases at bar. Instead, there is a lengthy discussion regarding whether or not Mr. and Mrs. B.

could take custody of the Appellant considering their out-of-state residency. *Id.*

The Appellant claims that the trial judge's administrative role over the Juvenile Department created a conflict, but she does not provide any citation to the record that supports this. Nor does she provide any legal authority that would support a claim that this tenuous connection created a conflict. The Appellant also fails to show any facts or authority that a pending lawsuit had any role in the case at bar.

Assignments of error unsupported by citation of authority or legal argument will not be considered by the court. *Riksem v. City of Seattle*, 47 Wash. App. 506, 513, 736 P.2d 275, 279 (1987); *Hamilton v. State Farm Ins. Co.*, 83 Wash.2d 787, 523 P.2d 193 (1974). On appeal, the court will disregard any alleged facts not supported by the record. *Lemond v. Dep't of Licensing*, 143 Wn. App. 797, 807, 180 P.3d 829 (2008). As the Appellant's claims regarding bias are not supported by the record or legal authority, this court should deny relief on this basis.

CONCLUSION

The Appellant was entitled to, and received a fair trial, she is not entitled to a perfect one. In light of the overwhelming evidence against her, she cannot show that there was any error that undermines confidence in the outcome.

Any complaint she has regarding the physical restraint used by the detention officers should be addressed in a civil proceeding. We do not allow inmates, whether adults or juveniles, to physically fight officers to sort out such disagreements.

Trial counsel put in a significant amount of work on the Appellant's behalf and was effective in her representation. Likewise, the trial court acted impartially and made decisions that are supported by the record.

The verdict of the trial court should be affirmed and the relief requested by the Appellant should be denied.

DATED this 14th day of March, 2019.

Respectfully Submitted,



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