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Court of Appeals
Division III
State of Washington

No. 32553-9-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SUSAN J. LASTER

Appellant.

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

The Honorable Judge Allen C. Nielson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Susan Laster was charged with assaulting Police Chief Lewis in Republic, Washington, when she either touched or struck his shoulder in February 2013. At the time of the incident, the chief and other officers were impounding Ms. Laster's inoperable truck, which she had been living in at the time. Ms. Laster screamed, yelled and refused to cooperate with the officers who were trying to physically force her into their patrol vehicles. She was quite upset, screaming that the officers intended to kill her dog Sarah and that she had done nothing wrong, refusing to go with the male officers without a matron present. Officers testified that she kicked her legs out, striking another officer during the process, which led to a second charge of assault and a charge of resisting arrest.

The jury did not return a verdict on either of the two assault charges. The jury did find Ms. Laster guilty of resisting arrest. However, Ms. Laster's conviction should now be reversed and dismissed. There was insufficient evidence on two key elements of Ms. Laster's crime, including that she intended by her actions to prevent her arrest (as opposed to preventing the killing of her dog and impounding of her vehicle). There was also insufficient evidence that Ms. Laster was lawfully arrested for assault.

Alternatively, Ms. Laster should receive a new trial, because the jury was not properly instructed on how to make the mixed factual and legal determination of whether Ms. Laster was lawfully arrested. Because this determination was a key element of the crime, and because the inadequate instructions misled and confused the jury, and led to a conviction on insufficient evidence, the conviction should be reversed and remanded.

Alternatively, Ms. Laster remains entitled to a new trial, because officers' opinion testimony invaded the province of the jury when they testified at least 10 times that Ms. Laster had resisted arrest.

Finally, the mental health sentencing conditions were factually and legally unsupported.

B. ASSIGNMENTS OF ERROR

1. The court erred by entering a conviction for resisting arrest that was not supported by sufficient evidence.
2. The court erred by failing to instruct the jury on how to determine whether a warrantless arrest is lawful.
3. The court erred by permitting opinion testimony that invaded the province of the jury on an ultimate fact pertaining to guilt.
4. The court erred by ordering a mental health evaluation and treatment as a sentencing condition.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether there is insufficient evidence to affirm Ms. Laster's conviction for resisting arrest, because (1) there was not sufficient

evidence that the defendant intended to prevent her arrest; and/or (2) there is insufficient evidence that Ms. Laster's underlying arrest for alleged assault was lawful.

- a. There was insufficient evidence that Ms. Laster intended to resist arrest.
- b. There was insufficient evidence that Ms. Laster's underlying arrest was lawful.

Issue 2: Whether the jury should have been instructed on how to determine whether Ms. Laster's arrest was lawful.

Issue 3: Whether Ms. Laster was denied her constitutional right to a jury when the testifying officers invaded the province of the jury by testifying repeatedly that Ms. Laster resisted arrest.

Issue 4: Whether the court-ordered mental health evaluation and follow-up treatment constituted an unlawful sentencing condition.

D. STATEMENT OF THE CASE

Susan J. Laster was a 64-year-old homeless woman who had been living in her truck in the city of Republic, Washington, for a couple of years. (RP 126-27) In early 2013, her truck was inoperable for a couple months and remained parked on a city street in violation of a city ordinance. (RP 63, 69, 104, 127) All of Ms. Laster's worldly possessions were in her truck, including bedding, clothing, pictures, knick knacks, personal items, and her beloved dog Sarah. (RP 77, 98-99, 127; Exhibits D101-105)

Around 7:00 a.m. on February 7, 2013, Ms. Laster left her belongings and Sarah in her truck and went down the street to shovel snow

for a local store for five dollars. (RP 127-28) Meanwhile, Police Chief Jan Lewis, Officer Matthew Beard, and Officer Loren Culp arrived with a tow truck driver to give Ms. Laster a citation and impound her truck. (RP 62-63, 66, 104) Ms. Laster noticed the officers down the street and came toward them, screaming and appearing quite upset that they were taking her truck and dog. (RP 87, 105, 128, 130)

Chief Lewis met Ms. Laster in the street and he testified that she either struck or touched his shoulder,¹ meanwhile yelling that they could not take her truck and kill her dog. (RP 63-64, 87, 93, 115, 130, 132, 155) Chief Lewis informed Ms. Laster that she should not have done that because he was now going to arrest her. (RP 64, 87, 93) Chief Lewis grabbed one of Ms. Laster's arms and Officer Beard simultaneously grabbed her other arm to put them behind her back. (RP 75) Chief Lewis and Officer Beard placed her in handcuffs, and Ms. Laster "flailed" about, struggled, kicked², went limp, tried to get away from the officers' hold, and stretched her feet and legs so that the officers could not physically put her in any of the patrol cars. (RP 64-65, 88-90, 106, 107)

Ms. Laster called for Officer Culp to help her, but he was unable to calm her down while she continued to scream for her dog, "Sarah!" (RP 76-77, 91; Exhibit P-1) Ms. Laster refused to walk or cooperate with any

¹ The jury was unable to reach a verdict on whether Ms. Laster assaulted Chief Lewis.

² The jury was also hung as to whether Ms. Laster ever kicked/assaulted the officer.

of the officers' requests to get in a patrol vehicle, meanwhile screaming hysterically and yelling at the officers that they intended to kill her dog, that they were taking her truck and belongings, and refusing to go anywhere with the male officers without a matron [female guard]. (RP 80-81, 90; Exhibit P-1) Ms. Laster repeatedly cried out that she wanted her dog Sarah, that she wanted a matron, that she had not done anything wrong, that she would not go anywhere with the officers without a matron, and that the officers were "not going to kill my dog!" (Exhibit P-1) Ms. Laster then sat or knelt on the ground and still refused to let officers forcibly place her in any of the three patrol vehicles. (RP 65, 111; Exhibit P-1)

After approximately 10 minutes of the officers trying to calm Ms. Laster down and reassure her that they would not kill her dog and that her belongings in the truck would be returned, a van arrived to transport Ms. Laster to jail. (RP 65, 66, 81-82, 90-91, 93, 112) She was charged with two counts of third-degree assault of the officers and resisting arrest.³ (CP 33-35)

Ms. Laster was tried on the above counts in January 2014, after which the jury was hung on both of the assault charges (CP 118-19).

³ The court dismissed an unlawful weapons charge for insufficient evidence after the State's case-in-chief (RP 122)

In addition to the testimony above, the officers testified at least ten times in various contexts that Ms. Laster was “resisting” them during the incident, which will be addressed further below. (RP 64, 83, 88-90, 106)

Ms. Laster then testified that she never hit or kicked anyone, that she was shocked at being arrested and that she refused to cooperate because she did not trust the officers, did not know what they intended to do with her since she was not well-liked in town, and was afraid they would kill her dog. (RP 132, 133-34, 138-39) Ms. Laster reiterated that she was extremely upset and concerned for her dog, especially given the sub-zero temperatures and her fear that the officers would destroy the animal. (RP 133-34, 136)

In closing, the State acknowledged that “Ms. Laster was acting with a particularized intent. She was going to stop them from doing anything to her truck or to her dog.” (RP 209)

During deliberations, the jury submitted the following question to the court:

When does an arrest start and when does it end[?] When the cuffs go on? When they are in the car? Or when she’s in jail?

(RP 218)

Defense counsel noted that this was both a factual and legal issue and suggested that the jury be instructed on the definition of arrest. (RP 219) The court refused counsel’s request, at which point the parties

agreed to instruct the jury to refer back to their existing instructions. (RP 219-20) The jury then submitted the following additional question:

If an officer arrests a person, is he able to rescind the charge and arrest[?]

(RP 221) The jury was again referred back to their existing instructions.

(RP 222-23)⁴

The jury found Ms. Laster guilty of only the resisting arrest charge.

(RP 229) After an agreed stay of six months, she was sentenced. (CP

173-74) Over objection, Ms. Laster was ordered to complete a mental health evaluation and any recommended treatment. (*Id.*; RP 247-48) Ms. Laster had already completed a mental health evaluation while this case was pending in June 2013, and psychologist Dr. Trevor Travers found that Ms. Laster was competent to stand trial, that she did not suffer from a mental disease or defect, and that there was no basis for her to be evaluated further by a designated mental health professional. (CP 23-28)

This appeal timely followed. (CP 175)

⁴ The docket sheet does not include any documents filed regarding jury questions or the court's response thereto, so these documents are not included in the clerk's papers. But the questions and responses were read aloud in open court and are included in the verbatim report of proceedings.

E. ARGUMENT

Issue 1: Whether there is insufficient evidence to affirm Ms. Laster's conviction for resisting arrest, because (1) there was not sufficient evidence that the defendant intended to prevent her arrest; and/or (2) there is insufficient evidence that Ms. Laster's underlying arrest for alleged assault was lawful.

There was insufficient evidence that Ms. Laster ever intended to prevent her arrest. Instead, the evidence showed (as acknowledged by the State, RP 209), that Ms. Laster intended throughout the ordeal to stop officers from doing anything with her truck and dog. Ms. Laster also feared the male officers and refused to go with them without a matron female guard. (Exhibit P-1). Ms. Laster's "particularized intent," as the State called it (RP 209), does not establish that Ms. Laster intended to prevent her arrest, so her conviction must be reversed. Furthermore, the evidence is insufficient that Ms. Laster's underlying arrest for allegedly assaulting Chief Lewis was lawful. The jury was presented no evidence regarding the lawfulness of Ms. Laster's arrest, and it was unable to reach a verdict as to whether any assault had actually occurred based on its own weighing of the conflicting evidence. Given the jury's indecision on the assault charge and lack of factual proof that the arrest was otherwise lawful, the conviction should be reversed for insufficient evidence.

On a challenge to the sufficiency of the evidence, this Court reviews the record to determine whether the evidence is sufficient for a

reasonable person to find every element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)). Sufficient means more than “a mere scintilla of evidence” to “rise to the level of sufficiency in order to support a conviction.” *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). “Instead, there must be substantial evidence, i.e., that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved.” *Id.* at 102-03.

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the State, could have found the elements of the charged crime beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). “Credibility

determinations are for the trier of fact and are not subject to review.”

State v. Mann, 157 Wn. App. 428, 439, 237 P.3d 966 (2010).

“A person is guilty of resisting arrest if he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her.” RCW 9A.76.040(1); 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 120.05 (3d Ed)⁵; CP 110. “A person acts with intent or intentionally when [she] acts with the objective or purpose to accomplish a result which constitutes a crime.” *See e.g. State v. Ware*, 111 Wn. App. 738, 745, 46 P.3d 280 (2002) (citing RCW 9A.08.010(1)(a)). A person may resist arrest, among other ways, when she flees or attempts to flee from an arresting officer with the intent to prevent or attempt to prevent her lawful arrest. *Id.*

a. There was insufficient evidence that Ms. Laster intended to resist arrest.

First, the defendant must intend to prevent or attempt to prevent her arrest to be convicted of resisting arrest. This particularized intent is an important element of the crime of resisting arrest, especially because a person’s intended actions could constitute, for example, an assault on a police officer performing official duties that is “unrelated to making an arrest.” *See State v. Cuellar*, 164 Wn. App. 701, 703, 262 P.3d 1251 (2001) (rejecting notion that resisting arrest is a lesser included offense of

⁵ Hereinafter short-cited as “WPIC” from practice edition, unless otherwise noted.

third-degree assault, explaining that the intent for the former is to resist arrest and the intent for the latter is to assault the officer under circumstances that may be unrelated to making the arrest).

Here, the officers testified that Ms. Laster essentially began displaying hostility before she was ever subject to any arrest. Chief Lewis claimed that Ms. Laster approached the officers, screaming and yelling from down the street, and that she “struck” him in the shoulder prior to any need for arresting her when she learned that officers intended to impound her vehicle where Sarah was located. The jury did not return a verdict on the assault charge against Chief Lewis. Regardless, for purposes here, even when viewing this evidence in a light most favorable to the State, Ms. Laster’s intent was clear: she intended to disrupt the officers from taking her dog and truck and to express her frustration, anger and fear over the impound process while doing so. A review of the video shows that she also intended to wait for a female guard to arrive to ensure her own protection from the male officers. (Exhibit P-1)

Ms. Laster, the officers, and the prosecutor all acknowledged that the defendant’s difficult behavior began prior to any basis for arrest, continued throughout the arrest, and did not end until after she was in the jail van. Throughout the ordeal, Ms. Laster screamed about her dog, her truck, a matron, and that she had done nothing wrong; Ms. Laster was

desperately afraid of what might happen to Sarah, her belongings and herself. There was insufficient evidence (other than inadmissible opinion testimony by the officers that the defendant had “resisted arrest,” see Issue 3 below) from which a jury could infer that Ms. Laster intended to attempt to prevent her own arrest by her actions. The intent Ms. Laster showed related to stopping officers from doing anything with her dog and truck and to protecting herself by asking for a matron; Ms. Laster’s intended actions were “unrelated to making an arrest.” *See Cuellar*, 164 Wn. App. at 703.

b. There was insufficient evidence that Ms. Laster’s underlying arrest was lawful.

The State was next required to prove that Ms. Laster’s underlying arrest for either striking or touching Chief Lewis in the shoulder was lawful in order to convict Ms. Laster of resisting arrest. CP 111; RCW 9A.76.040; WPIC 120.06 (Comment: “The statute requires the prosecutor to prove a lawful arrest.”) *See also City of Seattle v. Cadigan*, 55 Wn. App. 30, 37, 776 P.2d 727, *review denied*, 113 Wn.2d 1025 (1989) (“An individual who is illegally arrested by an officer may resist arrest...”). Moreover, because the lawfulness of the arrest is an element of the crime, it must ultimately be found by the jury beyond a reasonable doubt, rather than by the court, for example, as it would when sitting in a hearing to suppress evidence that was allegedly obtained pursuant to an unlawful

arrest. *See e.g. State v. Eggleston*, 129 Wn. App. 418, 438, 118 P.3d 959 (as amended 9/30/2005), *aff'd*, 164 Wn.2d 61 (2008) (quoting *United State v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) (“[T]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.”))

“A citizen has the right to resist an unlawful arrest so long as that resistance is reasonable in light of all the circumstance.” *State v. Crider*, 72 Wn. App. 815, 820, 866 P.2d 75 (1994) (approving law set forth in Crider’s trial, and disapproving the use of force to resist an unlawful arrest). If the arrest is unlawful, the defendant’s actions may be reasonable in resisting arrest so long as unlawful force is not used. *See e.g. State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 1986), superseded by statute on other grounds as stated in *State v. Ortega*, 177 Wn.2d 116, 297 P.3d 57 (2013). *And see State v. Calvin*, ___ Wn. App. ___, 316 P.3d 496, 502 (2013) (as amended on reconsideration 10/22/2013) (disapproving the use of “force” to resist arrest and commenting that the Court in *State v. Hornaday*, *supra*, “came to the sensible conclusion that a defendant, already detained, is merely ‘recalcitrant’ and does not commit resisting arrest by refusing to voluntarily enter a police car.”) *And see State v. Valentine*, 132 Wn.2d 1, 9 n.5, 935 P.2d 1295 (1997) (noting the holding

in *Hornaday* that “reasonable resistance to an unlawful arrest is justified,” but clarifying that the use of force to resist an unlawful arrest which threatens only loss of freedom is not reasonable).

In *State v. Hornaday, supra*, evidence that the defendant “resisted arrest” and had to be “forcibly placed in the back of the police car” merely showed that the defendant was “recalcitrant” and was insufficient to affirm where the underlying arrest was unlawful; the evidence was “insufficient to establish that the defendant acted unreasonably in resisting arrest.” *Id.* at 131. The Court emphasized that “there is no evidence before us that the defendant used force to resist, but only that he was recalcitrant.” *Id.* Therefore, the defendant did not act unreasonably by resisting the unlawful arrest. *Id.*

It should be noted that the analysis regarding the lawfulness of the arrest is very different for the crime of resisting arrest under RCW 9A.76.040 (for which Ms. Laster was convicted) and the crime of assault while resisting arrest under RCW 9A.36.031(1) (for which the jury was unable to reach a decision in this case). *See e.g.*, WPIC 120.06 (Commenting that the crime of resisting arrest will have a different analysis than for an assault while resisting, in which case a person cannot use force to resist even if the arrest was unlawful); *and see State v. Valentine*, 132 Wn. 2d at 44-45 (J. Sanders, Dissenting) (noting that the

analyses on lawfulness of the arrest are unique depending on whether the person was convicted of being uncooperative in resisting arrest verses assaulting an officer while resisting.) As to the latter, there is a long line of cases clarifying that a person may not use force (assault) to resist an arrest, even if the arrest is unlawful.⁶

In other words, when the issue is whether the person used force when resisting arrest (i.e., assault), the lawfulness of the arrest is not a statutory element and only arises in the context of a self-defense claim if the arrestee was in actual and imminent danger of serious injury from an officer's use of excessive force. WPIC 120.06 (Comment); WPIC 17.02.01; *Calvin*, ___ Wn. App. ___, 316 P.3d at 502-03. But when, as here, the issue is whether the person resisted arrest under RCW 9A.76.040 by being uncooperative, but not necessarily forceful, the lawfulness of the arrest remains a key element of the crime that the State must prove and the jury must find. *Id.*

Ms. Laster acknowledges that the issue in this case is not whether she used reasonable force to resist arrest. Indeed, such a theory was never

⁶ See e.g., *Valentine*, 132 Wn.2d at 21 (abandoning common law rule and holding that reasonable and proportional force in response to an unlawful arrest is only permitted when acting in an attempt to resist an attempt to inflict injury upon the arrestee); *City of Seattle v. Cadigan*, 55 Wn. App. at 37 (quoting *State v. Goree*, 36 Wn. App. 205, 209, 673 P.2d 194 (1983) (“The use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable.”); *State v. Kolesnik*, 146 Wn. App. 790, 810, 192 P.3d 937 (2008) (“An individual may not use force against an officer making an unlawful arrest if he or she faces only a loss of freedom.”); *Mann*, 157 Wn. App. at 437-38 (same).

argued to the jury, Ms. Laster instead testified that she never used force or assaulted the officers in any way, and there was no evidence that Ms. Laster was in actual and imminent danger of serious injury from an officer's use of excessive force. And, ultimately, the jury was hung on the assault charge. In other words, the lawfulness of the arrest was of no moment for the assault allegation, which is not at issue in this case since the jury did not convict on that charge.

Instead, the pertinent issue in this case is whether the State proved the key elements of resisting arrest under RCW 9A.76.040, including that Ms. Laster's underlying arrest was lawful. Ultimately, Ms. Laster could lawfully behave in an uncooperative, recalcitrant manner in response to an unlawful arrest, so long as she did not resort to forceful behavior (which the jury did not find she committed). The lawfulness of the arrest was a key element to be proven in this case, yet it was not supported by sufficient evidence.

Here, the jury was offered no evidence that Ms. Laster had been lawfully arrested. Additionally, the jury was not able to determine that Ms. Laster had ever struck Chief Lewis in an assaultive manner to otherwise justify her arrest as having been lawfully made. At least some juror[s] were unconvinced that Ms. Laster had struck Chief Lewis in an assaultive manner, as opposed to merely touching him when she

approached in her emotional upheaval. Ultimately, there was insufficient evidence that Ms. Laster was lawfully arrested for assault, which is highlighted by the jury's inability to return a verdict on the assault charge.

Issue 2: Whether the jury should have been instructed on how to determine whether Ms. Laster's arrest was lawful.

The jury did not find that Ms. Laster assaulted either officer. It only found that she had resisted arrested under RCW 9A.76.040. Under the resisting statute, there must be proof beyond a reasonable doubt that the underlying arrest for assaulting the officer in this case was lawful. But, as set forth above, there was no evidence that Ms. Laster's underlying arrest for third-degree assault was actually lawful, so the conviction should be reversed. Alternatively, if the jury was expected to make this determination on its own from the other evidence presented– that the underlying arrest was lawful – the jury should have been instructed on how to apply the facts to the law and determine when an arrest is lawful.

Failure to so instruct the jury was misleading, confusing, legally inadequate and led to an infirm conviction that was unsupported by the evidence. The incomplete instructions were either sufficiently challenged at RP 219 (in response to a question posed by the jury, defense counsel suggested “a supplemental instruction to define ‘arrest’”); the inadequate instructions constituted manifest constitutional error; or the inadequate instructions denied Ms. Laster her right to effective assistance of counsel.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions that violate an accused person's constitutional rights may constitute manifest error and be raised for the first time on appeal. RAP 2.5(a)(3). An error is "manifest" if it "had practical and identifiable consequences in the trial." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 Led.2d 368 (1970); U.S. Const. Amend. XIV, art. I, §3.

The jury is entitled to regard the court's to-convict instruction as a yardstick against which to measure guilt or innocence. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). A to-convict instruction violates due process if it permits conviction absent proof of each element of a charged offense. *Id.* at 7. Improper instructions affecting a constitutional right require reversal unless the state can demonstrate beyond a reasonable doubt that it did not contribute to the verdict. *State v. Montgomery*, 163 Wn.2d 577, 600, 183 P.3d 267 (2008). Erroneous instructions are only harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002).

Jury instructions must make the relevant legal standard manifestly apparent to the average juror and must not be misleading or confusing. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). The instructions, when read as a whole, “must properly inform the trier of fact on the law.” *Valentine*, 75 Wn. App. at 616. “The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict, so far as it is competent for the court to assist them.” *Goree*, 36 Wn. App. at 207.

To demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An appellate court will not find defense counsel ineffective based upon decisions concerning the defense theory or trial tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Ms. Laster was charged with resisting arrest – that is, intentionally preventing a peace officer from lawfully arresting her. RCW

9A.76.040(1) (emphasis added). The lawfulness or validity of an arrest is generally a determination for the court, not the jury, to make as a matter of law after resolving disputed facts. *State v. Hoffman*, 116 Wn.2d 51, 97, 804 P.2d 577 (1991). However, the lawfulness of an arrest “becomes a jury question if the issue is injected into the trial by reason of the charging language of the information, as, for example, when a defendant is charged with resisting ‘lawful’ apprehension.” *Id.* at 98. *Accord State v. Cox*, 532 N.W.2d 384, 386-87 (N.D. 1995) (“when the lawfulness of the police conduct has a bearing on the ultimate question of the defendant’s guilt or innocence, the jury must be permitted to resolve any factual disputes concerning the lawfulness of the police conduct.”) Particularly where there is a factual dispute as to whether the arrest was lawful, the jury must be instructed on what constitutes a lawful arrest and what a defendant’s rights are in resisting an unlawful arrest. *See City of Tacoma v. Nekeferoff*, 10 Wn. App. 101, 104-05, 516 P.2d 1048 (1973).

Here, the jury was instructed on the definition of resisting arrest as set forth in WPIC 120.05, and on the elements of resisting arrest as set forth in WPIC 120.06. However, the comments to WPIC 120.06 remind practitioners and courts that the prosecutor must prove the underlying arrest was lawful, and the comments further warn that additional instruction to educate the jury on determining the lawfulness of an arrest

may be necessary, citing *State v. Simmons*, 35 Wn. App. 421, 667 P.2d 133 (1983), and *Hornaday*, *infra*. WPIC 120.06 (Comment: “The court should fashion similar instructions on an individual basis, reflecting the facts and applicable law in each case. For a discussion of applicable law, see *State v. Hornaday*, 105 Wn.2d 120...”)

Again, *State v. Hornaday* maintained that a conviction for resisting arrest requires that the underlying arrest be proven to be lawful. 105 Wn.2d 120. Without a lawful arrest, the defendant’s actions may be reasonable in resisting arrest, so long as unlawful force is not used. *Id.* A defendant’s recalcitrance, including refusing to be forcibly placed into a patrol car, may be reasonable and justified where the arrest is unlawful. *Id.* Accordingly, the lawfulness of the arrest is paramount in cases where force was not used to resist arrest. And, here, the jury never found that Ms. Laster exhibited any force on the officers, so the lawfulness of Ms. Laster’s arrest was key.

The jury was not instructed on how to determine whether Ms. Laster’s underlying arrest was lawful.⁷ The jury asked two questions to the court pertaining to the legality of Ms. Laster’s arrest, both of which suggested that it was confused, if not misled, on the pertinent law in this

⁷ The validity of an arrest is determined by objective facts and circumstances rather than the arresting officer’s subjective belief as to whether the arrest is lawful. *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992). “Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer’s knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed.” *Id.*

case and its related duties. The lawfulness of an arrest is not something the average juror would know how to determine, since it is both a factual and legal inquiry. This is the precise type of case where an instruction defining the lawfulness of an arrest is necessary and legally supported. *See e.g. City of Tacoma v. Nekeferoff*, 10 Wn. App. at 104-05; *Hornaday*, 105 Wn.2d 120; and WPIC 120.06 (Comment).

In response to the jury's questions, defense counsel did suggest that the court instruct the jury on the definition of a lawful arrest, but the court refused. (RP 219) The parties then agreed to refer the jury back to its existing instructions. Given counsel's suggested instruction, it would appear that this issue was sufficiently preserved. To any extent the objection was insufficient, the challenge can nonetheless be maintained in this appeal as manifest constitutional error or ineffective assistance.

The jury did not find that Ms. Laster exhibited any unlawful force on the officers. Given its inability to convict on the assault charges, one of which was the underlying basis for the arrest, the instructional gap in this case had practical and identifiable consequences in this trial. The jury could very well have found that, not only did Ms. Laster not use force and commit assault, but she never struck Chief Lewis in any manner that would provide the necessary probable cause for her arrest. In other words, the instructional error was manifest, and it affected Ms. Laster's

constitutional rights when it led to a conviction absent proof of all of the key elements.

Alternatively, counsel should have either asked for an instruction defining the lawfulness of the arrest in the initial jury instructions, or he should not have agreed with the court's answer to the jury's questions to simply refer back to their existing instructions. There was no tactical advantage in failing to request an instruction defining arrest, which would have held the State to its burden of proving all elements. Counsel was not advancing some other conflicting tactical technique by otherwise agreeing to the instructions given; counsel noted in his motion for arrest of judgment that a conviction for resisting arrest was improper without proof of the lawfulness of then underlying arrest. CP 124. An instruction to the jury prior to or during its deliberations would have better advanced this legal argument.

The factual deficiencies are especially problematic in this case, since the jury did not unanimously believe that Ms. Laster assaulted Chief Lewis – that is, that she had ever touched or struck the police chief with unlawful force that was harmful or offensive. CP 108. Accordingly, for a simple resisting arrest conviction, it was especially crucial that the jury find, after proper instruction, that the underlying arrest was lawful. Furthermore, given the jury's split verdicts and the jury's questions to the

courts, the State cannot establish beyond a reasonable doubt that the instructional error in this case did not contribute to the verdict and was harmless. The jury was not given the proper tools to make its mixed legal and factual determination prior to convicting Ms. Laster of resisting arrest. The matter should be reversed and remanded for a new trial.

Issue 3: Whether Ms. Laster was denied her constitutional right to a jury when the testifying officers invaded the province of the jury by testifying repeatedly that Ms. Laster resisted arrest.

Additional manifest constitutional error occurred that warrants reversal of Ms. Laster's conviction. Ms. Laster was convicted of resisting arrest after the officers repeatedly testified that she had resisted arrest. This improper opinion testimony invaded the fact-finding province of the jury by testifying directly to the ultimate guilt determination.

Furthermore, the improper opinion testimony was not harmless.

Ultimate guilt determinations are questions for the jury. *State v. Welch*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9) and (11). Neither a lay nor expert witness can testify that a defendant is guilty. *State v. We*, 138 Wn. App. 716, 725, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (citing *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)). "Improper opinion testimony violates a defendant's right to a jury trial and invades the fact-finding province of the jury." *We*, 138 Wn. App. at 730 (J. Schultheis

dissenting). “Since testimony concerning an opinion on guilt violates a constitutional right, it generally may be raised for the first time on appeal.” *Id.* (internal citations omitted).

Whether a defendant seeks review of this error as one of constitutional magnitude, or as one gleaned from ineffective assistance of counsel, the defendant is required to show two traits common to each: (1) that inadmissible opinion testimony occurred and (2) that the outcome of the trial would have been different if the improper opinions had been excluded. *We*, 138 Wn. App. at 722-23 (citing *State v. Warren*, 134 Wn. App. 44, 57, 138 P.3d 1081 (2006) (manifest constitutional error); and *State v. Hakimi*, 124 Wn. App. 15, 22, 98 P.3d 809 (2004) (ineffective assistance of counsel)). “[A]n explicit or nearly explicit’ opinion on the defendant’s guilt...can constitute manifest error.” *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (internal quotations omitted).

A witness’s opinion regarding the defendant’s guilt “is irrelevant and invades the defendant’s right to a jury trial and invades the jury’s exclusive fact-finding province.” *State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). “To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider ‘the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other

evidence before the trier of fact.” *We*, 138 Wn. App. at 723 (quoting *City of Seattle v. Heatley*, 70 Wash.App. 573, 579, 854 P.2d 658 (1993)).

Opinions on guilt are improper whether made directly or by inference.” *State v. Quaale*, ___ Wn.2d ___ 340 P.3d 213, 217 (12/18/2014) (internal cites omitted). Opinion testimony from law enforcement officers is especially problematic because it is more likely to influence the jury. *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); *King*, 167 Wn.2d at 331 (internal quotations omitted) (“A law enforcement officer’s opinion testimony may be especially prejudicial because the officer’s testimony often carries a special aura of reliability.”)

In *State v. Quaale*, where the defendant was charged with driving under the influence, the trooper testified that he had no doubt the defendant was “impaired,” which “parroted the legal standard contained in the jury instruction definition for ‘under the influence.’” *Quaale*, 340 P.3d at 218. “[T]he trooper’s opinion went to the core issue and the only disputed element: whether Quaale drove while under the influence of alcohol.” *Id.* at 217. In other words, because the “trooper’s inadmissible testimony went to the ultimate factual issue – the core issue of Quaale’s impairment to drive—the testimony amounted to an improper opinion on guilt.” *Id.* at 218. “This improper opinion on guilt violated Mr. Quaale’s

constitutional right to have a fact critical to his guilt determined by the jury...[,]” which resulted in reversal and retrial. *Id.*

Here, to convict Ms. Laster of resisting arrest, the jury was required to find that Ms. Laster intentionally prevented or attempted to prevent a peace officer from lawfully arresting her. RCW 9A.76.040(1); CP 110. The officers testified directly to the ultimate factual issue, stating repeatedly that Ms. Laster had resisted arrest, the very matter the jury was asked to determine. They testified as follows:

[Chief Lewis:] Off. Beard and I started tussling with her to get handcuffs on her. She resisted the whole time. (RP 64)

[Prosecutor, on reason for calling for the jail van:] Is that normal procedure that you follow when someone is being resistant?

[Chief Lewis:] Yes. (RP 83)

[Off. Beard:] And then when we were heading back towards the patrol cars, she was resisting even more, sticking her feet out in front of her and making us kind of push her on the ice...” (RP 88) ...Chief Lewis told her to stop resisting and to stop kicking... (RP 89)

[Off. Beard on not getting Ms. Laster in the patrol car:] We weren't able to get her in there with her resisting... And with three officers and her level of resistance we could not get her in the-- Off. Culp's truck, either... [not] with her resistance, no. (RP 90)

[Off. Beard:] Chief Lewis called Corrections to have them bring the jail van down, 'cause it's just a larger area, and was easier to get somebody that's attempting to resist into. (RP 90)

[Off. Culp:] I, you know, tried to talk to her, tried to calm her down, tried to get her to comply -- you know, told her not to resists [sic]. And -- because she was resisting, you know, quite -- quite a bit. (RP 106)

(Emphases added.)

Like in *Quaale, supra*, where the officer testified that the defendant was impaired, the ultimate guilt determination in that case, the officers here testified at least 10 times to the ultimate guilt determination that the jury was to make – that Ms. Laster had resisted, was resistant, kept resisting or was told not to resist. This testimony constituted improper opinion testimony that invaded the province of the jury and denied Ms. Laster her right to a jury and fair trial. This constitutional error was made especially problematic since the improper testimony was provided by officers, authority figures who carried a special aura of reliability with the jury. The constitutional error requires reversal and retrial in this case.

The improper opinion testimony in this case was also not harmless. An improper opinion on guilt is “harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error.” *Quaale*, 340 P.3d at 218. The State cannot meet this burden. The evidence in this case was not so overwhelming that any reasonable jury would have reached the same conclusion. The jury clearly struggled to determine whether there was sufficient evidence to convict when it sent its two questions to the court regarding the elements of the crime and how to determine whether Ms. Laster had resisted arrest.

The evidence was insufficient to support the conviction; it was, thus, not so overwhelming that the improper opinion testimony could be deemed harmless. In particular, there was insufficient evidence of Ms. Laster's intent – that she intended by her actions to prevent the officers from arresting her, as opposed to intending to save her dog, protect her belongings, and protect herself from the male officers she feared.

There was also insufficient evidence that Ms. Laster's underlying arrest was actually lawful, another key element of resisting arrest. CP 111. The jury was never provided factual evidence that the assault arrest was lawful, and the jury was never instructed on how to make this determination itself from the other facts put before the jury. The jury was unable to reach a verdict on the underlying alleged assault that resulted in Ms. Laster's arrest. With proper instructions, it is entirely possible that the jury would not have found that Ms. Laster's underlying arrest for assault was lawful either. And without the improper opinion testimony, there is an even greater possibility that the jury would not have found Ms. Laster guilty of resisting arrest. A reasonable jury could have reached a different conclusion in this case. The improper opinion testimony was not harmless.

Issue 4: Whether the court-ordered mental health evaluation and follow-up treatment constituted an unlawful sentencing condition.

The sentencing condition that Ms. Laster complete a mental health evaluation and any recommended treatment was not supported by the record and requisite findings and should now be stricken. (RP 247-49; CP 173-74) Whether the trial court exceeded its statutory authority in imposing the sentencing condition is subject to *de novo* review. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A trial court may order a mental health status evaluation and mental health treatment as a sentencing condition if appropriate pursuant to RCW 9.94B.080.

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080 (emphases added). *See also State v. Brooks*, 142 Wn. App. 842, 849-852, 176 P.3d 549 (2008); *State v. Stark*, ___ Wn. App. ___, 334 P.3d 1196 (2014) (State conceding error); *State v. Jones*, 118 Wn. App. 199, 202, 76 P.3d 258 (2003) (holding, court may only order

mental health treatment as a condition of community custody “based on a presentence report and any applicable mental status evaluation, that the offender suffers from a mental illness which influenced the crime.”)

Here, the trial court did not obtain or consider any presentencing report prior to imposing the mental health sentencing conditions. The court also did not make a record as to whether it had considered the mental health evaluation that was filed earlier in the case by Dr. Travers. That report contained important information, including that Ms. Laster was diagnosed as not suffering from any mental disease or defect and that there was no basis for Ms. Laster to be evaluated further by a designated mental health professional.

Furthermore, the trial court could only order a mental health status report and treatment where it found that reasonable grounds existed to believe that Ms. Laster was a mentally ill person and that this condition is likely to have influenced her offense. But the court did not make the statutorily mandated findings that Ms. Laster was a “mentally ill person” as defined by RCW 71.24.025 or that this alleged mental illness influenced Ms. Laster’s crime of resisting arrest. At most, the court commented that Ms. Laster’s behavior was “completely reckless and out of control,” that she had “the grips of profound anger” and that she “let [herself] go in a rather willful way.” (RP 247-48) But these comments

are not an adequate substitute for a finding that Ms. Laster was a mentally ill person and that this condition is likely to have influenced her offense.

Because the court did not follow the specific statutory procedures, it lacked authority to order the mental health evaluation and subsequent treatment. This Court should remand this case with an order to strike the offending sentencing condition. *See State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (setting forth this remedy).

F. **CONCLUSION**

Based on the foregoing arguments, Ms. Laster respectfully requests that this Court reverse and dismiss her conviction for insufficient evidence, or remand for a new trial with adequate jury instructions and that is free of improper opinion testimony. At a minimum, Ms. Laster requests that this Court remand to strike the improper sentencing condition.

Respectfully submitted this 2nd day of February, 2015.

/s/ Kristina M. Nichols

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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 32553-9-III
vs.)
)
SUSAN J. LASTER) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 2, 2015, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served Emma Paulsen at ejpaulsen@wapa-sep.wa.gov and CNELSON@wapa-sep.wa.gov by e-mail.

Dated this 2nd day of February, 2015.

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