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Court of Appeals  
Division III  
State of Washington

NO. 325539

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

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STATE OF WASHINGTON,

RESPONDENT,

V.

SUSAN JAYNE LASTER

APPELLANT

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BRIEF OF RESPONDENT

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## **I. APPELLANT'S 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.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Whether there is sufficient evidence to affirm Ms. Laster's conviction for resisting arrest when there is sufficient evidence that the defendant intended to prevent her arrest and there is sufficient evidence that the underlying arrest was lawful.
2. Whether it was necessary that the jury be instructed on how to determine whether the defendant's arrest was lawful.
3. Whether the testifying officers' comments about the defendant's actions constituted impermissible testimony regarding an ultimate fact pertaining to guilt.
4. Whether the court-ordered mental health evaluation and follow-up treatment constituted an unlawful sentencing condition.

### **III. STATEMENT OF THE CASE**

#### **1. FACTS PRESENTED AT TRIAL**

The Defendant was tried by jury on January 6-7, 2014. RP 58, 178. Witnesses called by the State were Republic Chief of Police Jan Lewis (RP 61-86, 154-161), Republic Police Officer Matthew Beard (RP 86-103), and Republic Police Officer Loren Culp (RP103-120). Witnesses called by the Defense were Defendant Susan Laster (RP 126-154). The facts presented at trial are as follows.

In February of 2013, Defendant Susan Laster owned a pickup truck and trailer that were parked in front of Anderson's Grocery Store on Clark Street in Republic, Washington. RP 63. Ms. Laster's vehicle had been parked there for at least a couple of months. RP 104, 126, 134. Ms. Laster had received a parking ticket around January or February of 2013. RP 69. Republic Police Chief Jan Lewis had also contacted Ms. Laster five or six different times regarding the need to move her vehicle. RP 66. Multiple people had offered to help Ms. Laster move her vehicle. RP 135. Chief Lewis even offered to fill Ms. Laster's vehicle with gas, using city funds, so that she could move it. RP 67. Ms. Laster refused the offer. RP 67.

On February 7, 2013, Chief Lewis and Republic Police Officers Matthew Beard and Loren Culp contacted Ms. Laster regarding towing her vehicle. RP 62-63. The reason Chief Lewis brought two officers for backup was because he had "intel" that Ms. Laster had a firearm and because Ms. Laster had previously made comments to Chief Lewis that worried him. RP 60, 70-71. Chief Lewis had information from a pawn shop that Ms. Laster had pawned some firearms but likely still had a pistol. RP 70. A tow truck driver was also present, in order to move Ms. Laster's vehicle. RP 62-63.

When the Officers approached Ms. Laster, they attempted to explain to her why they were there. RP 63. Ms. Laster began to yell at Chief Lewis, screaming that he was going to kill her dog. RP 63-64, 87. Chief Lewis tried to explain that they were not going to kill her dog, and that they would retrieve the dog for Ms. Laster as soon as her vehicle was loaded. RP 87. Ms. Laster then struck Chief Lewis on the shoulder. RP 63-64, 87, 93.

After Ms. Laster struck Chief Lewis, he advised her that he was going to arrest her for assaulting a police officer. RP 64, 87. While Chief Lewis and Officer Beard attempted to get the handcuffs on Ms. Laster, a "tussle" ensued. RP 64. Ms. Laster

was screaming a lot and “struggling quite profusely.” RP 94, 105. Ms. Laster kicked Officer Beard about three times in the right shin, using a stomping motion. RP 64, 87-88, 94-95. Ms. Laster flailed around, “trying to do what she could not to be put into handcuffs.” RP 88-89. Ms. Laster flailed her arms, screamed and hollered, and kicked her legs, attempting to get away. RP 106.

Even after the cuffs were on Ms. Laster, she fought with the Officers and was argumentative. RP 76. Ms. Laster refused to do anything the Officers asked her to do. RP 81. At that time, Officer Culp came across the street to assist Chief Lewis and Officer Beard. RP 64. Officer Culp was wearing a body camera that recorded what was going on. RP 105. The Officers began to escort Ms. Laster toward their patrol cars. RP 64. As they attempted to take Ms. Laster to the patrol cars, Ms. Laster was not compliant with the Officers and was “totally uncooperative” with everything they were trying to do. RP 64-65. At various times, the Officers had to carry and drag Ms. Laster just to get her across the street to the vehicle. RP 64-65.

Once the Officers had moved Ms. Laster over to the patrol vehicle, they were still unable to get her inside of it because she fought against getting into the vehicle. RP 65. The Officers tried

talking to Ms. Laster and tried reasoning with her, but she refused to get into the vehicle. RP 81. The Officers first tried getting Ms. Laster into a patrol car, but when that was unsuccessful, tried to get her into a larger pickup. RP 82. That attempt was also unsuccessful due to Ms. Laster kicking and catching the doors with her feet so that she could not be put into the vehicle. RP 82, 116, 119-20. Even with three officers attempting to place Ms. Laster into the vehicle, they were unable to get her into the truck. RP 90. Eventually the Officers had to call in the jail van to respond and transport Ms. Laster to jail. RP 65. The attempts to get Ms. Laster into the police vehicles lasted at least ten minutes. RP 83.

Later, when Officers Culp and Beard inventoried Ms. Laster's vehicle, a firearm was located. RP 65, 95. Officer Beard located a loaded .22 pistol within easy arm's reach of the driver's seat. RP 97, 113-14.

## 2. PROCEDURAL FACTS

On February 7, 2013, the Ms. Laster was charged by information with two counts of Assault in the Third Degree, contrary to RCW 9A.36.031, and one count of Resisting Arrest, contrary to RCW 9A.76.040, in Ferry County Superior Court for the altercation

involving Republic Police Officers Jan Lewis and Matthew Beard, and for attempting to prevent a lawful arrest. CP 1-2. On May 7, 2013, the Court ordered that Ms. Laster be evaluated for competency at Eastern State Hospital. CP 10-14. On July 5, 2013, Eastern State issued a report finding Ms. Laster competent to stand trial. CP 23-28. The report also noted that Ms. Laster had Axis II Personality Disorder with Borderline and Schizotypal Traits. CP 24.

The Defendant was tried by jury on January 6-7, 2014. RP 58, 178. The jury found the Defendant guilty of Resisting Arrest. CP 117-119. The jury, however, was unable to come to a unanimous verdict on the two Assault 3 charges. CP 117-119. A sentencing hearing was held on June 9, 2014, at which Ms. Laster was sentenced to 90 days in jail with 75 days of that sentence suspended on the condition that Ms. Laster comply with the terms of her probation. CP 173-74. Ms. Laster was given credit for the days in jail she had already served. CP 173. Ms. Laster was also assessed \$700 in fines and various legal financial obligations. CP 173. A condition of her suspended sentence and probation was that she obtain a mental health evaluation from a state licensed mental health provider, file a copy of the evaluation within 30 days, begin any recommended treatment or education within 60 days, and file proof

of timely enrollment and completion. CP 173-74.

#### IV. ARGUMENT

1. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO ESTABLISH A FINDING OF GUILT FOR THE CRIME OF RESISTING ARREST.

##### A. Standard of Review on Appeal

The standard of review requires an appellate court to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash.2d 333, 339, 851 P.2d 654, 657 (1993); *State v. Luther*, 157 Wash. 2d 63, 77-78, 134 P.3d 205 (2006) [citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Aver*, 109 Wn.2d 103, 310-311, 745 P.2d 479 (1987)]. “[I]n determining whether the necessary quantum of evidence exists, it is unnecessary for the reviewing court to be satisfied of guilt beyond a reasonable doubt. It is only necessary for it [the reviewing court] to be satisfied that there is substantial evidence to support the State’s case or the particular element in question. *State v. Green*, 94 Wash.2d at 220 [citing *State v. Green*, 91 Wn.2d 431, 588 P.2d 1370 (1979); *State v. Randecker*, 79 Wn.2d 512, 487 P.2d 1295 (1971)]; *State v.*

*Bencivenga*, 137 Wn.2d 703, 706, 974 P.2d 832 (1999).

“When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When raising an insufficiency claim, the appellant “admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it.” *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735, 740 (2003) [citing *State v. Salinas*, 119 Wn.2d at 201]; *State v. Alvarez*, 105 Wn.App. 215, 222, 19 P.3d 485 (Div. III, 2001).

In addition, circumstantial evidence is considered no less reliable than direct evidence. *State v. Price*, 127 Wn.App. 193, 202, 110 P.3d 1171, 1175 (Div. II, 2005), [citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)]. “Furthermore, the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d at 638. An appellate court also defers to the trier of fact regarding the credibility of witnesses and any conflicting testimony, and credibility determinations are not subject to review. *State v. Mann*, 157 Wn.App. 428, 438-39, P.3d 966 (2010) [citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)].

The appellant argues that, even considering the evidence in the light most favorable to the State, the State failed to prove that Ms. Laster *intended* to prevent her arrest and thus, the Appellant argues, the State has failed to satisfy constitutional demands. Respondent disagrees, as there was ample evidence of intent from which a jury could conclude that Ms. Laster intended to prevent her arrest.

**B. There was Sufficient Evidence that Ms. Laster Intended to Prevent Her Arrest.**

“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); WPIC 120.05; CP 110. “Intent” is an element of the crime of resisting arrest that must be proven beyond a reasonable doubt. WPIC 120.06; CP 111. “A person acts with intent or intentionally when acting with an objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); WPIC 10.01; CP 109.

Appellant argues, somewhat confusingly, that because Ms. Laster displayed hostility *before* she was placed under arrest, she could not also have intended to resist *after* the officer placed her under arrest, citing *State v. Cuellar* in support. 164 Wn.App. 701,

262 P.3d 1251 (2001). This assertion is not supported by either fact or law. While Appellant is correct that *Cuellar* stands for the notion that resisting arrest is not a lesser included offense of assault 3, it does not stand for the proposition that a defendant who intends to be disorderly, assaultive, or aggressive *before* an arrest cannot also intend to resist the arrest. *Id.* Ms. Laster may have initially begun yelling at the officers because she feared for her dog. And, after she was informed that she was under arrest, she may *still* have been afraid for her dog. That fear may have caused or influenced her decision to resist the officers as they arrested her, but it was a decision nonetheless. Ms. Laster made a conscious decision *not* to cooperate with the officers, as she made very clear at trial: "They were intent on arresting me...And I wasn't going to cooperate with them." RP 133.

The physical actions which constituted the resisting were intentional. Ms. Laster's actions of using her body so as to prevent the officers from at first being able to handcuff her, and then being able to get her into the patrol car, were entirely volitional. Ms. Laster stated that she was not going to cooperate, and her actions backed up that statement. The ultimate goal may have been to get free from the officers so as to ensure the safety of her dog, but that

does not mean that she did not intentionally resist arrest as a means to that end.

Appellant's argument essentially posits that any crime done in furtherance of a non-criminal goal cannot be considered criminal because the defendant had a different, underlying intent.

Unfortunately for the Appellant, this is not how the law works with respect to this issue. The law does not require that the Defendant *intend* to commit a crime, it only requires that the defendant intended to do the action which constituted the crime. *State v. Calvin*, 176 Wn.App. 1, 11, 316 P.3d 494 (2013).

In *State v. Calvin*, defendant was convicted of Assault 3 and Resisting Arrest after Calvin, who was irate and had been told to leave, confronted a park ranger, yelled at him, and reached toward him while standing five feet away. *Id.* at 8-9. After Calvin failed to retreat when commanded to do so, the ranger sprayed him with pepper spray but Calvin continued to come towards him aggressively. *Id.* at 9. Calvin struggled with the officer for about a minute before the ranger was able to handcuff him and effectuate the arrest. *Id.* On appeal, Calvin claimed that the facts were insufficient to show that he had the requisite intent to place the ranger in bodily fear [an element of the assault] because he had

testified that he did not intend to cause the officer fear, but rather was putting his hands up with the intent of blocking the light from the ranger's flashlight. *Id.* The Court of Appeals held that there was sufficient evidence presented for the trier of fact to find that the defendant intended to cause fear of bodily injury because at trial Calvin acknowledged he was angry and yelled at the ranger, and the ranger testified that Calvin had come toward him aggressively and with his fists up, even after he had been pepper sprayed. *Id.* 9-10.

Here, although Ms. Laster testified that she did not want or intend to commit a *crime*, sufficient evidence was presented from which the jury could find that she intended to do the action which constituted the crime. Her actions showed that she intended to prevent the officers from putting the handcuffs on her. Her actions showed that she intended to prevent the officers from putting her in the police vehicle to transport her to the jail. Her actions showed that she intended to *resist* them. She admitted that she knew they were trying to arrest her and it was her conscious decision not to cooperate. RP 138. Individuals quite often take actions that they may not know constitute criminal offenses; however, that ignorance does not absolve them of criminal liability so long as the action

itself was intended. Ignorance of the law is not a defense. *State v. Soper*, 135 Wn.App. 89, 101, 143 P.3d 335 (2006).

Appellant also seems to argue that because Ms. Laster feared the officers, she could not have the intent to resist arrest. The assertion that Ms. Laster feared the officers is somewhat at odds with her defiant attitude both during the event (Exhibit P-1) and at trial, where she stated “They couldn’t make me...even if they tried,” “They were intent on arresting me. I had no idea what they were going to do with my dog. And they planned it. I knew that. And I wasn’t going to cooperate with them,” and “Throw me around? They couldn’t throw me around....I wouldn’t let them”. RP 133, 138. In addition to being factually improbable, Appellant’s argument is not supported by the law. Fear in general, and fear of an officer in specific, does not grant license to disobey an officer or to break the law. Most individuals (probably all but the most hardened criminals) likely experience some kind of fear or apprehension when they are being arrested by law enforcement. By its very nature as a coercive process, it is an unsettling and likely unpleasant experience. However, in order for that fear to justify Ms. Laster’s subsequent actions, it would have to be a reasonable fear that she or her dog were in danger of some kind of

serious or imminent bodily harm, which is not substantiated by the record. Testimony was presented that the officers had offered her help on several occasions, and Appellant herself admitted that the officers did not call her names, and did not throw her around. RP 66-67, 138. Furthermore, Exhibit P1 shows that the Officers used respectful language, tried to calm Ms. Laster, and repeatedly reassured her that her dog would not be harmed. Appellant offers no facts or evidence to demonstrate that it was reasonable for her fear of the officers to be anything beyond the ordinary apprehension one feels at being taken into custody against her wishes.

Appellant does not explicitly make a necessity argument, but almost seems to suggest that Ms. Laster's actions were excusable because she believed that the only way to protect her dog was by escaping the officers. Aside from being factually unsupported (as explained above, there was no evidence presented to suggest or indicate that the officers threatened, or posed a threat to, Appellant's dog, and evidence was presented that the officers had assured her that she would be able to see her dog again and that the dog would not be harmed), again, the law does not support such an assertion. The necessity defense requires that there must

be no reasonable legal alternative to breaking the law. *State v. White*, 137 Wn.App. 227, 230-31, 152 P.3d 364 (2007). Here, clearly, there was a reasonable alternative: comply with the officers and let the officers take care of the dog as they promised to do.

The testimony and exhibits presented at trial provide sufficient evidence for a rational trier of fact to find that Ms. Laster intended to resist arrest, and Ms. Laster's testimony about her fear for her dog does not establish the absence of such facts.

**C. There was Sufficient Evidence that Ms. Laster's Arrest was Lawful.**

In order to prove that the crime of resisting arrest, the State must prove that the arrest was lawful. RCW 9A.76.040; WPIC 120.06; CP 111. A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. RCW 10.31.100. "Probable cause" exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. *State v. Terrovona*, 105, Wn.2d 632, 643, 716 P.2d 295 (1986). The absence of probable cause to believe

that a person committed a particular crime for which a person was arrested does not create an invalid arrest, if, at the time of the arrest, the police had sufficient information to support an arrest of the person on a different charge. *Seattle v. Cadigan*, 55 Wn.App. 30, 36, 776 P.2d 727 (1989). An acquittal on a charge for which a defendant is arrested does not mean that the officer did not have probable cause to arrest the defendant. *Id.*; see also *State v. Hornaday*, 105 Wn.2d 120, 126, 713 P.2d 71 (1986) (An officer need only have probable cause to arrest without a warrant and is not required to have knowledge of evidence sufficient to establish guilt beyond a reasonable doubt. An officer is not required to be absolutely certain that a person is committing a crime prior to that person's arrest).

In *Seattle v. Cadigan*, the defendant was charged with disorderly conduct, assault, and resisting arrest. *Id.* at 32. The City's evidence suggested that the defendant was arrested for obstructing a police officer, but that offense was never charged. *Id.* The disorderly conduct charge was dismissed prior to trial, and at trial, the jury returned a "not guilty" verdict for the assault and a "guilty verdict" for the resisting arrest charge. *Id.* at 32, 34. On appeal, defendant argued that because the City failed to prove that

he was lawfully arrested for obstructing a police officer, the resisting arrest charge could not stand. *Id.* at 36. The Court held that because the facts presented at trial established that there was probable cause for the disorderly conduct, even though that charge was dismissed prior to trial, the arrest was lawful. *Id.* at 36-37. Because the arrest was lawful, Cadigan had no right to resist. *Id.* The court further held that the City's evidence was sufficient to support the resisting charge where City had presented evidence that Cadigan yelled at the officer, hit the officer in the mouth, and thrashed around after the officers restrained him [despite the fact that Cadigan was acquitted of the assault]. *Id.* at 37-38.

The fact that the jury was unable to reach a decision on whether the Ms. Laster assaulted Chief Lewis is irrelevant to whether the arrest was lawful. In the vast majority of cases that proceed to trial, the defendant has, at some point, been arrested. Clearly, not all cases that go to trial result in a finding of guilt. A hung jury, or even an acquittal, does not however automatically render the arrest unlawful. In order to be lawful, the arresting officer need only have probable cause that a crime has been committed. Here, Chief Lewis and Officer Beard testified that Ms. Laster struck Chief Lewis on the shoulder, an act which the

officers, with their years of experience, considered an assault. Regardless of the fact that the jury could not agree on whether Ms. Laster committed the assault, when the acts giving rise to the assault charge occurred, Chief Lewis had probable cause that a crime had occurred, and thus the arrest of Ms. Laster was lawful.

Additionally, the facts presented at trial would also suggest that the officers also had probable cause to arrest Ms. Laster for obstructing a law enforcement officer: they were there to impound her vehicle and, as she stated at trial, she was not going to let them take her vehicle. Her actions of screaming at the officers and striking Chief Lewis hindered, delayed, and obstructed him in the discharge of his duties.

Because the Officers had probable cause to arrest Ms. Laster—regardless of whether she was ultimately charged or convicted of those offenses—the arrest was lawful. Sufficient evidence was presented at trial for the jury to find that element beyond a reasonable doubt.

**D. Ms. Laster had No Right to Forcibly Resist Even an Unlawful Arrest.**

The Court in *State v. Mann* held that “a person who is being unlawfully arrested has a right to use *reasonable* and *proportional*

force to resist injury from an officer during an arrest, but the person may not do so when faced only with a loss of freedom.” 157 Wn.App. 428, 438, 237 P.3d 966 (2010) [citing *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997)].

In *Mann*, the defendant was a passenger in a vehicle that was stopped for an infraction. *Id.* at 436. Before the vehicle came to a complete stop, Mann jumped out and started running, despite the officer’s order to stop. *Id.* at 433. Officers followed Mann’s footprints in the snow to someone’s backyard. *Id.* Mann crawled out from behind a piece of plywood and shot at the officer. *Id.* at 434. Eventually, Mann was arrested. *Id.* At trial, Mann admitted to running away because he had an outstanding warrant, but denied shooting at the officer. *Id.* at 434-35. The jury convicted Mann for first degree assault, unlawful possession of a firearm, possession of methamphetamine, and a dangerous weapon violation. *Id.* at 435. Upon appeal, Mann claimed that evidence of him shooting at the officer should have been suppressed at trial because the officer had unlawfully seized him by ordering him to stop as he ran from the traffic stop. *Id.* at 436.

The Court disagreed with Mann, holding that although the seizure was unlawful, Mann had no right to use force because he

was faced only with the loss of freedom. *Id.* at 438. The Court cited and relied upon *Valentine*, which stated that:

[I]f a person being unlawfully arrested may always resist such an arrest with force, [the Court] would be inviting anarchy...we...take note of the fact that in the often heated confrontation between a police officer and an arrestee, the lawfulness of the arrest may be debatable. To endorse resistance by persons who are being arrested by an officer of the law, based simply on the arrested person's belief that the arrest is unlawful, is to encourage violence that could, and most likely would, result in harm to the arresting officer, the Defendant, or both. In [the Court's opinion] the better place to address the lawfulness of an arrest that does not pose harm to the arrested person is in court and not on the street."

*State v. Valentine*, 132 Wn.2d at 21-22. See also *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").

Here the testimony indicates that, prior to the arrest, the Officers had done nothing other than to try to explain to Ms. Laster the reason for the impoundment. There is no testimony that the officers engaged in any activity that would pose harm to Ms. Laster. It is only after Ms. Laster struck Chief Lewis on the shoulder that the officers expressed an intent to arrest Ms. Laster. At this point all testimony is unanimous that Ms. Laster was deliberately uncooperative and did everything she could to avoid being

handcuffed and placed in the patrol vehicle for transport. In addition, testimony was presented by two officers, Chief Lewis and Officer Beard, that Ms. Laster kicked Officer Beard. Although the jury was hung on whether Appellant assaulted Officer Beard, competent evidence was presented at trial that Ms. Laster used force to resist the Officers.

As detailed above, Respondent believes the arrest of Ms. Laster was lawful. However, even assuming *arguendo* that the arrest was unlawful, Ms. Laster had no right to exercise physical force against the officers in resisting the arrest because the arrest did not pose any harm to Ms. Laster other than the minimal unease or discomfort associated with a routine arrest.

## 2. THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY AS TO LAWFULNESS.

Appellant asserts that the trial court erred in failing to instruct the jury on the definition of "lawful arrest". Respondent disagrees for a number of reasons.

### A. Standard of Review on Appeal

First, Appellant misstates the applicable standard of review. While it is true that jury instructions that *are* given to the jury and are

challenged for alleged errors in law are reviewed *de novo* in the context of the other instructions as a whole, the trial court's decision as to whether or not to give an instruction in the first place is reviewed for abuse of discretion. *State v. Hathaway*, 161 Wn.App. 634, 647, 649, 251 P.3d 253 (2011). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, Appellant is not challenging an instruction that was given, but rather, the trial court's failure to give an instruction, and therefore the appropriate standard of review is abuse of discretion, and Appellant must show that the trial court was manifestly unreasonable in failing to give the "lawful arrest" definition instruction.

**B. Appellant Did Not Request the "Lawful Arrest" Instruction.**

The failure to give a particular instruction is not error when no request was made for such an instruction. *State v. Hoffman*, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991). Trial counsel for Appellant *never* proposed or requested a jury instruction on the definition of

“lawful arrest”; this is substantiated by the report of the proceedings for the Jury Instruction Conference. RP 166-173.

Appellant argues that trial counsel’s mere suggestion of an additional instruction in response to the jury questions constituted a sufficient “request” for this instruction. However, this assertion is not substantiated by the record, as neither question concerned the “lawfulness” of the arrest, but rather the *timing* of the arrest. RP 218-223. Question 1 asked “when does an arrest start and when does it end. [sic] When the cuffs go on? When they are in the car? Or when she’s in jail?”. RP 218. In Question 1, there is no mention of the lawfulness of the arrest. Similarly, Question 2 asked “If an officer arrests a person is he able to rescind the charge and arrest. [sic]”. RP 221. Again, no mention of the lawfulness or unlawfulness of the arrest.

Appellant is correct in that trial counsel for the Ms. Laster did *suggest a possible* response to Question 1; however, he did not request it, and he specifically stated that he had no objection when the trial court stated that it was simply going to refer the jury back to the court’s instructions. RP 219-20.

THE COURT: ...My practice would be to refer them to the instructions of the court. But—

MS. PAULSEN: That would be my request.

THE COURT: Okay...And Mr. Morgan?

MR. MORGAN: Time of arrest, that's a combination factual and legal question your Honor. And the instructions really don't say – or give them any information as to when an arrest occurs. I think it's probably – they'll have to rely upon the testimony.

THE COURT: Well, I think that's right. I think in effect they've got to go back and listen – or remember what was said about that.

MR. MORGAN: Yeah, I would assume somebody must have taken down a note when Chief Lewis was testifying that said "As soon as she had touched me I said, 'Now you're under arrest for third degree assault' – assault on a—

THE COURT: Sure.

MR. MORGAN: To me that's the time of arrest. –we can't tell them that; they've got to figure it out.

THE COURT: So, counsel, write back and just say "Please refer to the instructions of the court," or--?

MR. MORGAN: It's not in the instructions, though.

THE COURT: Well, that's true. That's – there's no instruction on that point. But--.

MR. MORGAN: We can always do a supplemental instruction to define "arrest."

THE COURT: No, I don't want to go down that road—

MR. MORGAN: Okay.

THE COURT: I think it would – would – what – be an unfair – comment on the evidence, I think, for one thing. But what

should, then, I write back to them—

MS. PAULSEN: I think they have the court's instructions and they have all the evidence presented. They have to rely on those two things.

THE COURT: "Please refer to the – the court's instructions and the evidence presented," or—

MR. MORGAN: I don't have objection—

THE COURT: Pretty generic.

MR. MORGAN: Yeah.

THE COURT: Yeah.

MR. MORGAN: I don't have an objection to that.

THE COURT: Okay...

As is evidenced from the transcript of proceedings at trial, defense counsel never asked for an instruction defining "lawful arrest." At best, defense counsel *suggested* an instruction defining "arrest," but this was for the purpose of establishing the time of the arrest, not the lawfulness of the arrest. In any event, defense counsel stated that he did not object when the court decided not to further define "arrest."

In response to Question 2, trial counsel for the defendant specifically *asked* the court *not* to elaborate on the jury instructions:

MR. MORGAN: ...[I]t's really a question that's outside the realm of what was presented in the courtroom, outside the

realm of the facts and the law.”

THE COURT: Well, I guess – write back and saying, “Please refer to the instructions you’ve been given – given you by the court” in effect says that they go back and look at the instructions, which do not address that issue.

MR. MORGAN: I don’t think we can do anything else. It’s just – a really weird question.

THE COURT: Yeah. Well, --

MS. PAULSEN: I’m fine with that—

THE COURT: --Ms. Paulsen? Okay. Let’s me-- Okay. All right. Let’s see--. All right. Well, counsel, “Please refer to the instructions given you by the court.” So,--

MR. MORGAN: I think that’s all we can do with that question, your honor.

THE COURT: All right. There we go.

Because trial counsel for Ms. Laster never requested a “lawful arrest” instruction, either in its proposed jury instructions, or in response to the jury’s questions, Respondent contends that the court’s failure to give such an instruction was not error.

### **C. Specific “Lawful Arrest” Instruction was Not Required.**

Second, the trial court did not err in failing to give a specific “lawful arrest” definition instruction because the “to-convict” instruction properly instructed the jury that lawful arrest is an element

of the offense; no other instruction was required.

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Instructions are sufficient if, when read as a whole, they adequately follow the law. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). A trial court may refuse to give a proposed instruction that is not an accurate statement of the law. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

It is *not* error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory. *Id.* Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory. *State v. Brown*, 132 Wn.2d at 611-12. Trial courts should exercise sound discretion to determine the appropriateness of acceding to requests that words of common understanding be specifically defined. *Id.* at 612. And when a jury has begun deliberating, a trial court also has discretion to determine whether to give further instructions upon request. *Id.* A trial court's

failure to define an ordinary term used in an instruction defining an element of a crime does not constitute reversible error. *Id.* at 613, see also *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011) (Failure to give a definitional instruction is not failure to instruct on an essential element and is not constitutional error).

In *State v. Brown*, a murder case, appellant asserted that the trial court committed reversible error and denied him due process by not instructing the jury on the definitions of the phrases “in the course of,” “in furtherance of,” and “in immediate flight,” which were elements of the aggravating factors. 132 Wn.2d at 611. During deliberations, the jury submitted had questions asking for the “legal” definitions of those terms. *Id.* The trial court refused the request and referred the jury back to the original instructions. *Id.*

On appeal, the Supreme Court held that these were self-explanatory words and expressions of ordinary understanding and that it was not necessary that they be further defined, as distinguished from words that have a separate statutory meaning:

“For example, upon request, the trial court must give instructions on the statutory meaning of “intent”. But jury instructions need not define such terms as “common scheme or plan,” “single act,” “leniency,” or “mitigating circumstances”... The trial court in this case properly exercised its discretion by not giving Appellant’s proposed instructions defining the phrases “in the course of,” “in

furtherance of,” or “in immediate flight from.”

*Id.* at 612. The Supreme Court also disagreed with Appellant’s contention that the court’s refusal to define those terms violated his due process rights because they were “essential elements.” The court held that even if the phrases were essential elements of the crimes charged, failure to give a definitional instruction is *not* failure to instruct on an essential element and that no reversal was required because the defense was not prevented from arguing its theory of the case. *Id.* at 612-13.

Here, as in *Brown*, the trial court’s instructions were a proper statement of the law, did not mislead the jury, and allowed the defendant to present her theory of the case. The defendant’s theory of the case was *not* that the arrest was unlawful, but that Ms. Laster’s acts could not be considered resisting arrest, because the arrest was already over:

“Now, the two officers have come up the street, the chief says “you struck me; you’re under arrest for third degree assault.” That’s before the video starts. The arrest has occurred. How has she attempted to prevent an arrest? How has she prevented an arrest? She’s already been arrested.”

RP 207.

Defense counsel never claimed that the arrest was unlawful and never requested an instruction on “unlawful arrest”. Therefore,

the court's failure to give such an instruction in no way prevented the Defense from arguing its theory of the case and was not constitutional error.

Appellant also argues that the jury *must* be instructed as to what constitutes a lawful arrest and what a defendant's rights are in resisting an unlawful arrest, citing *City of Tacoma v. Nekeferoff*, 10 Wn.App. 101, 104-05, 516 P.2d 1048 (1973). However, the holding in *Nekeferoff* was limited to facts of that case and does not apply to Ms. Laster. In *Nekeferoff*, defendants were brothers who were charged with disturbing the peace and resisting arrest after being involved in a "somewhat violent struggle" with police officers on the streets of Tacoma late at night. At trial, defendants claimed that the initial arrest [for being drunk in public] was not legal and consequently, they had the right to resist arrest by use of force. The trial court instructed the jury regarding the definitions of the uncharged offenses of being intoxicated in public and walking in the roadway, and it was to these instructions that the Nekeferoffs objected, claiming that it was error for the court to instruct the jury about crimes for which the defendants were not presently charged. The appellate court held that it was not error for the trial court to do so, as the defendants had raised the defense of illegal arrest and the

instructions regarding the original offenses were “inform the jury upon which grounds a lawful arrest might be made.” *Id.* at 105.

Here, the jury was not given any instructions regarding uncharged offenses, and therefore the holding in *Nekeferoff* is inapposite.

Respondent does not believe Appellant has grounds to appeal the failure to give an “unlawful arrest” instruction given that the Appellant never requested one or objected to the court not giving one. However, even if the objection had been properly preserved, the record does not demonstrate that the jury was confused about the lawfulness of the arrest. Here, as in the *Brown* case, the to-convict instruction properly instructed the jury as to each element of the offense, including the requirement of a lawful arrest. CP 111. As in *Brown*, the Defense was not prevented from arguing its theory of the case. As in *Brown*, Appellant’s claim is without merit.

**D. Performance by Defense Counsel Did Not Constitute Ineffective Assistance.**

Finally, with respect to the jury instruction issue, Appellant argues ineffective assistance of counsel because trial counsel did not request an “unlawful arrest” instruction.

In order to demonstrate ineffective assistance of counsel, the

defendant must show that counsel's performance was deficient in that it fell below the objective standard of reasonableness. *In re Pers, Restraint of Cross*, 180 Wn.2d 664, 693, 327 P.3d 660 (2014), [citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]. In order for the Court to find ineffective assistance of counsel based on trial counsel's failure to request a jury instruction, the Court must find that the defendant was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced her defense. *Id.* at 718. In order to show that the defendant suffered prejudice, defendant must establish that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). A strong presumption exists that counsel's performance was reasonable, and to rebut this presumption, defendant bears the burden of establishing the absence of *any conceivable legitimate tactic* explaining counsel's performance. *In re Pers. Restraint of Cross*, 180 Wn.2d at 694, emphasis added.

Here, Appellant has not shown the absence of any conceivable legitimate tactical explaining counsel's performance. In

examining defense counsel's closing argument, in which the lawfulness of the arrest is never mentioned, it appears that trial counsel made a tactical decision to focus on whether Ms. Laster actually resisted the arrest, rather than on whether the arrest was lawful. Although it may not have been the most effective or successful strategy, the Court is to consider the reasonableness at the time of trial, not with the benefit of hindsight. *Id.* at 694.

Likewise, Appellant has not shown that the outcome would have been different. Appellant claims that because the jury did not convict Ms. Laster of the assault on Chief Lewis, the jury could have found that she never struck Chief Lewis in any manner that would provide the probable cause for the arrest, thus rendering the arrest unlawful. However, the simple fact that the jury was hung on the issue of the assault on Chief Lewis indicates that at least some jurors believed that Ms. Laster had struck him. Because at least some jurors believed that she struck him sufficient for a finding of assault, this means that presumably those same jurors would believe that there was probable cause for the arrest. Therefore, even if the court had instructed the jury as to the definition of a lawful arrest, the jury was never going to agree that there wasn't probable cause for the arrest. In addition, the "confusion of the jury" that Appellant relies

upon so heavily concerned the timing of the arrest only, not the lawfulness of the arrest, as is discussed above. Finally, the absence of the defining instruction did not prejudice the defense in presenting its case; the jury was still instructed as to all the elements of the crime and the defense was free to argue its theory of the case.

Because the Appellant has not shown that trial counsel's performance was deficient and that the defense was prejudiced, there was no ineffective assistance of counsel.

### 3. THE TESTIMONY OF THE OFFICERS DID NOT UNCONSTITUTIONALLY INVADE THE PROVINCE OF THE JURY.

Appellant argues, for the first time on appeal, that the testimony of the Officers invaded the province of the jury by testifying that Ms. Laster "resisted" arrest. However, the Officers' testimony was not improper opinion testimony. Under Washington case law, the fact that the testimony concerned an issue of fact for the jury to decide does not automatically render it improper. Here, the testimony was not improper because it was not given as an opinion, it was not a direct comment on Ms. Laster's guilt, it was helpful to the jury, and was based on inferences from the evidence.

"[N]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant." *City of Seattle v. Heatley*, 70 Wn.App.

573, 577, 854 P.2d 658 (1993), citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). ER 704 provides that testimony in the form of an opinion or inferences otherwise admissible is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. *Id.* at 578-79. Whether testimony constitutes an impermissible opinion on guilt or an impermissible opinion embracing an “ultimate issue” generally depends on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact. *Id.* at 579. The prohibition against testimony of the witness’s opinion as to a criminal defendant’s guilt is not violated by testimony that does not constitute a *direct* comment on the defendant’s guilt, is otherwise helpful to the jury, and is based on inferences from the evidence. *Id.* at 578. The fact that a witness’s opinion as to an ultimate issue supports a conclusion that the defendant is guilty does not render the opinion inadmissible as a direct opinion of guilt. *Id.* at 579. It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material. *Id.*

In *Heatley*, defendant was convicted of DWI. *Id.* at 577. At

trial, the arresting officer had testified:

“Based on my, his physical appearance and my observations of that and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the alcoholic drink that he’d been, [sic] he could not drive a motor vehicle in a safe manner. At that time, I did place Mr. Heatley under arrest for DWI.”

*Id.* at 576. On appeal, Heatley contended that the trial court erred in admitting the officer’s testimony that he was “obviously intoxicated,” claiming that it was an improper opinion on what was the only disputed element [intoxication]. *Id.* at 577.

The Court of Appeals disagreed with Heatley because: (1) the officer’s testimony took no direct opinion on Heatley’s guilt or the credibility of a witness, (2) the testimony was otherwise admissible, (3) the officer’s opinion regarding the defendant’s level of intoxication was based on his observations and training was helpful to the jury, not confusing, and did not encompass excessively technical matters, and (4) the officer’s opinion was based upon his testimony about defendant’s physical condition and performance on field sobriety tests. *Id.* at 589.

**A. The Officers Did Not Opine as to Guilt or Credibility.**

Improper opinion testimony usually involves an assertion

pertaining directly to the guilt of the defendant (such as testimony that the police tracking dog followed defendant's "fresh guilt scent") or which improperly comments on the guilt or credibility of the defendant (such as testimony that a child victim was not lying about sexual abuse). *Id.* at 577-78. Testimony that is not a comment of the defendant's guilt or the veracity of a witness is not improper. *Id.* at 578. Therefore, even though the officer's opinion in *Heatley* did encompass ultimate factual issues, it was not improper because it did not comment on the defendant's guilt or credibility.

At Ms. Laster's trial, as in the *Heatley* trial, at no point did any of the testifying officers directly state that the defendant was guilty of the crime for which she was being tried. Every single comment from the record cited by Appellant as "improper" occurred in the context of the Officers attempting to describe the events leading up to and after Ms. Laster's arrest; the testimony was never offered as an opinion, but rather as a narrative of events. Furthermore, at no point did any of the officers claim or state that Ms. Laster was lying about what had occurred or otherwise comment in her credibility. As such, their comments were not improper.

**B. The Officers' Testimony was Otherwise Admissible and Helpful to the Jury.**

Even if the Court were to find that the Officers' testimony regarding the events indirectly offered some kind of opinion via the verbiage they used, those opinions were not improper because they were admissible, helpful, and not confusing to the jury.

In *Heatley*, the Court found that the officer's testimony was helpful in that it supplemented the fact finder's general knowledge and that it did not improperly influence the jury because it was not framed in "conclusory terms that merely parroted the relevant legal standard." *Id.* at 580-81. The Court distinguished *Heatley* from other cases where the officer testified identical to the legal standard, because the officer's opinion as to defendant's intoxication in *Heatley* did not encompass excessively technical matters and the relevant concepts were described in words having their ordinary meaning, and thus there was no basis for concluding that the similarity between the officer's testimony and the legal standards contained in the jury instructions was confusing to the trier of fact. *Id.* at 581.

The testimony of Chief Lewis and Officers Beard and Culp was helpful for the jury. In order to determine whether Ms. Laster

had committed the offense of resisting arrest, the jury needed to hear the testimony from both the officers and Ms. Laster and make factual determinations about what had occurred and whether those facts met the statutory requirements of the offense. As in *Heatley*, the testimony was given by the officers in plain, straight-forward language that was no different than what a non-officer witness would have used to describe the same events.

The words “resisting”, “resistant”, and “resisted” are words of common meaning and usage and not technical terms that need to be defined. Since the words are so ubiquitous, the Officers could not reasonably have been expected to completely eliminate the terms from their testimony, especially as (in their opinion) they accurately described what had occurred. Therefore, even though the language they used in their testimony (“resistant,” “resisting,” and “resistance”) is similar to the title of the offense, there is no evidence that the jury was confused. Although the crime itself is called “resisting arrest,” the jury was instructed regarding four separate elements (none of which use the words “resist” or “resisting”) that the jury needed to find beyond a reasonable doubt. The jury was *not* instructed that it could simply rely on testimony from the officers that defendant was “resistant” or “resisted”. It is

presumed that the jury followed those instructions and found every element before rendering a guilty verdict.

**C. The Officers' Testimony was Based on Inferences from the Evidence**

Where the witness's opinion is directly and logically supported by the evidentiary foundation, the testimony does not constitute an opinion on guilt. *Id.* at 579-80. Witnesses are allowed to testify as to facts known to or observed by him, even though the statement involves a certain element of inference. *State v. Madison*, 53 Wn.App. 754, 770 P.2d 662 (1989).

Much effort is expended during the trial of causes to confine the testimony of witnesses to statements of what they saw, heard, or otherwise observed, as distinguished from the inferences or opinions formed as a result of such observation. The distinction is, however, one for which it is in many cases impossible to draw, for the reason that the most simple statement of fact involves an element of coordination, induction, or inference, the fact and the inference being frequently so blended that they cannot be separated.

*Id.* In *Heatley*, the Court found that the officer's opinion that the defendant was intoxicated was based on his experience and his observation of the defendant's physical appearance and performance of FSTs. *Id.* Because the jury was in a position to independently assess the opinion in light of the foundational

evidence and was the sole judge of credibility, the officer's testimony was not improper. *Id.* at 581.

In Ms. Laster's case, as in the *Heatley* case, the Officers' testimony was based on their experience and their observation of the defendant's physical appearance, actions, demeanor, and statements. As in *Heatley*, the jury was able to weigh the credibility of the Officers' testimony, and compare it to that of the defendant. As in *Heatley*, the jury was in a position to independently assess the statements in light of the foundational evidence, which included a video recording of the actual incident.

Because the Officers' statements did not opine on guilt or credibility, and when viewed in context, were merely helpful and non-technical descriptions of events experienced by the officers which were supported by the other evidence presented at trial, the testimony was not improper.

**D. There is no Constitutional Error.**

Even if the Court were to determine that the Officers' testimony constituted an opinion on guilt, Respondent contends that the admission of such testimony is not an error of constitutional magnitude and therefore may not be raised for the first time on

appeal.

“Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a manifest constitutional error.” *State v. King*, 167 Wn.2d 324, 219 P.3d 642 (2009).

Courts are reluctant to recognize admission of improper opinion testimony as constitutional error. *Id.* at 584-85:

Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse...it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

*Id.* Furthermore, the decision to admit or exclude opinion testimony generally involves the routine exercise of discretion by the trial court under the rules of evidence. *Id.* at 585. These rules govern evidentiary questions and that do not necessarily implicate constitutional rights. *Id.* Therefore, claims that testimony is an opinion on guilt do not necessarily allege a manifest constitutional error. *Id.*

The proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps. *City of Seattle v. Heatley*, 70 Wn.App. 573.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

*Id.*

The Court in *State v. Lynn* stressed the importance of this analysis on appeal.

Prohibiting all constitutional errors from being presented for the first time on appeal would denigrate our constitutional protections and result in unjust imprisonment. On the other hand, permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts. A judicious application of the 'manifest' standard permits a reasonable method of balancing these competing values. Thus, it is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.

*State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). In

determining whether the alleged error is manifest, the appellant “must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* This requires a showing of a “likelihood of actual prejudice.” *Id.* at 346; *State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002).

Admission of the Officers’ statements was not error. Even assuming *arguendo* that it was error, it was not a manifest constitutional error. When faced with similar scenarios, Courts have repeatedly found that admission of such testimony was not constitutional error. In *State v. Madison*, the Court held that it was not constitutional error to admit opinion testimony that improperly commented on the veracity of a child victim. 53 Wn.App. at 760-63. In *State v. Stevens*, the Court held that it was not constitutional error to admit opinion testimony from DSHS caseworker that improperly commented on veracity of sex abuse victim. 58 Wn.App. 478, 493, 794 P.2d 38 (1990). In both cases, the Court held that the testimony, although problematic, did not impermissibly invade the province of the jury and was not prejudicial.

Here, as in the above cases, the Officers’ unwitting usage of the terms “resisting” and “resisted” did not impermissibly invade the province of the jury as they did not specifically comment on the

guilt or credibility of the defendant, the testimony was not prejudicial, and did not invade the province of the jury.

#### 4. OBTAINING A MENTAL HEALTH EVALUATION AND FOLLOWING UP WITH THE RECOMMENDATIONS THEREIN DOES NOT CONSTITUTE AN UNLAWFUL CONDITION OF MS. LASTER'S SENTENCE

The requirements of RCW 9.94B.080 do not apply to Ms. Laster as she was sentenced on a misdemeanor, and not a felony. "Courts have a great deal of discretion when setting probation conditions for misdemeanors and are not restricted by the Sentencing Reform Act of 1981, RCW 9.94A, which applies only to felonies." *State v. Deskins*, 180 Wn.2d 68, 78, 322 P.3d 780 (2014). Misdemeanor sentencing courts have the discretion to issue suspended sentences or to impose sentences and conditions with "carrot-and-stick incentives" to promote rehabilitation, a goal of non-felony sentencing. *Harris v. Charles*, 171 Wn.2d 455, 465, 256 P.3d 328 (2011). A court may impose probationary conditions that bear a reasonable relation to the defendant's duty to make restitution or that tend to prevent the future commission of crimes. *State v. Deskins*, 180 Wn.2d at 77. Here, the sentencing court specifically stated that it was imposing the mental health evaluation "in recognition of [defendant's] behavior during the arrest that [she]

resisted.” RP 247. The sentencing court ordered the evaluation and treatment with the hope that it would be “an opportunity, a way to break this impasse, here, and let [defendant] go on living in this community but without all these problems.” RP 248.

A trial court’s sentencing decision is reviewed for abuse of discretion. *State v. Deskins*, 180 Wn.2d 68, 77, 322 P.3d 780 (2014).<sup>1</sup> Because the evaluation and counseling was ordered with the intent that it would help to prevent Ms. Laster from committing further crimes, the Court did not abuse its discretion in requiring it as a condition of Ms. Laster’s sentence and probation.

Even if the Court *were* bound by RCW 9.94B.080, as would be the case for a felony, Appellant’s argument would still fall short. Appellant contends that the sentencing condition requiring Ms. Laster to complete a mental health evaluation and follow up with treatment was not supported by the record and must be stricken. This is incorrect. A court may order a mental status evaluation and/or treatment as a condition of a sentence if the court finds that reasonable grounds exist to believe that the offender is a mentally

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<sup>1</sup> Appellant’s claim that the condition should be reviewed *de novo* is incorrect: *State v. Armenderiz* merely stands for the proposition that a case must be reviewed *de novo* when there is a question of statutory interpretation regarding a sentencing condition. 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Here, where there is no question about the meaning of the statute, the correct standard of review is abuse of discretion.

ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. RCW 9.94B.080. An order requiring a mental status evaluation or treatment must be based on a presentence report or, if applicable, mental status evaluations that have been filed with the court. *Id.* The court may order additional evaluations at a later date if deemed appropriate. *Id.*

The definition of “mentally ill person” found in RCW 71.24.025 reads as follows: ““mentally ill persons,” “persons who are mentally ill,” and “the mentally ill” mean persons and conditions defined in subsections (1), (4), (27), and (28) of this section.”

Subsection (1) states that ““acutely mentally ill” means a condition which is limited to a short-term severe crisis episode of:

- (1) a mental disorder defined in RCW 71.05.020, or
- (2) being gravely disabled as defined in RCW 71.05.020, or
- (3) presenting a likelihood of serious harm as defined in RCW 71.05.020.

RCW 71.05.020(26) defines “mental disorder” as “any organic, mental, or emotional impairment which has substantial adverse effects on a person’s cognitive or volitional functions.” RCW 71.05.020(17) states that “gravely disabled” means “a condition in which a person, as a result of a mental disorder: (a) is in danger of

serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifest severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving care such as is essential for his or her health or safety.” Under RCW 71.05.020(25), a “likelihood of serious harm” means:

- (a) A substantial risk that: (i) physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or
- (b) The person has threatened the physical safety of another and has a history of one or more violent acts.

As is demonstrated by the above statutes, there are multiple avenues by which a court could find or have reasonable grounds to believe that a person is “mentally ill”, sufficient to satisfy RCW 9.94B.080. In Ms. Laster’s case, there was abundant information on the record to support that Ms. Laster met the above-listed criteria. For instance, the Court heard testimony that Ms. Laster

was deliberately not eating or drinking (such that she was faint and having a hard time standing), refusing to change clothes or bathe appropriately, and exhibited failure to maintain hygiene such that others were concerned for her well-being and safety. RP 12-13, 17-18, 31. The court also heard testimony that Ms. Laster exhibited symptoms of paranoia, persecution, feeling like she was being poisoned, appetite disturbances, and grandiose ideas. RP 21-22. Testimony was also given that Ms. Laster had been referred to New Alliance Counseling Services for being dangerous to others and making threats. RP 24-25.

The trial court made findings that Ms. Laster had “set herself apart” by “willful behavior” including “paranoia, feels like being poisoned, excessive worry, lost appetite, and grandiose ideas.” RP 50-51. The Court further found that “these things are all unusual, aberrant, statistically aberrant behaviors, highly unique, unusual behavior.” RP 51. The Court concluded that Ms. Laster’s behavior justified the need for a competency evaluation. RP 501.

Given the information before the court, there was more than adequate evidence from which the Court could find reasonable grounds that Ms. Laster was a mentally ill person, as defined above. Furthermore, the Court did find that the condition was likely

to have influenced the offense. At sentencing, the Court specifically linked the requirement of the evaluation to Ms. Laster's behavior during her arrest (see above). The Court further stated that Ms. Laster had "let herself go in a rather willful way" and that her behavior was "completely reckless and out of control." RP 247-48.

Additionally, the sentencing requirement that Ms. Laster get a mental evaluation and comply with recommended treatment was based on a presentencing report, as required by statute. The Court ordered a competency evaluation on May 7, 2013. CP 10-14. On July 5, 2013, a Summary of Findings was sent to the Court and became part of the Court record. CP 23-28. That report indicated that, while the psychologist believed that Ms. Laster did not appear to be imminently dangerous, she was diagnosed with Axis II Personality Disorder with Borderline and Schizotypal Traits. CP 24. Individuals with such a disorder can decompensate under stress and exhibit psychotic-like symptoms. CP 27.

It was the above-referenced report on which the Court relied when sentencing Ms. Laster. RP 248. The sentencing judge specifically referenced the psychologist's findings that Ms. Laster has a personality disorder and ordered the evaluation and

treatment with the hope that it would prevent future problems for Ms. Laster in the community. RP 248.

Because the Court found reasonable grounds to believe that Ms. Laster was a mentally ill person and that the condition influenced the offense, and because the Court relied upon the presentencing report from Eastern State Hospital, the Court did not abuse its discretion in requiring that Ms. Laster obtain an evaluation and follow the recommendations as a condition of her sentence. Therefore, Respondent asks that Appellant's request to strike that sentencing condition be denied.

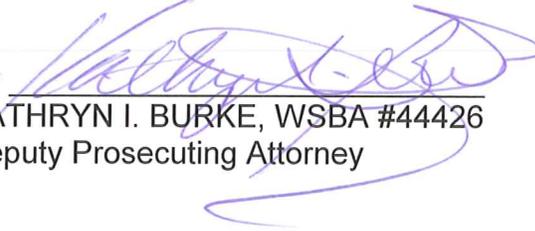
## V. CONCLUSION

The Court of Appeals should affirm the decision of the trial court and the jury finding that defendant was guilty of the crime of resisting arrest. Furthermore, the conditions of the sentence were lawful and within the sound discretion of the trial court and should not be disturbed.

Dated this 20 day of April, 2015.

Respectfully Submitted by:

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Ferry County Prosecuting Attorney

By   
KATHRYN I. BURKE, WSBA #44426  
Deputy Prosecuting Attorney

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COURT OF APPEALS, DIVISION III  
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
SUSAN JAYNE LASTER  
  
Appellant.

No. 32553-9-III  
Ferry County #13-1-00006-7  
  
PROOF OF SERVICE

I, Cynthia Nelson, do hereby certify under penalty of perjury that on April 20, 2015,  
I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided  
e-mail service by prior agreement (as indicated), a true and correct copy of:

**BRIEF OF RESPONDENT**

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DATED this 20th day of April, 2015, in Republic, Ferry County, Washington.

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