71499-6

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No. 71499-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRED MYERS, JR.,

Appellant.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 AUG 22 PM 1:56

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Warrantless police entry into a person's home, absent exigent circumstances, violates the constitutions of Washington State and the United States. Police have long been on notice of this clear constitutional rule. Thus, when police officers violate this rule, they necessarily do so in bad faith, contrary to their "official duties" as officers. Here, without a warrant and in the absence of an exigency, police entered the defendant's home intending to arrest him. Moments after police entered his home, the defendant purportedly kicked an officer in the leg. He was charged and convicted of third degree assault. This required proof that the law enforcement officer was performing his "official duties" at the time of the assault. Because the officer was not performing his "official duties" in invading the defendant's home without a warrant and no exigency justified entry, this Court should reverse the defendant's conviction for insufficient evidence. Additionally, this Court should reverse for ineffective assistance of counsel.

B. ASSIGNMENTS OF ERROR

1. Because insufficient evidence supports the jury's determination that the defendant committed third degree assault, the defendant's conviction violates the due process clause of the Fourteenth Amendment.

2. The defendant was denied his Sixth Amendment right to effective assistance of counsel.

3. As part of a community custody condition, the court erroneously ordered that the defendant participate in a mental health evaluation and to fully comply with all recommended treatment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person is guilty of third degree assault if he or she assaults a law enforcement officer who is exercising his or her "official duties." "Official duties" excludes bad faith performance of job-related duties. Absent an exigency or consent, police may not enter a person's home without warrant even if there is probable cause for arrest. An officer acts in bad faith when violating this constitutional rule. Police entered the defendant's apartment to arrest the defendant for domestic violence without a warrant, consent, or an exigency. While inside, the defendant purportedly kicked an officer in the shin. Did the State fail to prove beyond a reasonable doubt that the officer was performing his "official duties" at the time of the assault?

2. If harmful evidence can be excluded through an objection, defense counsel should object. Pretrial, the court prohibited testimony about the defendant's possible mental illness as irrelevant. Nevertheless, an officer testified that the defendant "manically" said he was "quad-

polar" and that he sometimes thought about killing everyone. Defense counsel failed to object to this inadmissible and harmful evidence. Was the defendant deprived of his Sixth Amendment right of effective assistance of counsel?

3. Irrelevant evidence is inadmissible. Evidence of other acts is inadmissible if its purpose is to prove propensity. Even relevant evidence should be excluded if the evidence is unfairly prejudicial. During trial, an officer recounted that the defendant stated that if he had hit his wife, police would have found her corpse. Defense counsel failed to object to this irrelevant and unfairly prejudicial evidence. Was the defendant deprived of his Sixth Amendment right of effective assistance of counsel?

4. Before requiring a mental health evaluation and treatment as a condition of community custody, the trial court must find that the defendant is mentally ill and that his mental illness influenced the offense. These findings must be based on a presentence report. The court did not enter findings that the defendant was mentally ill or that mental illness influenced the offense. No presentence report addressing the defendant's mental health was filed. Did the court exceed its authority in ordering that, as a condition of community custody, the defendant participate in a mental health evaluation and follow treatment recommendations?

D. STATEMENT OF THE CASE

According to the testimony of police officers at trial, on March 4, 2013, police responded to a call around 3 a.m. about a disturbance at an apartment complex in Marysville. RP 95-96, 104-05, 133-34, 150.[1] The complex had units on two levels. RP 96. Entrances to the units were on the outside. RP 96

Officer Michael Young and Sergeant Rick Sparr approached a unit that was upstairs. RP 105-06, 134. They saw that the door to the apartment was open. RP 105, 134-35. Items were piled up in the area outside the door and in the entry hallway inside. RP 105, 107, 134. Young saw Fred Myers inside the apartment, about half-way down the hallway. RP 107. He knocked on the door. RP 107. Myers approached and spoke with Young. RP 107. Myers remained inside. RP 107.

Young told Myers he was there to figure out what the noise was and to quiet it down. RP 107. Myers said his wife was cheating on him, that he was collecting his things, and was moving out. RP 107-08. Young told Myers to keep the noise down. RP 108. Myers said he would. RP 108. Young began to leave. RP 109.

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[1] Unless otherwise indicated, the volume referred to is the volume dated December 2 and 3, 2013.

Meanwhile, Officer Pat Connelly was speaking with Myers' wife outside the apartment in the parking lot. RP 96-97. Connelly spoke with her for about 15 to 20 minutes. RP 97. After his conversation, he determined that there was probable cause to arrest Myers for an assault. RP 98. Connelly advised Young on the radio that he had probable cause to arrest Myers. RP 98, 109.

Young and Sparr, who had not yet made it down the stairwell, returned to the apartment door. RP 109. Officer Matthew Mishler was also present. RP 150. Young asked Myers to speak with him again. RP 109. Myers approached, but remained in the hallway. RP 109-110, 151. According to Young, Myers appeared agitated. RP 109-10. Myers acknowledged he had been drinking. RP 110. When asked about the assault allegation, Myers denied hitting his wife. RP 136. As they were speaking, Young's partner radioed him, telling him that there was probable cause to arrest Myers. RP 112.

Young and Sparr then entered the apartment and told Myers he was under arrest. RP 112. Young had Myers put his hands behind his back and handcuffed him. RP 113. Sparr remained near the front door. RP 113. Mishler remained outside and was not directly involved in the arrest. RP 116, 150.

Myers, who was initially cooperative and readily conversed with law enforcement, became upset once cuffed. RP 113-14. Myers tried to turn around to face Young. RP 114. In response, Young pinned Myers up against the wall. RP 114, 139. According to Young, Myers began kicking backwards and kicked him in the shin. RP 115-16, 126. Young also perceived that Myers tried to turn his head to bite him. RP 116-17. Young struck Myers in the face and hit him in the chest twice. RP 118-19. Sparr grabbed Myers by the neck. RP 118. After applying pressure, Myers agreed to stop. RP 142. Officer Mishler took Myers into custody. RP 153.

The State charged Myers with third degree assault, alleging that he had assaulted Officer Young while Young was performing his official duties. CP 92. Officer Young testified that Myers had kicked him in his shin, bruising him. RP 116, 119-20, 126-27. Although present, Sergeant Sparr testified he did not see this kicking. RP 146. Similarly, Officer Mishler testified he did not see Myers kick Young. RP 152. While law enforcement would ordinarily document injuries, police did not document Young's bruise. RP 128. The jury convicted Myers as charged. RP 182-83.

E. ARGUMENT

1. Sufficient evidence does not support the jury's determination that at the time of the assault, Officer Young was exercising his "official duties," requiring reversal of the conviction for third degree assault.

a. Warrantless entries into the home violates the Fourth Amendment and article 1, section 7.

Article 1, section 7 of the Washington Constitution commands that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, § 7. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

Under these constitutional provisions, protections of privacy are strongest in the home. Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("the Fourth Amendment has drawn a firm line at the entrance to the house"); State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) ("the home receives heightened constitutional protection"). Absent a recognized exception, warrantless entries into a home are unreasonable under both constitutions. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). This applies even where a statute authorizes or mandates an arrest. State v. Ramirez, 49 Wn. App. 814, 824,

746 P.2d 344 (1987) (statute authorizing arrest cannot give officers authority that violates the Fourth Amendment and article 1, section 7).

Even where police have probable cause to arrest a person within a home, article 1, section 7 and the Fourth Amendment prohibit the warrantless entry into a person's home unless there is an exigency. Payton, 445 U.S. at 587-88; State v. Holeman, 103 Wn.2d 426, 429, 693 P.2d 89 (1985) (without a warrant or exigency, police could not lawfully arrest suspect who was standing in doorway of his house); State v. Counts, 99 Wn.2d 54, 60–61, 659 P.2d 1087 (1983); State v. Hinshaw, 149 Wn. App. 747, 753, 205 P.3d 178 (2009). The United States Supreme Court established this clear constitutional rule over 30 years ago in Payton. Thus, when an officer enters a home without a warrant or exigency, no reasonably competent officer would believe his or her action to be lawful. Osborne v. Seymour, 164 Wn. App. 820, 862, 265 P.3d 917 (2011) (officer who entered home to assist estranged husband in repossessing property liable under 42 U.S.C. § 1983 for violating the Fourth Amendment; no reasonably competent officer would have believed action lawful); Hopkins v. Bonvicino, 573 F.3d 752, 759-60 (9th Cir. 2009) (affirming denial of defendants motion for summary judgment in section 1983 lawsuit where two police officers entered home to arrest person who had been in a minor traffic accident and may have been drinking).

b. Absent good faith performance of job-related duties, law enforcement officers are not performing their "official duties." Officers do not act in good faith when they enter a home without a warrant or exception to the warrant requirement.

To commit third degree assault under RCW 9A.36.031(1)(g), the officer who is assaulted must have been performing his or her official duties at the time:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> . . .
>
> (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

RCW 9A.36.031(1)(g). Our Supreme Court has defined "official duties" as encompassing "good faith performance of job-related duties":

> "official duties" as used in RCW 9A.36.031(1)(g) encompass all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own.

State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995) (emphasis added) (citing State v. Hoffmann, 116 Wn.2d 51, 99–100, 804 P.2d 577 (1991)).

In Mierz, Department of Wildlife agents entered the defendant's property without a warrant to seize coyotes the defendant was keeping.

Mierz, 127 Wn.2d at 463. Upon their entering his yard, Mierz told his dogs to attack the agents. Id. at 465. One bit an officer. Id. After detaining Mierz, Mierz bit an agent on his hand when the agent tried to put Mierz in a car. Id. at 466. Mierz was found guilty of two counts of third degree assault under RCW 9A.36.031(1)(g). Id. at 468. On appeal, Mierz argued that he had been improperly charged because the officers had illegally arrested him and were therefore, not performing their "official duties." Id. 479. The Court rejected his argument, adopting the definition quoted above and concluding that: "RCW 9A.36.031(1)(g) includes assaults upon law enforcement officers in the course of performing their official duties, even if making an illegal arrest. Mierz was properly charged under RCW 9A.36.031(1)(g)." Id.[2]

The Mierz Court relied on Hoffman in adopting a definition for "official duties." Id. at 479. In Hoffman, the defendants were convicted of aggravated murder in the first degree after shooting to death a tribal police officer who was on one of the defendant's land. Hoffman, 116 Wn.2d at 59, 62. Under statute, first degree murder is aggravated if a law

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[2] Mierz also argued that trial counsel was ineffective for failing to move to suppress the evidence of the assaults because police had illegally entered onto his land. Mierz, 127 Wn.2d at 471. Without deciding whether the officers had illegally entered the property, the Court held that suppression was not available even if there had been a violation of the Fourth Amendment or article 1, section 7. Id. at 472-75.

enforcement officer is murdered while performing his or her "official duties." RCW 10.95.020. The defendants argued the officer was not engaged in his "official duties" because the officer entered the property without a search warrant. Hoffman, 116 Wn.2d at 99. The Court rejected their argument, determining that the entry was lawful and that regardless, an officer may still be engaged "official duties" when making an arrest without probable cause, if the officer is not on a "frolic." Id. at 100. The Court determined there was no evidence that the officer was on a frolic. Id. The Court further rejected their argument that the entry onto the land violated Payton because there was no entry into a residence and exigent circumstances would have excused any violation. Id. at 101.

Unlike this case, neither Mierz nor Hoffman involved an entry into a residence without a warrant. Thus, neither is controlling on the question of whether a law enforcement officer is acting in accordance with his or her "official duties" when entering a person's home to make an arrest without a warrant or exigency.

"Official duties," as defined in Mierz, requires evidence that the officer act in "good faith." The Court did not define "good faith" and Hoffman did not use the term. "Courts generally define 'good faith' to mean a state of mind indicating honesty and lawfulness of purpose." Jensen v. Lake Jane Estates, 165 Wn. App. 100, 111, 267 P.3d 435 (2011).

As explained earlier, police officers have been on notice of the rule forbidding police entry into homes absent a warrant even if there is probable cause to arrest for over 30 years. Payton, 445 U.S. at 587-88. No reasonably competent officer could believe otherwise. Osborne, 164 Wn. App. at 862; Hopkins, 573 F.3d at 759-60. Thus, a police officer does not act with "honesty and lawfulness of purpose" by disregarding this fundamental constitutional rule. The officer is not acting in "good faith." See United States v. Span, 970 F.2d 573, 581 (9th Cir. 1992) ("An officer who uses excessive force is not acting in good faith.").

Unlike a rule of exclusion, this does not license assault upon law enforcement. Absent some valid defense, a person who assaults an officer acting contrary to his or her "official duties" will at the very least be guilty of fourth degree assault. See RCW 9A.36.041. If the assault was severe or a weapon was used, the person may still be guilty of third degree assault or a greater degree of assault. See RCW 9A.36.031(1)(d) (third degree assault committed when weapon or instrument is used with criminal negligence); 9A.36.021 (second degree assault); 9A.36.011 (first degree assault).

This Court should hold that law enforcement officers do not act according their "official duties" under RCW 9A.36.031(1)(g) when they

enter a home without evidence of a warrant or exception to the warrant requirement.

c. The State failed to prove that Officer Young was assaulted while he was acting in accordance with his official duties.

Due Process requires the State prove with sufficient evidence every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art 1, § 3. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980).

Per the to-convict instruction, the jury was required to find beyond a reasonable doubt that "at the time of the assault, Michael Young was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties." CP 39. Viewing the evidence in the light most favorable to State, a rational trier of fact could not find that Officer Young was performing his "official duties" at the time of the assault.

The testimony from law enforcement officers established Myers remained inside his apartment. RP 107, 109-110, 151. Officer Young

entered the apartment after he was told that there was probable cause to arrest Myers. RP 112. There was no testimony that the officers secured a warrant beforehand. There was no testimony that Myers' consented to their entry.

There was also no evidence of an exigency. The exigent circumstances exception to the warrant requirement applies where obtaining a warrant is impractical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). "'When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.'" Welsh v. Wisconsin, 466 U.S. 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (quoting McDonald v. United States, 335 U.S. 451, 460, 69 S. Ct. 191, 93 L. Ed. 153 (1948) (Jackson, J. concurring)). Without such evidence of immediate and serious consequences, the State fails to carry its burden to prove exigency. Hinshaw, 149 Wn. App. at 755.[3]

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[3] Additionally, Washington courts have outlined six factors to use as a guide in determining whether exigent circumstances exist: (1) Is the suspected offense grave?; (2) Is there a reasonable belief that the suspect is armed?; (3) Is there reasonably trustworthy information that the suspect is guilty?; (4) Is there strong reason to believe that the suspect is on the premises?; (5) Is there a likelihood that the suspect will escape if not quickly apprehended?; and (6) Was

Here, there was no showing that police needed to act quickly and enter Myers' home. The alleged victim, Myers' wife, was not there. She was in the parking lot with Officer Connelly about 100 yards away. RP 99. There was no evidence that the alleged domestic violence was grave.[4] See State v. Hatchie, 161 Wn.2d 390, 399, 166 P.3d 698 (2007) (absent a warrant, "police entry into a private home to make a misdemeanor arrest is per se invalid."). Police are required to make arrests for even the most minor of assaults if it involves domestic violence. RCW 10.31.100(2)(c). There was no evidence that Myers had a weapon. Until police entered Myers' home and pushed him against the wall, he was cooperative and readily spoke with Officer Young. There was no evidence Myers attempted to evade or escape law enforcement. His door was open. He was in the process of collecting his things. RP 108. He was leaving his wife because she had cheated on him. RP 108. Police could have observed Myers' apartment and waited until Myers moved other items

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the entry made peaceably? State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127 (2002).

[4] The police reports and affidavit of probable cause show that police arrested Myers on probable cause of fourth degree assault. CP 75, 77, 79, 88. Fourth degree assault is a gross misdemeanor. RCW 9A.36.041(1). It "is essentially an assault with little or no bodily harm, committed without a deadly weapon—so-called simple assault." State v. Hahn, 174 Wn.2d 126, 129, 271 P.3d 892 (2012).

outside. Rather than wait or get a warrant, the officers chose to violate article 1, section 7, and the Fourth Amendment.

Hence, there is not sufficient evidence to establish that Young was acting in "good faith" when he entered Myers' home to arrest Myers. Because the evidence showed the assault occurred at the home shortly after the officers' unlawful entry, the State failed to prove that Young was assaulted while exercising his official duties as a law enforcement officer. The conviction should be reversed for insufficient evidence and dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

2. Failing to object to irrelevant and unfairly prejudicial evidence, the defendant was deprived of his right to effective assistance of counsel.

The State had the burden of proving that Myers intentionally assaulted Officer Young. Officer Young testified that Myers kicked him. Rather than leave it at that, the State elicited testimony from the officers that painted Myers as mentally unstable and dangerous. Defense counsel did not object and actually made no objections during the entire trial. Because there was no valid strategic reason for not objecting and the evidence prejudiced Myers, Myers was deprived his constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const. art 1, § 22.

a. Counsel's performance is deficient when harmful evidence would have been excluded with an objection.

To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is performance falling below an objective standard of reasonableness. Id. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Defense counsel should object to evidence that is inadmissible and harmful to his or her client. See State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to prior convictions was deficient performance; court could discern no reason why counsel would not have objected to such damaging and prejudicial evidence when evidence was inadmissible). This includes evidence that is irrelevant[5] or unfairly prejudicial.[6] Counsel should also object to propensity evidence

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[5] ER 402 ("Evidence that is not relevant is not admissible."). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

[6] ER 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

that is barred under ER 404(b). Under that rule, evidence of prior bad acts or misconduct "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." ER 404(b); see State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (ER 404(b) is a "categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character."). Prior bad acts, "including acts that are merely unpopular or disgraceful, are inadmissible to show that the defendant is a 'criminal type' and is likely to have committed a crime for which charged." State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002) (citation and brackets omitted).

b. Counsel's failure to object to inadmissible evidence that portrayed the defendant as mentally unstable and dangerous constituted deficient performance.

Counsel's deficient performance began when Officer Young started to testify about what happened after he returned to Myers' door and asked Myers about the domestic violence allegations. See RP 110. Without any objection, Young testified that Myers said he was bipolar. RP 110. Young then began a narrative, where he recounted that Myers' talked in a "crazy, maniacal voice," said he was "quad-polar," was off his medication, that he began stabbing a pen downwards, and said that he sometimes felt like killing everyone:

> Q. And then what happened there at the doorway?
>
> A. . . . He told me he was bipolar.
>
> Q. And when he's telling you about him being bipolar, I guess, where are you positioned in relation to the defendant?
>
> A. . . . So I asked - - he said he was bipolar. I said, "You're bipolar?' And then in this really like crazy, maniacal voice, I don't know how to describe it, he said, "I'm quad-polar." And so I'm like, "Okay. You're quad-polar."
>
> I said, "Are you on medication?" He said, "No, I'm not on medication." And then with his left hand, he had like a pen in his left hand and he started stabbing it downwards. He said, "Sometimes I want to kill everyone."

RP 110-11.[7]

This testimony violated a pretrial ruling. The Court had earlier granted the State's motion in limine "[t]o prohibit testimony regarding the defendant's mental illness absent a showing of relevance and the laying of a foundation for it by an appropriate expert witness." Supp. CP __, sub. no. 57; RP 5. Despite the violation, defense counsel did not object. Further, defense counsel should have objected under ER 403 because the probative value was weak and substantially outweighed by a risk of unfair prejudice that the jury would infer Myers was mentally unstable, violent,

[7] Myers put the pen down when asked. RP 111.

and dangerous. Had counsel objected on either ground, the evidence would have been excluded.

There was no valid strategy in failing to object. The defense had foregone a diminished capacity defense. RP 5. In its motion in limine, the State asserted that Myers' mental health "would only serve to gain juror sympathy." Supp. CP __, sub. no. 57. However, without expert testimony to explain bipolar disorder or Myers' actions, the evidence was actually more likely to instill disdain of Myers and fear that he was dangerous. If this evidence truly engendered sympathy, defense counsel should have followed up on this testimony during cross-examination. That he did not, shows that he did not make a tactical decision that this evidence was helpful. See RP 121-31.

Counsel's deficient performance continued when Sergeant Sparr took the stand. Sparr testified that when Myers was confronted with the accusation of domestic violence, Myers denied it. However, he recounted with detail that Myers said if he had assaulted his wife, he would have killed her, leaving her corpse:

> Q. Prior to being placed under arrest, did either you of Officer Young inform him why you were there?
>
> A. Yes, Officer Young talked to him about that.
>
> Q. Were you able to hear what the defendant was saying?

> A. Yes. There was - - he had said he wouldn't have laid a hand on her and if he had, they'd be looking at a corpse, we'd be looking at a corpse, something along that line.

RP 136. Counsel failed to object.

Myers' statement that police would have found his wife's dead body if he had hit her was irrelevant. It did not tend to show that Myers assaulted Officer Young. It did not tend to prove or disprove any element of third degree assault under RCW 9A.36.031(1)(g). ER 401. Even assuming relevancy, a general statement that Myers denied the allegation of domestic violence was sufficient. There was no need for an incendiary statement concerning a corpse. ER 403. The statement also tended to show that Myers was dangerous and that he had prior criminal experience using violence. The jury would logically use this propensity evidence to infer that Myers assaulted Officer Young. This is barred under ER 404(b). Thus, had counsel objected, the evidence would have been excluded.

There was no valid strategic reason for counsel to not object. The statement made Myers out to be extremely dangerous, placed a gruesome image of a dead woman in the minds of the jury, and allowed the jury to infer from Myers' statement that he assaulted Officer Young.

Counsel was aware the State might elicit such a statement at trial, but erroneously conceded admissibility. In his motion in limine, counsel moved to exclude evidence of prior convictions and evidence that crime

had occurred at the apartment complex before. CP 52-53. In the motion, counsel acknowledged there was evidence of a "fairly graphic" statement attributed to Myers "suggesting that if he had assaulted her he would have killed her." CP 53. Nevertheless, counsel conceded it was admissible to establish "demeanor." CP 54; RP 13 ("As much as I would like to keep that kind of thing away from my jury, I know it does go somewhat to his demeanor.").

State v. Perrett, 86 Wn. App. 312, 936 P.2d 426 (1997) shows counsel erred in his analysis. There, the defendant was charged for second degree assault after allegedly pointing a gun at a tenant. Perrett, 86 Wn. App. at 315-16. After being arrested, police asked for the gun. Id. at 316. The defendant refused, stating that the last time police took his guns, he did not get them back. Id. The trial court admitted the statement as relevant as to the defendant's demeanor. Id. at 319. This Court disagreed, holding it was not relevant as to any element of the charged offense. Id. This Court also held it was unfairly prejudicial because it raised an inference that the defendant had committed a previous offense with a gun. Id. at 320.

As in Parrett, the statement was not relevant for any proper purpose. It did not tend to prove that Myers later intentionally kicked Officer Young. Even if it did, its relevance was outweighed by the danger

of unfair prejudice. It implicitly raised the specter that Myers had a criminal background, tended to show that Myers was dangerous, and that he had a propensity towards violence. It also painted a graphic image for the jury, distracting it from the issue before it.

This court should hold that counsel was deficient in failing to object to (1) Officer Young's narrative about Myers appearing to be mentally ill and (2) Myers' statement that police would have found a corpse if he had hit his wife.

c. There is a reasonable probability that absent the deficient performance, the jury would have acquitted the defendant.

There is a reasonable probability that the deficient performance prejudiced Myers. The evidence that counsel failed to object to cast Myers as dangerous and mentally disturbed. The jury may have convicted Myers for appearing to be a "bad" person. Or the jury may have improperly reasoned that Myers had a propensity towards violence and that, therefore, he intentionally kicked Officer Young. ER 404(b).

The State's closing argument compounded the prejudice. Despite acknowledging that this evidence was irrelevant, the prosecutor emphasized the evidence:

> It doesn't matter if he was just mad at the world. You heard Officer Young testify that the defendant had a pen and said "I just want to kill everybody sometimes."

RP 164-65.

This continued on rebuttal. Responding to defense counsel's statement that Myers had been in throes of his wife leaving him, the prosecutor stated the evidence did not show this and that the "only testimony you heard about his wife was him saying if he would have assaulted her, they would be there to pick up a corpse":

> What testimony was there that his wife was leaving? The only testimony you heard was from the officer, said the defendant told him he was moving. In fact, he had stuff there. The only testimony you heard about a wife is that they had probable cause to arrest him for assaulting his wife. The only testimony you heard about his wife was him saying if he would have assaulted her, they would be there to pick up a corpse. There is no testimony that his wife was leaving him, just to be clear.

RP 175 (emphasis added).

Additionally, the evidence that Myers had actually kicked Officer Young was weak. Although present, Sergeant Sparr testified he did not see the kicking that Officer Young claimed bruised him. RP 146. Similarly, Officer Mishler testified that he did not see Myers kick Young. RP 152. Contrary to their ordinary practice to document injuries, the police did not document Young's bruise. RP 128. Only Young testified that Myers kicked him.

Hence, given the weakness of the State's evidence, the prejudicial nature of the evidence, and the State's emphasis on the evidence which should have been excluded, there is a reasonable probability that counsel's deficient performance was prejudicial. If not reversed and dismissed for insufficient evidence, this Court should reverse and remand for a new trial because Myers was deprived of his right to effective assistance of counsel.

3. Without making the necessary findings and in the absence of a presentence report, the court erroneously required the defendant to obtain a mental health evaluation and treatment as a condition of community custody.

As a community custody condition, the court ordered that Myers participate in a mental health evaluation and fully comply with all recommended treatment. CP 18. Because the court lacked authority to impose this condition, the Court should vacate the condition.

A sentencing court may order a mental health evaluation and treatment as a condition of community custody only if it complies with certain procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). The court must find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn. App. at 851.[8] The court must also find that

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[8] This statute reads:

The court may order an offender whose sentence includes community placement or community supervision to undergo a

this mental health condition was likely to have influenced the offense. Id. These findings must be based on a presentence report. RCW 9.94B.080; State v. Locke, 175 Wn. App. 779, 804, 307 P.3d 771 (2013).

The trial court did not make the necessary findings. See 1/15/2014RP 1-10 (sentencing hearing); CP 18. And while there was a DOSA (Drug Offense Sentencing Alternative) report, there was no presentencing report filed that specifically addressed Myers' mental health. See 1/15/2014RP 1. Hence, the court erred in imposing a mental health evaluation and treatment as a condition of Myers' community custody. This Court should vacate the condition. Locke, 175 Wn. App. at 804.

F. CONCLUSION

The State failed to prove that that Officer Young was acting in accordance with his "official duties" because he did not act in good faith

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> 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. This statute applied to Myers. See Locke, 175 Wn. App. 804 n.7.

in entering Myers' home without a warrant or legal justification. The conviction for third degree assault should be reversed for insufficient evidence. Additionally, the conviction should be reversed for ineffective assistance of counsel. If not reversed, the community custody condition requiring a mental health evaluation and treatment should be vacated.

DATED this 21st day of August, 2014.

Respectfully submitted,

Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
Respondent,	)	NO. 71499-6-I
	)	
FRED MYERS, JR.,	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________
[X]	FRED MYERS, JR. 960923 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY OF AUGUST, 2014.

X

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