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Court of Appeals
Division I
State of Washington

Supreme Court No. 92178-4
Court of Appeals No. 71499-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRED MYERS, JR.,

Petitioner.

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Fred Myers, the appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals affirmed Mr. Myers' conviction for third degree assault of a police officer. In disregard of long-standing constitutional law and his official duties, this officer unlawfully entered Mr. Myers' home and, while pinning Mr. Myers up against a wall inside, was purportedly kicked in the shin by Mr. Myers. The Court of Appeals rejected Mr. Myers' argument that the evidence was insufficient to prove this officer was performing his "official duties," an essential element of the offense. The court, however, agreed that the trial court erred by imposing mental health treatment as a condition of community custody. The unpublished opinion was filed on July 20, 2015 and is attached in the appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A person is guilty of third degree assault if he or she assaults a law enforcement officer who is performing his or her "official duties." "Official duties" excludes bad faith performance of job-related duties. Absent consent or exigency, warrantless entries into civilians' homes are

not part of a police officer's official duties, even if there is probable cause to arrest a person inside. This long-standing constitutional rule is clearly established and no reasonable officer could believe otherwise. When an officer disregards this rule and enters a person's home in bad faith, is the evidence insufficient to prove that the officer was performing with his "official duties"?

2. Due process requires evidence sufficient to prove guilt beyond a reasonable doubt. A scintilla of evidence is insufficient. Though an officer claimed Mr. Myers' kicked him, there was no corroborating evidence. In fact, two other officers who were present testified they did not see Mr. Myers kick the officer. There were no photos or documents showing the bruise the officer purportedly suffered. Was the evidence insufficient to prove beyond a reasonable doubt that Mr. Myers assaulted the officer?

D. STATEMENT OF THE CASE

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. Officer Michael Young and Sergeant Rick Sparr approached Mr. Myers' unit, which 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 inside. RP 105, 107, 134. After Officer Young knocked on the door, Mr. Myers answered. RP 107.

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

Meanwhile, another officer was speaking with Mr. Myers' wife outside the apartment complex in the parking lot. RP 96-97. The officer determined that there was probable cause to arrest Mr. Myers for an assault. RP 98, 109. After Officer Young learned there was probable cause to arrest Mr. Myers, he entered Mr. Myers' apartment without Mr. Myers' permission and informed Mr. Myers he was under arrest. RP 109, 112. Mr. Myers was initially cooperative, but became upset when he was handcuffed and pinned up against a wall inside by Officer Young. RP 113-14, 139. According only to Officer Young, Mr. Myers then kicked him in the shin. RP 115-16, 126. Shortly thereafter, Mr. Myers acquiesced and was taken into custody. RP 142, 153.

The State charged Mr. Myers with third degree assault, alleging that he had assaulted Officer Young while he was performing his "official duties." CP 92. Officer Young testified that Mr. Myers had kicked him in

his shin, bruising him. RP 116, 119-20, 126-27. Although they were present, Sergeant Sparr and Officer Matthew Mishler both testified they did not see Mr. Myers kick Officer Young. RP 146, 152. While law enforcement would ordinarily document injuries, there was no documentation of Officer Young's supposedly bruised leg. RP 127-28. The police trespass and lack of evidence notwithstanding, the jury convicted Mr. Myers of third degree assault. RP 182-83. The Court of Appeals affirmed the conviction.

E. ARGUMENT

1. The Court of Appeals' holding that a police officer acts in good faith performance of his official duties by making a warrantless, unlawful entry into a person's home to effect an arrest conflicts with precedent and is an issue of substantial public interest meriting review.

a. Warrantless entries into the home violates article one, section seven and the Fourth Amendment.

Under our state and federal constitutions,¹ protections of privacy are strongest in the home. State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) (“the home receives heightened constitutional protection”); Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639

¹ Article one, section seven 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.

(1980) (“the Fourth Amendment has drawn a firm line at the entrance to the house”). 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 one, section seven and the Fourth Amendment prohibit the warrantless entry into a person’s home absent consent or an exigency.

Payton, 445 U.S. at 587-88; State v. Holeman, 103 Wn.2d 426, 429, 693 P.2d 89 (1985) (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. Given this constitutional background, when an officer enters a home without a warrant, consent, or exigency, no reasonably competent officer would believe this action to be lawful or part of his or her official duties. Groh v. Ramirez, 540 U.S. 551, 564, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (“No reasonable officer could claim to be unaware of the basic rule, well established by our cases,

that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.”) (citing Payton, 445 U.S., at 586-588); 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. When police enter a home without a warrant or exception to the warrant requirement, they act in bad faith contrary to their official duties.

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). This 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)). “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).

Nevertheless, this Court has held that an officers’ “official duties” under RCW 9A.36.031(1)(g) may include unlawful arrests. Mierz, 127 Wn.2d at 479. Thus, a simple unlawful arrest or the mere unlawful entry by police onto private land does not mean an officer is not performing his or her “official duties.” See id. (officers’ unlawful entry onto defendant’s property did not preclude guilt under RCW 9A.36.031(1)(g)); Hoffmann, 116 Wn.2d at 99-101.

This case involves more than an unlawful arrest, it involves police trespass into a person’s home without a warrant or exception to the warrant requirement. The Court of Appeals recognized that the caselaw did not address this scenario. Still, the court held that the rule from Mierz

extends to this scenario, concluding Mr. Myers' argument was a "distinction without a difference." Op. at 6. Police officers, however, 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. Groh, 540 U.S. at 564; Osborne, 164 Wn. App. at 862; Hopkins, 573 F.3d at 759-60. This is no legal nicety upon which a reasonable officer may have difficulty with. It is a bright-line, clearly established constitutional rule. Thus, a police officer does not act with "honesty and lawfulness of purpose" by disregarding this fundamental rule. Rather, the officer is acting in bad faith, precluding a defendant's conviction under RCW 9A.36.031(1)(g). 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."); Mickelson v. State, 906 P.2d 1020, 1023 (Wyo. 1995) (because officer was not engaged in lawful performance of official duties by entering private place, the defendant's conviction for interference with a peace officer could not stand).

c. The Court of Appeals decision holding there was sufficient evidence proving Mr. Myers assaulted an officer who was performing his “official duties” is in conflict with precedent and presents an issue of substantial public interest.

Accordingly, the Court of Appeals should have reversed Mr. Myers’ conviction under RCW 9A.36.031(1)(g) for insufficient evidence. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (criminal convictions must be supported by evidence establishing guilt beyond a reasonable doubt). The jury was required to find beyond a reasonable doubt that “at the time of the assault, Michael Young was a law enforcement officer . . . who was performing his official duties.” CP 39 (emphasis added). The testimony established Mr. 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 Mr. Myers. RP 112. There was no evidence that the officers secured a warrant beforehand. There was no evidence of consent or exigency.² Mr.

² 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).

Myers' wife, who was purportedly assaulted,³ was with police and not in the home. RP 99.

The Court of Appeals opinion is in conflict with the precedent recognizing that the home is afforded special protection and that no reasonable officer would think his or her official duties include violating the clearly established constitutional rule forbidding warrantless police entry into the home. RAP 13.4(b)(1), (2). And given the sanctity and special protection afforded to the home, the issue is also one of substantial public interest. RAP 13.4(b)(4). This Court should grant review and address whether law enforcement officers are performing their "official duties" within the meaning of RCW 9A.36.031(1)(g) when they disregard clearly established constitutional law and enter a private home without a warrant or exception to the warrant requirement.

2. The determination that there was sufficient evidence proving beyond a reasonable doubt an assault is in conflict with precedent and should be reviewed.

This Court should also review whether the evidence was sufficient to prove Mr. Myers assaulted Officer Young. In his statement of

³ The police reports and affidavit of probable cause show that police arrested Mr. 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).

additional grounds, Mr. Myers pointed out that the evidence did not prove he kicked Officer Young. Op. at 9. The two officers present did not see Mr. Myers kick Officer Young. RP 146, 152. Officer Young did not document or photograph the purported bruise he suffered. RP 127-128. There was no evidence that Officer Young sought medical treatment. The only evidence that Mr. Myers kicked Officer Young came from Officer Young himself, who did not even testify which leg had been kicked. Given this mere “scintilla of evidence,” the State failed to meet its burden to prove beyond a reasonable doubt that Mr. Myers assaulted Officer Young. See State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975) (deputy’s testimony that he obtained trunk keys from either the husband or the wife was a mere “scintilla of evidence” insufficient to establish dominion and control by the wife over the trunk’s contents). The Court of Appeals failure to recognize this conflicts with precedent and merits this Court’s review. RAP 13.4(b)(1), (2).

F. CONCLUSION

Warrantless, illegal entries by the police into civilians’ homes are not part of the official function of the police. In conflict with precedent, the Court of Appeals opinion failed to recognize this fundamental principle and improperly held that police do not act in bad faith when they disregard fundamental, clearly established constitutional law protecting

the home. The issue is also one of substantial public interest.

Accordingly, this Court should grant review and hold that police officers act in bad faith performance of their official duties by entering a person's home in the absence of a warrant or exception to the warrant requirement.

DATED this 19th day of August, 2015.

Respectfully submitted,

/s/ Richard Lechich 
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Petitioner

Appendix

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

STATE OF WASHINGTON,)	No. 71499-6-1
)	
Respondent,)	
)	
v.)	
)	
FRED CHARLES MYERS, JR.,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 20, 2015
_____)	

VERELLEN, A.C.J. — Fred Myers challenges his conviction for third degree assault, arguing the State failed to present sufficient evidence to support his conviction and his attorney provided ineffective assistance. We disagree and affirm. However, we accept the State’s concession that the sentencing court erred by imposing mental health treatment as a community custody condition and remand for the court to strike the condition.

FACTS

On March 4, 2013, at approximately 3:00 a.m., the Marysville Police Department sent officers to a large apartment complex in response to a call reporting a disturbance involving a man banging on the walls. Officer Michael Young and Sergeant Rick Sparr went to the apartment indicated in the report and found the door wide open and personal belongings piled up as if they had been thrown out the door. When Officer Young knocked on the open door and identified himself as a police officer, Fred Myers came around a corner inside the apartment and continued “throwing stuff around,”

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moving piles, and "basically collecting everything he owned."¹ Myers told Officer Young he was moving out because "his wife was cheating on him."² Officer Young asked Myers to "keep it down" because it was late and the noise was bothering the neighbors.³ Myers agreed, and Officer Young turned to leave.

As Officer Young started down the stairs outside the apartment, Officer Pat Connelly called on the radio and said that he had probable cause to arrest Myers for a domestic violence incident involving Myers's wife. Officer Young returned to the apartment and asked Myers to speak to him again. Myers came within "a couple feet" of where Officer Young stood, "outside right at the doorway" of the apartment.⁴ Myers "was agitated" and Officer Young could smell the odor of alcohol.⁵ Officer Young asked Myers if he had been drinking and asked about the incident reported by his wife. Myers admitted he had been drinking, but denied committing a crime against his wife. Myers became more agitated and "bizarre" and began to "rant about his past, his history," and his mental health.⁶

Officer Young then stepped into the hallway inside the apartment and said, "Fred, turn around. You're under arrest."⁷ Myers turned around and put his hands behind his back. After Officer Young fastened the handcuffs, Myers became "really

¹ Report of Proceedings (RP) (Dec. 2, 2013) at 107-08.

² Id. at 108.

³ Id.

⁴ Id. at 109.

⁵ Id. at 109-10.

⁶ Id. at 110.

⁷ Id. at 112.

upset” and began to try to turn around to face the officers.⁸ As Officer Young and Sergeant Sparr tried to restrain Myers and calm him, Myers began kicking backwards with his left leg and kicked Officer Young in the “shin pretty good a couple of times.”⁹ Myers also turned his head and tried to bite Officer Young’s arm. After three officers used their body weight to hold him down on the floor, Myers stopped fighting.

The State charged Myers with third degree assault against Officer Young under RCW 9A.36.031(1)(g), which criminalizes “[a]ssault[ing] 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.” Prior to trial, Myers waived his right to a CrR 3.5 hearing and stipulated to the admissibility of statements he made to the officers during the incident.

At trial, the State presented the testimony of Detective Connelly, Officer Young, Sergeant Sparr, and Officer Matthew Mishler. All four testified they were on duty as police officers on March 4 and were dispatched to investigate a call reporting a disturbance at Myers’ apartment. The trial court instructed the jury, in pertinent part:

A person commits the crime of Assault in the Third Degree when he or she 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.

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

To convict the defendant of the crime of Assault in the Third Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

⁸ Id. at 114.

⁹ Id. at 116.

(1) That on or about the fourth day of March, 2013 the defendant assaulted Michael Young;

(2) 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 or her official duties; and

(3) That any of these acts occurred in the [s]tate of Washington.^[10]

In closing, defense counsel argued that Myers did not intend to kick Officer Young, but acted like an “animal” and “react[ed] without thinking” when he was “already agitated,” “highly emotional,” and “drunk.”¹¹ The jury found Myers guilty as charged, and the trial court imposed a standard range sentence.

Myers appeals.

ANALYSIS

Myers first challenges the sufficiency of the evidence, arguing that the State failed to prove that Officer Young was performing his official duties at the time of the assault. We disagree.

Evidence is sufficient to support a conviction if, 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.¹² “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.”¹³ “[A]ll reasonable

¹⁰ CP at 37-39.

¹¹ RP (Dec. 3, 2013) at 166.

¹² State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

¹³ Id.

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”¹⁴ Circumstantial evidence and direct evidence are deemed equally reliable.¹⁵ We leave credibility determinations to the trier of fact and will not review them on appeal.¹⁶

Our Supreme Court has held that “official duties,” as stated 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.”¹⁷ The court has rejected efforts to adopt an “overly restrictive definition of the term ‘official duties’” based on the constitutional validity of an arrest.¹⁸ “Whether an officer may have made an incorrect judgment regarding one or more of a suspect’s myriad constitutional rights in no way determines whether that officer was . . . ‘performing his official duties.’”¹⁹ “Cases in which an officer is engaged in a crime of violence upon a citizen are distinguishable from situations wherein an officer may inadvertently infringe upon some constitutional rights of a person.”²⁰ “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.*”²¹

¹⁴ Id.

¹⁵ State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

¹⁶ State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

¹⁷ State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995).

¹⁸ Id.

¹⁹ State v. Hoffman, 116 Wn.2d 51, 99, 804 P.2d 577 (1991).

²⁰ Id. at 100.

²¹ Mierz, 127 Wn.2d at 479 (emphasis added).

Myers claims that prior authority on the meaning of “official duties” is not controlling because Washington courts have not decided whether an officer may be considered to act in good faith while failing to respect the well-known and fundamental constitutional rights prohibiting entry into a person’s *home* to make an arrest without a warrant or exigency. He points out that other cases involved crimes against officers who entered private property, rather than private homes, without a warrant.²²

First, this is a distinction without a difference. Myers fails to offer a cogent explanation or any relevant authority to justify imposing restrictions on the definition of “official duties” based on whether an officer inadvertently infringes upon one particular constitutional right rather than another. Second, “[t]he lawfulness of an arrest only becomes a jury question if the issue is injected into the trial by reason of the charging language of the information, as, for example, when a defendant is charged with resisting ‘lawful’ apprehension.”²³ The lawfulness of an arrest is *not* part of the charging information for assault in the third degree.²⁴ We reject the invitation to depart from Washington law.

Here, the State presented substantial, undisputed evidence that Officer Young was on duty as a patrol officer for the Marysville Police Department in the early morning hours of March 4, 2013; that his duties included responding to calls; that he was dispatched to Myers’ apartment to respond to a report of a disturbance; that he

²² Mierz, 127 Wn.2d at 463 (defendant assaulted Department of Wildlife agents who entered his yard without a warrant to seize coyotes); Hoffman, 116 Wn.2d at 99 (defendants shot tribal police officers who entered private property without a search warrant).

²³ Hoffman, 116 at 98.

²⁴ See id.; RCW 9A.36.031(1)(g); Clerk’s Papers at 92.

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identified himself as a police officer to Myers; that he spoke to Myers about the reason for the disturbance call and about the domestic violence report; that he placed Myers under arrest as requested by Officer Connelly; and that he used force to try to control Myers when he began to struggle against the officers. Myers does not identify any evidence in the record indicating that Officer Young had some other personal reason, separate from his job as a police officer, to act as he did, or that he intended to commit any kind of crime against Myers. Nothing in the record suggests that Officer Young decided to step inside the door of the apartment to make the arrest in bad faith or with malicious intent. There was no evidence whatsoever in this case to suggest that Officer Young was "on a frolic of his own" unrelated to his proper official duties as a Marysville police officer when Myers kicked him in the shin.²⁵ The State presented sufficient evidence to support the conviction.

Myers next claims he received ineffective assistance of counsel when his attorney failed to object to testimony from the officers indicating that he was mentally unstable and dangerous. In particular, defense counsel did not object when Officer Young testified that Myers said he was "bipolar" and "quad-polar"; that he spoke in a "really like crazy, maniacal voice"; that he denied being on medication; and that he made a stabbing motion with a pen and said, "Sometimes I want to kill everyone."²⁶ Counsel also failed to object when Sergeant Sparr testified that Myers "said he wouldn't have laid a hand on [his wife] and if he had, they'd be looking at a corpse."²⁷ Myers argues that counsel should have objected to the testimony as irrelevant, unduly

²⁵ See Hoffman, 116 Wn.2d at 99-100.

²⁶ RP (Dec. 2, 2013) at 110-11.

²⁷ Id. at 136.

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prejudicial, and/or in violation of an order in limine preventing the defense from asserting a mental health defense. He also claims that no legitimate strategy justified counsel's failure to object.

Myers must show both deficient performance, i.e., that counsel's performance fell below an objective standard of reasonableness, and resulting prejudice.²⁸ Failure on either prong of the test defeats an ineffective assistance claim.²⁹

Generally, the decision of when or whether to object to the admission of evidence "is a classic example of trial tactics" that does not support an ineffective assistance claim.³⁰ Exceptional deference is given "when evaluating counsel's strategic decisions."³¹ "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal."³² The tactic or strategy must be reasonable.³³

The record reveals that the defense theory of the case was that Myers was so emotionally upset about his dispute with his wife, agitated about the confrontation with police, and drunk, that he was acting out of a kind of wild animal instinct rather than an intent to assault Officer Young. In response to the State's motion to exclude any mental health defense prior to trial, defense counsel stated that he planned to "elicit some

²⁸ State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

²⁹ Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

³⁰ State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

³¹ State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); see also State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) ("There is a strong presumption that counsel's performance was reasonable.").

³² Madison, 53 Wn. App. at 763.

³³ State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

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testimony that [Myers] was a little bit incoherent, a little bit ranting and raving," but he did not "plan to characterize that as mentally ill."³⁴ And in his closing argument, defense counsel repeatedly compared Myers to a threatened or startled animal and argued that the State did not prove he acted intentionally when his foot came back toward the officer. Counsel also argued that Officer Young was so hypervigilant and so focused on his own safety that he could not view Myers' actions reasonably or objectively and exaggerated the incident. On this record, Myers cannot establish that defense counsel's decision not to object was unreasonable in light of his theory of the case. His ineffective assistance claim fails.

Finally, Myers contends that the sentencing court failed to obtain a presentence report and enter necessary findings, as required by RCW 9.94B.080, before imposing mental health evaluation and treatment as a condition of community custody.³⁵ The State concedes that the court did not obtain the required presentence report. We accept the State's concession.

In his statement of additional grounds for review, Myers contends that the State failed to present sufficient evidence to support his conviction because (1) there was no eyewitness testimony; (2) Officer Young failed to properly photograph or document his injury; (3) Officer Young did not seek medical attention or file a loss of wage report; (4) the State did not present any evidence of a weapon; (5) Officer Young "could have

³⁴ RP (Dec. 2, 2013) at 6.

³⁵ See RCW 9.94B.080; State v. Jones, 118 Wn. App. 199, 209-10, 76 P.3d 258 (2003).

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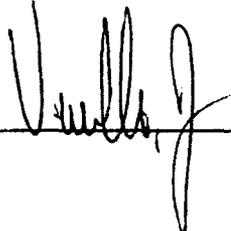
been bumped or kicked by a fellow officer as they were in a frenzy";³⁶ and (6) Officer Young did not testify which leg was injured.³⁷

But viewed in the light most favorable to the State, Officer Young's testimony that Myers repeatedly kicked backwards in a "downward stomp kind of motion,"³⁸ making contact with the officer's shin "pretty good a couple of times,"³⁹ would allow a rational trier of fact to find that Myers intentionally assaulted Officer Young. Myers fails to demonstrate any basis for relief.

We affirm the conviction, reverse the section of the judgment and sentence requiring a mental health evaluation and treatment as a condition of community custody, and remand for further proceedings consistent with this opinion.⁴⁰

WE CONCUR:

Trickey, J.


COX, J.

³⁶ Statement of Additional Grounds at 7.

³⁷ After filing a reply brief, counsel for Myers filed a motion to permit Myers to file a supplemental statement of additional grounds in reply to the State's brief. In response, the State asked this court to deny his motion as RAP 10.10 does not authorize such additional briefs. In this instance, we grant Myers' motion and have considered his supplemental statement of additional grounds.

³⁸ RP (Dec. 2, 2013) at 115.

³⁹ *Id.* at 116.

⁴⁰ See Jones, 118 Wn. App. at 212 n.33 (indicating, without deciding, that the statutory provision that the court "may order additional evaluations at a later date" may extend the authority to comply with RCW 9.94B.080 on remand).

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Snohomish County Prosecuting Attorney
- petitioner
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MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 19, 2015

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