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COURT OF APPEALS
DIVISION II

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NO. 35139-1-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

OLIVIA LEANORA LAUIFI

Appellant.

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

The Honorable Kitty-Ann van Doorninck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Counsel was ineffective for failing to maintain its request for a self-defense instruction.
2. Appellant was denied her right to a fair trial when her attorney rescinded his request for a self-defense instruction.
3. The trial court exceeded its statutory authority by imposing 9-18 months of community custody for a sentence of confinement less than one year.

Issues Presented on Appeal

1. Was counsel ineffective for failing to maintain its request for a self-defense instruction?
2. Was appellant denied her right to a fair trial when her attorney rescinded his request for a self-defense instruction?
3. Did the trial court exceed its statutory authority by imposing 9-18 months of community custody for a sentence of confinement less than one year?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ms. Lauifi was charged with one count of custodial assault in violation of RCW 9A.36.100 (1). CP 1-2. Ms. Lauifi was tried by a jury, the

Honorable Kitty Ann van Doornink presiding. Ms. Lauifi was convicted as charged. CP 18. On July 21, 2006 Ms. Lauifi was sentenced within the standard range. CP 34-44.

On October 30, 2006, the superior court nunc pro tunc amended the judgment and sentence to add 9-18 months of community custody. Supp CP. (Motion and Order Correcting Judgment and Sentence 10-20-06). This order incorrectly stated that Ms. Lauifi pleaded guilty to custodial assault, when in fact she was tried by a jury. Id; CP 18. During the sentencing hearing, the state asked for 9-18 months of community custody but indicated that the Department of Corrections would not impose the community custody because Ms. Lauifi's standard range sentence was only eight months which is not a prison sentence. RP (7-21-06) 5. The defendant argued that community custody was not appropriate for a non-prison sentence. Id. The trial court imposed 9-18 months of community custody. Supp CP. (Motion and Order Correcting Judgment and Sentence 10-20-06).

This timely appeal follows. CP 19-30.

2. SUBSTANTIVE FACTS

Pierce County Corrections Officer ("CCO") Bryce Sawyer testified that while on duty in the Pierce County Jail on September 9, 2005 he was charged with escorting Ms. Lauifi back to her cell. RP 71-74. Ms. Lauifi

responded without incident and proceeded up a flight of stairs to her cell. RP 75-76. According to Sawyer, Ms. Lauifi was moving slowly and he was in a hurry. Id. Sawyer followed Ms. Lauifi up the stairs and just before the threshold of her cell she asked him if he just kicked her. According to Sawyer before he could answer Ms. Lauifi attempted to hit him, but missed. RP 76-77. Sawyer took defensive action and grabbed Ms. Lauifi by her hair and brought her to her knees. RP 77. According to Sawyer, while attempting to control Ms. Lauifi, she hit him on the legs but he was not hurt. RP 78, 80.

CCO Jonathan Blind was working in the control booth for the doors in the Pierce County Jail on September 9, 2005 in the area where Ms. Lauifi was housed. RP 12-15. He testified that he called a “Code Blue” on his radio when he saw Sawyer grab Ms. Lauifi by the hair and Ms. Lauifi hit Sawyer’s legs. RP 16. A “Code Blue” is a radio message that lets Jail staff know that there is a fight in progress and an officer needs help. RP 17. CCO Blind did not have a very clear view of the incident due to his vantage point and he could not hear any conversation between Ms. Lauifi and CCO Sawyer. RP 21-22, 27, 55.

CCO Miller was the first person to respond to the call for assistance. RP 46. She agreed that there were blind spots in the area where the incident occurred and that CCO Blind would not have had a clear view. RP 55.

Ms. Lauifi was walking in bare heel sandals back to her cell with CCO Sawyer behind her when he kicked her in her bare heel. RP 93, 95. Ms. Lauifi asked CCO Sawyer if he kicked her and he put his hand on her elbow. Ms. Lauifi told CCO Sawyer not to touch her and he grabbed her hair and pulled her to her knees. CCO Sawyer told her to lie on her stomach but she could not because of Sawyer's hair hold. RP 93-94. Ms. Lauifi struggled for balance and may have bumped Sawyer, but she did not try to hit him. RP 95.

C. ARGUMENT

1. APPELLANT WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL ATTORNEY FAILED TO MAINTAIN A REQUEST FOR A SELF DEFENSE JURY INSTRUCTION.

The Washington and United States Constitutions guarantee criminal defendants effective assistance of counsel to ensure the fairness and impartiality of criminal trials. To prove ineffective assistance of counsel, a defendant must show based on the record that (1) his counsel's performance was deficient, and (2) prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The appellate courts review the defendant's claim of ineffective assistance of counsel de novo. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003). There is a strong presumption that counsel's representation was adequate and effective. *Id.*; McFarland, 127 Wn.2d at 335. To show deficient performance, the defendant must present evidence of counsel's unprofessional errors. Accordingly, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To meet the second prong, a defendant must show that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335. If an appellant fails to establish either element of the ineffective assistance of counsel claim, the reviewing court need not address the other element. Hendrickson, 129 Wn.2d at 78.

In the instant case, the failure to maintain a request for a self-defense instruction constituted deficient performance. There was no tactical reason not to maintain a self defense strategy because it was the only viable defense. Counsel initially requested a self-defense instruction and then withdrew the request when the judge questioned him regarding Ms. Lauifi's claim that she never struck the corrections officer. Although the facts of the case supported the instruction, counsel did not explain to the court that Ms. Lauifi testified

that although she did not try to strike Sawyer, she may have done so in her struggle for balance. RP 95.

The facts in the record support a request for a self defense instruction because the overwhelming evidence presented at trial indicated that Ms. Lauifi acted in self defense. Thus the failure to request the instruction cannot be fairly explained on the basis of trial strategy.

The failure to maintain a request for a self defense instruction prejudiced Ms. Lauifi. The state had a duty to disprove self-defense beyond a reasonable doubt and counsel's failure to maintain a request for this instruction relieved the state of this burden to Ms. Lauifi's prejudice. Strickland, supra.

To raise the claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. Once the defendant offers credible evidence, the burden then shifts to the state to prove the absence of self-defense beyond a reasonable doubt. State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999). A defendant is entitled to a self-defense instruction if he or she produces "some credible evidence" tending to establish self-defense. State v. Walker, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985).

Ms. Lauifi presented testimony that CCO Sawyer kicked in her bare backed foot while escorting her up the stairs into her cell. Thereafter, Ms. Lauifi told Sawyer not to touch her. Sawyer then grabbed Ms. Lauifi by the elbow and then hair and pulled her to the ground. RP 93-95. Ms. Lauifi said that she did not swing at Sawyer, but did move her elbow away and may have bumped him in the legs while struggling for balance. RP 95.

CCO Sawyer, testified that Ms. Lauifi kicked him in the legs while he had her restrained by a hair hold. RP 78. CCO Blind testified that while operating the doors in the jail he observed Ms. Lauifi hitting Sawyer in the legs while she was held down, but that he also testified that he did not have a clear view of the scene. RP 16, 27. CCO Miller testified that she responded to the Code Blue and saw that Sawyer needed help because Ms. Lauifi would not hold still to be handcuffed. RP 53-54. Ms. Lauifi produced credible evidence that she was grabbed by the hair, pulled to the ground and kept on her knees or near the ground but unable to lie down until CCO Sawyer released her into the custody of another CCO. Ms. Lauifi struggled for balance during the entire episode likely striking Sawyer in the process.

The South Dakota Supreme Court addressed the failure to raise a self dense argument in Conaty v. Solem, 422 N.W.2d 102 (1988). Therein the

Court determined that defense counsel's failure to request a self-defense instruction satisfies the prejudicial element of Strickland. The Court in Conaty held "[t]he facts ... raise the issue of self-defense, and therefore, defense counsel should have proposed an instruction ... the failure to request a self-defense instruction constituted ineffective assistance of counsel." Conaty v. Solem, 422 N.W.2d at 105. Conaty, involved a defendant who after ordering the plaintiff to leave the apartment building, admitted to shooting three feet to the side of the plaintiff with a borrowed shot gun. The shots fired were in response to the plaintiff's prior deadly threats against the defendant and other apartment tenants. A witness testified that Conaty was "scared and shaken up like he feared for his life." Conaty v. Solem, 422 N.W.2d at 103.

Like in Conaty, Ms. Lauifi presented credible evidence tending to establish self-defense. She established that CCO Sawyer grabbed her first and pulled her down toward the ground by her hair. This testimony was uncontroverted. The witnesses differ on whether Sawyer kicked Lauifi or not, but in either case, Sawyer physically touched Lauifi first. Thereafter, all of the witnesses indicated that Lauifi made physical contact with Sawyer in the legs but he was not hurt. Ms. Lauifi testified that the contact occurred during her struggle for balance.

A self defense instruction is appropriate when the evidence suggests self defense by credible evidence. This does not require proof beyond a reasonable doubt, rather it merely requires the defendant to establish some evidence of self defense. State v. Walker, 40 Wn. App. at 662. Certainly struggling for balance when grabbed by the hair and dragged toward the ground qualifies as self defense even under the standard enunciated in State v. Bradley, 141 Wn.2d 731; 739, 10 P.3d 358 (2000), which requires the defendant to be in actual danger when the assault is against a police or corrections officer.

2. THE TRIAL COURT WAS NOT AUTHORIZED TO IMPOSE COMMUNITY CUSTODY FOR CUSTODIAL ASSAULT WHEN THE STANDARD RANGE FOR THAT OFFENSE WAS LESS THAN ONE YEAR

The trial court imposed 9-18 months of community custody for Ms. Lauifi's custodial assault. Her standard range sentence was 8 months of incarceration. RCW 9.94A.545, which cites to RCW 9.94A.715 inter alia, sets forth the requirements and limits for the imposition of community custody. RCW 9.94A.545 and RCW 9.94A.715 provide in relevant part that the court may impose up to 12 months of community custody for "violent

offenses” when the offender is with a sentenced to the Department Of Corrections (“DOC”) for less than one year:

[O]n all sentences of confinement for one year or less, in which the offender is convicted of a ...violent offense...the court may impose up to one year of community custody, subject to the conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720.

RCW 9.94A.545.1 RCW 9.94A.715 provides in relevant part:

When a court sentences a person to the custody of the department for a violent offense... the court shall in addition to the other terms of the sentence, sentence the offender to community custody....

Under RCW 9.9A.030 (50), custodial assault is not a "violent offense", thus the court was not authorized to impose community custody.

RCW 9.94A.715 and RCW 9.94A.545 contain identical language regarding the court’s authority to impose community custody. The only difference is that RCW 9.94A.715 applies to all sentences and RCW 9.94A.545 applies to sentences of one year or less. In In re Childers, 135 Wn. App. 37, 40, 143 P.3d 831 (2006); citing, to In re Sentence of Jones, 129

¹ A trial court may impose up to two years of community custody under the first-offense waiver. RCW 9.94A.650 (3) (b). But neither the State nor Ms. Lauifi requested the first-time offender waiver.

Wn. App. 626, 120 P.3d 84 (2005), the Court held that RCW 9.94A.715 and RCW 9.94A.545 “unambiguously limits the court's authority to impose community custody to those offenses listed in the statute.” Childers, 135 Wn. App. at 40.

Prior to the 2003 amendments to RCW 9.94A.545, the statute authorized the court to impose community custody in all sentences for felonies when the confinement was less than one year. *Id.*, citing, Jones, 129 Wn. App. at 629. “The purpose of the 2003 amendment was to move less serious offenders out of the state-funded corrections system”. Jones, 129 Wn. App. at 630-32. After 2003, under RCW 9.94A.715, and RCW 9.94A.5454 the court is only authorized to impose community custody only for “violent offenses” in specific situations, none of which exists here. The trial court erred by imposing community custody. Childers, 135 Wn. App. at 41. The remedy is remand for resentencing without the community custody.

D. CONCLUSION

For the reasons stated herein, Ms. Lauifi respectfully requests this Court reverse her conviction and remand for a new trial and in the alternative remand for removal of community custody.

DATED this 12th day of December 2006.

Respectfully submitted,

LISE ELLNER
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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Olivia Lauifi, #895517 Washington Corrections Center for Women 9601 Bujacich Rd. NW Gig Harbor, WA 98332-8300 a true copy of the document to which this certificate is affixed, on December 14, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature