

NO. 35139-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

OLIVIA LEANORA LAUIFI, APPELLANT

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
07 FEB 15 PM 1:50
BY *[Signature]*

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 05-1-04441-3

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Has defendant failed to meet her burden of showing ineffective assistance of counsel? 1

 2. Has defendant failed to show that the trial court lacked the authority to impose community custody? 1

B. STATEMENT OF THE CASE.

 1. Prodedure 1

 2. Facts 1

C. ARGUMENT..... 1

 1. DEFENDANT HAS FAILED TO MEET HER BURDEN OF SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL. 4

 2. DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT LACKED THE AUTHORITY TO IMPOSE COMMUNITY CUSTODY. 10

D. CONCLUSION. 11

Table of Authorities

Federal Cases

<u>Campbell v. Knicheloe</u> , 829 F.2d 1453, 1462 (9th Cir. 1987), <u>cert. denied</u> , 488 U.S. 948 (1988)	6
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	5
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	5, 6, 7, 8, 10
<u>United States v. Cronin</u> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	4
<u>United States v. Layton</u> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <u>cert. denied</u> , 489 U.S. 1046 (1989).....	6

State Cases

<u>State v. Benn</u> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993)	6
<u>State v. Bradley</u> , 141 Wn.2d 731, 732, 10 P.3d 358 (2000).....	8
<u>State v. Brett</u> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995); <u>cert. denied</u> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	6
<u>State v. Carpenter</u> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	5
<u>State v. Ciskie</u> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	5
<u>State v. Dyson</u> , 90 Wn. App. 433, 438, 952 P.2d 1097 (1997)	7
<u>State v. Hendrickson</u> , 81 Wn. App. 397, 399, 914 P.2d 1194 (1996)	7
<u>State v. Holeman</u> , 103 Wn.2d 426, 430, 693 P.2d 89 (1985).....	8
<u>State v. Janes</u> , 121 Wn.2d 220, 237, 850 P.2d 495, 22 A.L.R. 5th 921 (1993)	7
<u>State v. LeFaber</u> , 128 Wn.2d 896, 899, 913 P.2d 369 (1996)	8

<u>State v. McFarland</u> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	5, 6
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	5, 6, 7
<u>State v. Walden</u> , 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).....	7

Constitutional Provisions

Sixth Amendment, United States Constitution.....	4
--	---

Statutes

RCW 69.50	10
RCW 69.52	10
RCW 9.94A.030(50).....	10
RCW 9.94A.411	10
RCW 9.94A.411(2)(a)	11
RCW 9.94A.545	10, 11
RCW 9.94A.545(1).....	10
RCW 9.94A.650	10
RCW 9.94A.715	10
RCW 9.94A.720	10
RCW 9A.36.100(1)(b).....	1

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to meet her burden of showing ineffective assistance of counsel?
2. Has defendant failed to show that the trial court lacked the authority to impose community custody?

B. STATEMENT OF THE CASE.

1. Procedure

On September 12, 2005, the State charged OLIVIA L. LAUIFI, hereinafter “defendant,” with one count of custodial assault in violation of RCW 9A.36.100(1)(b). CP 1-2. On July 10, 2006, the Honorable Kitty Ann van Doornick presided over defendant’s jury trial. RP 1. The jury returned a guilty verdict on July 11, 2006. CP 18. The court originally sentenced defendant to eight months in the Pierce County Jail, the high end of the standard range, with no time for community custody. CP 34-44; RP (07/21/06) 7. The court later amended the judgment and sentence to include nine to eighteen months of community custody. CP 47-48.

Defendant filed a timely notice of appeal. CP 19-30.

2. Facts

On September 9, 2005, defendant was incarcerated at the Pierce County Jail. RP 13. Corrections Officer Bryce Sawyer was on duty at the

jail when he informed defendant that she had to return to her cell. RP 72.

Officer Sawyer performed the first part of his formal head count while defendant walked to the stairs in order to get back to her cell which was on the second floor of the unit. RP 74. Officer Sawyer finished his count before defendant ascended the stairs. RP 76.

Officer Sawyer followed defendant at a distance of approximately two feet while she climbed the stairs. RP 76. When they arrived at defendant's open cell door, defendant stopped before entering. RP 76. Defendant asked Officer Sawyer, "Did you just kick me?" RP 76. Before Officer Sawyer could respond, defendant turned and swung her closed fist toward his face. RP 76.

Officer Sawyer moved out of the way of defendant's punch, and responded by using a department-approved, two hand hair hold to take defendant to the ground. RP 77. Officer Sawyer was unable to handcuff defendant as she kept swinging her arms trying to hit him. RP 77. Defendant hit Officer Sawyer multiple times on his legs. RP 78.

Officer Sawyer's partner, Corrections Officer Jonathan Blind, witnessed the attack. RP 13. He saw Officer Sawyer contact defendant to send her to her cell, but did not see that defendant was restrained in any way. RP 14. He noticed that Officer Sawyer was following defendant "at some distance," and that there was no contact between defendant and his

partner. RP 21. Officer Blind also saw defendant “take a swing out of nowhere,” towards Officer Sawyer, and watched as she continued to swing at Officer Sawyer’s legs, even after she was on the ground. RP 16. Officer Blind immediately called for backup, which arrived within five to ten seconds. RP 16-17. Officer Blind’s view of the attack was blocked after the responding officers arrived. RP 24-25.

Pierce County Sheriff’s Deputy Kathi Miller was on supervisory duty and responded to the Code Blue. RP 35. When she arrived at the scene, she saw that defendant was struggling with Officer Sawyer and he did not have defendant under control. RP 40, 52. The responding officers were able to handcuff defendant and put her in her cell. RP 86. Neither defendant nor Officer Sawyer complained of injuries that day. RP 43. Deputy Miller saw that defendant filed a grievance several days later. RP 44.

Defendant testified that, as she was walking up the steps to her cell, Officer Sawyer kicked the back of her foot. RP 93. When she turned to ask him if he had kicked her, Officer Sawyer put his hand on her elbow. RP 93. She stated that she moved her arm away from him and told him not to touch her. RP 93. At that point, according to defendant, Officer Sawyer grabbed her by the hair and started pulling her out of her cell. RP 93. She told the jury that Officer Sawyer ripped her shirt as he dragged

her around the tier. RP 93. Defendant said she was unable to comply with Officer Sawyer's orders to get on the ground because of his grip on her hair. RP 93. Defendant claimed that she was not struggling with the officer, but struggling for balance. RP 95. She testified that she never tried to hit him in the face or legs, but she might have bumped him as he dragged her around. RP 95. Defendant filed grievances and went to the clinic for bruising a week later. RP 96-97.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO MEET HER
BURDEN OF SHOWING INEFFECTIVE
ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v.

Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different."

Strickland, 466 U.S. at 694. A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In this case, defendant cannot make either showing.

A claim of self-defense is available only if the defendant first offers credible evidence tending to prove that theory or defense. State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997); State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495, 22 A.L.R. 5th 921 (1993) (defendant bears initial burden of producing some evidence demonstrating self-defense). Because self-defense is an affirmative defense, the defendant bears the initial burden to set forth some evidence demonstrating self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Once the defendant presents some evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. Walden, 131 Wn.2d at 473.

An unintentional assault can be excused through the defense of accident but it cannot be justified through a claim of self-defense. State v. Hendrickson, 81 Wn. App. 397, 399, 914 P.2d 1194 (1996).

In most cases, reasonable force used in self-defense is justified based on the defendant's subjective, reasonable belief of imminent harm

from the victim. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). But the use of force against a law enforcement officer making an arrest is lawful only if the arrestee is actually about to be seriously injured or killed. State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985).

The circumstances of individuals using force in self-defense against correctional officers are analogous to the situation of persons resisting arrest, we hold a person may claim self-defense and use force to resist only when that person is in actual, imminent danger of serious injury. State v. Bradley, 141 Wn.2d 731, 732, 10 P.3d 358 (2000).

Here, defendant is unable to meet the first prong of Strickland, which requires her to show how counsel's performance fell below an objective standard of reasonableness. Defense counsel's performance was not deficient where defendant was not entitled to a self defense instruction. Defendant never admitted that she hit Officer Sawyer. See RP 93-95. She claims she probably "bumped into him while he was dragging [her] around," but she denied ever punching, hitting, or kicking him. RP 95. Defendant never claimed that she was justified in striking out at Officer Sawyer in order to protect herself. If defendant never intentionally struck the officer, she was not acting to defend herself from bodily harm.

Even if defendant did claim she was acting in self defense, she failed to show that she was in actual, imminent danger of serious injury

from Officer Sawyer. Defendant testified that Officer Sawyer kicked the back of her foot and that he touched her elbow. RP 93. Neither of these actions would give rise to a belief that defendant was in actual, imminent danger of serious injury.

Because defendant was not acting in self defense, she was not prejudiced by counsel's failure to insist on a self defense instruction. After defendant's testimony, counsel offered a self defense instruction to the court. RP 102. The State pointed out that there is not only a higher standard for self defense against a corrections officer, but also that defendant's testimony did not support any theory of self defense. RP 103.

The court clarified the State's position:

Mr. Whitehead, I thought it was an affirmative defense which she needed to say, yes, I committed an assault, but I was legally justified in doing that, and that's not what her testimony was. She basically said it was unprovoked and he assaulted her, which is fine. That can be the theory. But she didn't respond in any way, shape, or form, according to her testimony, other than being subdued.

RP 104. While defense counsel agreed with the court and withdrew the instruction, it is clear from the court's statement that it was not inclined to give the jury an instruction on self defense. RP 104. Since the court would not have given an instruction defendant was not entitled to, she was not prejudiced by counsel's withdrawal of the self defense instruction.

Defendant has failed to meet the second prong of Strickland, which requires a showing of actual prejudice.

2. DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT LACKED THE AUTHORITY TO IMPOSE COMMUNITY CUSTODY.

Defendant claims that the trial court lacked the authority to impose community custody where her sentence was less than one year and her offense could not be considered a violent offense. Custodial assault is not a violent offense under RCW 9.94A.030(50). However, defendant's brief omitted pertinent language directly relating to this issue. See Appellant's Brief at 10. Contrary to defendant's reading of RCW 9.94A.545, the statute does not only apply to violent offenses. RCW 9.94A.545(1) provides:

Except as provided in RCW 9.94A.650 and in subsection (2) of this section, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, ***a crime against a person under RCW 9.94A.411***, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

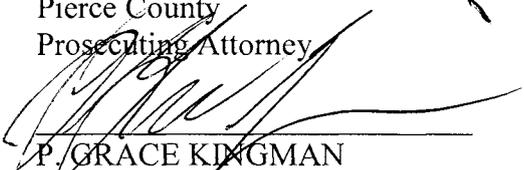
(emphasis added). RCW 9.94A.411(2)(a) defines custodial assault as a crime against persons. Clearly, RCW 9.94A.545 granted the court authority to impose community custody up to one year. The court did, however, exceed its authority under the statute where it imposed community service in excess of one year. If this Court makes any change to defendant's community custody, it should only be to correct the judgment and reduce the duration of community custody to nine to twelve months.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that the court affirm defendant's conviction and remand only to correct the judgment and sentence to reflect nine to twelve months of community custody.

DATED: FEBRUARY 14, 2007

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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