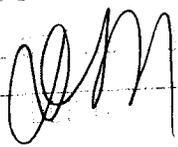


NO. 40902-0-II

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

FILED - 6
BY: 

STATE OF WASHINGTON,
Respondent,

v.

CORINA M. KERR,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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Prosecuting Attorney
for Grays Harbor County

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P.M. 7-5-2011

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RESPONDENT'S STATEMENT OF CASE

On February 15, 2008, Officers Andy Snodgrass and Steve Timmons responded to the residence of the appellant to investigate a report of domestic violence. (report of proceedings July 31, 2010 at 10). The appellant was uncooperative in the investigation. RP 11. Due to the nature of the report and the statements of the reporting party the officers attempted to arrest the appellant. RP 12. She did not comply with the officer directions during the arrest and was generally resistive. The Appellant was cited in municipal court with charges Malicious Mischief in the Third Degree and Resisting.

At the police station she continued to be abrasive towards the officers. RP 77. She would not answer booking question and swore at the officers. When Officer Ron Bradbury attempted to take the appellant out of the booking area and place her in a changing room she assault him. RP 80. The appellant first intentional scratched him with her fingers and then kicked him.

In an effort to move the appellant to the changing room, Officer Bradbury grabbed the chain of the hand cuffs that the appellant was wearing. She reached around with her fingers and dug the nails into the officers wrists. RP 82. The appellant was then taken in to the changing room. As Officer Bradbury attempted to gain control of the appellant she reared back with her foot and kicked the officer. The officer described this as a "mule kick." RP 82. Her foot stuck his thigh.

Kris Sidor, who is an employee of the Aberdeen Police Department, was asked to search the appellant, because she is a female. RP 52. Sidor witnessed the appellant yelling and being uncooperative. RP 53. She saw the appellant transferred from the booking cell to the changing room. The appellant also assaulted Sidor. As Sidor attempted to search the appellant's pockets the appellant kick her. RP 54. Sidor testified that she could see the appellant's eyes before the kick and that the appellant could see her. *Id.*

The appellant was moved to another cell, and later Sgt. Ross Lampky attempted to check her well being. RP 59. The sergeant observed the appellant to be agitated. He made a closer examination of her and she latched on to his wrist with her fingers and would not let go. RP 60. Her fingernails embedded in his arm. And he suffered a small injury as a result. RP 61. The sergeant stated the appellant's grip on his arm lasted over a minute.

The appellant was charged with one count of Assault in the Third Degree. After a mistrial the State moved to amend the information to three counts of Assault in the Third Degree. Prior to the second trial the defense moved for a continuance so that an expert as to the appellant's mental health could be consulted. (report of proceedings June 29, 2009). at that time two previous orders had been enter authorizing public funds for such an expert. (RP 06/29/09 3).

**SUFFICIENT EVIDENCE WAS PRESENTED THAT THE
APPELLANT ACTED INTENTIONALLY WHEN SHE
ASSAULTED THE PERSONS AT THE JAIL.**

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Carmillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In this case there was evidence that the appellant scratched and kicked Ron Bradbury; kicked Kris Sidor, and grabbed and injured Ross Lampky. The combination of the two assaults on Bradbury suggested that each was intentional, This is particularly true of the scratching. The appellant had to reach around the officers hand to grab him. This clearly

being an assault on the officer it make more likely the fact that the kick was intentional.

Sidor saw the appellant eyes and testified that the appellant could see Sidor when she kicked her. Jury can infer from these facts that the appellant intentionally assaulted Sidor.

The length of the assault on Lampky suggested that it was intentional. Unintentional actions tend to be brief and without direction. The fact that the appellant latched on to the officer arm and would not let go, evidences a determination on the part of the appellant.

The appellant cites no authority that police officers are required by law to suffer assaults in the line of their duty. There is no “reasonable police officer” standard and there should not be. The appellant is suggesting that police officers deserve less protection from the law than ordinary citizens. Scratching and kicking police officers is not tolerated by the law.

**THE APPELLANT WAS PROVIDED EFFECTIVE ASSISTANCE
OF COUNSEL**

The Washington State Supreme Court adopted a two prong test for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to

maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney's performance fell below an acceptable standard, but also that his attorney's failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel's performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

The claimed error is that the appellant's attorney did not consult a mental health expert regarding the appellant's post-traumatic stress

disorder. The record indicates that the not only did trial counsel consult an expert, but the appellant's two prior counsel did as well. The fact that no expert was called indicated that these persons would not have been of any benefit to the appellant. There is no further record on the subject because counsel is not required to provide expert evaluations if the expert is not to called at trial. The presumption is that trial counsel was effective in light of the record.

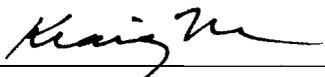
CONCLUSION

For the reasons above the respondent asked that the Court deny the appellant's claimed errors.

DATED: July 5, 2011.

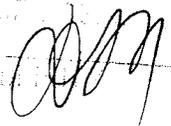
Respectfully Submitted,

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KCN/

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DECLARATION OF MAILING

DECLARATION

I, *Barbara Chapman* hereby declare as follows:

On the 5th day of July, 2011, I mailed a copy of the Brief of Respondent to Carol Elewski, Attorney at Law, PO Box 4459, Tumwater, WA 98501, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 5th day of July, 2011, at Montesano, Washington.

Barbara Chapman