IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CORINA MAE KERR, Appellant.	No. 40902-0-II UNPUBLISHED OPINION

Penoyar, C. J. — Corina Mae Kerr appeals her convictions on three counts of third degree assault against law enforcement agency employees. She contends that the evidence is insufficient to sustain her convictions and that her trial counsel was ineffective for failing to pursue a diminished capacity defense. We affirm.

Facts

On February 15, 2008, Aberdeen police officers John Andrew Snodgrass, Steve Timmons, and Ron Bradbury responded to a disorderly person report at the residence shared by Kerr and Byron Hixson. Police found the two arguing and Hixson told the officers that Kerr had kicked a hole in his kitchen door.[1] When officers asked Kerr about the matter, she was uncooperative. Kerr refused to comply with any of the officers' requests; she would not give her name, she was angry, cursing, argumentative, and upset. The officers arrested Kerr for obstructing a police investigation and malicious mischief. After Kerr was handcuffed, she resisted going to the police car and continued to yell and curse at the officers. She had to be escorted to the police car with an officer guiding her by each arm, and officers had to employ a "hair-hold" to get her into the

[1] Because Kerr and Hixson shared the same residence, the officers treated the call as a domestic violence incident.

police car. Report of Proceedings (RP) (June 9, 2010) at 25, 33. Kerr remained upset for the duration of the drive to the jail.

At the police station, Kerr continued to be abrasive and uncooperative. She would not answer booking questions and swore at the officers. When Bradbury attempted to take Kerr out of the booking area and place her in a changing cell she refused to go. Kerr's hands were still cuffed behind her back, and as she moved away from Bradbury he grabbed her forearm with his left hand and the link of chain between the cuffs with his right hand. As he did so, Kerr reached around the handcuffs and scratched Bradbury's hand with her fingernails. As Bradbury moved Kerr into the changing room, Kerr lifted her right leg and kicked backward with her foot, kicking Bradbury's left thigh. Bradbury described this as a "mule kick." RP (June 9, 2010) at 82.

Kristina Sidor, a female employee of the Aberdeen Police Department, was asked to search Kerr. Sidor observed Kerr yelling and being uncooperative. Sidor watched as officers moved Kerr from the booking cell to the changing cell. Because Kerr refused to cooperate, the officers put her on the ground for the search. As Sidor attempted to search Kerr's pockets, Kerr kicked Sidor on the left calf, causing Sidor to fall and hit a bench. Sidor testified that she could see Kerr's eyes before the kick and that Kerr could see Sidor when Kerr kicked her.

Kerr was moved to an isolation cell (crisis cell), where she was shackled. When Sergeant Ross Lampky, a supervisor, checked on Kerr's well being, he noticed that she was still agitated; also her face was flushed and the veins in her neck were distended showing a high pulse rate. Lampky called the Aberdeen Fire Department to come examine Kerr. When Lampky entered the cell with the fire department personnel, he attempted to put a spit hood on Kerr. Kerr grabbed Lampky's left wrist with her fingers and would not let go, embedding her fingernails into his arm and causing a small puncture wound. Lampky said that Kerr latched on to his arm for some time and would not let go.

The State initially charged Kerr with one count of third degree assault. After a mistrial, the State moved to amend the information to three counts of third degree assault. Before the second trial, defense counsel moved for a continuance so that an expert could be consulted regarding Kerr's mental health. At that time two previous orders had been entered authorizing public funds for such an expert. The trial court denied the continuance.

A jury convicted Kerr as charged. The trial court imposed a sentence below the standard range,[2] noting that Kerr's capacity to conform her conduct to the requirements of the law was significantly impaired by a preexisting mental health condition. Kerr appeals.

analysis

I. Sufficiency of Evidence

A. Standard of Review

Kerr argues that the evidence was insufficient to convict her of the three counts of third degree assault. We disagree.

Sufficient evidence supports the jury's verdict if a rational person viewing the evidence in the light most favorable to the State could find each element proven beyond a reasonable doubt. *State v. Raleigh*, 157 Wn. App. 728, 736, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011); *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. *Raleigh*, 157 Wn. App. at 736 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829

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[2] The court sentenced Kerr to 62 days with credit for time served of 62 days.

P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Raleigh*, 157 Wn. App. at 736-37 (citing *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004)).

B. Unlawful Force

This issue turns on the difference between the requirements of a definitional instruction and a "to convict" instruction. Specifically, Kerr claims that the instruction defining assault to include the term "unlawful force" required the State to prove beyond a reasonable doubt that she assaulted "with unlawful force" a law enforcement agency employee while performing his or her official duties. We hold that the evidence was sufficient to convict Kerr of the charged crimes, notwithstanding the language in the definitional instruction.

To convict jury instructions must contain all the elements of the crime, or else the State has been relieved of its burden to prove every essential element beyond a reasonable doubt. *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). If the parties do not object to jury instructions, they become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). In a criminal case, if the State adds an unnecessary element *in the to-convict instruction* without objection, the added element also becomes the law of the case and the State assumes the burden of proving the added element. *Hickman*, 135 Wn.2d at 102. A criminal defendant may challenge the sufficiency of the evidence to support such added elements. *Hickman*, 135 Wn.2d at 102. As noted, in a criminal case, evidence is sufficient to support a guilty verdict if, viewed in the light most favorable to the State, any rational trier of fact could find each element of the crime proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980).

Here, Kerr has not assigned error to the to convict instructions regarding the third degree assault charges. Moreover, she does not and could not assign error to instruction 13, the definitional instruction for "assault" that contains the reference to "unlawful force." *See State v. Stearns*, 119 Wn.2d 247, 249-50, 830 P.2d 355 (1992) (definitional jury instructions cannot be challenged for the first time on appeal).

It is uncontested that the to convict instructions (instructions 8, 9, 10) for the third degree assault charges contained each element of the charged crime.[3] It is also uncontested that the to convict instructions have no added elements. Those instructions provide that to convict Kerr of third degree assault as charged in counts 1, 2, and 3, respectively,

> each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about February 15, 2008, Corina Kerr assaulted Ron Bradbury [(Instruction 8 regarding count 1); "Ross Lampky" (Instruction 9 regarding count 2; "Kris[tina] Sidor" (Instruction 10 regarding count 3)];
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> (2) That at the time of the assault Ron Bradbury ["Ross Lampky;" "Kris[tina] Sidor"] was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
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> (3) That any of these acts occurred in the State of Washington.

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[3] RCW 9A.36.031 defines assault in the third degree in relevant part as follows:

> (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

(NOTE: The 2011 amendments to the statute added gender neutrality and a new section at the end of the statute, but did not affect subsection (1)(g), which applies here. *See* Laws of 2011, ch. 336, § 359 (eff. July 22, 2011); Laws of 2011, ch. 238, § 1 (eff. July 22, 2011).)

Clerk's Papers (CP) at 23, 20.

Hickman teaches that if an instruction contains additional elements of a crime, the State is required to prove those additional elements. 135 Wn.2d at 102. In *Hickman*, although the law did not require it, the State did not object to an element in the to-convict jury instruction that the acts in question occurred in Snohomish County. 135 Wn.2d at 101-02. The *Hickman* court held that as a result, the State was required to prove the added element, based on the law of the case doctrine. 135 Wn.2d at 102. The defendant could assign error on appeal, arguing that the new element was unsupported by substantial evidence in the record. *Hickman*, 135 Wn.2d at 102-03. Because the State had presented no evidence at trial that the acts had occurred in Snohomish County, the court reversed the conviction. *Hickman*, 135 Wn.2d at 106.

Unlike the facts in *Hickman*, there are no added elements in the to convict instruction here, and Kerr does not challenge the to convict instruction as inadequate or improper. Nevertheless, Kerr argues that a separate instruction, which defines the word "assault," effectively adds an additional element to the charged crime. That instruction states:

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

CP at 21 (emphasis added).

The phrase "unlawful force" is to be included in the definitional instruction "if there is a claim of self defense or other lawful use of force." *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal § 35.50, at 547-48 (3d ed. 2008). There is no assertion of self defense here. *See* RP (June 9, 2010) at 135 (State argues in closing: "There is no self-defense instruction in here."); RP (June 9, 2010) at 138 (State argues in closing: "the crux of . . . assault, is an intentional touching."); (June 9, 2010) RP at 145 (Defense argues in closing: "[T]he real issue here is intent."); RP (June 9, 2010) at 148 (Defense in closing mentions "unlawful force," but does not argue it.). *See also State v. Brooks*, 142 Wn. App. 842, 846, 176 P.3d 549 (2008) (the phrase "unlawful force" is generally applicable in self-defense cases).

Kerr relies on *Hickman* to support her argument that an additional element is added by virtue of the information contained in the definitional instruction. As we have explained, however, *Hickman* is distinguishable. Kerr fails to cite any other persuasive authority to support her argument.[4]

In this instance, because there is no assertion or evidence of self defense, the term "unlawful force" appearing in the instruction defining assault was mere surplusage. *See State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007) ("Assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury."). *Cf. State v. Spiers*, 119 Wn. App. 85, 94, 79 P.3d 30 (2003) (where no evidence was admitted regarding a constitutionally infirm alternative method of conviction, the inclusion of such alternative in the 'to convict' instruction was mere surplusage, and convictions based on other valid alternatives as supported by the evidence did not require reversal).

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[4] Kerr cites *State v. Atkins*, 156 Wn. App. 799, 236 P.3d 897 (2010), and the concurrence in *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 145 P.3d 371 (2006) for support, but her reliance is misplaced. In *Atkins*, an additional term appeared in the to convict instruction. *See Atkins*, 156 Wn. App. at 811. *Soccolo* was a civil case and, thus, did not address a to convict instruction and the State's burden in a criminal case. Accordingly, the concurrence's observation in *Soccolo* of the general rule, that unchallenged instructions become the law of the case, has no impact here. *See Scoccolo*, 158 Wn.2d at 522-23 (Madsen, J., concurring).

C. Other Definitional Terms

Kerr additionally argues that the evidence did not show that the touching in question was harmful or offensive, or intentional. We disagree.

"[A] touching is unlawful when the person touched did not give consent to it, and was either harmful or offensive." *State v. Shelley*, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997). A touching is "offensive" if the touching or striking "would offend any ordinary person who is not unduly sensitive." "'The concept of offensive touching is well rooted, and persons of ordinary understanding from the early days of the common law to the present have understood its meaning.'" *Shelley*, 85 Wn. App. at 34 n.23 (quoting *City of Seattle v. Taylor*, 50 Wn. App. 384, 388, 748 P.2d 693 (1988)).

Here, Kerr argues that the context in which the touchings (i.e. scratches and kicks) at issue occurred rendered the touchings inoffensive. That is, she contends that an ordinary police officer facing a resisting arrestee should expect to be scratched and kicked. Kerr cites no case that so holds, and for good reason. The fact that police officers are more likely to be confronted with physical conflict than many other professions speaks only to the probability and expectation of the *frequency* of being faced with the type of touching at issue here. But such expectation of frequency does not make the touchings at issue any less offensive. The applicable test is whether an ordinary person would find the touching offensive, and a reasonable jury could find that an ordinary person would be offended at being purposefully grabbed, scratched, and kicked in the manner described in the testimony. Kerr's contention that the touchings were inoffensive fails.

Kerr's contention that the touchings were not intentional, but were the result of her flailing limbs and general agitation, also fails. A fact finder may reasonably infer criminal intent from the defendant's conduct as a matter of logical probability. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Here the evidence showed that Kerr reached around the handcuffs with her fingers when she scratched Bradbury and that she mule kicked at him while he was standing behind her and holding on to her handcuffs. The evidence also shows that Kerr latched onto Lampky's arm and would not let go for some time as she punctured his skin with her fingernails. Also, when Kerr kicked Sidor, Sidor could see Kerr's eyes and Kerr could see Sidor. A reasonable juror could infer that these purposeful actions showed Kerr's intent to touch the officers as described. Kerr's contention that the evidence shows only inadvertent touching fails.

II. Ineffective Assistance

Kerr contends that her trial counsel was ineffective for failing to consult with an expert on posttraumatic stress disorder (PTSD) prior to trial. We disagree.

A defendant asserting ineffective assistance of counsel must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (if either part of the test is not satisfied, the inquiry need go no further). In weighing the two prongs of deficient performance and prejudice, we begin with a strong presumption that counsel's representation was effective and base our determination on the entire record below. *Grier*, 171 Wn.2d at 33; *McFarland*, 127 Wn.2d at 335. The defendant alleging ineffective assistance of counsel must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Grier*, 171 Wn.2d at 29, 33; *McFarland*, 127 Wn.2d at 336. If the defendant's claim rests on evidence or facts not in the existing trial record, filing a personal restraint petition is her appropriate course of action. *Grier*, 171 Wn.2d at 29; *McFarland*, 127 Wn.2d at 335.

Here, the record shows that on June 29, 2009, defense counsel (Kerr's third appointed counsel) sought a continuance to consult an expert regarding a possible diminished capacity defense. The proceeding revealed that Dr. Brett Trowbridge had already provided an evaluation report and that public funds had been expended on such evaluation matter on two previous occasions. The State noted that Dr. Trowbridge's report did not indicate that a diminished capacity defense was available.[5] The trial court denied the motion, noting the numerous delays in the case to date.

Kerr also received a court ordered forensic mental health evaluation at Western State Hospital. This report notes that Kerr suffers from PTSD, but concludes that despite her PTSD, Kerr was aware of the nature and quality of her acts.

Kerr relies on *State v. Bottrell*, 103 Wn. App. 706, 716, 14 P.3d 164 (2000), which held that PTSD is generally accepted by the scientific and psychiatric communities as a condition that

[5] Dr. Trowbridge's report purportedly indicated that Kerr's PTSD made her more fearful while incarcerated than another person who had not had her life experiences. But there was nothing indicating diminished capacity.

may result in the diminished capacity of the actor. The *Bottrell* court held that because the psychiatric expert concluded that the defendant suffered from PTSD, that the PTSD caused flashbacks, and that the flashbacks impaired the defendant's ability to act with intent, the trial court abused its discretion by excluding the expert's testimony at trial. 103 Wn. App. at 718. But here, there is no similar expert conclusion. Kerr's mental health evaluation report concludes that while she suffers from PTSD, her condition did not result in diminished capacity on the night in question. Also, Dr. Trowbridge's report purportedly does not support a diminished capacity defense.

Under this record, Kerr cannot show that trial counsel was deficient for failing to pursue a defense that expert opinion concluded was not available. Kerr's assertion of ineffective assistance fails.

III. Statement of Additional Grounds

Kerr's SAG is 6 pages long with multiple attachments. It provides a narrative account of various topics including why she was living with Hixson and the circumstances of her life at the time. It also describes her military service history and various past hardships and traumatic events that she has endured. It alleges that Hixson has victimized other women. But these statements and assertions identify no cognizable claim or issue for review.

She also contends that a prior tenant put the hole in the kitchen door. But that matter is irrelevant regarding the third degree assaults for which she was ultimately charged and tried.

She reiterates the assertion of ineffective assistance made in her brief regarding defense counsel's alleged failure to secure a psychological evaluation concerning Kerr's PTSD. We already addressed that issue above.

She additionally asserts trial counsel was ineffective for failing to object when she told him that the video recording (showing what transpired at her booking) had been tampered with. But such decision goes to trial tactics and cannot serve as the basis for a claim of ineffective assistance. *See State v. Johnston*, 143 Wn. App. 1, 19, 21, 177 P.3d 1127 (2007) (counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions, and an appellate court presumes that a failure to object constituted a legitimate strategy or tactic).

Kerr raises no valid basis for reversing her convictions. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Johanson, J.