IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:	No. 42005-8-II
MARGARET ELAINE BELKNAP, Petitioner.	UNPUBLISHED OPINION

Hunt, J. — Margaret Elaine Belknap filed a personal restraint petition (PRP), challenging her judgment and sentence for third degree assault of a police officer. She argues that her trial counsel provided ineffective assistance by (1) failing to conduct an adequate investigation of a potentially exculpatory police video, including having the video digitally enhanced to increase its clarity; and (2) failing to cross-examine the assaulted police officer about his disciplinary record. We deny Belknap's petition.

FACTS

I. Third Degree Assault

In April 2010, Margaret Elaine Belknap and 20-25 other people participated in an anti-police brutality protest march in Olympia, Washington. During the course of the march, the

protesters blocked traffic, attacked a photographer from a local newspaper, broke several businesses' windows, and spray-painted buildings with the words "Kill Cops" and "F*ck the Police Anarchy." Clerk's Papers (CP) at 3.

At around 9:00 pm, six to eight Olympia police officers stopped the group of protesters, surrounded them, ordered them to the ground, and arrested them. Officer Jason Winner was in the process of pulling a male protester to the ground away from the group when Officer Charles Gassett, standing to Winner's right, saw Belknap roll over onto her right hip, attempt to kick Winner with her left foot, and miss. As Belknap kicked at Winner, Gassett reached out and grabbed one of Belknap's legs. Belknap turned to look at Gassett and kicked him with her combat boots in the right knee and near the groin area of his right leg. Shortly thereafter, two other police officers observed Gassett struggling with Belknap but did not see her kick him. Gassett told one of the officers that Belknap had "assaulted" him; the officer told Gassett to release her, and Gassett complied. Personal Restraint Petition (PRP) at Ex. A.

Gassett later placed Belknap under arrest for assault and riot. Before Gassett could read Belknap her *Miranda*[1] rights, she blurted out, "You are lying. I didn't kick you." CP at 3. Although Gassett had told Belknap that she was under arrest for "assault," he had not mentioned anything about her having "kick[ed]" him as the basis for the assault. PRP at Ex. D (Verbatim Report of Proceedings (VRP) at 11).

II. Procedure

The State charged Belknap with two counts of third degree assault for assaulting Winner

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and Gassett. Before trial, the State gave Belknap's counsel an "unclear" police video that documented her altercation with Gassett: The footage was dark, it was not focused on Belknap's alteration with Gassett, and the altercation occurred quickly. PRP at Ex. F. According to Belknap, her counsel viewed the video and told her it was not useful because it was too "dark" and it was "impossible to see" what had happened. PRP at Ex. C. When Belknap asked to see the video herself, her counsel reiterated that the video was too dark. Neither Belknap's trial counsel nor the State offered the video into evidence.

At trial, Winner testified that (1) out of the corner of his eye, he had seen Belknap "kicking next to [him]," but he was not sure when this kicking had occurred; and (2) he did not observe Belknap actually kick Gassett. PRP at Ex. D (VRP at 20). Belknap's cross-examination focused primarily on the "chaotic" nature of the group arrest, the police officers' having been "outnumbered" by the protesters, and Winner's lack of personal knowledge of either of Belknap's assaults. PRP at Ex. D (VRP at 28, 29).

Gassett testified that (1) at least "two" protesters did not follow the police officers' instructions to go to the ground; (2) Winner was standing on Gassett's "left" and tending to one of them when Belknap attempted to kick Winner; (3) Belknap made eye contact with Gassett when she kicked him in the leg and the groin; and (4) when he arrested Belknap, she blurted out, "You're lying, I didn't kick you." PRP at Ex. D (VRP at 6, 7, 11). Belknap's cross-examination of Gassett focused on the configuration of the protesters at the time of arrest, the police officers' having been outnumbered, and the importance of writing detailed and accurate police reports. Belknap did not seek to cross-examine Gassett about whether he had any instances of misconduct

in his disciplinary record.

In her trial testimony, Belknap denied having kicked Gassett and asserted that another person had been lying on top of her during the altercation. Fellow protester Matthew Duran testified on Belknap's behalf that he had been looking directly at Belknap during her entire altercation with Gassett, that someone had been lying on top of her, and that she had not kicked anyone.

The jury found Belknap not guilty of assaulting Winner and guilty of third degree assault of Gassett.[2] The trial court sentenced Belknap to 1 month of confinement in jail and 12 months of community custody.[3] Belknap filed a motion to vacate her judgment and sentence under CrR 7.8 below. The trial court transferred the case to our court for consideration as a personal restraint petition.

ANALYSIS

Belknap argues that her trial counsel provided ineffective assistance by (1) failing to conduct an adequate investigation of the police video and (2) failing to cross-examine Gassett about his disciplinary record. These arguments fail.

[2] After the jury found Belknap guilty of assaulting Gassett, the State charged her with perjury based on her having given false testimony during her assault trial. Belknap retained a new counsel for the perjury charge; her new counsel enhanced the video and eventually succeeded in having the perjury charge dismissed.

[3] According to Belknap's PRP, she served 16 days in jail and was released early for good behavior.

I. Standards of Review

A petitioner may request relief through a PRP when she is under unlawful restraint. To prevail on a PRP, the petitioner must show that there was a

> constitutional error that resulted in actual and substantial prejudice to the petitioner or that there was a nonconstitutional error that resulted in a fundamental defect which inherently results in a complete miscarriage of justice.[4]

In re Pers. Restraint of Woods, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). The petitioner must prove the error was prejudicial by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

A petitioner must support her petition with facts or evidence; she must also show that the "factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); *see also* RAP 16.7(a)(2)(i). If the petitioner's allegations are "based on matters outside the existing record, the petitioner must demonstrate that [she] has competent, admissible evidence to establish the facts that entitle [her] to relief." *Rice*, 118 Wn.2d at 886. Belknap fails to fulfill these PRP requirements here.

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prove ineffective assistance of counsel, a petitioner must show that (1) counsel's performance was deficient, and (2) the deficient performance

[4] Where, as here, a PRP is based on ineffective assistance of counsel, the petitioner does not need to satisfy a heightened prejudice requirement that exceeds the showing of prejudice necessary to establish the prejudice prong of the ineffective assistance of counsel test on direct appeal. *In re Pers. Restraint of Crace*, No. 85131-0, 2012 Wash. LEXIS 535, at *15, 17 (Wash. July 19, 2012).

prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The threshold for deficient performance is high: A petitioner alleging ineffective assistance must overcome "'a strong presumption that counsel's performance was reasonable.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)), *adhered to in part on remand*, ___Wn. App.___, 278 P.3d 225 (2012). If counsel's conduct "'can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863). To satisfy the prejudice prong, the petitioner must establish that "'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Grier*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). A petitioner's failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Belknap fails to satisfy either prong.

II. No Ineffective Assistance of Counsel

A. Video

Belknap first argues that her trial counsel was ineffective in failing to conduct an adequate investigation of the police video of her altercation with Gassett and, more specifically, having failed to have the video digitally enhanced for clarity to see if it contained exculpatory evidence. Belknap contends that her trial counsel conducted an inadequate investigation because (1) he viewed the video that the State provided during discovery and quickly determined that it was too "dark" to see anything; (2) he did not consult her about the possibility of enhancing the video; and

(3) when she later obtained new counsel for a related charge and had the video digitally enhanced, it allegedly showed that she did not "kick[ ]" or "attempt[ ] to kick" anyone and that she may have raised her leg or another appendage merely to block Gassett from striking her with his baton.[5] PRP at Ex. C, F. Having viewed this "enhanced" video, we disagree.

Failure to investigate evidence, at least when coupled with other defects, can amount to ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010). "The degree and extent of investigation required will vary depending upon the issues and facts of each case, but . . . at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial." *A.N.J.*, 168 Wn.2d at 111.

Belknap concedes that her trial counsel viewed the police video and determined that the video would not be helpful for her defense to the assault charges. Nevertheless, Belknap suggests that more was required of her trial counsel, namely that counsel had an affirmative obligation to enhance the video to determine whether any exculpatory evidence could be extracted from it, regardless of what information his initial viewing unearthed.[6]

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[5] According to Belknap, the digitally enhanced video shows Gassett twice approaching her with his baton extended; both times, "a limb" blocks him from striking her, but it is "not clear whose limbs they were" or whether the limbs were legs or arms. PRP at Ex. F.

[6] The cases Belknap cites do not support such a broad reading. *See e.g., Webster v. Secretary, Doc, FL Attorney General*, 291 Fed. App'x 964, 2008 WL 4138128, at *1-2 (11th Cir. 2008) (defendant failed to show ineffective assistance where counsel allegedly "did not fully examine, enhance, and present a surveillance video of the crime"); *State v. Yusipovich*, noted at 157 Wn. App. 1003, 2010 WL 2911023, at *3 (defendant could not rely on "speculative allegation" that a security video exists and that it would contain exculpatory evidence to establish ineffective assistance); *State v. Conner*, noted at 134 Wn. App. 1057, 2006 WL 2578281, at *3 (defendant did not establish ineffective assistance based on counsel's failure to procure video of the crime where there was no evidence in the record that such video existed).

We need not address whether Belknap's counsel's failure to enhance the video constituted deficient performance because Belknap has not demonstrated prejudice, the second prong of the ineffective assistance of counsel test. Far from being "completely exculpatory," PRP at 9, as Belknap suggests, the enhanced video is very dark, murky, and unfocused; it is impossible to discern what is happening. The enhanced video, thus, does not support the self-defense claim that Belknap implies she would have raised during trial had she had access to the enhanced video at the time.

To prove prejudice, "[i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Instead, the petitioner must show "'there is a *reasonable probability* that, but for counsel's deficient performance, the *outcome of the proceedings would have been different*.'" *Grier*, 171 Wn.2d at 34 (emphasis added) (quoting *Kyllo*, 166 Wn.2d at 862). Here, in addition to Gassett's and Winner's testimonies about Belknap "kicking" during the altercation with Gassett and the male protester's arrest, the State introduced evidence that Belknap had tacitly *admitted* that she had kicked Gassett when she spontaneously asserted, "You're lying. I didn't kick you." PRP at at Ex. D (VRP at 11). The jury, which is the sole determiner of witness credibility and weigher of evidence,[7] could have inferred Belknap's guilt from this statement alone. Because Belknap has not shown that the video included exculpatory evidence or that its contents would have affected her defense strategy or the jury's verdict, we hold that she has failed to show prejudice and that

[7] *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (credibility determinations are for the trier of fact and are not subject to appellate review); *see also In re Pers. Restraint of Bugai*, 35 Wn. App. 761, 765, 669 P.2d 903 (1983).

her ineffective assistance of counsel claim also fails on this second prong of the test.

B. Cross-examination of Gassett

Belknap next argues that her trial counsel was ineffective in failing to cross-examine Gassett about his disciplinary record and his past instances of "misconduct," including that he and other Olympia police officers (1) had been named defendants in a 1992 sexual harassment lawsuit, which settled for $10,000 without any admission of liability; and (2) had been involved in a 2009 wrongful death and section 1983[8] lawsuit, which was dismissed with prejudice against the plaintiff on summary judgment. PRP at 4. We disagree.

Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Courts view such decisions as tactical because "counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense." *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001). Belknap asserts that her trial counsel refused to cross-examine Gassett about his instances of "misconduct" because the jury "would not like [her]" if she impeached the credibility of a uniformed police officer. PRP at Ex. C.

[8] 42 U.S.C. § 1983.

Belknap, however, fails to show that her counsel's failure to cross-examine Gassett about the about the settled sexual harassment and dismissed wrongful death lawsuits was not a matter of trial strategy. The two lawsuits were not related to Belknap's case; and both were disposed of pretrial without liability on Gassett's part. Belknap's counsel, thus, could have reasonably concluded that (1) this evidence would not have been a relevant or a helpful subject for cross-examination in Belknap's case, or (2) any benefits would have been marginal compared to the potential for confusing the jury about the issues in her case. Furthermore, it is doubtful that this evidence would even have been admissible under ER 608(b) to impeach Gassett's credibility.[9]

Because Belknap has not shown the absence of any "'*conceivable* legitimate tactic explaining counsel's performance,'" she has failed to show deficient performance. *Grier*, 171 Wn.2d at 33 (emphasis added) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). We, therefore, hold that her ineffective assistance of counsel claim fails.

[9] Washington case law allows cross-examination under ER 608(b) into specific instances that are relevant to veracity. *State v. Wilson*, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). "'Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue.'" *Wilson*, 60 Wn. App. at 893 (quoting *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980)). The specific instances, however, *must be probative of truthfulness and not be remote in time*; and this evidence is still subject to the overriding protections of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury) and ER 611 (prohibiting harassment and undue embarrassment). *Wilson*, 60 Wn. App. at 893. Because neither the sexual harassment nor the wrongful death lawsuit led to a finding of guilt, it is doubtful that this evidence would have been probative of Gassett's "truthfulness" had he testified that he had not engaged in any past misconduct. This evidence would also have likely been excluded under ER 403.

We deny Belknap's PRP.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, P.J.

Penoyar, J.