98681-9
Supreme Court No. (to be set)
Court of Appeals No. 52697-2-II

IN THE SUPEME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBBIE LEE FITCH,

Appellant.

PETITION FOR REVIEW
BY THE APPELLANT, ROBBIE LEE FITCH

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY
THE HONORABLE ANNE CRUSER, JUDGE

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I. IDENTITY OF PETITIONER

Robbie Lee Fitch, the Appellant, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this motion.

II. COURT OF APPEALS DECISION

Mr. Fitch seeks review of the unpublished decision of the Court of Appeals issued on May 27, 2020. A copy of this decision is attached, see App. at 1-10.

III. ISSUES PRESENTED FOR REVIEW

All criminal defendants have a constitutional right to effective assistance of counsel. Given that right:

1. Should this Court grant review and reverse when trial counsel failed to move to sever the bail jumping charges from the controlled substances charges after potential jurors stated that they thought Mr. Fitch was guilty of all charges because he allegedly failed to appear?

2. Should this Court grant review and reverse when trial counsel failed to stipulate that Mr. Fitch was charged with a class B felony, resulting in the jury viewing dropped controlled substances charges?

3. Should this Court grant review and reverse when trial counsel failed to object to police testimony that the amount of methamphetamine found in Mr. Fitch's house was "far in excess" of a typical user amount?

IV. STATEMENT OF THE CASE

On February 17, 2017, Longview police executed a search warrant at the house Robbie Lee Fitch shared with his wife. RP at 154, 336. Police

found controlled substances, a digital scale with residue, and about $100 in cash. RP 210, 236. Initially, the state charged Mr. Fitch with three counts of possession with intent to deliver, one count each for methamphetamine, heroin, and clonazepam. CP 12-13. In the months that followed, the state amended these charges twice. CP 58-59; CP 143-44. At trial, Mr. Fitch was charged with possession with intent to deliver methamphetamine, possession of heroin, and two counts of bail jumping. RP at 61-63.

This case proceeded to trial in March 2018. During voir dire, potential jurors expressed bias against Mr. Fitch based on the charges he faced. The judge properly instructed that Mr. Fitch was presumed innocent of all charges throughout the entire trial. RP at 63-64. Despite this instruction, two potential jurors believed Mr. Fitch must be guilty of all charges because he was accused of bail jumping. One said, "I already think he's guilty," reasoning that "the fact that he [Mr. Fitch] jumped bail pretty much tells me." RP at 97. Another juror stated that she already made up her mind "based on the allegations, particularly the fact that he [Mr. Fitch] skipped bail" because "why would he skip bail if he's not guilty?" RP at 114. These potential jurors were excluded from the final panel. RP at 97, 114; CP 147. Mr. Fitch's attorney never moved to sever his bail jumping charges.

At trial, police testified that they surveilled Mr. Fitch's house prior to executing the search warrant. RP at 196. In February 2017, Det. Seth Libbey observed Mr. Fitch in his front driveway, talking with a woman in a car. RP at 197. He testified that the woman and Mr. Fitch made a hand-to-hand exchange, and then the woman left. *Id*. Officers let the woman drive away. RP at 216, 232, 262.

Police then drove up to the house to execute the warrant. RP at 198. According to the officers, Mr. Fitch ran inside his house and locked his front door. RP at 198. Mr. Fitch opened the door a short time later and police arrested him. RP at 199, 213-14, 234. Sgt. Mark Langlois read Mr. Fitch his Miranda rights, and Mr. Fitch made a statement. RP at 214. Officers could not remember exactly what Mr. Fitch said but believed it resembled, "is this because I sold dope to that girl?" RP at 200, 235. Police also believed that Mr. Fitch said the woman's name was "Willow." RP at 217. They did not attempt to locate or question this woman. RP at 240-41.

Officers testified that when they searched the garage, they found baggies containing a white crystalline substance and a brown sticky substance. RP at 219. A state chemist testified that the white crystalline substance weighed 11.9 grams, without packaging, and tested consistent with methamphetamine. RP at 314-15. He said that the brown sticky

substance weighed 1.2 grams, with packaging, and tested consistent with heroin. RP at 317, 320.

All of the police officers testified about their familiarity with controlled substances, based on their training and experience. RP at 182-83, 226, 244. Det. Libbey and Sgt. Langlois also testified about typical user amounts of drugs, as opposed to typical dealer amounts. RP at 186-90, 227. Sgt. Langlois took his testimony a step further. When asked specifically about the white crystalline substance found in Mr. Fitch's garage, Sgt. Langlois testified that it was "far in excess of" a typical user amount of methamphetamine. RP at 237. Mr. Fitch's attorney did not object to this testimony. RP at 237-38.

In addition to drug charges, Mr. Fitch was charged with bail jumping. CP 143-44. To prove bail jumping in this case, the state needed to prove that Mr. Fitch was charged with a class B or C felony at the time he failed to appear in court. RCW 9A.76.170; CP 143-44. To meet this burden of proof, the state admitted the original charging information as an exhibit. Ex. 7; RP at 273. This original information included the two charges that the state later dropped or reduced: (1) possession with intent to deliver heroin and (2) possession with intent to deliver clonazepam. Ex. 7. In addition to this exhibit, the state detailed these dropped charges in testimony and in closing argument. RP at 274, 386.

Mr. Fitch's attorney did not object to admitting the original information as an exhibit. RP at 273. He did not offer to stipulate that Mr. Fitch was charged with a class B felony. *Id*. He did not ask to redact the dropped charges from Exhibit 7. *Id*. He did object when the state's witness described the dropped charges, or when the prosecutor relied on these dropped charges during closing argument. RP at 274, 386. Mr. Fitch's attorney did not request any kind of limiting instruction, and none was given. RP at 349-73; CP 199-225.

Mr. Fitch called two witnesses to testify, Scott Shill and Willa Boyer. RP at 329, 335. Mr. Shill testified that Mr. Fitch was working for him both days he did not appear in court. RP at 330. According to Mr. Shill, Mr. Fitch was helping to lay pavement and did not have the ability to get to court. *Id*. Ms. Boyer testified that she was the woman at Mr. Fitch's house the day police executed the search warrant. RP at 336. She testified that she gave Mr. Fitch $100 that day as the second payment on a puppy she had purchased from him a few weeks prior. RP at 336-37.

The jury convicted Mr. Fitch of all four counts. RP at 407-09. He was sentenced to 84 months confinement, with 12 months of community custody. CP 238. Mr. Fitch appealed, and the Court of Appeals affirmed his convictions. App. at 1. Mr. Fitch seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Fitch respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals. This Court grants review under four circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, review is appropriate under subsection (3).

This Court should grant review because Mr. Fitch was denied effective assistance of counsel. RAP 13.4(b)(3). Every criminal defendant has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Ineffective assistance occurs when (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the client. *Hendrickson*, 129 Wn.2d at 77.

Both requirements are met here. Mr. Fitch's attorney was ineffective by failing to: (1) move to sever his bail jumping charges despite bias from potential jurors; (2) stipulate that Mr. Fitch was charged with a

class B felony, allowing the state to admit charging documents showing dropped charges; and (3) object when the state's witness opined on guilt. These deficiencies prejudiced Mr. Fitch by undermining the outcome of the case.

A. Mr. Fitch's Attorney Performed Deficiently on Numerous Occasions.

At trial, Mr. Fitch's attorney repeatedly performed deficiently, allowing irrelevant and unfairly prejudicial information to be presented to the jury. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Generally, courts assume that trial counsel is effective. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (1999). However, a defendant overcomes this presumption by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id*. No legitimate strategy justified counsel's shortcomings in this case.

1. Reasonable trial counsel would have moved to sever the bail jumping charges.

Mr. Fitch was denied effective assistance of counsel because his trial attorney failed to move to sever his bail jumping charges, despite expressed bias by potential jurors. Charges may be severed "to promote a fair determination of the defendant's guilt or innocence of each offense." CrR

4.4(b). In determining whether to sever charges, courts consider (1) the strength of the state's evidence on each count; (2) the clarity of defenses as to each count; (3) whether the court instructs the jury to consider each count separately; and (4) the admissibility of evidence of the other charges, even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Severance is appropriate where there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. *Id*. at 62-63. In this case, there was a real risk that the jury would draw improper inferences unless the bail jumping charges were severed. Two potential jurors expressed their belief that Mr. Fitch must be guilty of all charges because he was accused of bail jumping. One said, "I already think he's guilty," reasoning that "the fact that he [Mr. Fitch] jumped bail pretty much tells me." RP at 97. Another juror stated that she already made up her mind "based on the allegations, particularly the fact that he [Mr. Fitch] skipped bail" because "why would he skip bail if he's not guilty?" RP at 114.

Given these statements and the risk of bias, the record reflects no tactical or strategic reason for counsel's failure to move for a severance. *See Hendrickson*, 129 Wn.2d at 77-78 ("Deficient performance is not shown by matters that go to trial strategy or tactics.") Defense counsel did not

proffer any evidence or arguments that necessitated trying the bail jumping charges with the drug charges. The bail jumping charges only encouraged the jury to draw an improper inference. Reasonable trial counsel would have moved to sever. *See State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009) (finding counsel deficient for failing to move for a severance where there was a risk of prejudice and no strategic reason for counsel's decision).

The Court of Appeals held that trial counsel was not ineffective because any motion to sever was unlikely to succeed. App. at 7, citing *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007) (when ineffective assistance of counsel claim is based on failure to bring a motion, the appellant must show that motion would likely have been successful). Relying on *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999), the Court concluded that "[w]here a defendant's custody and release on bond stems directly from an underlying substantive charge, a charge of bail jumping is properly joined for trial with the underlying charge." App. at 7.

The Court of Appeals erred because *Bryant* contains an important caveat: "We conclude as a matter of law that when a defendant's custody and release on bail or bond stems directly from an underlying substantive charge, a charge of bail jumping is properly joined for trial with the

underlying charge, ***absent a strong showing of prejudice to the accused***." 89 Wn. App. at 864 (emphasis added). Prejudice may result "if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition." *Id*. at 867.

The statements by potential jurors in this case show that trying these charges together encouraged the jury to infer Mr. Fitch's guilt on all charges because he allegedly failed to appear at pretrial hearings. The Court of Appeals may be correct that the "controlled substances charges would be admissible in a separate bail jumping trial." App. at 7. It does not follow that evidence about Mr. Fitch's alleged failure to appear should be admissible at a trial about the controlled substances charges. This encouraged the jury to convict him of dealing drugs because he failed to appear at pretrial hearings, an improper inference that prejudiced Mr. Fitch.

2. Reasonable trial counsel would have offered to stipulate that Mr. Fitch was charged with a class B felony.

Trial counsel was also deficient by failing to offer to stipulate that Mr. Fitch was charged with a class B felony. Mr. Fitch was accused of bail jumping. RP at 62-63; CP 144. To prove felony bail jumping, the state must prove that the defendant was charged with a felony when he failed to appear in court. RCW 9A.76.170.

Though the state has to establish the status element in RCW 9A.76.170, a defendant can stipulate and keep the details of the charge from the jury. When a defendant's legal status is at issue, the state must accept a defense offer to stipulate to that status rather than present unfairly prejudicial evidence. *See Old Chief v. United States*, 519 U.S. 172, 191-92, 117 S.Ct. 644 (1997) (where the existence of a prior conviction is an element of an offence, the trial court must accept the accused's offer to stipulate to the prior conviction); *State v. Johnson*, 90 Wn. App. 54, 63, 950 P.2d 981 (1998) (applying the *Old Chief* rule in Washington).

Mr. Fitch's trial attorney failed to offer to stipulate that he was charged with a class B felony. Instead, the state admitted the original charging information to establish Mr. Fitch's status. Ex. 7; RP at 273. This information showed that Mr. Fitch was initially charged with two counts of possession with intent to deliver heroin and clonazepam—felony charges that were later dropped or reduced. Ex.7; CP 58-59, 143-44. The state described these dropped charges in detail, both in testimony and in closing arguments. RP at 273-4, 386. Mr. Fitch's trial counsel failed to object to this evidence. *Id*.

Competent trial counsel would have offered to stipulate that Mr. Fitch was charged with a class B felony in order to remove these prejudicial dropped charges from the purview of the jury. At a minimum, counsel

should have objected to the original charging information, requested to redact this document, or requested a limiting instruction. Without a stipulation, objection, redaction, or limiting instruction, the jury was free to draw an impermissible inference from Mr. Fitch's dropped charges. At trial, Mr. Fitch's pending charges closely resembled the dropped charges. A competent attorney would recognize that evidence of prior criminal conduct, particularly conduct similar to pending charges, is "extremely difficult, if not impossible" for a jury to ignore. *State v. Escalona*, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987).

In its decision, the Court of Appeals relied on *State v. Streepy*, 199 Wn. App. 487, 400 P.3d 339 (2017), to conclude that Mr. Fitch's attorney was not ineffective. App. at 5. In that case, the defendant was charged with unlawful possession of a firearm, which required proof that he was previously convicted of assault. *Streepy*, 199 Wn. App. at 502. Counsel refused to stipulate to the prior conviction, and the state introduced the judgment and sentence from that offense to meet its burden of proof. *Id*. at 502-03. However, the judgement and sentence was deficient because it lacked the date of the offense. *Id*. at 503. The trial court permitted the state to reopen its case, over defense counsel's objection, to correct this error. *Id*. The Court in *Streepy* held that defense counsel strategically refused to offer

an *Old Chief* stipulation, reasonably believing that the state might fail to meet its burden of proof—which nearly occurred. *Id*. at 504.

Here, the Court's reliance on *Streepy* was misplaced for two reasons. First, counsel in *Streepy* specifically declined, on the record, to offer an *Old Chief* stipulation. *Id*. at 502-03. Second, counsel's decision was legitimately strategic because the document offered by the state—the judgment and sentence—was defective and nearly caused the state to fail to meet its burden. *Id*. at 503-04.

Here, trial counsel had no strategic reason to fail to stipulate the Mr. Fitch was charged with a class B felony. Counsel never mentioned an *Old Chief* stipulation on the record. Counsel did not object when the state offered to admit the original charging information. RP at 273. Counsel did not ask the court to redact the dropped charges or issue a limiting instruction. Instead, the state had free reign to present evidence of Mr. Fitch's dropped charges, regardless of their relevancy or prejudicial effect. This constitutes deficient performance.

3. Reasonable trial counsel would have objected when the state's witness improperly opined on guilt.

Finally, trial counsel was ineffective by failing to object to improper opinion testimony on guilt. Mr. Fitch was charged with possession with intent to deliver methamphetamine. CP 12-13. At trial, the ultimate factual

issue was whether the methamphetamine found in Mr. Fitch's home was for personal use or for sale. To support its allegation that Mr. Fitch intended to sell these drugs, the state elicited testimony from a police officer, Sgt. Langlois, that the methamphetamine found in Mr. Fitch's house was "far in excess of" a typical user amount. RP at 237.

Sgt. Langlois's conclusory testimony amounted to his opinion that Mr. Fitch was guilty of intending to sell drugs. Witnesses may not testify as to the guilt of a defendant, whether directly or by inference. *State v. Montgomery,* 163 Wn.2d 577, 594, 183 P.3d 267 (2008). Such evidence is unfairly prejudicial because it "violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). An opinion about a defendant's guilt is more likely to be improper when it is given by a police officer because it carries an "aura of reliability." *Montgomery,* 163 Wn.2d at 595.

Courts may permit law enforcement officers to testify about their specialized knowledge gained through training or experience. *Montgomery*, 163 Wn.2d at 590-91. This may include specialized information about drug use and the drug trade, which is likely beyond the experience of jurors. *United States v. Boissoneault*, 926 F.2d 230, 232-33 (2d Cir. 1991). However, witnesses may not "effectively testif[y]" that a defendant is

"guilty as charged." *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Police officers' opinions on guilt, in particular, have low probative value and a high risk of unfair prejudice. *See Montgomery*, 163 Wn.2d at 595.

Here, the Court of Appeals concluded that Sgt. Langlois's testimony "was not an opinion on guilt or inference" and was instead his expert opinion, formed after "extensive training in drug investigations." App. at 8. The Court erred because police testimony can amount to an improper opinion, even if it is based on training and expertise. In *Montgomery*, detectives testified that they believed the defendant purchased items intending to manufacture methamphetamine based on their experience investigating drug crimes. 163 Wn.2d at 587-88. The Court held that these statements amounted to improper opinion testimony, despite the officers' training and experience, because "the opinions in this case went to the core issue and the only disputed element, Montgomery's intent." *Id*. at 594.

In this case, like in *Montgomery*, the only issue was intent. Mr. Fitch argued that the controlled substances were for personal use, and the state argued that they were for sale. Sgt. Langlois did not merely testify about his experience with user and dealer amounts of drugs in general. He took an extra step and described the specific quantities at issue as "***far*** in excess of" a typical user amount. RP at 237 (emphasis added). This assertion

pertained directly to Mr. Fitch and his alleged intent. *See Montgomery*, 163 Wn.2d at 594. It was thus improper opinion testimony, violating Mr. Fitch's constitutional rights. *Id*. A competent defense attorney would have objected.

B. Counsel's Deficient Performance Prejudiced Mr. Fitch, Violating his Constitutional Rights.

This Court should grant review and reverse because Mr. Fitch was prejudiced by counsel's ineffective assistance, violating his constitutional rights. *See* RAP 13.4(b)(3). To prove ineffective assistance, defendants must show prejudice in addition to deficient counsel. *Hendrickson*, 129 Wn.2d at 77. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A "reasonable probability" is lower than a preponderance but more than a "conceivable effect on the outcome." *Strickland*, 466 U.S. at 693-94. It exists when there is a probability "sufficient to undermine confidence in the outcome." *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

The Court of Appeals concluded that no prejudice resulted because the facts supporting Mr. Fitch's convictions were "overwhelming." App. at 5, 6. The Court erred because there was not overwhelming evidence to support the conviction for possession with intent to deliver. This conviction

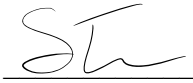
was supported by evidence about the quantity of methamphetamine, an alleged statement by Mr. Fitch, and a hand-to-hand exchange with a woman witnessed by police. RP at 197, 200, 235, 237. Mr. Fitch also had a digital scale with residue, which could be for personal use or for dealing, and about $100 in cash. RP 210, 236.

This evidence was hardly overwhelming. It was bolstered by the improper inferences the jury could make from the bail jumping charges and the dropped charges, as well as Sgt. Langlois's opinion testimony about intent. Had competent counsel objected to this evidence, moved to sever the charges, and moved to stipulate to the class B felony charge, it is likely that the jury would reach a different verdict. Mr. Fitch was prejudiced by ineffective assistance of counsel, justifying review by this Court. *See* RAP 13.4(b)(3).

VI. CONCLUSION

Mr. Fitch respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 23rd day of June, 2020.



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VII. APPENDIX

Filed
Washington State
Court of Appeals
Division Two

May 27, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBBIE LEE FITCH, Appellant.	No. 52697-2-II UNPUBLISHED OPINION

LEE, C.J. — Robbie Lee Fitch appeals his convictions for possession of a controlled substance, methamphetamine, with intent to deliver; possession of a controlled substance, heroin; and two counts of bail jumping. He argues that defense counsel provided ineffective assistance during trial by not stipulating that Fitch was charged with a class B felony, by not moving to sever his bail jumping charges from his other two charges, and by not objecting to allegedly improper opinion testimony. In his statement of additional grounds (SAG) for review, Fitch argues his possession of methamphetamine with intent to deliver and possession of heroin convictions should be reversed because the search of his home, where evidence of these offenses was found, was unlawful because the search warrant had expired. We affirm.

FACTS

On February 7, 2017, Longview Police Department Officer Seth Libbey obtained a search warrant to search Fitch's home. On February 17, officers executed the search warrant and found a plastic bag with methamphetamine, a smaller bag with heroin, cash, a digital scale with

methamphetamine and heroin residue, and three clonazepam pills. Officer Libbey located 14.9 grams of methamphetamine and 1.26 grams of heroin.

The State initially charged Fitch with three counts of possession of a controlled substance with intent to deliver, one count each for methamphetamine, heroin, and clonazepam. Possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver are both class B felonies. RCW 69.50.401(2)(a), (b).

While released from jail and awaiting trial, Fitch failed to appear for two pretrial hearings. The trial court issued warrants for his arrest. After Fitch failed to appear, the State amended the information and charged Fitch with possession of methamphetamine with intent to deliver, possession of heroin, and two counts of bail jumping.

Fitch moved to suppress the evidence found inside his home, arguing the search warrant had expired. After a hearing on Fitch's motion to suppress, the trial court found that on February 7, 2017, Officer Libbey presented the affidavit and search warrant to the judge for signature, and the judge signed the search warrant later that same day. Based on this finding, the trial court concluded that "the execution of the search warrant on February 17, 2017 . . . was within the 10 day requirement." Clerk's Papers (CP) at 246.

Fitch proceeded to trial on all four charges in the amended information. Fitch did not move to sever the bail jumping charges from the controlled substance charges.

At trial, Officer Libbey testified that when the amount of controlled substances found is "[a]round three to four grams" and above, and when he locates a scale, packaging material and cash, then it tends to show the controlled substances are for more than personal use. 2 Verbatim Report of Proceedings (VRP) at 190.

Longview Police Department Sergeant Mark Langlois also testified and began by setting forth his specialized training in drug investigations. Sergeant Langlois participated in the search of Fitch's home. When the State asked if the amount of methamphetamine found at Fitch's home was consistent with a typical user amount, Sergeant Langlois stated, "Far in excess of." 2 VRP (Mar. 29, 2018) at 237. Fitch did not object. Sergeant Langlois further testified that a typical user amount would be under "a couple of grams." 2 VRP (Mar. 29, 2018) at 227.

To prove the bail jumping charges, the State needed to prove that Fitch was charged with a class B or class C felony at the time he failed to appear. RCW 9A.76.170(c). Fitch did not offer to stipulate that the charges against him were class B or class C felonies. The State offered, and the trial court admitted, the original information that applied to Fitch at the time he failed to appear. The original information included charges for possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver, both of which are class B felonies. RCW 69.50.401(2)(a), (b). The trial court instructed the jury that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP at 206.

In his defense, Fitch argued that the delay in executing the search warrant caused officers to rush the search, the amount of methamphetamine found was for personal use, and that his missed court hearings were due to uncontrollable circumstances.

The jury found Fitch guilty as charged in the amended information. Fitch appeals.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Fitch contends he was denied effective assistance of counsel when counsel failed to offer to stipulate that Fitch was charged with a class B felony, failed to make a motion to sever the bail jumping charges from the controlled substances charges, and failed to object to Sergeant Langlois's testimony regarding the quantity of methamphetamine in Fitch's home. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). To prevail in an ineffective assistance of counsel claim, the defendant must show (1) counsel's performance was deficient and (2) this deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the defendant fails either part of this two-part test, the defendant's ineffective assistance of counsel claim fails. *Grier*, 171 Wn.2d at 32-33.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id*. at 33. We engage in a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d. 80 (2004)). The decision of when or whether to object is a classic example of trial tactics. *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009). Prejudice

is established if the result of the case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

1. Failure To Stipulate

a. Bail jumping charges

Fitch argues that counsel rendered ineffective assistance by failing to stipulate that he was charged with a class B felony pertaining to the two counts of bail jumping. We disagree.

The elements of bail jumping as defined in RCW 9A.76.170 are as follows: (1) that the defendant was charged with a particular crime, (2) that he or she was released by court order or admitted to bail, (3) that he or she had knowledge that a subsequent appearance was required, and (4) that he or she failed to appear as required. The State charged Fitch with two counts of bail jumping under RCW 9A.76.170(3)(c), which requires the State to prove that he was "held for, charged with, or convicted of a class B or class C felony." RCW 9A.76.170(3)(c).

Here, because the State was required to prove that Fitch was charged with a class B felony when he failed to appear in court, it could be considered trial tactic to require the State to prove all elements of that crime rather than stipulate. *See State v. Streepy*, 199 Wn. App. 487, 501-02, 400 P.3d 339, *review denied*, 189 Wn.2d 1025 (2017). Thus, Fitch cannot show that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *Reichenbach*, 153 Wn.2d at 130). A party cannot show deficient performance if we can conceive of any legitimate tactic based on the record. *Streepy*, 199 Wn. App. at 502; *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018).

Nevertheless, even assuming Fitch can show deficient performance he cannot show prejudice. The State's evidence of guilt was overwhelming. The State initially charged Fitch with

three counts of possession of a controlled substance, methamphetamine, heroin, and clonazepam, with intent to deliver. Possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver are both class B felonies. RCW 69.50.401(2)(a), (b). While released from jail and awaiting trial, Fitch failed to appear for two pretrial hearings. Thus, it is unlikely the result of the case would have been different if Fitch stipulated that the original charges at the time he failed to appear in court were class B felonies. *McFarland*, 127 Wn.2d at 335-36.

b. Controlled substance charges

Fitch also argues that counsel rendered ineffective assistance by failing to stipulate that he was charged with a class B felony with regard to the remaining controlled substance charges, thus, allowing the jury to hear that he was charged with other "felony charges that were later dropped." Br. of Appellant at 9. Even assuming counsel was deficient, for the reasons discussed above, Fitch cannot show prejudice. The facts that support the current controlled substance crimes were overwhelming. Thus, it is unlikely the result of the case would have been different if Fitch had stipulated that the original charges were class B felonies. *McFarland*, 127 Wn.2d at 335-36. Thus, Fitch cannot show ineffective assistance of counsel.

2. Failure To Move To Sever

Fitch next argues that counsel rendered ineffective assistance by failing to move to sever his bail jumping charges from his controlled substance charges. We disagree.

In determining whether severance is appropriate, a court considers (1) the strength of evidence on each count, (2) the clarity of the defenses on each count, (3) the court's instructions to consider each charge separately, and (4) the admissibility of the evidence of one charge in a

separate trial of the other charge. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Where a defendant's custody and release on bond stems directly from an underlying substantive charge, a charge of bail jumping is properly joined for trial with the underlying charge. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999). This furthers "Washington's strong policy in favor of conserving judicial and prosecution resources." *Id*. at 867.

Here, there was strong evidence to support each count charged, the defense on the drug charges was different from the defense on the bail jumping charges, the trial court instructed the jury to consider each charge separately, and the admissibility of evidence from the controlled substances charges would be admissible in a separate bail jumping trial. Therefore, any motion to sever likely would have been unsuccessful, and Fitch's ineffective assistance of counsel claim based on a failure to bring a motion to sever fails. *See State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007) (when ineffective assistance of counsel claim is based on failure to bring a motion, the appellant must show that motion would likely have been successful).

3. Failure To Object to Testimony

Fitch next argues that counsel rendered ineffective assistance of counsel by not objecting to improper opinion testimony regarding guilt. Specifically, Fitch argues that there was no legitimate tactic or strategy in failing to object to Sergeant Langlois's testimony and the trial court would likely have sustained an objection to the opinion testimony. We disagree.

A party cannot show deficient performance if we can conceive of any legitimate tactic or strategy for counsel's decision not to object. *Streepy*, 199 Wn. App at 502; *Linville*, 191 Wn.2d at

525. Moreover, when a challenge is based on a failure to object, a party must show that an objection would likely have been sustained. *McFarland*, 127 Wn.2d at 337 n4.

"Opinions on guilt are improper whether made directly or by inference." *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). The rationale for this rule is that such statements invade the exclusive province of the finder of fact. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Here, police located 14.9 grams of methamphetamine and 1.26 grams of heroin inside Fitch's home. Officer Libbey testified that when the amount of controlled substances is above "around three to four grams" then it tends to show the controlled substances are for more than personal use. 2 VRP (Mar. 29, 2018) at 190. Sergeant Langlois testified after Officer Libbey. When the State asked if the amount of methamphetamine found at Fitch's home was consistent with a typical user amount, Sergeant Langlois stated, "Far in excess of." 2 VRP (Mar. 29, 2018) at 237.

Sergeant Langlois's testimony was not an opinion on guilt or inference; rather, he testified consistently with Officer Libbey that the amount of methamphetamine located inside Fitch's home was more than typical for personal use. Moreover, experts are permitted to testify on information and subjects that are not within the understanding of the average person. ER 702. Sergeant Langlois testified to his extensive training in drug investigations. The fact that an expert opinion might cover an issue that will ultimately be decided by the jury does not require automatic exclusion. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

It was clearly trial tactic to not object to admissible testimony. Moreover, Fitch's challenge fails because, based on the record, he cannot show that an objection to Sergeant Langlois's testimony would likely have been sustained.

Because Fitch fails to show either deficient performance or prejudice in any of the instances above, his ineffective assistance of counsel claim fails.

B. SAG ISSUE

Fitch contends his possession of methamphetamine with intent to deliver and possession of heroin convictions should be reversed because the search of his home, where evidence of these offenses was found, was unlawful. Specifically, Fitch contends the search warrant had expired. We disagree.

We review a trial court's decision on a CrR 3.6 suppression motion to determine whether substantial evidence supports the court's findings of facts and whether those findings, in turn, support the court's conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). Our review of the record shows that the trial court's findings of fact support its conclusions of law.

Here, the trial court found that Officer Libbey presented the affidavit and search warrant to the judge for signature on February 7. The judge signed the search warrant that same day. The search warrant was executed on February 17. The trial court concluded that the search warrant was executed within the 10-day requirement.

CrR 8.1 states that "[t]ime shall be computed and enlarged in accordance with CR 6." CR 6(a) states:

> In computing any period of time, prescribed or allowed by these rules . . . by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

Therefore, because the search warrant was signed on February 7 and the warrant was executed on February 17, the search warrant was not expired when officers executed it. Thus, the search was not unlawful, and the trial court properly denied Fitch's motion to suppress the evidence found inside his home.

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 in accordance with RCW 2.06.040, it is so ordered.

, C.J.

Lee, C J.

We concur:

Worswick, J.

Sutton, J.

Supreme Court No. (to be set)
Court of Appeals No. 52697-2-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On June 23, 2020, I electronically filed a true and correct copy of the **Petition for Review by the Appellant, Robbie Lee Fitch**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Sean M Brittain Cowlitz Co. Prosecutors Office 312 SW 1st Ave Kelso WA 98626-1739	(X) via email to: brittains@co.cowlitz.wa.us, appeals@co.cowlitz.wa.us
Robbie Lee Fitch DOC # 376031 Olympic Corrections Center 11235 Hoh Mainline Forks, WA 98331	(X) via U.S. mail

SIGNED in Tacoma, Washington, this 23rd day of June, 2020.

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