SUPREME COURT NO. 99294-1
COURT OF APEALS NO. 36392-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JUAN MANUEL FLORES ARROYO

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable Robert B.C. McSeveney, Judge
The Honorable T. W. Small, Judge

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Juan Manual Flores Arroyo, the appellant below, seeks review of the Court of Appeals decision in State v. Flores Arroyo, noted at 13 Wn. App. 2d 1056, 2020 WL 2392541 (May 12, 2020) (Appendix A), following denial of his motion for reconsideration on November 5, 2020 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. In failing or refusing to address Mr. Flores Arroyo's ineffective assistance of counsel claims under the authority Mr. Flores Arroyo cited and discussed in his briefing, did the Court of Appeals violate Mr. Flores Arroyo's state constitutional right to appeal?

2. Does the Court of Appeals decision merit review because it improperly diminishes the standard for evaluating deficient immigration plea advice, stating that contradictory or wavering warnings are merely "disfavored" instead of recognizing clear precedent that inadequate warnings may negate the effect of all immigration plea advice?

3. Does the Court of Appeals decision merit review because it seemingly would require argument about success at a trial that hasn't happened yet, which is a significant misapplication of the standard for evaluating prejudice from deficient performance of counsel in the immigration advice context?

4. In upholding the trial court's exclusion of Mr. Flores Arroyo's admissible rebuttal evidence, does the Court of Appeals decision merit review because it misapplies the evidence rules and related authority?

C. STATEMENT OF THE CASE

Mr. Flores Arroyo was originally charged with drive-by shooting, alien in possession of a firearm, and violation of the uniform controlled substances act for possession of meth. CP 1-3. The possession of meth charge included a firearm enhancement allegation. CP 2-3.

Mr. Flores Arroyo pleaded guilty to one count of drive-by shooting. CP 4-15; 1RP[1] 6-12. The trial court dismissed the other two counts and sentenced Flores Arroyo to 15 months, the low-end of the standard range for the drive-by shooting. CP 19-20.

Mr. Flores Arroyo entered the United States from Mexico in 2013 on a tourist visa; he overstayed the tourist visa by about five years. 2RP 27.

Mr. Flores Arroyo later moved to withdraw his guilty plea to the drive-by shooting, asserting that his attorney had not adequately advised him regarding the immigration consequences of pleading guilty. CP 30-100. In his declaration, Mr. Flores indicated that avoiding deportation was

[1] Flores Arroyo refers to the verbatim report of proceedings as follows: 1RP—July 17, 2017; 2RP—consecutively paginated transcripts of August 16 and 29, 2018.

particularly important because of the danger he faced if he returned to his home town in Michoacan, Mexico. CP 50-51. He stated his father had been murdered there when he was nine years old. CP 50. He expressed fear of being killed, tortured, kidnapped, and extorted for money by local gangs working in conjunction with transnational criminal organizations. CP 50-51. Several of Mr. Flores's family members recounted similar concerns in their declarations. CP 69-70, 78-79. Mr. Flores's mother testified at the withdrawal of plea hearing that she was afraid for her son if he were deported, given the violence in their neighborhood in Mexico. 2RP 63-65. Mr. Flores himself expressed similar fears, stating he was afraid of returning to Mexico because he thought he might be murdered like his father. 2RP 16.

At the hearing to withdraw the plea, Mr. Flores and his family members testified regarding the immigration advice they received from defense counsel before entering the plea. The various testimony indicated that Mr. Flores's risk of deportation depended not on his plea of guilty, but on whether ICE would actually end up enforce immigration laws. E.g., 2RP 11 ("Sometimes they're deported and sometimes they're not."); 2RP 41 ("[Counsel] said he didn't know and that not to worry because sometimes immigration doesn't do anything."); 2RP 43 ("Don't worry about it. They might not do anything."); 2RP 53 ("He just said he didn't think so, that

sometimes Immigration does things like that; and other times, they just don't do anything.").

Mr. Flores's plea counsel, George Trejo, also testified at the hearing and had submitted written declarations. In his declaration, counsel stated he "specifically told [Mr. Flores Arroyo] that is was likely he would be removed permanently from the United States if ICE commenced removal proceedings against him." CP 133. Counsel also wrote, "I explained that if ICE stepped in after he completed his sentence," there was limited possible relief for Flores Arroyo. CP 133. Counsel stated his advice to Mr. Flores Arroyo was contingent on ICE's actions because in his prior experience there were instances were ICE took no action despite a defendant's removability from the United States. CP 133-34. At the plea withdrawal hearing, counsel also stated that his immigration consequences advice to Mr. Flores Arroyo was contingent on ICE commencing removal proceedings. 2RP 132-33. According to counsel, he told Mr. Flores Arroyo that it was more likely than not that he would be taken to ICE. 2RP 133.

Plea counsel also stated in his declarations that he advised Mr. Flores Arroyo of the immigration consequences just as he advises all noncitizen clients of such consequences. CP 113, 139. Counsel also referred to himself as a highly experienced and competent criminal defense attorney, listing several cases he had handled that resulted in acquittal. CP 101-06, 117-22.

He stated, "There should be no doubt that I am amongst the top criminal defense attorneys in the Country. Counsel's attempt to disparage me is pointless. His record does not compare to mine. Very few attorneys have a record of success comparable to mine." CP 106-122-23.

Mr. Flores's immigration attorney also testified at the hearing. Upon questioning of the trial court, she acknowledged that the outcome of removal proceedings could not be predicted with certainty in advance because the outcome was dependent on an immigration judge's factual analysis and legal ruling. 2RP 87-89.

At the plea withdrawal hearing, Mr. Flores Arroyo wished to present the testimony of Christian Ulloa Duenas, a former client of the same plea counsel. 2RP 34-35. The prosecution objected that such testimony violated ER 404, and the trial court agreed, stating that the focus of the hearing should be "exclusively on this defendant." 2RP 35-38. The trial court also disallowed defense counsel to question plea counsel about his history of discipline by the Washington State Bar Association, ruling that it was irrelevant. 2RP 133-34.

The trial court denied Flores Arroyo's motion to withdraw the guilty plea, concluding that his attorney was required only to advise that Flores faced possible adverse immigration consequences. CP 187-98. The trial

court specifically credited the testimony of plea counsel, noting he always advises noncitizen clients regarding immigration consequences. CP 194.

Mr. Flores Arroyo appealed. CP 209-21. He asserted his plea counsel's advice minimized the risk of deportation by divorcing the risk from the plea itself and making it contingent on the potential actions of nonactions of immigration authorities. Citing Washington and federal authority, Mr. Flores Arroyo contended that defense counsel's uncertain and wavering advice constituted the "useless formality" or "negat[ion]" discussed in State v. Sandoval, 171 Wn.2d 164, 1773, 249 P.3d 1015 (2011), and State v. Manajares, 197 Wn. App. 798, 807, 391 P.3d 530 (2017). Br. of Appellant, 7-10 (also citing Padilla v. Kentucky, 559 U.S. 356, 369, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); McMann v. Richardson, 397 U.S. 759, 770-71, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). Mr. Flores also contended that his counsel's inadequate plea advice prejudiced him because he demonstrated that avoiding deportation was *the* central issue for him and he would not have pleaded guilty but for the uncertain immigration advice of counsel. Br. of Appellant, 10-19; Reply Br., 2-5.

As for the claim of deficient plea advice, the Court of Appeals refused to address Mr. Flores Arroyo's actual claims, merely stating, "Contradictory or wavering warnings about deportation are disfavored

because they decrease the likelihood that a defendant will appreciate the potential consequences." Slip op., 4. Nowhere did the Court of Appeals address Mr. Flores Arroyo's claims that the contradictory and wavering deportation warnings are more than disfavored, they may negate the plea advice altogether. As for prejudice, the Court of Appeals faulted Mr. Flores Arroyos because he "does not argue that he had any likelihood of success at trial." Slip op., 5. Nowhere did the Court of Appeals address Mr. Flores Arroyo's prejudice claim under the correct standard, which Mr. Flores Arroyo clearly briefed: "whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right.'" Lee v. United States, ___ U.S. ___, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017) (alteration in original) (quoting Roe v. Flores Ortega, 528 U.S. 470, 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

In addition to the plea advice issue, Mr. Flores Arroyo also contended that the plea withdrawal hearing violated due process because he was denied the right to present evidence that tended to contradict plea counsel's claims that (1) he advised every client of deportation risk and (2) that he was one of the best attorneys in the country and so fervently expressed as much in his declarations. Applying ER 608, the Court of Appeals decided that Mr. Flores Arroyo's claims were improper impeachment on collateral matters and/or irrelevant. Slip op., 6.

Mr. Flores Arroyo timely moved for reconsideration raising the points discussed above and below. More than five months passed before the Court of Appeals issued a one-page order denying reconsideration.

D. ARGUMENT IN SUPPORT OF REVIEW

1. Mr. Flores Arroyo was denied his article I, section 22 right to appeal because the Court of Appeals failed or refused to address the claims he actually raised on appeal

The Court of Appeals decisions states, "Contradictory or wavering warnings about deportation are disfavored because they decrease the likelihood that a defendant will appreciate the potential consequences. State v. Manajares, 197 Wn. App. 798, 807, 391 P.3d 530 (2017)." Slip op., 4. This misapprehends that contradictory warnings are more than "disfavored"; contradictory warnings "may negate the effect of any warning included in the plea statement or given by the trial court." Manajares, 197 Wn. App. at 807. Immigration warnings become a "useless formality" if counsel suggests or gives the impression that the defendant should disregard the immigration warning. Sandoval, 171 Wn.2d at 173.

Mr. Flores Arroyo presented clear briefing in which he argued that his plea counsel couched his advice with too much uncertainty and contradiction, thereby negating the effect of the immigration warnings. He asserted that the immigration warnings given by plea counsel

constituted the precise "useless formality" or "negat[ion]" discussed in Sandoval and Manajares, citing these cases. Br. of Appellant at 7-10; Reply Br. at 1-2.

The Court of Appeals failed to address or even acknowledge these claims under the authority that Mr. Flores Arroyo cited. This failure or refusal is a plain violation of Mr. Flores Arroyo's right to appeal.

The Washington Constitution guaranties the accused "the right to appeal in all cases[.]" CONST. art. I, § 22. Included in the right to appeal is the right to have the appellate court consider the merits of the issues raised on appeal. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985). Where the nature of the appeal is clear and the relevant issues are briefed along with citations, the Court of Appeals has no lawful basis for failing or refusing to consider the merits of an issue. State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); accord State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998) (Court of Appeals will reach merits if issues are "reasonably clear" from briefing).

Mr. Flores Arroyo properly raised an issue in this appeal through his briefs. He argued the issue and he cited supporting legal authority. The Court of Appeals violated the authority cited in the preceding paragraph and denied Mr. Flores Arroyo's right to appeal guarantied in article I, section 22 of the Washington Constitution. Because of this

constitutional violation in conflict with Washington precedent, the Court of Appeals decision merits review under RAP 13.4(b)(1), (2), and (3).

Finally, the fact that the Court of Appeals refused even to acknowledge Mr. Flores Arroyo's properly raised assignments of errors and arguments shows a lack of integrity in the appellate court system. This lack of integrity is a matter of public importance that should be reviewed by the Washington Supreme Court under RAP 13.4(b)(4).

2. The Court of Appeals decision diminishes the standard for evaluating the adequacy of counsel's immigration advice, in conflict with constitutional precedent

The Court of Appeals initially seems to set out the correct legal standards in its decision. Slip op., 3-4. But then it states, "Contradictory or wavering warnings about deportation are disfavored because they decrease the likelihood that a defendant will appreciate the potential consequences." Slip op., 4.

The Court of Appeals statement that contradictory or wavering warnings about immigration consequences are merely "disfavored" is a misstatement of the law in conflict with Washington Supreme Court and Court of Appeals precedent. Under Sandoval and Manajares, contradictory warnings may negate the effect of any warning about immigration consequences and may constitute a "useless formality" if counsel gives the impression that the defendant should disregard the warning. 171 Wn.2d at

173; 197 Wn. App. at 807. The Court of Appeals application of the incorrect standard to evaluate the constitutional question of the adequacy of plea counsel's advice conflicts with clear constitutional precedent of the Washington Supreme Court and Court of Appeals. Review is warranted under RAP 13.4(b)(1), (2), and (3) to address Mr. Flores Arroyo's arguments about the inadequate of plea counsel's immigration advice under the correct legal standard.

Rather than attaching the potential adverse immigration consequences to Mr. Flores Arroyo's guilty plea where it belongs, plea counsel attached immigration consequences to whether immigration enforcement officials might decide not to enforce immigration laws. Plea counsel's advice gave the impression that the immigration consequences, although concededly not definite or "truly clear" in these circumstances, should be disregarded or minimized in pleading guilty. Clarity in the law would improve if the Washington Supreme Court applied the Sandoval and Manajares standards to the contradictory and wavering advice at issue in this case, meriting RAP 13.4(b)(3) review.

3. In faulting Mr. Flores Arroyo for not arguing "success at trial," the Court of Appeals decision applies the incorrect prejudice standard to these circumstances, in conflict with constitutional precedent

The Court of Appeals stated, "While Mr. Flores-Arroyo now argues he would prefer to go to trial, he does not argue that he had any likelihood of success at trial. Conviction for any of his charged offenses would still carry immigration consequences regardless of his sentence duration." Slip op., 5.

Mr. Flores did not argue he would have success at a trial that has not occurred yet because that is not the standard for addressing prejudice in this context. Rather, the question is whether there is a reasonable probability that Mr. Flores would have gone to trial rather than plead guilty. Sandoval, 17 Wn.2d at 170). Stated differently, the correct prejudice question is whether the defendant was denied an entire judicial proceeding to which he had a right based on the inadequate plea advice of counsel. Lee, 137 S. Ct. at 1965; Flores Ortega, 528 U.S. at 483.

Because the Court of Appeals decision clearly misapplies and thereby conflicts with constitutional precedent regarding ineffective assistance of counsel prejudice in the plea withdrawal context, review is warranted under RAP 13.4(b)(1) and (3).

Because it applies the wrong standard, the Court of Appeals never addressed Mr. Flores Arroyo's claim that, consistent with Lee, he establishes

prejudice because "avoiding deportation was *the* determinative factor for him," he established strong family connections in the United States, and it would not have been irrational to reject a plea deal for 15 months of incarceration and go to trial, risking a 60-month sentence on all charges. Br. of Appellant, 14-19; Reply Br., 3-5. Review should be granted to address the Court of Appeals' misapplication of the prejudice standard and to apply the correct standard. RAP 13.4(b)(1), (3).

4. The Court of Appeals decision to uphold the exclusion of Mr. Flores Arroyo's admissible rebuttal evidence at the plea withdrawal hearing violates the evidence rules and authority applying them

Plea counsel claimed he advises each and every noncitizen client adequately regarding immigration consequences. CP 113, 139. The trial court explicitly found plea counsel's statements credible. CP 194. Plea counsel also claimed he was among the top performing criminal defense attorneys in the state and in the country, suggesting quite hyperbolically that, given his unparalleled successes, the adequacy of his plea advice could or should never possibly be questioned. CP 102-06, 118-23.

To rebut plea counsel's claims, Mr. Flores Arroyo attempted to present the testimony of plea counsel's former client, who had also presented a declaration in support of Mr. Flores Arroyo's motion to withdraw his plea. CP 86; 2RP 34-35. This witness would have contradicted plea counsel's

claims about always giving adequate advice by testifying to the inadequate advice he received. Mr. Flores Arroyo also wished cross-examine plea counsel regarding bar discipline proceedings to attack plea counsel's various representations about his superiority as a criminal defense lawyer. 2RP 133-34.

The Court of Appeals decision applies ER 608, holding that Mr. Flores Arroyo's proffered evidence was improper impeachment on a prior instance of conduct and that it was otherwise irrelevant. This conflicts with the evidence rules and caselaw applying them, meriting RAP 13.4(b)(1) and (2) review.

First, ER 608(b) bars extrinsic evidence of specific instances of conduct to support or attack witness credibility. But it does not prohibit one witness from contradicting another witness. As Karl Tegland explains, "If X testified that the light was red, Y can testify that her recollection differs from that of X, and that she thinks the light was green." 5A WASH. PRACTICE: EVIDENCE LAW AND PRACTICE § 608.14 (6th ed. 2019 updated). For instance, it was not error for the prosecution to call witnesses who contradicted the defendant's claim he was in Idaho when a robbery occurred. State v. Stambach, 76 Wn.2d 298, 299-300, 456 P.2d 362 (1969). These witnesses were permitted to testify they saw the defendant in a local bar on the date of the robbery to rebut the alibi

defense. Id. at 300. Professor Tegland further explains, "Rule 608 does not prohibit Witness B from recounting circumstances personally observed by Witness B and casting doubt on the credibility of Witness A." 5A WASH. PRACTICE, supra, § 608.15 (discussing State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) (police officer properly allowed to testify that the accused told three inconsistent versions of the events); State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002) (one witness was allowed to recount the out-of-court statements of another witness, not for the truth of the matter asserted but to reveal the witness's prejudicial state of mind); Tamburello v. Dep't of Labor & Indus., 14 Wn. App. 827, 545 P.2d 570 (1976) (video evidence of claimant's physical activities permitted to cast doubt on claimant's testimony about his disability)).

The Court of Appeals decision conflicts with these evidence-rule cases and the basic constitutional principle that the defendant has the right to present rebuttal and impeachment evidence to undermine the prosecution's key witness(es). See Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 374 (1984). Review is therefore warranted. RAP 13.4(b)(1)-(3).

Second, the Court of Appeals' claim that the rebuttal evidence was irrelevant to the issues at hand is untenable. Credibility of the prosecution's principal witness is never a collateral or irrelevant matter. E.g., State v.

Gunderson, 181 Wn.2d 916, 930-31, 337 P.3d 1090 (2014); State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996); State v. Whyde, 30 Wn. App. 162, 166, 632 P.2d 913 (1981); State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (collecting cases); accord ROBERT H. ARONSON & MAUREEN A. HOWARD, THE LAW OF EVIDENCE IN WASHINGTON § 7:06(2)(a) (5th ed. 2017) (noting the weight of authority that a witness's credibility is *always* in issue).

The excluded evidence went to the hearing's central issue—did plea counsel credibly give adequate advice about immigration consequences to Mr. Flores Arroyo. The trial court credited plea counsel in every respect yet denied Mr. Flores Arroyo his rightful opportunity to rebut plea counsel with his own competent evidence. The Court of Appeals conclusion that the excluded evidence was collateral under ER 608 or irrelevant conflicts the cases cited above, meriting RAP 13.4(b)(1) and (2) review.

E. CONCLUSION

Because Mr. Flores Arroyo satisfies every RAP 13.4(b) criterion, review should be granted.

DATED this 7th day of December, 2020.

Respectfully submitted,

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# APPENDIX A

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CASE # 363929
State of Washington v. Juan Manuel Flores Arroyo
CHELAN COUNTY SUPERIOR COURT No. 171001237

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Robert McSeveney
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**FILED**
**MAY 12, 2020**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | No. 36392-9-III |
| Respondent, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| JUAN MANUEL FLORES-ARROYO, | ) | UNPUBLISHED OPINION |
| | ) | |
| Appellant. | ) | |

KORSMO, J. — Juan Flores-Arroyo appeals the denial of his motion to withdraw his guilty plea. He argues that he received ineffective assistance of counsel and that the court erred in excluding evidence offered to attack his plea counsel's credibility. We affirm.

## FACTS

Mr. Flores-Arroyo came to the United States on a tourist visa in 2013 and overstayed the visa limit. In 2017, he was charged in Chelan County with drive-by shooting, possession of methamphetamine, and alien in possession of a firearm. Mr. Flores-Arroyo's family hired George Trejo to represent Mr. Flores-Arroyo. Mr. Trejo negotiated an agreement for Flores-Arroyo to plead guilty solely to drive-by shooting with a low end sentence recommendation. Mr. Trejo advised Mr. Flores-Arroyo that

immigration consequences were possible and that he likely would be deported if federal authorities commenced immigration proceedings. Mr. Flores-Arroyo acknowledged on the record that he could face immigration consequences from his plea. The court accepted the plea after verifying that it was knowingly and voluntarily entered.

Immigration authorities commenced deportation proceedings after Mr. Flores-Arroyo completed his sentence. An immigration judge determined that the drive-by shooting constituted a "particularly serious crime" for immigration purposes and ordered his deportation. Mr. Flores-Arroyo appealed the immigration decision.

While that appeal was underway, Mr. Flores-Arroyo also filed a CrR 7.8 motion to withdraw his guilty plea in Chelan County Superior Court. He argued that he received ineffective assistance of plea counsel because his attorney failed to adequately advise him about immigration consequences. He also asserted that he would have accepted a longer prison time in order to avoid deportation. The court conducted a hearing on the motion. Mr. Flores-Arroyo sought to call a past client of Mr. Trejo to testify that he had received incorrect immigration advice. The trial court found the testimony irrelevant to whether Mr. Flores-Arroyo received proper advice. The court also disallowed evidence of counsel's bar discipline history.

The trial court denied the CrR 7.8 motion because it found Mr. Flores-Arroyo was adequately advised about immigration consequences before entering his plea. The court further noted that, of the three charges Mr. Flores-Arroyo faced, the drive-by shooting

charge carried the least certain immigration consequences. Mr. Trejo correctly advised his client that deportation was likely.

Mr. Flores-Arroyo timely appealed the trial court's denial of his motion. A panel considered his appeal without hearing argument.

ANALYSIS

The appeal presents two arguments. We first address whether the trial court erred in denying the motion to withdraw the guilty plea before turning to the contention that the court erred when it rejected impeachment evidence.

*Ineffective Assistance of Counsel*

We review the trial court's decision whether to allow withdrawal of a guilty plea for abuse of discretion. *State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 281-282, 319 P.3d 53 (2013). The trial court may allow withdrawal of a guilty plea to correct a manifest injustice, including ineffective assistance of counsel. *Id*. at 282.

A defendant who claims ineffective assistance must establish that counsel's performance was deficient and prejudicial. *State v. Sandoval*, 171 Wn.2d 163, 170, 249 P.3d 1015 (2011). Prejudice is established if the defendant can demonstrate that, but for counsel's errors, there was a reasonable probability he would have gone to trial rather than plead guilty. *Id*. at 174-175.

Defense counsel must advise a client about the consequences of pleading guilty. *In re Ramos*, 181 Wn. App. 743, 749-750, 326 P.3d 826 (2014). Counsel must provide accurate information about potential immigration ramifications, even though the relevant law is often unclear. *Id*. at 750-751. Subsequent to *Padilla v. Kentucky*[1], counsel must appropriately advise a client when federal law classifies the defendant's offense as clearly deportable. *Id*. at 751. If immigration consequences for the offense are not clear, counsel must provide a general warning that immigration consequences are possible. *Id*. at 752. Contradictory or wavering warnings about deportation are disfavored because they decrease the likelihood that a defendant will appreciate the potential consequences. *State v. Manajares*, 197 Wn. App. 798, 807, 391 P.3d 530 (2017).

Both parties acknowledge Washington's drive-by shooting offense does not have clear federal deportation consequences, while possession of methamphetamine and alien in possession of a firearm have clear negative consequences. Mr. Trejo correctly informed Mr. Flores-Arroyo that he could face immigration consequences, including possible deportation, if he chose to plead guilty to drive-by shooting. This advice was accurate and sufficient for an offense with unclear immigration consequences. Had Mr. Flores-Arroyo pleaded guilty to his other two offenses or been convicted for these offenses, his immigration consequences were likely far worse. While Mr. Flores-Arroyo

[1] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

now argues he would prefer to go to trial, he does not argue that he had any likelihood of success at trial. Conviction for any of his charged offenses would still carry immigration consequences regardless of his sentence duration.

Mr. Trejo gave his client accurate and adequate advice prior to pleading guilty. Counsel was not ineffective for negotiating a relatively favorable deal under the circumstances. Mr. Flores-Arroyo has not met his heavy burden of establishing that counsel provided ineffective assistance. Accordingly, the trial court did not abuse its discretion by denying the motion to withdraw the plea.

*Impeachment Evidence*

This court reviews evidentiary rulings for abuse of discretion. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017). A trial court abuses its discretion when it applies the wrong legal standard. *Gilmore v. Jefferson County Pub. Transp. Benefit Area*, 190 Wn.2d 483, 499, 415 P.3d 212 (2018). Evidentiary errors are not presumptively prejudicial and we will only reverse when the appellant establishes the error affected the outcome. *State v. Barry*, 183 Wn.2d 297, 303, 313, 352 P.3d 161 (2015).

A witness may not be impeached on a collateral matter. *State v. Oswalt*, 62 Wn.2d 118, 120-121, 381 P.2d 617 (1963). "An issue is collateral if it is not admissible independently of the impeachment purpose." *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006). Prior conduct normally is inadmissible to show that an

individual acted in a same manner on a given occasion. ER 404. A court may allow specific instances of conduct to be raised during cross-examination if the court considers the issue probative of truthfulness. ER 608(b). Extrinsic evidence may not be used to prove or disprove past conduct. *Id*. Even prior conduct related to credibility may not be admissible if not germane. *Harbottle v. Braun*, 10 Wn. App. 2d 374, 396, 447 P.3d 654 (2019).

Mr. Flores-Arroyo sought to use one of Trejo's past clients to suggest that Mr. Trejo gave that client incorrect immigration advice. This is a single past instance of conduct used to suggest Mr. Trejo acted in the same way with Mr. Flores-Arroyo. After hearing arguments from each side, the court reasonably concluded that this witness would only testify about issues unrelated to the advice given to Mr. Flores-Arroyo. The court properly followed evidentiary rules in concluding the testimony was irrelevant.

Mr. Flores-Arroyo also did not present any reason why the bar discipline history was relevant. In fact, it was ancient and involved unrelated circumstances. The only relevance was to challenge Mr. Trejo's character, not to show that he lied or acted improperly in this case. The trial court did not abuse its discretion when it disallowed questions about the discipline history.

The trial court did not abuse its discretion in its evidentiary rulings.

Affirmed.

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

Korsmo, A.C.J.

WE CONCUR:

Lawrence-Berrey, J.

Siddoway, J.

# APPENDIX B

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CASE # 363929
State of Washington v. Juan Manuel Flores Arroyo
CHELAN COUNTY SUPERIOR COURT No. 171001237

Counsel:

Enclosed is a copy of the order deciding a motion for reconsideration of this Court's May 12, 2020 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this Court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this Court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

**FILED**
**NOVEMBER 5, 2020**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JUAN MANUEL FLORES-ARROYO,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 36392-9-III<br><br><br><br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 12, 2020 is hereby denied.

PANEL: Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:

REBECCA PENNELL
Chief Judge

**NIELSEN KOCH P.L.L.C.**

**December 07, 2020 - 12:43 PM**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division III |
| **Appellate Court Case Number:** | 36392-9 |
| **Appellate Court Case Title:** | State of Washington v. Juan Manuel Flores Arroyo |
| **Superior Court Case Number:** | 17-1-00123-7 |

**The following documents have been uploaded:**

- 363929_Petition_for_Review_20201207124320D3259726_6797.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was State v. Juan Flores-Arroyo 36392-9-III.Petition.pdf*

**A copy of the uploaded files will be sent to:**

- douglas.shae@co.chelan.wa.us
- james.hershey@co.chelan.wa.us
- prosecuting.attorney@co.chelan.wa.us

**Comments:**

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Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
**Filing on Behalf of:** Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email: )

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