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NO. 52697-2-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

ROBBIE LEE FITCH,

Appellant.

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BRIEF OF APPELLANT,  
ROBBIE LEE FITCH  
**AMENDED TO CORRECT FORMATTING ERROR**

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

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## I. INTRODUCTION

Robbie Lee Fitch was convicted of four crimes following a jury trial. These convictions must be reversed because Mr. Fitch was denied effective assistance of counsel. His attorney was deficient for three reasons. First, counsel permitted the state to introduce unfairly prejudicial evidence of Mr. Fitch's prior dropped charges. Second, counsel failed to move to sever the bail jumping charges, even after potential jurors expressed their belief that Mr. Fitch must be guilty of all charges because he was accused of bail jumping. Third, counsel failed to object when the state introduced improper opinion testimony on guilt. Counsel's failings prejudiced Mr. Fitch, violating his constitutional rights. Mr. Fitch respectfully requests that this Court reverse his convictions and remanded for a new trial.

## II. ASSIGNMENTS OF ERROR

Assignment of Error 1: Mr. Fitch was denied effective assistance of counsel when his trial attorney failed to offer to stipulate that he was charged with a class B felony, failed to object when the state introduced evidence of two dropped charges, failed to request to redact these dropped charges from the original information admitted as an exhibit, and failed to request an appropriate jury instruction.

Assignment of Error 2: Mr. Fitch was denied effective assistance of counsel when his trial attorney failed to move to sever his charges for bail jumping,

particularly after multiple potential jurors expressed their belief that Mr. Fitch must be guilty of all charges because he was accused of bail jumping.

Assignment of Error 3: Mr. Fitch was denied effective assistance of counsel when his trial attorney failed to object when the state introduced improper opinion testimony on guilt and failed to request a proper limiting instruction.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Was Mr. Fitch denied effective assistance of counsel when his attorney failed to offer an *Old Chief* stipulation, resulting in the jury being presented with evidence of two dropped charges for possession of controlled substances with intent to deliver?

Issue 2: Was Mr. Fitch denied effective assistance of counsel when his attorney failed to move to sever his bail jumping charges after potential jurors expressed their belief that he was guilty of all charges due to his alleged bail jumping?

Issue 3: Was Mr. Fitch denied effective assistance of counsel when his attorney failed to object to improper opinion 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**

This case arose after police executed a search warrant at the house Robbie Lee Fitch shared with his wife. RP at 154, 336. Initially, Mr. Fitch was charged 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. First, the state added two counts of bail jumping and reduced the heroin and clonazepam charges to simple possession. CP 58-59. Second, the state dropped the clonazepam charge altogether. 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.

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. 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. RP at 234. Det. Libbey forced Mr. Fitch to the ground, placed his knee on Mr. Fitch's back, and handcuffed him. RP at 199, 213-14. Officers then moved Mr. Fitch to the living room. RP at 199.

In the living room, Sgt. Mark Langlois read Mr. Fitch his Miranda rights, then 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. However, 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: (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 appeals.

## V. ARGUMENT

Mr. Fitch was denied effective assistance of counsel, for three reasons. First, trial counsel failed to offer to stipulate that Mr. Fitch was charged with a class B felony. At trial, the state described in detail two of Mr. Fitch's dropped felony charges. Trial counsel failed to object to this unfairly prejudicial evidence. Second, trial counsel failed to move to sever the bail jumping charges, even after potential jurors expressed that Mr. Fitch must be guilty because he was accused of bail jumping. Third, trial counsel failed to object when a state's witness improperly commented on guilt. Counsel's errors prejudiced Mr. Fitch and violated his constitutional rights. This Court should reverse.

**A. Mr. Fitch was Denied Effective Assistance of Counsel because his Trial Attorney Failed to Stipulate that he was Charged with a Class B Felony.**

Mr. Fitch was denied effective assistance of counsel when his attorney permitted the jury to learn irrelevant and unfairly prejudicial evidence of two dropped charges. Ex. 7. 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). A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). 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.

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

Trial counsel was deficient by failing to offer to stipulate that Mr. Fitch was charged with a class B felony. 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.*

Here, 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 this status element, 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. 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.*

This Court should reverse because 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).

This case differs from *State v. Streepy*, where counsel had a legitimate strategic reason to decline to offer an *Old Chief* stipulation. 199 Wn. App. 487, 400 P.3d 339 (2017). In *Streepy*, the defendant was charged with unlawful possession of a firearm. *Id.* at 502. To prove this charge, the state needed to prove that the defendant was previously convicted of assault. *Id.* Defense counsel declined, on the record, to offer an *Old Chief* stipulation. *Id.* at 502-03.

Instead, the state in *Streepy* relied on the judgment and sentence from defendant’s prior conviction. The trial court admitted this document as an exhibit over defense counsel’s objection. *Id.* at 503. However, the judgment and sentence was deficient because it lacked the date of the offense. *Id.* Defense counsel also refused to stipulate to the date. *Id.* The trial court permitted the state to reopen its case, over defense counsel’s objection, to correct this error. *Id.* The trial court also issued a proper limiting instruction. *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, unlike in *Streepy*, 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. As explained below, Mr. Fitch was also prejudiced by counsel's deficient performance.

**2. Trial counsel's deficient performance prejudiced Mr. Fitch.**

To prove ineffective assistance, Mr. Fitch 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).

Here, trial counsel's deficient performance prejudiced Mr. Fitch for two reasons. First, the trial court would likely have accepted Mr. Fitch's offer to stipulate that he was charged with a class B felony. Second, admitting the dropped charges likely changed the outcome of the trial. The

original information encouraged the jury to convict Mr. Fitch based on an unfair inference of criminal propensity. *See State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 907 (2000) (finding that evidence of prior criminal conduct is especially prejudicial in the eyes of the jury because it raises an inference of “once a criminal, always a criminal”); *Escalona*, 49 Wn. App. at 255-56.

**a. The trial court likely would have accepted an offer to stipulate.**

Had counsel offered to stipulate that Mr. Fitch was charged with a class B felony, the trial court likely would have accepted that stipulation. Under ER 404(b), evidence of misconduct cannot be used to show the defendant’s criminal propensity. ER 404(b). Under ER 403, the court can exclude evidence when the danger of unfair prejudice substantially outweighs any probative value. ER 403. Evidence is unfairly prejudicial if it is “likely to provoke an emotional response rather than a rational decision.” *Johnson*, 90 Wn. App. at 62, 950 P.2d 981. “The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence.” *Id.*

Due to the danger of unfair prejudice, the court must accept the accused’s offer to stipulate to a prior conviction where the existence of the prior conviction is an element of an offense. *Old Chief*, 519 U.S. at 191-92; *Johnson*, 90 Wn. App. at 63. Washington courts have extended this rule

to include offers to stipulate to post-conviction no-contact orders. *State v. Taylor*, 4 Wn. App.2d 381, 421 P.3d 983 (2018).

When the defendant's status is at issue, the state is not prejudiced by proving that status by stipulation. *Id.* at 387-88. The difference between the value of a stipulation and of a court record is “distinguishable only by the risk [of unfair prejudice] inherent in one and wholly absent from the other.” *Johnson*, 90 Wn. App. at 63 (quoting *Old Chief*, 519 U.S. at 191). Evidence of prior criminal conduct is inherently prejudicial because of the risk that the jury will “generaliz[e] a defendant's earlier bad act into bad character” or “worse, . . . call[ ] for preventative conviction even if [the accused] should happen to be innocent momentarily.” *Old Chief*, 519 U.S. at 180-81. This risk is particularly high when the prior criminal conduct is similar to the charge for which the accused is currently on trial. *Id.* at 185.

*Old Chief* and *Johnson* applied to stipulations to prior criminal convictions. *Old Chief*, 519 U.S. at 191-92; *Johnson*, 90 Wn. App. at 63. *Taylor* extended this rule to no-contact orders. 4 Wn. App.2d at 388. The same reasoning applies to dropped charges. The probative value of the original information was to show that Mr. Fitch was charged with a class B felony when he failed to appear in court. Mr. Fitch did not argue this point. The dropped charges had no bearing on the trial itself, apart from unfair prejudice. Had Mr. Fitch offered to stipulate that he was charged with a class B felony, the trial court would have likely accepted this stipulation in

the interest of fairness. At the very least, the trial court would likely have agreed to redact the information or issue an appropriate limiting instruction to minimize the chance of the jury drawing an improper inference.

**b. Admitting the original information, including two dropped felony charges for drug crimes, likely affected the outcome of Mr. Fitch's trial.**

As explained above, defense counsel could have removed the dropped charges from the jury, or at least minimized their damage. Counsel's incompetence prejudiced Mr. Fitch by likely affecting the outcome of the trial and undermining confidence in his convictions. *See Strickland*, 466 U.S. at 694.

When presented with Mr. Fitch's prior charges, the jury was likely to convict based on the unfair inference of criminal propensity. *See Bacotgarcia*, 59 Wn. App. at 822; *Escalona*, 49 Wn. App. at 255-56. The dropped charges were especially prejudicial with respect to Mr. Fitch's pending drug charges. Without evidence of his prior dropped charges for possession with intent to deliver, the jury was far more likely to conclude that Mr. Fitch only possessed drugs for his personal use. Mr. Fitch also could have advanced the argument that the drugs found in the garage belonged to a different resident in the house. Counsel's failure to prevent the jury from learning of his dropped felony charges was deficient performance that violated Mr. Fitch's right to effective assistance of counsel. His convictions should be reversed.

**B. Mr. Fitch was Denied Effective Assistance of Counsel because his Trial Attorney Failed to Move to Sever his Bail Jumping Charges.**

Mr. Fitch was also denied effective assistance of counsel when his trial attorney failed to move to sever his bail jumping charges. As described above, to prove ineffective assistance, a defendant must show that his counsel was deficient, and this deficient performance resulted in prejudice. *Hendrickson*, 129 Wn.2d at 77.

CrR 4.4 governs severance of charges in a criminal trial. Charges may be severed “to promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). A defendant demonstrates ineffective assistance based on counsel’s failure to litigate a motion to sever by proving (1) counsel’s performance was deficient, (2) the motion to sever would likely have been granted, and (3) the defendant was prejudiced because, but for counsel’s deficient performance, the outcome would have differed. *See State v. Sutherby*, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). This case meets all three requirements.

**1. Reasonable trial counsel would have moved to sever.**

Mr. Fitch’s trial counsel was deficient by failing to move to sever his bail jumping charges, particularly given the statements made by potential jurors in voir dire. 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. *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994).

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 Sutherby*, 165 Wn.2d at 884 (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).

**2. The trial court would likely have granted a motion to sever.**

Had counsel moved for a severance, the trial court would likely have granted the motion. In determining whether to sever charges, a court must 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. *Sutherby*, 165 Wn.2d at 884-85. These factors favor severing the bail jumping charges in this case.

First, the state's case as to the drug charges was strengthened significantly by the bail jumping charges. Two potential jurors stated that they believed Mr. Fitch was guilty of all charges based on the bail jumping charges. RP at 97, 114. The second factor also favors severance. Generally, "the likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." *Russell*, 125 Wn.2d at 64. Here, Mr. Fitch's defenses were not identical on each charge. He denied the drug charges and offered an affirmative defense to bail jumping. The third factor weighs against severance because the trial court did instruct the jury to consider each count separately. RP at 366. Fourth, the evidence from the drug charges almost certainly would not have been admissible at a separate trial for the bail jumping charges, and vice-versa. The facts relevant to each were distinct

in time and place, and evidence from one trial would only be unfairly prejudicial at the other.

On sum, the *Sutherby* factors favor severing the bail jumping charges from the controlled substance charges. Factually, these charges were distinct and should have been tried separately. The trial court likely would have granted a motion for severance to avoid unfair prejudice to Mr. Fitch.

**3. Counsel’s deficient performance prejudiced Mr. Fitch by encouraging the jury to draw an improper inference about his criminal disposition.**

As explained above, had counsel moved for severance, the trial court likely would have granted that motion. Counsel’s deficient performance in failing to file this motion prejudiced Mr. Fitch by undermining confidence in the outcome of this case and likely changing its outcome. *See Strickland*, 466 U.S. at 694.

Prejudice may result “‘if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.’” *State v. Bryant*, 89 Wn. App. 857, 867, 950 P.2d 1004 (1998) (quoting *Russell*, 125 Wn.2d at 62-63). A more subtle prejudicial effect may be present in a “‘latent feeling of hostility engendered by the charging of several crimes as distinct from only one.’” *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (quoting *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964)).

In this case, trying the bail jumping and drug charges together encouraged the jury to make improper inferences about Mr. Fitch's disposition. Two potential jurors admitted drawing such inferences in voir dire. RP at 97, 114; CP 147-48. The remaining jurors were unlikely to be able to compartmentalize the evidence for each charge. *See State v. Bythrow*, 114 Wn.2d 713, 721, 790 P.2d 154 (severance may be appropriate where the jury cannot compartmentalize the evidence for each charge). In all likelihood, the jurors concluded that Mr. Fitch was guilty of the drug charges because he failed to appear in court and was charged with bail jumping. Competent counsel would have moved to sever these charges, and trial counsel's failure to do so prejudiced Mr. Fitch, amounting to ineffective assistance.

**C. Mr. Fitch was Denied Effective Assistance of Counsel because his Trial Attorney Failed to Object When a State's Witness Improperly Opined on Guilt.**

Finally, Mr. Fitch was denied effective assistance of counsel when his trial attorney failed to object to improper opinion testimony on guilt. As described above, ineffective assistance occurs when counsel was deficient, and this deficient performance resulted in prejudice to the client. *Hendrickson*, 129 Wn.2d at 77. A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show three things: (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection likely would have been sustained; and (3) that

the improperly admitted evidence undermined confidence in the outcome of the case. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Here, all three requirements are met.

**1. Failing to object served no legitimate tactic or strategy.**

Mr. Fitch's trial counsel failed to object when a state's witness gave improper opinion testimony on guilt. No legitimate trial tactic or strategy excuses this failure. *See Crawford*, 159 Wn.2d at 98 (a defendant shows deficient performance by proving "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel").

Mr. Fitch was charged with possession with intent to deliver methamphetamine. 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); *see also City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Improper opinion testimony often involves an assertion pertaining directly to the defendant. *Heatley*, 70 Wn. App. at 577. 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.

A competent defense attorney would have objected to Sgt. Langlois’s testimony. The record does not reflect any strategic advantage to permitting a police officer to testify that the drugs found in Mr. Fitch’s home were “far in excess of” a typical user amount. RP at 237. In fact, this testimony directly undercut defense counsel’s argument that the drugs were for Mr. Fitch’s personal use. In the absence of any legitimate strategic rationale, counsel’s failure to object constituted deficient performance. *See Hendrickson*, 129 Wn.2d at 77-78.

**2. The trial court would likely have sustained an objection to Sgt. Langlois’s testimony.**

The trial court would likely have sustained an objection to Sgt. Langlois’s testimony because it exceeded the permissible scope of law enforcement opinion testimony. At the very least, the trial court would likely have issued a specific limiting instruction to the jury.

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. *U.S. 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.

In this case, Sgt. Langlois effectively opined that Mr. Fitch was guilty of intending to sell drugs by testifying that the amount of methamphetamine found in Mr. Fitch’s house was “far in excess of” a typical user amount. RP at 237. This testimony went beyond the officer’s experience with user and dealer amounts of drugs in general. *See Heatley*, 70 Wn. App. at 577-78. Instead, Sgt. Langlois’s assertion pertained directly to Mr. Fitch and his alleged intent. *See id.* It was thus improper opinion testimony, violating Mr. Fitch’s constitutional rights. *See Quaale*, 182 Wn.2d at 199. Had defense counsel objected, the trial court likely would have excluded this opinion testimony.

**3. Counsel’s failure to object undermined confidence in the outcome of the case.**

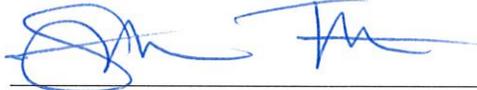
Sgt. Langlois’s testimony on guilt prejudiced Mr. Fitch by undermining confidence in the outcome of this case. When considering whether improper opinion testimony resulted in prejudice, courts look at whether the jury was properly instructed regarding expert witnesses. *Montgomery*, 163 Wn.2d at 595-96; *see also State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). For example, the Court in *Montgomery* concluded that improper opinion testimony did not prejudice the defendant where jurors were instructed that they “are not bound” by expert witness opinions. 163 Wn.2d at 595-96.

Unlike in *Montgomery*, here the jury was not instructed on expert testimony at all. RP at 361-75; CP 199-225. Uninstructed, the jury likely gave undue weight to the officer’s opinion because of its aura of certainty and reliability. *Montgomery*, 163 Wn.2d at 595; *see also Quaale*, 182 Wn.2d at 202. Introducing damaging opinion testimony on guilt—without instructions to the jury about how to properly consider this evidence—prejudiced Mr. Fitch by undermining confidence in the result of his trial. *See Strickland*, 466 U.S. at 694. This Court should reverse.

## VI. CONCLUSION

Robbie Fitch was denied effective assistance of counsel. His trial attorney permitted the state to introduce unfairly prejudicial evidence of dropped charges, failed to move to sever the charges for bail jumping, and failed to object when the state introduced improper opinion testimony on guilt. Counsel's incompetence denied Mr. Fitch a fair trial and violated his constitutional rights. Mr. Fitch respectfully requests that this Court reverse his convictions and remanded for a new trial.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of March, 2019.



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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 March 11, 2019, I electronically filed a true and correct copy of the **Brief of Appellant, Robbie Lee Fitch, AMENDED TO CORRECT FORMATTING ERROR**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

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SIGNED in Port Orchard, Washington, this 11<sup>th</sup> day of March,

2019.



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**March 11, 2019 - 12:18 PM**

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**Comments:**

Amended to correct formatting error. I apologize for initially mislabelling the page numbers in the Table of Contents and Table of Authorities. Nothing else in the brief has been changed.

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