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Court of Appeals  
Division III  
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NO. 36365-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JESSICA VAZQUEZ,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

**1. Defense counsel’s failure to object to a host of inadmissible and prejudicial evidence, advocate for a desired plea bargain, or object to inapplicable LFOs amount to the deprivation of Ms. Vazquez’s right to effective assistance of counsel.**

*a. Counsel’s own pending prosecution is part of the record and based on publicly available information of such seriousness that it is an essential backdrop to the case.*

A court’s assessment of whether an attorney’s performance complied with essential constitutional requirements includes consideration of any impairment from which the lawyer was suffering. *State v. Lopez*, 190 Wn.2d 104, 119 & n.9, 410 P.3d 1117 (2018). An impairment such as drug addiction does not alone amount to deficient performance, but it does factor into the presumption of competence and is “certainly relevant.” *Id.* at 119 n.9.

Here, defense counsel disclosed her arrest and pending prosecution at Ms. Vazquez’s sentencing. CP 61. But counsel disclosed only part of the relevant information and further, publicly available information and admissions of counsel should not be hidden from this Court.

The prosecution criticizes Ms. Vazquez for even raising this issue, claiming the sole purpose is to taint counsel's reputation. Resp. Brief at 7. But that assertion is patently incorrect. When a lawyer admits that the impairment of drug and alcohol addiction undermined her ability to practice law and resigns from practice due to this impairment, it is not a character attack but a relevant fact that should be considered. *See Lopez*, 190 Wn.2d at 119; *United States v. Washington*, 869 F.3d 193, 204 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 713 (2018) ("Alcohol or drug use by trial counsel can certainly be relevant to both parts of an ineffectiveness inquiry, especially if amplified or systemic, or on close questions of strategy and jury perception.").

Contrary to the prosecution's misleading reframing of the issue, Ms. Vazquez does not contend counsel's admitted impairment from addiction constitutes structural error, as in the case the State cites, *Ivory v. Jackson*, 509 F.3d 284, 295 (6th Cir. 2007). This factual background and counsel's admissions of intractable addiction at the time of Ms. Vazquez's sentencing are "certainly relevant" and they necessarily impact the presumption of competence that generally applies.

An overarching goal of appellate rules is the reaching just decisions on the merits. RAP 1.2(a), (c). It would be unjust, and would deprive this Court of critical information, to ignore information that is now plainly available about trial counsel's admitted impairment at the time of Ms. Vazquez's trial. See RAP 9.11; *see also Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 154, 437 P.3d 67 (2019) (explaining rules for supplementing record on appeal are construed liberally).

While counsel's own prosecution and her admissions of addiction that caused her to withdraw from the practice of law quickly after Ms. Vazquez's trial do not settle the question of whether Ms. Vazquez received competent counsel on their own, they are certainly relevant and should inform this Court's consideration of counsel's performance.

*b. The prosecution impermissibly introduced details of Ms. Vasquez's otherwise inadmissible prior convictions without following court rules and yet counsel did not object.*

On appeal, the prosecution claims it was perfectly permissible to cross-examine Ms. Vazquez about the details of her otherwise inadmissible multiple convictions for the same

offense as charged because she “broached the topic” of her criminal history, thus allowing the State to “clarify” by eliciting the details of all her felony convictions. Resp. Brief at 10. This specious contention misrepresents the doctrine of when a party “opens the door” to otherwise inadmissible evidence, and its inapplicability to this case.

The “open door” doctrine provides that a party may not introduce favorable evidence and then protest when their adversary offers further detail about this same information in rebuttal. *See State v. Brush*, 32 Wn. App. 445, 448, 648 P.2d 897 (1982) (defendant who testifies about “his own past good behavior may be cross-examined as to specific acts of misconduct” in response).

In any event, a passing, general reference to a topic does not open the door. *State v. Harstad*, 153 Wn. App. 10, 28-29, 218 P.3d 624 (2009) (witness’s “passing” or “vague” reference to “some other time” did not open door to evidence of other incidents); *see State v. Avendano-Lopez*, 79 Wn. App. 706, 904 P.2d 324 (1995) (defendant’s testimony he had just been released from jail did not open door to prior criminal conviction);

*see also State v. Stockton*, 91 Wn. App. 35, 39-40, 955 P.2d 805 (1998) (defendant’s testimony attackers were trying to sell drugs did not open door to his knowledge of how to buy drugs or his prior drug use).

Here, it was the prosecution, not Ms. Vazquez, who introduced the issue of her prior convictions when cross-examining Ms. Vazquez. Ms. Vazquez did not raise the issue or seek a benefit from it that would entitle the prosecution to elicit more detail under the “open door” doctrine. *See Brush*, 32 Wn. App. at 448.

The prosecution first asked, “You have some criminal history, don’t you?” RP 255. Ms. Vazquez responded, “I have a very lengthy criminal history.” *Id.* While Ms. Vazquez gave more information in her answer she needed to do, the prosecutor also asked a far broader question than it should have. Ms. Vazquez did not open the door to evidence of her three unrelated drug convictions and a fourth conviction for escape when she answered the prosecutor’s question about having “some criminal history.”

The prosecution was only permitted to elicit Ms. Vazquez's two prior convictions for crimes of dishonesty (theft and forgery) under ER 609. Drug convictions are not probative of veracity and are inadmissible for purposes of assessing credibility. *State v. Hardy*, 133 Wn.2d 701, 707, 946 P.2d 1175 (1997). The prosecutor's question fished for improper information or at least to implied to the jury that Ms. Vazquez had more criminal history than the two convictions that were admissible.

Even if a defendant may have "opened the door" to a particular subject, "the prosecutor is not absolved of her ethical duty to ensure a fair trial by presenting only competent evidence on this subject." *State v. Jones*, 144 Wn. App. 284, 297, 183 P.3d 307 (2008). "[C]onstitutional concerns such as the right to a fair trial" trump the "opening the door" doctrine. *Id.*

Defense counsel's utter failure to object or make any effort to curb the improper inquiry into all of Ms. Vazquez's felony convictions, including those likely to be used as forbidden propensity evidence cannot be the product of a reasonable strategy. An objection would have been sustained before the jury

heard this damning information. At least the jury would have been instructed to disregard any questions or answers about Ms. Vasquez's multiple counts felony drug convictions on other occasions "here in Asotin County." 2RP 255.

Only a *reasonable* strategy or tactic merits deference by the court. *In re Khan*, 184 Wn.2d 679, 691, 363 P.3d 577 (2015). There is no recognizable, reasonable strategy in permitting the prosecution to ask improper questions about the defendant's otherwise inadmissible and highly prejudicial criminal history. An objection would be been sustained and the jurors would not have been permitted to use Ms. Vazquez's prior convictions for selling and possessing drugs against her.

*c. Evidence that people threatened the prosecution's witnesses because they were aiding the State's case against Ms. Vazquez was inadmissible and markedly prejudicial.*

The prosecution elicited substantive evidence that people leveled serious death threats against the State's witnesses because they were testifying in this case against Ms. Vazquez. Brief of Appellant, at 19-20; RP 156-57, 178. The defense raised no objection and made no effort to limit this testimony.

The prosecution claims it had a legitimate reason to elicit serious threats received by the only two non-police witnesses who testified against Ms. Vazquez. Its purportedly legitimate reason was to explain why these witnesses gave different testimony at trial than what they had previously told police. But the prosecutor could have elicited the inconsistent statements without any reference to the threats. The jury was never told these threats were for a limited purpose of assessing the witnesses' credibility.

Instead, the jurors were presented with this information for its truth, to use for any purpose. The prosecution highlighted this testimony in closing argument, noting that Ms. Vazquez claimed the drugs were not hers, then asked jurors to consider why two witnesses are "in fear when they testify," if Ms. Vazquez was not selling drugs. RP 300. The jurors were so concerned about the threats the witnesses received that they believed they needed protection for themselves after they reached their verdict finding Ms. Vazquez guilty. RP 304.

A competent defense attorney would have objected and the objection would have been sustained. At the very least, a

limiting instruction could have been given to alert jurors that this allegation of an outside threat could not be used as evidence implicating Ms. Vazquez. But the jury received no such instruction and the jurors' post-verdict comments show they were clearly affected by this evidence.

*d. The prosecution downplays and ignores a host of inadmissible evidence casting Ms. Vazquez as a drug dealer.*

Without objection, the State introduced a host of evidence from the detective that other people told him Ms. Vazquez was selling drugs and "sitting on dope" to sell. RP 97, 98, 99, 215.

The prosecution claims it was a reasonable strategy for the defense not to object because the defense could use this testimony to explain that the detective's opinion of Ms. Vazquez as a drug seller came from unreliable sources. Resp. Brief at 17-18. But the detective's opinion about Ms. Vazquez's proclivity for drug dealing was inadmissible. There was no reason for Ms. Vazquez to explore why the detective thought she was selling drugs; the jury never should have heard about the detective's state of mind. *State v. Aaron*, 57 Wn. App. 277, 380, 787 P.2d 949 (1990) (officer's state of mind is not in issue and inadmissible).

This information was offered for its truth, when it should not have been elicited for any purpose.

The response brief does not offer any reason counsel did not object to the detective's testimony that Ms. Vazquez's purported bedroom contained tools for a "dope rip," where drug sellers steal drugs from others. RP 128-29. This allegation speculating Ms. Vazquez's involvement in violent thefts was not relevant and decidedly prejudicial.

It finally claims its questions to Christine Babbish about whether she knew Ms. Vazquez had "been selling meth" on other occasions was permissible because it related to Ms. Vazquez's intent to sell the drugs in the bedroom. Resp. Brief at 18. But there was no temporal connection to these prior sales and the charged offense. *See Avendano-Lopez***Error! Bookmark not defined.**, 79 Wn. App. at 71 ("whether or not *Avendano-Lopez* had previously sold narcotics had no legitimate bearing on whether, on the date in question, he possessed with intent to deliver").

The prosecution never focused Ms. Babbish on the day of the incident when asked her about Ms. Vazquez's other drug

sales. RP 162-63. On appeal, it claims the relevant time period was the entire month and a half the led to the search warrant. Resp. Brief at 18. But its questions contained no limits to time or place. RP 162-63. This evidence was inadmissible propensity testimony elicited by the prosecution yet defense counsel never objected.

*e. Defense counsel also abdicated her role in advocating for plea bargains and sentencing leniency.*

Defense counsel's obligations extend beyond registering trial objections, and include competent representation during plea bargaining and sentencing. *State v. A.N.J.*, 168 Wn.2d 91, 113-18, 225 P.3d 956 (2010). It is undisputed that the prosecution was willing and ready to offer a resolution to reduced charges and recommend a 24-month sentence. RP 5, 8-9. But solely because the prosecution did not want a two-week delay before sentencing, and defense counsel proposed no compromise, Ms. Vazquez gave up this beneficial plea bargain. RP 6, 8. After trial, she faced a 60 to 120-month standard range and received a 90-month sentence. CP 36.

The sole reason the plea bargain was not entered was because Ms. Vazquez wanted a sentencing delay so she could see her children in a visit scheduled 10 days after the plea hearing. RP 5-9. Counsel did not ask the court to set the sentencing hearing over for one week, or ten days, or anything less than two weeks and the court was unwilling to wait for two weeks. *Id.* Defense counsel inexplicably failed to advocate for an agreed upon favorable resolution to the case.

In addition, defense counsel did not object to legal financial obligations that were no longer statutorily authorized. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). She did not ascertain whether Ms. Vazquez's DNA had been taken in the past, which would obviate the DNA fee yet the prosecution insisted no DNA was on file despite having six prior felony convictions. RP 319-20. She did not ask the court not to impose any non-mandatory fees.

*f. Prejudice from deficient performance requires only a "reasonable probability" of a different outcome, which is not a rigorous standard and rests on cumulative errors.*

A reasonable probability of a different outcome based on counsel's deficient performance is a lower standard than a preponderance of the evidence. *Lopez*, 190 Wn.2d at 116. When merely one jury may have harbored a reasonable doubt, there is sufficient evidence of prejudice to constitute reversible error. *Buck v. Davis*, \_ U.S. \_, 137 S. Ct. 759, 776, 197 L. Ed. 2d 1 (2017).

These errors are examined cumulatively. *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9<sup>th</sup> Cir. 1995). Cumulative prejudice "obviate[s] the need to analyze the individual prejudicial effect of each deficiency." *Id.* at 1439.

The case was a credibility contest about whether to believe Ms. Vazquez's description of a chaotic home where she sometimes slept in a bedroom shared by many people, which was corroborated by Ms. Babbish and Ryan Fitzhugh, or the police officer's opinion of her as "Target No. 1" who was known in the community to sell drugs. Jurors could readily have doubted whether the small tin of drugs in a pillowcase belonged to Ms. Vazquez, or that she maintained the home, had they not heard evidence of her prior drug convictions, the detective's

belief she was a drug seller, or the threats people leveled against those who testified against her. Had counsel advocated her and sought a shorter sentencing delay, it is reasonably probable she would have entered a far more favorable plea bargain.

Because it is reasonably probable counsel's numerous errors affected the outcome, a new trial should be ordered.

**2. The court improperly imposed LFOs without considering Ms. Vazquez's ability to pay.**

The prosecution concedes, in part, that the court erroneously imposed discretionary legal financial obligations without considering Ms. Vazquez's inability to pay and her established indigence.

But it erroneously insists LFOs imposed pursuant to RCW 43.43.690 are mandatory and must be imposed regardless of indigence. Resp. Brief at 22. It cites *State v. Clark*, 191 Wn. App. 369, 375-76, 362 P.3d 309 (2015), without mentioning the Supreme Court reversed the Court of Appeals decision in *Clark*, 187 Wn.2d 1009, 388 P.3d 487 (2017) (remanding for court to consider ability to pay LFOs); see also *State v. Diaz-Farias*, 191

Wn. App. 512, 528, 362 P.3d 322 (2015) (ordering court on remanding to reconsider crime lab fee based in ability to pay).

Here, the judgment and sentence notes the court could defer the \$2000 VUCSA fine “due to indigence,” but that box was unchecked, showing the court could have waived this fine due to Ms. Vazquez’s indigence. CP 44.

The court also imposed a \$3000 “methamphetamine clean up assessment,” but that is also discretionary when less than two kilograms of drugs are involved, as in the case at bar. *State v. Corona*, 164 Wn. App. 76, 79-80, 261 P.3d 680 (2011); RP 85 (noting case involves approximately eight grams of methamphetamine).

The court gathered evidence of Ms. Vazquez’s indigence yet still imposed non-mandatory LFOs. This Court should reverse all LFOs other than the mandatory victim penalty assessment in the event Ms. Vazquez’s conviction is not overturned.

**3. The court did not make the mandatory findings for HIV testing.**

The prosecution contends the court could have found a basis to order HIV testing because the police found “alcoholic wipes” that could be used for needles in a bedroom Ms. Vazquez used. Resp. Brief at 23. It does not claim the court actually made the mandatory finding that Ms. Vazquez “used or intended to use a hypodermic needle at the time of committing the crime.” RCW 70.24.340(1)(c). The statute mandates that the court may impose this sentencing condition only if it “entered a finding” of this essential factual predicate, and it did not do so. *Id.*

The prosecution’s tenuous efforts to speculate a possible basis on which the court could have imposed this condition is irrelevant. “The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they *must defer to the factual findings* made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (emphasis added); *see also State v. Boyer*, 200 Wn. App. 7, 13, 401 P.3d 396 (2017) (citing *Quinn*).

Here, the court did not enter the mandatory factual finding. The record of “alcohol wipes” would not have supported such a finding in any event. The court’s order of HIV testing lacks a necessary factual determination and it should be reversed. *State v. Mercado*, 181 Wn. App. 624, 636, 326 P.3d 154 (2014).

B. CONCLUSION.

As explained above and in Ms. Vazquez’s opening brief, this Court should reverse the convictions and sentence and remand the case for further proceedings.

DATED this 8<sup>th</sup> day of August 2019.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36365-1-III
	)	
JESSICA VAZQUEZ,	)	
	)	
APPELLANT.	)	

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