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Division III
State of Washington
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No. 36365-1-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JESSICA L. VAZQUEZ, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUES

1. HAS THE APPELLANT DEMONSTRATED THAT COUNSEL WAS INEFFECTIVE DURING TRIAL AND THAT PREJUDICE RESULTED THEREFROM?
2. DID THE COURT IMPROPERLY IMPOSE CERTAIN LEGAL FINANCIAL OBLIGATIONS?
3. DID THE COURT IMPROPERLY REQUIRE HIV TESTING?

II. SUMMARY OF ARGUMENT

1. THE APPELLANT HAS FAILED TO DEMONSTRATE THAT COUNSEL WAS INEFFECTIVE DURING TRIAL OR THAT PREJUDICE RESULTED THEREFROM.
2. THE COURT IMPROPERLY IMPOSED CERTAIN LEGAL FINANCIAL OBLIGATIONS.
3. THE COURT PROPERLY ORDERED HIV TESTING.

III. STATEMENT OF THE CASE

In the month and a half leading up to October 21, 2017, Deputy Daniel Vargas and other law enforcement became aware of a residence being resorted to by drug users and dealers. Report of Proceedings (*hereinafter* RP) 96-8. Officers were observing a high volume of foot and vehicle traffic at the residence located at 1566 Libby Street, in Clarkston, Asotin County, Washington. RP 96. Individuals were identified by officers and were known to be drug users coming to and going from the residence. RP 97.

On October 21, 2017, Deputy Vargas stopped a vehicle that had left the residence. RP 97. The driver provided Deputy Vargas with information that the Appellant, Jessica Vazquez, was staying/living in the residence and was selling methamphetamine from her bedroom therein. RP 97. Based upon this information, Deputy Vargas applied for and was granted a search warrant for the residence. RP 98. After briefing with other officers, law enforcement executed the search warrant in the early morning hours of October 21, 2017. RP 98-9.

Upon entry, officers located a number of individuals who were or had been using drugs. RP 101. Officers located drug paraphernalia throughout the house. RP 102-3. Officers located and identified a bedroom in the basement as belonging to the Appellant. RP 105. Nearly an hour into searching the residence and while

specifically searching the basement area, the Appellant, and another adult female, Christine Babbish, were located hiding in a covered recess behind the washer and dryer. RP 114-5. The Appellant was arrested on an outstanding warrant for violation of community custody in a previous case. RP 242. One officer spoke to Babbish, and she stated that, when they heard the police making entry, the Appellant hid a tin, about the size of a deck of playing cards, inside the pillows on the bed, in the Appellant's room. RP 203.

In addition to an ordinary interior door handle and latch, the Appellant's bedroom had a hasp and padlock. RP 206. In the Appellant's bedroom, officers located video surveillance monitors connected to a camera which recorded the front entry of the residence. RP 121. Also located were weapons including realistic replica airsoft¹ handguns, a baseball bat, brass knuckles, a switchblade style knife, and nunchucks. RP 195-8. Near the baseball bat was a law enforcement radio scanner. RP 195-7. On the bed, officers located a basket with plastic ziplock baggies and a glass pipe for ingesting methamphetamine, along with sterile wipes for IV drug use, on the bed. RP 118. Officers also located ten cell phones, a notebook containing "pay and owe" sheets and plastic ziplock baggies, and scales. RP 118-122. On the wall, officers observed

¹Airsoft guns use compress air or CO2 cartridges to fire plastic pellets.

photos of the Appellant wearing clothing with the Oakland Raiders football team logo and other items in the room emblazoned with the teams markings. RP 123-4. One of these photos matched the photo used by the Appellant as her “profile picture”² on her FaceBook account. RP 123-4. Also on her wall in the bedroom was the word, written in stenciled letters. “Hustler.” RP 123.

In the pillowcase, as described by Babbish, were two cigarette tins. RP 108. One contained one hundred twenty dollars (\$120.00) and the other contained a baggie which held approximately nine (9) grams of methamphetamine. RP 108.

The Appellant was charged with Maintaining a Drug Dwelling, Possession of a Controlled Substance with Intent to Deliver (Methamphetamine), and Possession of Drug Paraphernalia. Clerk’s Papers (*hereinafter* CP) 1-3. The matter progressed and, at one point, the Appellant offered to plead to a reduced charge of Possession of a Controlled Substance and stipulate to a high end recommendation of twenty-four (24) months and the State accepted the offer. RP 6. When the parties appeared before the court, the Appellant asked the court, prior to entering her plea, to continue sentencing for two weeks, and the trial court declined to do so. RP 8. After the court stated its intention to sentence the Appellant

²The social network site, FaceBook, allows members to personalize their page with one or more photographs that prominently appear on that individual’s page.

immediately after her plea, the Appellant stated, through counsel, that she would not plead guilty and requested that the court set a trial date. RP 9.

The matter was scheduled for trial commencing September 6, 2018. RP 10, 12-306. At trial, Ms Babbish and another witness, Dale Fitzhugh, testified contrary to statements made previously to the police and during pretrial interviews. RP 147-52,7 173, 175-6. After confronting the respective witnesses with their prior inconsistent statements, the State inquired whether they had been threatened, in order to explain why their respective statements had changed. RP 155-6, 177-8.

The Appellant took the stand and testified on her own behalf. RP 233-257. The Appellant denied that the bedroom in question was hers, but admitted to having decorated it with photos and other items. RP 250-3. The Appellant admitted that the photo on her FaceBook profile and on the wall of the room were the same, that she was, in fact a fan of the Oakland Raiders' football team, and that her profile lists her occupation as "CEO and Founder of Hustling." RP 251-2. She further admitted that the notebook containing the "pay and owe" sheets and the baggies was hers. RP 24, P-2. In an effort to explain the "pay and owe" sheets, the Appellant testified that people had "pledged" to give her money to go to Moscow, Idaho. RP 247. She later testified, "I don't sell enough drugs for people to owe me money."

RP 247. She further admitted to having provided methamphetamine to Babbish before the police made entry. RP 255.

At the conclusion of trial, the jury found the Appellant guilty as charged. RP 303, CP 28-9. The Appellant was sentenced to a standard range sentence and the court imposed a filing fee of two hundred dollars (\$200.00) and a felony DNA collection fee of one hundred dollars (\$100.00). CP 34. Prior to sentencing, the Appellant was notified, in writing, concerning her trial counsel's recent arrest and resulting legal issues, and given an opportunity to seek alternative counsel. CP 61. She declined, choosing to proceed with her trial counsel. CP 61. The Appellant filed timely Notice of Appeal. CP 42.

IV. DISCUSSION

1. THE APPELLANT HAS FAILED TO DEMONSTRATE THAT COUNSEL WAS INEFFECTIVE DURING TRIAL OR THAT PREJUDICE RESULTED THEREFROM.

The Appellant's primary contention is that trial counsel was ineffective. A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution. See, e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish a violation of the right to

effective assistance of counsel, the Appellant must show: 1) that counsel's representation was deficient, and 2) that counsel's deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). As stated in McFarland:

Courts engage in a strong presumption counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation

McFarland, at 335 (*internal citations omitted*).

The Appellant concedes that the record does not support her claim that trial counsel's subsequent alleged alcohol or drug use affected counsel's performance. Brief on Appeal, (*hereinafter* Brief) p. 13. The Appellant nonetheless cites to newspaper articles³ to paint counsel in a negative light, in an effort to taint counsel's reputation to this Court and manufacture an inference of ineffective assistance. Allegations of drug and alcohol use by an attorney do not create a *per se* violation of the right to counsel, and the Appellant must therefore establish both deficient performance and prejudice, independent of any claimed disability. See Ivory v. Jackson, 509 F.3d 284, 295 (6th

³ To the extent the newspaper articles are offered to prove the truth of the matters stated therein, they should be properly excluded as hearsay. See Tortes v. King Cty., 119 Wn. App. 1, 14, 84 P.3d 252, 258 (Div. I, 2003). To the extent the Appellant seeks to supplement the record through inappropriate citation to newspaper articles, the State objects. Direct appeal is not the appropriate procedural mechanism. See McFarland, 127 Wn.2d at 338.

Cir. 2007); State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (*matters referred to in the brief but not included in the record cannot be considered on appeal*).

To establish deficient performance, the Appellant must show that trial counsel's performance fell below an objective standard of reasonableness. Davis, 152 Wn.2d 672. Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73. The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

The Appellant's primary claims relate to trial counsel not objecting to certain evidence or testimony. However, counsel's

decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. See State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (Div. I, 1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* To establish prejudice where the allegation is counsel's failure to object, the Appellant must establish that an objection would have been sustained, and that introduction of improper evidence effective the outcome of the trial. See State v. Hendrickson, 129 Wn.2d 61, 79–80, 917 P.2d 563 (1996). The prejudicial effect "is viewed against the backdrop of the evidence in the record. *Id.* Reviewing the available record herein, and in the light of the proper legal standards set forth above, trial counsel was not "asleep at the wheel" and the Appellant was not, in any event, substantially prejudiced at trial.

A. The Appellant's Right to Counsel Was Not Violated When Trial Counsel Did Not Object to Questioning Concerning Her Criminal History.

The Appellant first complains that trial counsel failed to object to introduction of her criminal history. The Appellant concedes that her convictions for Theft in the Second Degree and Forgery were *per se* admissible for impeachment purposes by virtue of her decision to testify. See Brief, p. 14. See also ER 609(a)(2). The Appellant

instead complains that four other felony convictions, which were not *per se* admissible as crimes of dishonesty, were elicited on cross examination. The Appellant asserts that these offenses were not admissible under ER 609(a)(1). Pretermitted for the moment whether these other convictions would have been admissible thereunder, the Appellant's argument ignores the fact that she, herself, opened the door to inquiry beyond her two felony crimes of dishonesty. As stated above, the Appellant must, in the context of a claim that failure to object constituted ineffective assistance, demonstrate that the objection would have been successful. See Hendrickson, 129 Wn.2d at 79–80. Here, the Appellant herself told jurors she had “a very lengthy criminal history.” RP 255. This opened the door to inquiry beyond the theft and forgery convictions. “Generally, once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence.” State v. Crow, ___ Wn.App. ___, 438 P.3d 541, 555 (Div. III, April 9, 2019)(citing State v. Wafford, 199 Wn. App. 32, 37, 397 P.3d 926 (Div. I, 2017)). The Appellant herself brought out the subject of her “lengthy criminal history.” The State had only intended to inquire concerning the two, clearly admissible, convictions. Once the Appellant broached the topic, it was appropriate for State's counsel to clarify. As such, an objection would, in all likelihood, have been overruled.

Additionally, even failure to object to inadmissible evidence does not, in and of itself, constitute ineffective assistance. In determining whether an omission by a criminal defense lawyer was deficient representation or strategic, no proposition is better settled than that it is legitimate trial strategy to withhold a valid objection if it would draw attention to damaging evidence - especially where the evidence is fleeting. E.g., State v. Gladden, 116 Wn. App. 561, 568, 66 P.3d 1095 (Div. III, 2003) (*counsel may have decided that an objection would draw attention to the information he sought to exclude*); State v. Mendoza, 139 Wn. App. 693, 713, 162 P.3d 439 (Div. II, 2007), *aff'd*, 165 Wn.2d 913, 205 P.3d 113 (2009) (*decision not to object, which would highlight inadvertently-elicited information and cause jury to focus on it, was legitimate trial strategy*). Here, in light of the Appellant's gaff in arguably opening the door, it was wholly appropriate to withhold objection and not further highlight the criminal history, especially where the Appellant admitted to her own ongoing involvement in methamphetamine. Counsel's failure to object was not deficient performance and was, in fact, legitimate trial strategy.

Even accepting the Appellant's arguments at face value, and discounting the record, the Appellant must show more than the introduction of inadmissible ER 609 evidence. Reversal is only required where "there is a reasonable probability that, but for

counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The Appellant relies on State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997), claiming that "introduction of a single improperly admitted conviction" requires reversal. See Brief, p. 17. However, this misstates the decision therein. In Hardy, the Court stated: "But the prior crime was the only impeachment of Hardy's veracity and was thus critical." *Id.* at 713. In the present case, the Appellant had two convictions for crimes of dishonesty. Unlike Hardy, the other convictions were not the only impeachment crimes. It should also be noted that the State did not discuss her criminal history, beyond the theft and forgery convictions, during closing, and even then, only in rebuttal as it related to the Appellant's testimony and her credibility. RP 299.

Counsel's failure to object was reasonable and legitimate trial strategy. In any event, the Appellant was not prejudiced by any actions of counsel, but rather, by her own words and testimony.

B. The Appellant's Right to Counsel Was Not Violated When Trial Counsel Did Not Object to Questioning Concerning Threats Against Witnesses.

The Appellant next complains that trial counsel failed to object to evidence that certain witnesses had been threatened. The Appellant's argument ignores the obvious and proper purpose for the

admission of this evidence. It is important at this juncture, to explain the purpose for which the evidence was, and was NOT, introduced. The threats against certain witnesses were not introduced to demonstrate any sort of consciousness of guilt on the part of the Appellant. *C.f. State v. McGhee*, 57 Wn.App. 457, 460–61, 788 P.2d 603 (Div. I, 1990). The prior threats were offered to explain why the respective witnesses recanted previous statements made to the police and the prosecutors. The specific witnesses were Christine Babbish and Dale Fitzhugh. A cursory review of the record leading up to the State's respective questioning of each witness concerning the threats reveals this proper purpose. During questioning of Ms Babbish, she testified contrary to statements made previously to the police and during interviews conducted for discovery purposes. RP 147-52. After several inconsistencies by Ms Babbish, and a clear reluctance to testify on her part developed, the State inquired concerning threats made against her and her boyfriend, which she believed were the result of her cooperation with police. RP 155-6. The same occurred when Mr. Fitzhugh testified. His testimony was in substantial conflict with prior statements he made during an interview with the State. RP 173, 175-6. When his recantation and reluctance to testify became clear, the State inquired and Mr. Fitzhugh testified to receiving threats. RP 177-8. Importantly, both

testified that it was not the Appellant who threatened them. RP 160, 178. It was defense counsel that further clarified with Ms Babbish that the Appellant would never threaten her. RP 159-60.

The Appellant cites State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997), as standing for the proposition that the witness' fear is not admissible. This is not the holding of Bourgeois, and in any event, that case is distinguishable. In Bourgeois, the State sought to introduce the fear of four witnesses during their respective testimony. *Id.* at 393-5. With regard to three of the witnesses, prior to any challenge to their respective credibility, the State introduced evidence of fear, solely to bolster the witness's testimony. *Id.* This was determined to be error but was held to be harmless. *Id.* at 403.

With regard to a fourth witness, the State preemptively addressed prior false statements the witness had made to police during the initial reporting of the crime. *Id.* at 402-3. The State, in an effort to reduce the "sting," introduced these false statements through the witness on direct examination, and then had the witness explain that he had lied to police initially due to fear for his family. *Id.* at 395. The Court held that, while his credibility had not yet been assailed, it was appropriate for the State to anticipate the defense's attack and the witness' "discrepant statements and his reluctance to be a witness

was both relevant and properly admitted to blunt the impact of Bourgeois's cross-examination." *Id.* at 403.

Here, the situation was a photo negative of the fourth witness in Bourgeois. Each of the witnesses in this case testified contrary to prior statements. As such, it was their respective trial testimonies that the State sought to impeach by use of prior inconsistent statements which is entirely proper. See State v. Lavaris, 106 Wn.2d 340, 346, 721 P.2d 515 (1986). When each acknowledged having made the respective prior statements and having avowed the truth thereof, it became necessary to rehabilitate the credibility of the initial truthful reports in order for the jury to evaluate the credibility of the testimony.

Evidence of threats and other violence against a witness is properly admissible to show motive for recantation. See Bourgeois, at 402. See also State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008)(*prior domestic violence against the victim properly admitted to explain recantation*). Other courts have allowed evidence of a witness's fear to explain that witnesses apparent recantation. See e.g. People v. Shief, 62 N.E.3d 1154, 1168 (Ill. App. Ct. 2016)(*gang evidence offered to explain why witness recanted*); Lopez v. State, 716 So. 2d 301, 307 (Fla. Dist. Ct. App. 1998)(*the fact that a witness has been threatened with respect to his testimony may bear on his credibility regardless of who made the threat*); Brown v. State, 80 Md.

App. 187, 194, 560 A.2d 605 (1989); United States v. Stockton, 788 F.2d 210, 218 n. 15 (4th Cir.1986); State v. Walker, 214 Conn. 122, 571 A.2d 686, 690 (1990); Commonwealth v. Martin, 356 Pa.Super. 525, 515 A.2d 18, 20 (1986). As with the cases above, in this case, the evidence of threats directed toward each respective witness was offered and admitted to rehabilitate the witness and to explain the discrepancy between his or her trial testimony and her pretrial statement. Under these circumstances, counsel was hardly ineffective for failing to object to obviously admissible evidence.

C. The Appellant's Right to Counsel Was Not Violated When Trial Counsel Did Not Object to Deputy Vargas' Testimony Regarding His Investigation and Statements by Ms Babbish About the Appellant's Drug Dealing Activities.

The Appellant further complains that trial counsel failed to object to Deputy Vargas' testimony concerning his investigation into drug activities at the residence, the steps he took to investigate, and the events that led to the decision to obtain a search warrant. As discussed above, to prevail on a claim of ineffective assistance of counsel based on a failure to object, the Appellant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been

admitted. See State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (Div. II, 1998).

Here, trial counsel's decision was clearly strategic. The defense's theme throughout trial was that Deputy Vargas focused on the Appellant and ignored a house full of other suspects. Beginning in opening statement, counsel began weaving the theory that, on the strength of a drug user's statement, made during a traffic stop, Deputy Vargas focused solely on the Appellant. RP 87-90. This continued into cross examination where counsel pressed Deputy Vargas' claim that the bedroom belonged to the Appellant and his basis of knowledge. RP 134-7. Counsel established that police relied heavily on Ms Babbish's claims, ignoring her as a possible owner of the drugs found. RP 135-6. Counsel pointed out that it was the Ms Babbish's boyfriend who was found in the room when police arrived. RP 140-1, 231, 243-244. It was not disputed that drugs were being used and sold in the residence, but counsel adeptly did their best to point out the weak points in the State's evidence that tied the Appellant to the residence and the drugs in the bedroom. RP 217, 290-4. By not objecting to statements made to Deputy Vargas, counsel was able to freely probe his basis of knowledge, pointing out that the beliefs he held so firmly, were based largely on information obtained from two

drug users with motivation to distance themselves from the crimes charged. This was sound legal strategy.

With regard to Ms Babbish's testimony regarding the recent drug activities of the Appellant, these were admissible to show intent and plan ER 404(b). In State v. Thomas, the Court held evidence of the defendant's participation in prior drug deliveries was related to the issue of intent to manufacture or deliver. See State v. Thomas, 68 Wn.App. 268, 269, 273, 843 P.2d 540 (Div I, 1992). There, the Court found, "[t]hat evidence logically relates directly to the material issue of what [the defendant] intended to do with the cocaine he possessed when he was arrested." *Id.* at 273. The evidence was not offered to show mere propensity, but rather testimony relating to the period of time in question (the month and a half leading up to the search warrant). This was further relevant to the charge of Maintaining a Drug Dwelling, where the Appellant's knowledge of ongoing activities is necessarily required to be proven. See RCW 69.50.402(1)(f). Counsel was not ineffective for failing to object to admissible testimony.

Finally, considering the overwhelming evidence in the case and her testimony at trial, the Appellant cannot demonstrate that any of the claimed errors would have made a difference in her case. The bedroom in question was personally decorated by her to include

photos of her on the wall, her favorite sports team's logo, her personal slogan ("Hustler"), and other personal items establishing dominion and control over the room where the drugs were found. RP 251, 252. In addition to the drugs, she had video monitors, both hand held and bench top, in the room. RP 254. She admitted that she was using these monitors during the time in question. RP 254. The Appellant further admitted that the notebook containing "pay and owe" sheets and baggies was hers. RP 246. She attempted to explained that people had "pledged" to give her money to go to Moscow, Idaho. RP 247. She further testified, "I don't sell enough drugs for people to owe me money," and admitted to giving methamphetamine to Ms Babbish shortly before police arrived. RP 255. While denying responsibility, her own testimony corroborated Deputy Vargas' suspicions. Trial counsel did their best to defend against substantial and compelling evidence and ably defended the Appellant, even if in vain, as required by the Sixth Amendment. Counsel's actions cannot be measured in hindsight.

D. The Appellant's Right to Counsel Was Not Violated When Trial Counsel Negotiated a Favorable Resolution Which the Appellant Rejected.

The Appellant finally complains that counsel was ineffective in negotiating a plea deal. The Appellant's argument misrepresents and misconstrues the circumstances. The Appellant construes the

agreement as having been an offer from the State. This is wholly incorrect. The Appellant had forwarded an offer to the State, agreeing to plead to a reduced charge and stipulate to a high end sentence. RP 7. On the day she appeared for change of plea, she sought to have the court continue sentencing for two weeks. RP 6. When the trial court denied her request, the Appellant withdrew from the agreement for reasons personal and important to her.

It was not the State's unwillingness⁴ to agree to continue sentencing, or counsel's failure to obtain such a concession from the State, but rather the court's denial of her request that prompted her to revoke her offer. The court cannot be bound by the agreement of the parties. See In re Hudgens, 156 Wn. App. 411, 420, 233 P.3d 566 (Div. III, 2010). Even if the State had agreed, it was the court's refusal that prompted the Appellant to renege on her offer. The fact that the Appellant withdrew from her own offer is not the result of anything counsel did, and the fact that, in hindsight, the plea deal turned out to be most advantageous, is of no consideration. Counsel negotiated a most favorable resolution and it was the Appellant herself that spoiled

⁴As is usually the case, there are a number of motivations on the part of the State for entry into negotiations. These reasons rarely, if ever become memorialized in the record, and such is the case here. While the Appellant's Brief disparages both State's counsel and trial counsel concerning a lack of logic to the State's position, the reasons for insisting upon swift resolution were numerous. Regardless, the record is insufficient to support the Appellant's supposition and resulting disparagement of counsel.

the fruits thereof. She can't now be heard to complain that her own decision to withdraw from the agreement is somehow counsel's fault. This argument merely demonstrates how the Appellant seeks to blame her attorney for the circumstances she created.

2. THE COURT IMPROPERLY IMPOSED CERTAIN LEGAL FINANCIAL OBLIGATIONS.

The Appellant complains concerning the court's imposition of "non-mandatory" legal financial obligations. The Appellant fails to specify which specific financial assessments she is claiming were improperly imposed. To the extent this claim is limited to the court's imposition of the filing fee, the State concedes. Pursuant to HB 1783, the court should not have imposed the filing fee. The State hereby concedes and agrees to remand for entry of an order striking the filing fee.

The Appellant complains concerning "discretionary costs." However, no discretionary costs pursuant to RCW 10.01.160 were imposed. CP 44. This is a non-issue.

With regard to the DNA fee, the State made a record at the sentencing hearing that the criminal history report indicated that the Appellant had not previously provided a DNA sample. RP 321. The Appellant did not object or offer evidence or testimony proving

otherwise, so any claim of error, even assuming she had previously submitted a DNA sample, is not preserved. See RAP 2.5.

The Crime Victim Assessment is required by RCW 7.68.035(1)(a), irrespective of the Appellant's ability to pay. See State v. Lundy, 176 Wn.App. 96, 102-103, 308 P.3d 755, 758 (Div. II, 2013). The remaining legal financial obligations (fines and lab fee) are properly imposed without regard to the Appellant's ability to pay. See State v. Clark, 191 Wn.App. 369, 375-76, 362 P.3d 309 (Div. III, 2015). See also RCW 43.43.690(1) .

3. THE TRIAL COURT PROPERLY ORDERED HIV TESTING.

Finally, the Appellant claims that the court erred in requiring HIV testing.

RCW 70.24.340(1)(c) authorizes a local health department to conduct human immunodeficiency virus (HIV) testing and counseling of a defendant found guilty of a drug offense if the court determines that the "related drug offense is one associated with the use of hypodermic needles."

State v. Mercado, 181 Wn.App. 624, 626–27, 326 P.3d 154, 156 (Div. III, 2014). In Mercado, this Court held that the fact that the drug involved is sometimes used intravenously is insufficient to require HIV testing without evidence that the defendant used or intended to use a hypodermic needle at the time of committing the crime. *Id.* at 636. Therein, this Court stated:

[W]e hold that HIV testing may not be ordered unless the trial court enters a finding that the defendant used or intended use of a hypodermic needle at the time of committing the crime.

Id. While Mercado established the appropriate standard, the facts herein are distinguishable. In Mercado, there was no evidence whatsoever of IV drug use. *Id.* at 627. Here, law enforcement found alcohol wipes for use with needles. RP 118. These were found in a basket in the Appellant's bedroom, along with small baggies used for packaging controlled substances. RP 117-8. The Appellant did not object to this finding, which was supported by evidence at trial. The court did not error in requiring HIV testing of the Appellant.

V. CONCLUSION

The Appellant's aspersions of counsel aside, trial counsel aptly and adequately represented the Appellant at trial. Pretermitted whether counsel struggled with chemical dependency, review of the record reveals that the Appellant's attorney pursued a legitimate strategy to defend against the State's charges. The Appellant fails to demonstrate deficient performance or resulting prejudice. While the filing fee should be stricken, this shortcoming alone is insufficient to merit reversal of the jury's verdicts. This Court should remand for striking of the filing fee and otherwise affirm the convictions and

sentence imposed herein. The State respectfully requests this Court enter a decision so affirming.

Dated this 7th day of June, 2019.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Respondent,

v.

JESSICA L. VAZQUEZ,

Appellant.

Court of Appeals No: 36365-1-III

DECLARATION OF SERVICE

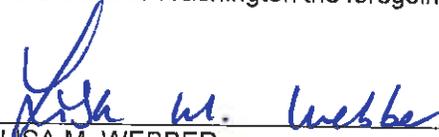
DECLARATION

On June 7, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

NANCY COLLINS
nancy@washapp.org

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on June 7, 2019.



LISA M. WEBBER
Office Manager

DECLARATION
OF SERVICE

ASOTIN COUNTY PROSECUTOR'S OFFICE

June 07, 2019 - 12:55 PM

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