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Supreme Court No. 98928-1
(COA No. 36365-1-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSICA VAZQUEZ,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 7

This Court should grant review because the Court of Appeals cast aside the controlling test for ineffective assistance of counsel and refused to assess whether counsel's performance was deficient and prejudicial 7

1. A well-established test controls the inquiry into ineffective assistance of counsel 7

2. There was no reasonable basis to permit the jury to hear a host of prejudicial propensity evidence barred by the rules of evidence and case law 9

a. Counsel did not object to prior convictions for the same drug selling misconduct as charged 9

b. The defense did not object to testimony that witnesses were threatened by unnamed people 11

c. Counsel did not object to extensive hearsay testimony of uncharged bad acts and police opinion testimony about Ms. Vazquez's guilt 12

3. This inadmissible evidence was markedly prejudicial and satisfies the test for ineffective assistance but the Court of Appeals did not apply this test 15

4. Counsel's deficient performance in the course of plea negotiation also deprived Ms. Vazquez of her right to counsel 17

E. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Supreme Court

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 17

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997).................. 11

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) 13

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) 8

State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997).................... 9, 10

State v. Jones, 101 Wn.2d 113, 677 P.2d 466 (1984)........................... 10

State v. Lopez, 190 Wn.2d 104, 410 P.3d 1117 (2018) 15

State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003) 14

Washington Court of Appeals

State v. Crow, 8 Wn. App. 2d 480, 438 P.3d 541, *rev. denied*, 193 Wn.2d 1038 (2019). 8, 10, 11, 14, 16

State v. Hawkins, _ Wn. App. 2d _, 2020 WL 4745088 (Aug. 17, 2020) 13

State v. Hendrickson, 138 Wn. App. 827, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.2d 1029 (2009) 12

State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999).................... 9, 10

United States Supreme Court

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).. 12

Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) 16, 17, 19

Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) 7, 17, 19

Roe v. Flores–Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) 8

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 7, 8

United States Constitution

Sixth Amendment 8, 12

Washington Constitution

Article I, section 22 .... 8, 12

Court Rules

ER 404 9

ER 609 .... 9, 10

ER 801 12

ER 802 12

RAP 13.3(a)(1) 1

RAP 13.4(b) 1, 20

A. IDENTITY OF PETITIONER AND DECISION BELOW

Jessica Vazquez, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated June 11, 2020, for which reconsideration was denied on July 21, 2020, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies are attached as Appendix A and B.

B. ISSUES PRESENTED FOR REVIEW

1. When a defense attorney fails to object to a host of highly prejudicial evidence that would have been excluded if any objection had been raised, it is reasonably probable counsel's performance was deficient and prejudicial under the Sixth Amendment and article I, section 22.

The Court of Appeals agreed that highly prejudicial evidence could have been excluded if counsel objected. In a case involving drugs found in a shared home, defense counsel did not object to the jury learning Ms. Vazquez had numerous prior drug convictions, including two convictions for selling drugs "here in Asotin County"; someone threatened the prosecution's witnesses for cooperating with the State; police officers believed Ms. Vazquez was a drug dealer; people told the

police she was selling drugs; and she had tools to rob drug dealers in her bedroom.

Despite established law dictating the inadmissibility of this evidence and its prejudicial effect, the Court of Appeals did not apply the controlling test for ineffective assistance of counsel. Instead, it decided counsel was able to argue a theory of the case despite the inadmissible evidence involving a propensity to deal drugs.

Should this Court grant review when counsel deficiently allowed the jury to hear markedly prejudicial evidence and the Court of Appeals applied a diluted test that bypassed the mandatory consideration of whether counsel's conduct was deficient and prejudicial under the Sixth Amendment and article I, section 22?

2. One of defense counsel's fundamental obligations is to assist a client with understanding and entering an available guilty plea if the client chooses to plead guilty. Ms. Vazquez agreed to accept a plea offer to reduced charges but asked for a two-week delay in sentencing to see her children. When the prosecutor opposed the length of the delay, defense counsel did not seek any compromise but instead allowed the plea offer to become unavailable. Did counsel's failure to

advocate for her client when pursuing a plea bargain constitute ineffective assistance under Supreme Court precedent?

C. STATEMENT OF THE CASE

Jessica Vazquez faced three charges: maintaining a dwelling for controlled substances, possession of methamphetamine with intent to deliver, and possession of drug paraphernalia. CP 1-3.

Officer Daniel Vargas testified that the driver of a car told him Ms. Vazquez was "[s]elling narcotics from her room" in a house at 1566 Libby Street. RP 97. This person also said Ms. Vazquez "was there sitting on dope right then and there." RP 99. Officer Vargas got a search warrant for the house and the police labeled Ms. Vazquez as "Target Number 1" in the warrant. RP 98.

The home was owned by Kelly Everett. RP 169. Her son Justin Patton lived there and was in charge. RP 175-76. Ryan Fitzhugh rented a room in the house. RP 169. Officer Vargas said the other people present in the home were people he was familiar with from "narcotics" and he was aware "they use" drugs. RP 101. The home was strewn with drug paraphernalia. RP 102.

In one bedroom, the police found two small tins in a pillowcase. One tin had $120 and the other contained 8.2 grams of

methamphetamine. RP 108. There was at least one man in this bedroom when the police arrived. RP 141. Ms. Vazquez was not there. RP 106. The room also had a binder with “Pay and Owe” sheets, a scale and some baggies, along with “meth pipes.” RP 107-08.

The police found Christine Babbish hiding with Ms. Vazquez. Several police officers testified that Ms. Babbish told them there was methamphetamine in a pillowcase in Ms. Vazquez’s bedroom. RP 105, 108, 230. Ms. Babbish denied saying this to the police. RP 154. She testified she had only been inside this house one time and did not know if Ms. Vazquez was staying in this house. RP 148, 158. The prosecutor elicited from Ms. Babbish that Ms. Vazquez sold drugs on other occasions. RP 163.

Mr. Fitzhugh, who rented a room and lived in the home several years, also said Ms. Vazquez only stayed there off and on during the past few months. RP 170, 172. She did not pay rent. RP 173.

Ms. Vazquez testified that she was transient and stayed “wherever I could crash,” including staying in this home one or two nights a week. RP 234-35. She described the bedroom as a “flophouse,” where people like her would stay as needed and it was a safe place to use drugs. RP 237.

Ms. Vazquez denied the methamphetamine in the pillowcase belonged to her. RP 242. When cross-examining Ms. Vazquez, the prosecutor asked her about each felony conviction she had in the past. RP 255. Defense counsel did not object. *Id*. The jury learned Ms. Vazquez's prior convictions included two counts of delivery of a controlled substance "here in Asotin County," one count of possession of methamphetamine on a different occasion in Garfield County, and escape from community custody. RP 255-56.

In its direct examination, the prosecution asked Ms. Babbish and Mr. Fitzhugh about receiving threats for testifying against Ms. Vazquez. RP 156-57, 178. Both described receiving serious threats of harm and said these threats were not from Ms. Vazquez. RP 160, 178. Defense counsel did not object to this testimony. RP 156-58, 178.

After the jurors reported their verdict finding Ms. Vazquez guilty, the foreperson told to the court that jurors were concerned for own safety due to the threats the witnesses had received. RP 304. The court told them to call the police if they received threats. RP 305.

Before trial, Ms. Vazquez reached a plea agreement with the prosecution. RP 5. The plea agreement involved a stipulated sentencing recommendation for 24 months of incarceration. RP 7, 8. When Ms.

Vazquez went to court on July 8, 2018, to enter this plea, she asked the court if it would postpone the sentencing hearing for two weeks because her children lived on the other side of the state and she promised she would see them when they came for a visit in 11 days, on July 19. RP 6, 8.

The prosecutor objected to this long of a delay. He argued that "we're not running a visitation center; we're running a jail and [ ] the real estate is valuable." RP 6. He told the court there was no reason to continue the sentencing and because Mr. Vazquez was in jail, the delay would cause "14 more nights at taxpayers' expense here in Asotin County." RP 7.

Ms. Vazquez asked the court if she could "please see my children before I go to prison." RP 8. The presiding commissioner said, "I certainly sympathize with you, Ms. Vazquez . . . . But it is also important to keep the wheels of justice moving." RP 8. The court denied the request to continue sentencing. *Id*. Because the court would not continue the sentencing hearing for two weeks, Ms. Vazquez said she would not enter a guilty plea. RP 9.

The court immediately asked the prosecution what trial date it wanted. RP 9. Despite having objected to Ms. Vazquez staying in jail

for "14 more nights" during July, the prosecutor asked for a September trial date. RP 7, 9. Defense counsel voiced no objection. RP 10. The court set the case for trial in September, keeping Ms. Vazquez in jail for several more months. *Id*.

Before her sentencing hearing, Ms. Vazquez's court-appointed lawyer was arrested and charged with driving under the influence. CP 61. At that time, defense counsel also faced a possible charge for possession of a controlled substance. *Id*. Defense counsel apprised Ms. Vazquez of her arrest but said she was still presently able to practice law in Washington and did not provide her with advice from another lawyer. *Id*.

The court sentenced Ms. Vazquez to 90 months in prison, the middle of the standard range of 60 to 120 months. CP 36.

D. ARGUMENT

This Court should grant review because the Court of Appeals cast aside the controlling test for ineffective assistance of counsel and refused to assess whether counsel's performance was deficient and prejudicial.

1. A well-established test controls the inquiry into ineffective assistance of counsel.

The right to counsel is satisfied only when counsel provides "effective assistance." *Missouri v. Frye*, 566 U.S. 134, 138, 132 S. Ct.

1399, 182 L. Ed. 2d 379 (2012) (citing *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); U.S. Const. amend. VI; Const. art. I, § 22. Ineffective assistance of counsel occurs when "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 688.

Even if defense counsel had a strategic or tactical reason for certain actions, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). A *possible* strategic choice does not matter, but rather the reasonableness of that strategy. "Not all strategies or tactics on the part of defense counsel are immune from attack." *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011).

"[E]ffective representation entails certain basic duties, such as the overarching duty to advocate the defendant's cause and the more particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Crow*, 8 Wn. App. 2d 480, 507, 438 P.3d 541, *rev. denied*, 193 Wn.2d 1038 (2019). When an objection "would likely have succeeded," and the evidence may have

affected the outcome, counsel lacked a reasonable tactical ground to refrain from objecting. *Id*. at 508.

2. There was no reasonable basis to permit the jury to hear a host of prejudicial propensity evidence barred by the rules of evidence and case law.

a. Counsel did not object to prior convictions for the same drug selling misconduct as charged.

An accused person's past criminal convictions are inadmissible, other than in a few limited circumstances, such as crimes of dishonesty. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997); ER 609. Prior felony convictions are "not relevant to the question of guilt" and are "very prejudicial," because they lead jurors "to believe the defendant has a propensity to commit crimes." *Id.*

In prosecutions for possession with intent to deliver, evidence of prior convictions for drug dealing is inadmissible propensity evidence. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999); ER 404(b).

Despite established law precluding the admission of prior drug convictions in a prosecution for possessing or selling drugs, the prosecution elicited Ms. Vazquez's four prior felony convictions that were not crimes of dishonesty. RP 255. Without any objection from defense counsel, the prosecution asked Ms. Vazquez if she had

convictions for: “Delivery of Controlled Substance, two Counts, in 2014 here in Asotin County”; “Escape from Community Custody in 2015”; and “Possession of Methamphetamine out of Garfield County.” RP 255-56. Ms. Vazquez agreed she had these convictions. *Id*. The prosecution also elicited Ms. Vasquez’s felony narcotics warrant in its case-in-chief, long before Ms. Vasquez testified. RP 116.

These drug and escape convictions are inadmissible under ER 609 (a)(2) because they are not crimes of dishonesty. *Hardy*, 133 Wn.2d at 122 (“drug convictions are not crimes of ‘dishonesty or false statement’ . . . and thus ER 609(a)(2) does not apply”); *State v. Jones*, 101 Wn.2d 113, 123, 677 P.2d 466 (1984) (attempted escape not crime of dishonesty). They were also inadmissible under ER 404(b) because they only served a propensity purpose and the prosecution did not contend otherwise. *Wade*, 98 Wn. App. at 336.

A single improperly admitted prior conviction may affect the jury’s determination and require reversal. *Hardy*, 133 Wn.2d at 713; *Wade*, 98 Wn. App. at 336. Defense counsel’s lack of objection to four inadmissible felony convictions, including multiple convictions for the same type of crimes as charged, directed jurors to conclude Ms. Vazquez has a propensity to commit the crimes charged. *Hardy*, 133

Wn.2d at 706. It was unreasonable to fail to object to this inadmissible evidence. *Crow*, 8 Wn. App. 2d at 510.

This error alone constitutes both deficient and prejudicial performance, given the likelihood the jurors considered Ms. Vazquez history of drug dealing convictions when deciding her connection to the drugs in the house. *Crow*, 8 Wn. App. 2d at 511.

b. The defense did not object to testimony that witnesses were threatened by unnamed people.

The prosecution may not use allegations that someone other than the accused person may have threatened a witness without a connection between the accused person and the threat. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). This testimony is prejudicial because it signals to the jury the defendant is dangerous and jurors will infer the threat is evidence of the defendant's guilt. *Id*. This inference is improper when the defendant is not the person who made the threat. *Id.*

As *Bourgeois* explained, well-settled law prohibits the State from eliciting evidence on direct examination that its witnesses are afraid to testify when the defendant did not personally instill this fear. *Id*. at 400-01.

During direct examination of the only non-police witnesses, Christine Babbish and Ryan Fitzhugh, the prosecution elicited threats they had received due to their cooperation in this case. RP 156, 178. The witnesses detailed serious threats to themselves or their immediate family due to their involvement in this prosecution. RP 156-60, 178. Defense counsel registered no objections.

This testimony clearly impacted the jury. As soon as they delivered their verdict, they asked the court about their own safety based on the witnesses' concerns about threats against them. RP 304.

c. Defense counsel did not object to extensive hearsay about unrelated bad acts and police opinion testimony about Ms. Vazquez's guilt.

Eliciting a police officer's testimony "about a conversation he had during his criminal investigation" is "clearly hearsay and inadmissible under the rules of evidence." *State v. Hendrickson*, 138 Wn. App. 827, 832, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.2d 1029 (2009); ER 801; ER 802. It also violates the right to confrontation for a police officer to repeat information gathered in an investigation from a non-testifying witness. *Id.*; *Davis v. Washington*, 547 U.S. 813, 832, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); U.S. Const. amend. VI; Const. art. I, § 22. '

Opinions from law enforcement about an accused person's involvement in criminal behavior have an "aura of special reliability and trustworthiness" and are particularly inappropriate and prejudicial. *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001); *State v. Hawkins,* _ Wn. App. 2d _, 2020 WL 4745088, *3 (Aug. 17, 2020) (reversing conviction based on objected-to testimony by police about their belief they had probable cause to refer charges against the defendant).

Without any defense objection, the prosecution elicited out-of-court allegations from several police officers repeating what people told them during their investigation and their resulting opinion that Ms. Vazquez was the person in the house selling drugs.

Officer Vargas said people told him Ms. Vazquez was a known drug seller who spent her time with "well-known drug users/abusers." RP 97. Sources told him Ms. Vazquez "was sitting on dope right then and there" the day of the arrest. RP 99. Officer Martin similarly said his "sources" told him Ms. Vazquez was "living in the basement or in the downstairs of that house and was selling meth." RP 215. The police believed Ms. Vazquez was "Target Number 1" and obtained a search warrant for this house based on that belief. RP 98.

The prosecutor used this hearsay and opinion evidence to argue Ms. Vazquez was selling drugs in the house as charged. RP 297-98. It relied on hearsay to show the single baggie of methamphetamine was found in Ms. Vazquez's bedroom. RP 105, 108, 139, 230. The defense never objected to the officers repeating what other people told them about Ms. Vazquez's drug activity or living arrangements in the home.

Officer Vargas also speculated that a police vest found in this bedroom was intended to steal drugs from others, in a "dope rip." RP 128. Without any objection, he explained how criminals steal drugs from others in a "dope rip" by dressing up like police, such as by using this vest. RP 128-29. Defense counsel did not object.

Defense counsel also voiced no objection when the prosecutor elicited from Ms. Babbish that Ms. Vazquez had a history of selling drugs on other occasions. RP 163.

This evidence repeating out of court allegations and prior misconduct, and speculating about other dangerous acts Ms. Vazquez could have been involved in, was inadmissible and decidedly prejudicial. *See Crow*, 8 Wn. App. 2d at 510-11.

Furthermore, despite evidence of Ms. Vazquez's prior convictions and her indigence, counsel did not ask the Court to waive

the DNA fee that was mandatory to collect for those prior convictions. The Court of Appeals insisted this was reasonable performance and refused to strike the fee. Slip op. at 7.

3. This inadmissible evidence was markedly prejudicial and satisfies the test for ineffective assistance but the Court of Appeals did not apply this test.

A person is prejudiced by her attorney's deficient performance if there is a reasonable probability of a different outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). "[A] 'reasonable probability' is lower than a preponderance standard," and reflects a probability sufficient to undermine confidence in the outcome. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (internal citations omitted).

The Court of Appeals opinion never mentioned this test. Instead, it noted that defense counsel could still argue her theory of the case, that Ms. Vazquez was merely present in a house where lots of people used drugs, despite this otherwise inadmissible, prejudicial evidence. Slip op. at 6. This is the wrong standard. The jury heard extensive and markedly prejudicial evidence about Ms. Vazquez's history of selling and possessing drugs.

Without this testimony, it is reasonably probable jurors would have concluded she was transient, temporarily present in a chaotic home where people used drugs, as she testified. But by introducing testimony of her numerous drug convictions, community knowledge of her drug selling, and police opinion that she was the prime target in the home, it is reasonably probable this information affected the jury's verdict. The jurors told the court when delivering their verdict they were concerned for their safety, demonstrating the improperly elicited testimony about threats to witnesses was information that jurors not only credited, they were personally disturbed and afraid because of it.

The Court of Appeals decision conflicts with settled precedent from this Court and the United States Supreme Court by disregarding the prejudicial effect of inadmissible evidence and refusing to apply the "reasonable probability of a different outcome" test. It conflicts with *Crow*, a recent Court of Appeals decision explaining the failure to object to inadmissible evidence is unlikely to be the product of a reasoned strategy, particularly when that evidence offers no advantage and instead makes it far harder to convince the jury that the prosecution has not met its burden of proof. This Court should grant review.

4. Counsel's deficient performance in the course of plea negotiation also deprived Ms. Vazquez of her right to counsel.

The right to effective assistance of counsel is "a right that extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). At the plea bargaining stage, "defendants are entitled to the effective assistance of competent counsel." *Id*. at 1385.

Lawyers are obligated to meaningfully convey all plea bargains and give accurate legal advice about them, even if the defendant has a fair trial. *Frye*, 566 U.S. at 143-44; *Lafler*, 566 U.S. at 169. Similarly, a client's intent to plead guilty does not excuse a lawyer from trying to minimize the negative consequences of conviction to the accused. *State v. A.N.J.*, 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010). Put simply, a lawyer is obligated to pursue the best interest of the client, including when seeking a plea bargain.

On July 9, 2018, Ms. Vazquez agreed to accept the prosecution's offer of a plea bargain that involved 24-months of incarceration. RP 5, 8. The prosecutor called it a "super-sweet deal." RP 8. Ms. Vazquez wanted to enter into the plea bargain and continue the sentencing hearing so she could have a visit with her children

scheduled for July 19, 2018, ten days away. RP 5, 9. Defense counsel asked to enter the guilty plea and continue the sentencing hearing for two weeks. RP 5.

The prosecutor opposed this delay for sentencing to allow this visit with her children because “we’re not running a visitation center; we’re running a jail [and] . . . - - the real estate is valuable.” RP 6. The prosecutor wanted the case “done and gone,” not to “drag it out.” RP 6. The prosecutor complained that continuing the sentencing hearing for two weeks would be “14 more nights at taxpayers’ expense here in Asotin County.” RP 7.

The commissioner presiding at the hearing refused the two week continuance, saying, “I certainly sympathize with you, Ms. Vazquez,” but “it’s also important that we keep the wheels of justice moving.” RP 8.Because the court would not postpone the sentencing hearing for two weeks, Ms. Vazquez did not enter into the plea agreement and instead went to trial. RP 9.

Despite the prosecution’s insistence that continuing the sentencing hearing for 14 days after the plea was an untenable drain on the taxpayers, the prosecution immediately asked for a trial date that

was two months away. RP 9. Ms. Vazquez remained in the county jail for three more months awaiting her trial and sentencing.

After the trial, Ms. Vasquez faced a standard range of 60 to 120 months, with the prosecution seeking 100 months and the court imposing 90 months. Her plea agreement involved a 24-month stipulated sentencing recommendation. RP 9. The only reason Ms. Vazquez was unable to enter this plea bargain was the inability to resolve a short continuance for her to see her children.

Defense counsel asked to postpone sentencing for two weeks, longer than Ms. Vazquez said she needed to see her children and it was the length of the delay that triggered the prosecution's objection. RP 5, 8. Counsel did not ask for a different date, or try to compromise. Counsel did not point out the absurdity of the State insisting 14 days' delay was too long and too expensive to the taxpayers yet it wanted several more months to prepare for trial.

Defense counsel's failure to advocate for her client, who faced a far longer prison term if convicted and had reached a plea agreement, is unreasonable and without strategic benefit.

The Court of Appeals summarily disregarded this unreasonable performance, contending counsel was not obligated to do more than

obtain the plea offer. Slip op. at 4. But counsel's obligations do not end at getting an offer. In *Frye* and *Lafler*, the defense attorneys also obtained plea offers, but they unreasonably failed to ensure their clients understood and had a meaningful chance to act on these offers. *Frye,* 566 U.S. at 144-45, 147; *Lafler*, 566 U.S. at 169-70. Counsel similarly abandoned her client rather than pursue the final details of an agreed upon plea. This court should grant review to address counsel's obligations to aid a client with a plea bargain and to correct the Court of Appeals opinion misunderstanding this controlling law.

E. CONCLUSION

Based on the foregoing, Petitioner Jessica Vazquez respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 20th day of August 2020.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON,	)	
	)	No. 36365-1-III
Respondent,	)	
	)	
v.	)	
	)	
JESSICA L. VAZQUEZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Jessica Vazquez appeals from three drug-related convictions claiming ineffective assistance of counsel and errors in the judgment and sentence. We affirm the convictions and reverse some of the challenged sentence conditions.

FACTS

Pursuant to a search warrant based on an informant's tip, Asotin County deputy sheriffs searched a "drug house" occupied by several people. The deputies discovered methamphetamine in Ms. Vazquez's bedroom. Charges of maintaining a drug dwelling, possession of methamphetamine with intent to deliver, and possession of drug paraphernalia were filed.

The prosecutor offered a plea agreement calling for a 24 month sentence. Ms. Vazquez indicated that she would accept the offer if the sentencing could be delayed two weeks to allow her to visit with her family. Having made the offer in order to free jail space, the prosecutor objected to a continuance; the trial judge declined to continue sentencing. Ms. Vazquez rejected the agreement and proceeded to jury trial.

Ms. Vazquez testified in her own behalf that she lived in the house and helped the home owner control matters. While Ms. Vazquez admitted to extensive history of drug use, she denied that the methamphetamine belonged to her. She claimed that a binder indicating drug sales actually tracked money people pledged to help her return to Idaho because "I don't sell enough drugs for people to owe me money." During cross-examination, the State elicited Ms. Vazquez's complete criminal history, including prior controlled substance convictions.

Defense counsel's theme throughout trial was that Ms. Vazquez was the wrong target of the law enforcement investigation. The jury convicted Ms. Vazquez on all charges. The court imposed a standard range sentence and imposed financial obligations that included a $200 criminal filing fee, a drug fine, methamphetamine cleanup fee, lab fee, and DNA testing fee. The court also required HIV testing.

Ms. Vazquez timely appealed to this court. A panel considered her case without hearing argument.

ANALYSIS

We first consider Ms. Vazquez's argument that her trial attorney provided ineffective assistance. We then consider her sentence-related arguments.

Ineffective Assistance Argument

Ms. Vazquez challenges her defense attorney's conduct before, during, and after trial. She claims that counsel erred by failing to negotiate a favorable plea bargain, that counsel had personal issues, counsel should have objected to evidence during trial, and should have challenged the legal financial obligations (LFOs).[1] With the exception of the LFO challenges that are considered independently, we address each issue in turn.

This issue is reviewed in accordance with well settled law. Counsel's failure to live up to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Courts apply a two-pronged test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Strickland v. Washington*, 466 U.S. 668, 690-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). When a claim can be resolved on one ground, a reviewing court need not consider both prongs. *Id*. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166

[1] We do not separately address Ms. Vazquez's cumulative error claim because we necessarily review the entirety of counsel's performance when evaluating ineffective assistance claims.

P.3d 726 (2007). This claim requires we review counsel's performance as a whole to ascertain whether counsel rendered effective assistance. *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). Review is highly deferential and we engage in the presumption that counsel was competent; moreover, counsel's strategic or tactical choices are not a basis for finding error. *Strickland*, 466 U.S. at 689-691.

Ms. Vazquez does not provide any authority suggesting that counsel is ineffective for failing to negotiate a plea agreement, let alone a superior plea deal with desired conditions. Counsel has a duty to provide effective assistance during plea bargaining, which constitutes providing meaningful advice about the relevant consequences. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). Here, counsel obtained an offer that apparently was acceptable to Ms. Vazquez, but she ultimately rejected it for a collateral reason. No evidence suggests Ms. Vazquez received improper or ineffective plea advice. This argument is utterly lacking factual or legal support.

Only evidence in the trial court record can be considered on appeal. *McFarland,* 127 Wn.2d at 337-338 & n.5. While there is a passing reference in the record to personal challenges experienced by Ms. Vazquez's defense attorney, nothing in the record suggests counsel was impaired at trial. Claims that defense counsel was inattentive or indisposed at trial require evidence of actual prejudice from the record. *Matter of Lui*, 188 Wn.2d 525, 540-542, 397 P.3d 90 (2017). This issue, too, utterly lacks factual support in the record.

The remainder of the challenges assert that counsel should have objected to questions asked of her client or challenged some of the evidence offered by the prosecutor. We lump these challenges together because, individually and collectively, they fail to overcome the presumption that counsel performed effectively.

As the *Strickland* court noted, no two lawyers would try a case in the same manner. 466 U.S. at 689. Accordingly, discerning error from an undeveloped appellate record is largely a fruitless undertaking because the decision to object is a "classic example of trial tactics." *See State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel." *Id.* A reviewing court presumes that a "failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing cases). Defense counsel may also make a reasonable tactical decision not to object to inadmissible evidence when such an objection may draw undesired attention or impair a defense strategy. *State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003).

Most of Ms. Vazquez's contentions present evidentiary arguments that in some contexts could have succeeded if raised at trial due to the discretion afforded the trial

judge over the admission of evidence.[2] *State v. Clark*, 187 Wn.2d 641, 648-649, 389 P.3d 462 (2017). However, none of these potential claims established error in the context of this trial. Ms. Vazquez was arrested inside of a house full of drug users with ample evidence of drug use throughout the building. Trial counsel's theory of the case played to those facts—Ms. Vazquez was just another user rather than a dealer.

Defense counsel presented a consistent theme at trial that Ms. Vazquez was a victim of police "tunnel vision" that ignored more culpable individuals. Counsel developed a defense theory to serve her client consistent with professional standards. Under the circumstances, the appellate claim rings hollow. Ms. Vazquez did not establish either that her counsel erred or that her trial was rendered unfair by counsel's mistakes. Thus, she has not proved her claim of ineffective assistance of counsel.

Sentencing Contentions

Ms. Vazquez challenges the imposition at sentencing of the criminal filing fee, various drug fines mentioned below, the DNA testing fee, and a HIV testing requirement. We grant relief on most of her arguments.

A defendant is subject to a mandatory $2,000 fine for a subsequent drug offense unless the court finds the defendant indigent. RCW 69.50.430(2). Methamphetamine

[2] *E.g.*, *State v. Warren*, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006) (admission of prior convictions otherwise excluded by ER 609); *State v. Bourgeois*, 133 Wn.2d 389, 402-403, 945 P.2d 1120 (1997) (prosecutor may pre-empt credibility challenge to witness).

possession under RCW 69.50.401(2) requires a mandatory cleanup fine when the quantity exceeds two kilograms, but it is otherwise discretionary. *State v. Corona*, 164 Wn. App. 76, 78-80, 261 P.3d 680 (2011). Crime laboratory fees may be suspended if the defendant is indigent. RCW 43.43.690(1). Trial courts may not impose discretionary LFOs on indigent defendants, including the $200 criminal filing fee. *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018).

The trial court found that Ms. Vazquez was indigent. Neither party disputes the $200 filing fee must be waived. The trial court erroneously treated the drug fine, crime laboratory fee, and methamphetamine cleanup fee[3] as mandatory. Because Ms. Vazquez is indigent, those fees should have been waived. The court found no evidence that Ms. Vazquez was previously ordered to provide DNA; that fee was properly imposed.

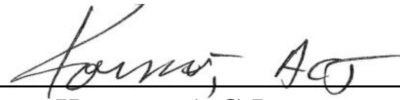
The trial court may order HIV testing if it "determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles." RCW 70.24.340(1)(c). The court must enter an appropriate finding to establish whether the defendant used or intended to use needles as part of the offense. *State v. Mercado*, 181 Wn. App. 624, 635-636, 326 P.3d 154 (2014).

[3] Ms. Vazquez possessed 8.2 ounces of methamphetamine, which is below the statutory requirement of 2 kilograms.

The record does not establish that Ms. Vazquez used needles as part of this offense. Her testimony only described smoking methamphetamine. Without an appropriate basis for the finding, we reverse the HIV testing order.

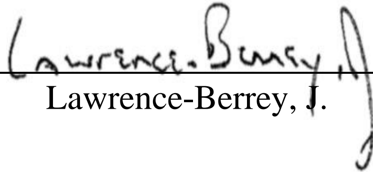
Affirmed and remanded to strike the noted provisions from the judgment and sentence.

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.

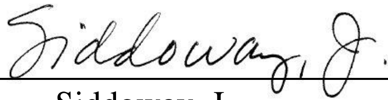


Korsmo, A.C.J.

WE CONCUR:



Lawrence-Berrey, J.



Siddoway, J.

APPENDIX B

FILED
JULY 21, 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, Respondent, v. JESSICA L. VAZQUEZ, Appellant.	)))))))))	No. 36365-1-III 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 June 11, 2020, is hereby denied.

PANEL: Korsmo, Lawrence-Berrey, Siddoway

FOR THE COURT:

REBECCA PENNELL
Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF AUGUST, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BENJAMIN NICHOLS, DPA [bnichols@co.asotin.wa.us] [lwebber@co.asotin.wa.us] ASOTIN COUNTY PROSECUTOR'S OFFICE PO BOX 220 ASOTIN, WA 99402-0220	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] JESSICA VAZQUEZ DOC 352924 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332-8300	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF AUGUST, 2020.

X_______________________________

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