

No. 39864-8-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SANDRA DANIELLE FICKETT

Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**A. FICKETT'S TRIAL COUNSEL WAS NOT
INEFFECTIVE FOR FAILING TO MAKE A SPECIOUS
OBJECTION.....1**

**B. THERE IS NO MERIT TO FICKETT'S CLAIM THAT
A JURY INSTRUCTION "BROUGHT COERCIVE PRESSURE ON
THE JURY TO RETURN A VERDICT."5**

CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	8
<u>State v. Boogaard</u> , 90 Wn.2d 733, 585 P.2d 789 (1978).....	6, 8
<u>State v. Carpenter</u> , 52 Wn.App. 680, 763 P.2d 455 (1988)	2
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001)	2
<u>State v. Crowell</u> , 92 Wn.2d 143, 594 P.2d 905 (1979).	8
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990)	7
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	5
<u>State v. Israel</u> , 113 Wn.App. 243, (2002), <i>review denied</i> , 149 Wn.2d 1013 and 1015 (2003).....	2, 5
<u>State v. Jeffries</u> , 105 Wn.2d 398, 717 P.2d 722 (1986).....	1
<u>State v. Jones</u> , 97 Wn.2d 159, 641 P.2d 708 (1982).....	6
<u>State v. Madison</u> , 53 Wn.App. 754, 770 P.2d 662()	2
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 12451 (1995).....	5
<u>State v. McNeal</u> , 145 Wn.2d 352, 37 P.3d 280 (2002)	2, 7
<u>State v. Watkins</u> , 99 Wn.2d 166, 660 P.2d 1117 (1983).....	6, 8

FEDERAL CASES

<u>Yarborough v. Gentry</u> , 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).....	2
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	1, 2

STATEMENT OF THE CASE

Except as otherwise cited below, Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. FICKETT'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MAKE A SPECIOUS OBJECTION.

Fickett claims her trial counsel was ineffective for failing to object to the State's questioning of the officer on rebuttal, in response to Fickett's defense of unwitting possession. This argument is without merit.

A defendant demonstrates ineffective assistance of counsel by proving (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). A defendant's counsel is ineffective if there is a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. Strickland, 466 U.S. at 687-88. "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). But, judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. Or, as the United States Supreme Court has put it, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988).

A valid tactical decision cannot provide the basis for an ineffective assistance claim. State v. Israel, 113 Wn.App. 243, 270 (2002), *review denied*, 149 Wn.2d 1013 and 1015 (2003).

Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662() (citing Strickland,

466 U.S. 668), *review denied*, 113 Wn.2d 1002 (1989). The complained-of conduct in the present case is not such an "egregious circumstance." Id.

Here, Fickett claimed "unwitting possession" of the methamphetamine that was found in the coin pocket of her pants. Brief of Appellant 9. Fickett also cross examined the officer under this theory when she asked the officer if he agreed-- given the time it took for him to turn around and pursue her vehicle--that Fickett had plenty of time to remove the methamphetamine from her pocket and throw it out the window. RP 40, 41. The officer said "it could have happened." RP 41. Then, on redirect, the prosecutor asked the officer whether a seatbelt would make it difficult to get reach into the coin pocket of the pants Fickett was wearing. RP 48. The officer said that was "possible." RP 49. It is this particular inquiry by the prosecutor that Fickett now says should have been objected to by her trial counsel. This is not a persuasive claim.

First of all, Fickett opened the door to questioning about the logistics of her being able to pull the meth out of her coin pocket and throw it out the window when she posed that hypothetical question to the officer. In response, the State was permitted to ask the officer to answer the related hypothetical of whether a seatbelt

would have blocked access to the coin pocket, making it difficult for Fickett to reach in and grab the packet and toss it. RP 48, 49. But this was not damaging to Fickett's case because her trial counsel effectively undercut the officer's response on recross when he got the officer to say that it would not have been impossible for Fickett to reach into the pocket, even with a seat belt on. RP 49. In short, Fickett's trial counsel's failure to object was a legitimate trial tactic. Why would trial counsel object to the State's query on re-direct, when trial counsel had (necessarily) opened the door to the issue, but he also correctly knew that he had another chance at the officer on re-cross? And trial counsel seized that chance, and successfully got the officer to concede that it would not be impossible for Fickett to have reached inside the coin pocket, even with a seat belt on. RP 49. This was not ineffective assistance of counsel. Rather, it is an example of competent trial counsel making a valid tactical decision to forgo an objection, knowing he could discredit the officer's statement on re-cross--which he *did*. RP 49.

Furthermore, Fickett cannot show that had trial counsel objected, the objection would have been sustained--because Fickett opened the door to the State's inquiry. "[I]t is a sound general rule that, when a party opens up a subject of inquiry on

direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). In short, an objection to the State's redirect under these circumstances would have been futile. Trial counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 12451 (1995).

Fickett's trial counsel's handling of the complained-of testimony was a valid, *tactical* decision, and cannot provide the basis for an ineffective assistance claim. Israel, 113 Wn.App. at 270. Accordingly, Fickett has not met her burden to show her trial counsel was ineffective, and this court should affirm her conviction.

B. THERE IS NO MERIT TO FICKETT'S CLAIM THAT A JURY INSTRUCTION "BROUGHT COERCIVE PRESSURE ON THE JURY TO RETURN A VERDICT."

Fickett claims that one of the jury instructions "brought coercive pressure on the jury to return a verdict" and violated Fickett's right to a fair trial. Brief of Appellant 12. This argument is without merit.

Under the federal and Washington constitutions, a criminal defendant has a right to a jury verdict uninfluenced by factors outside the evidence, the courts proper instructions, and the arguments of counsel. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The right to a fair and impartial jury trial requires that a judge not bring coercive pressure to bear upon jury deliberations. State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). "*After jury deliberations have begun*, the court shall not instruct the jury in such a way as to suggest the need for agreement." CrR 6.15(f)(2)(emphasis added); State v. Watkins, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983). There was no such action here.

Fickett finds fault with one sentence in one of the, standard, pattern, concluding instruction given by the court to the jury *before* the jury retired to deliberations. RP 89,90. Fickett claims that the sentence that instructed, "You must fill in the blank provided in the verdict form the words 'not guilty' or the word 'guilty,' according to the decision you reach," was coercive because "the court was requiring the jury to either acquit the defendant or convict him." Brief of Appellant 16. Fickett further claims this wording "precluded deadlock" and thus "coerced a verdict." Id. Apparently, Fickett

would have this instruction say, "fill in the blank provided in the verdict form the words 'guilty' or 'not guilty' or 'deadlocked.....'"

This argument is ridiculous. One can only imagine the can of constitutional worms that would be opened with such an instruction. If the jury was given such an instruction, and it chose the option "deadlocked," the defendant would then claim the instruction impermissibly allowed the State to obtain a mistrial, so there could be no retrial on double jeopardy grounds. Fickett's argument about this instruction simply makes no sense--nor is it backed by any on-point authority.

In the first place, this instruction is a standard, Washington pattern jury instruction that--so far as Respondent knows--has never been found unconstitutional. 11A WAPRAC WPIC 151.00. Nor has Fickett cited any case that holds this instruction is unconstitutional. Brief Appellant 15, 16. Nor has the State found any such authority. The failure to cite authority in support of a contention constitutes a concession that the argument is without merit. State v. McNeal, 88 Wash.App. 331, 340, 944, 944 P.2d 1099 P.2d 1099 (1997); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (declining to review argument unsupported by authority); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d

801, 809, 828 P.2d 549 (1992) (court will not consider an argument unsupported by authority).

While Fickett does cite several Washington cases, these cases are all distinguishable. The cases cited by Fickett pertain to situations where the trial court (or a bailiff) improperly instructed the jury after deliberations had begun, and most discuss circumstances where the jury was deadlocked. Fickett cites Boogaard, and Watkins, supra., and State v. Crowell, 92 Wn.2d 143, 594 P.2d 905 (1979). The facts of those cases are so different that their rulings cannot possibly apply to the circumstances here. Because none of the cases cited by Fickett are on point, and because her argument is not well-reasoned, her claim that the jury instruction give in this case was "coercive" is utterly without merit. This court should agree, and should affirm her conviction.

CONCLUSION

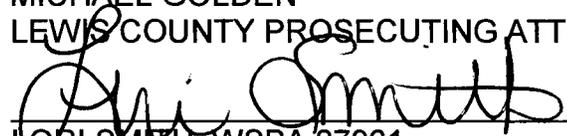
Fickett's claim that her trial counsel was ineffective is without merit because the complained-of conduct involved a valid tactical decision, and cannot support an ineffective assistance of counsel claim. Nor is Fickett's argument that a jury instruction brought "coercive pressure on the jury" either well-reasoned or supported

by any on-point authority. Accordingly, Fickett's conviction should be affirmed in all respects.

RESPECTFULLY SUBMITTED THIS 7th day of May, 2010.

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DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this date a copy of this response brief was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows: **John Hays, 1402 Broadway, Suite 103,**

Longview, WA 98632.

DATED THIS 10th day of May, 2010, at Chehalis, WA.



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