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SUPREME COURT NO. _____

NO. 39532-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FERNANDO SIFUENTEZ,

Petitioner.

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

The Honorable David Peterson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Fernando Sifuentez asks this Court to grant review of the Court of Appeals' decision in State v. Sifuentez, No. 39532-4-III, (Slip op. filed on July 11, 2024. A copy is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Petitioner was convicted of second degree assault and second degree unlawful possession of a firearm. The Court of Appeals agreed petitioner received ineffective assistance of trial counsel but ruled petitioner was not prejudiced by counsel deficient representation. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals failed to apply the proper prejudice standard articulated in State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) and State v. Estes, 188 Wn.2d 450, 395 P.3d 1045 (2017)?

2. Is review appropriate under RAP 13.4(b)(2) where the Court of Appeals decision conflicts with State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001)?

C. STATEMENT OF THE CASE

Christina Olson met Sifuentez on a dating site sometime in September or October 2021. RP 162.¹ Shortly after they met, Sifuentes moved into Olson's home. RP 164. Olson also let Sifuentez's mother stay at the home. RP 200. By December 3, 2021, Olson ended her relationship with Sifuentez and had moved to a hotel because she did not want any contact with him. RP 166-167, 169. On December 3, 2021, Olson's friend, Blanca Jacquez, Anna Dalton, who Olson had recently met, Olson's mother Debra Olson, and Olson's brother Robert Olson were living in the home. RP 167-168.

¹ RP Refers to the sequentially paginated verbatim report of proceedings for April 18th and April 19th, 2022. 1RP refers to the verbatim report of proceedings for April 15, 2022. 2RP refers to verbatim report of proceedings for February 17, 2023.

On that day, Jacquez and Dalton were at the home in Jacquez's room when Jacquez heard Sifuentez's voice and Robert Olson telling Sifuentez to leave. RP 175, 208. Jacquez said she walked out of her room and was confronted by Sifuentez who had a gun. Sifuentez said he was looking for Christina Olson. RP 176. He pointed the gun at her face, cocked it, and demanded to know where Christina Olson was and said that she (Jacquez) was going to die. RP 175-176.

Jacquez then turned away and Sifuentez ran towards the door. RP 205. Jacquez then went back to her room. Dalton was in the room and on the phone with 911. Jacquez told Dalton what had happened, which Dalton relayed to the 911 operator. RP 177-179, 201.

Jacquez told police the gun Sifuentez pointed at her was a grey shotgun with a black handle. RP 203. When interviewed by defense counsel she also said the gun was grey and black. Id. At trial, however, she testified the gun was greenish. RP 175. Contrary to her testimony at trial that Sifuentez said he was

looking for Olson, she told police Sifuentes said he was looking for a man. RP 204.

Kennewick police officer Cody Albertin responded to the 911 call and while on route to the home spoke with Dalton on the phone. RP 208-210. When Albertin arrived Jacquez, Dalton and Debra Olson were there. RP 213.² Dalton and Jacquez appeared shaken and in shock, but Debra Olson was very calm. RP 214. Debra Olson explained to Albertin what happened. Albertin thought her calm demeanor was odd. RP 215-216.

Richland Police subsequently searched the apartment where Sifuentes was staying with his father. found a green and black shotgun under a bed. RP 225, 243, 254-255. Sifuentes told the officers he found the shotgun that morning in a suitcase that he had taken from his mother's storage unit a week earlier. He said he told his father about the shotgun and then put it under the

² Robert Olson, Debra Olson, and Dalton did not testify at the trial. Albertin tried to contact Dalton and Debra Olson before the trial but was unsuccessful. RP 216.

bed. RP 244-245. Sifuentez also told the officers he was at Olson's home sometime in early December, but he did not remember what day. He said his mother would confirm he did not have the shotgun the day he was there. RP 253.

Kennewick police officers interrogated Sifuentez the following day, January 4. RP 265. Sifuentez was unclear about specific dates but "suggested" he might have been in Spokane on December 3. RP 266-267. He told these officers what he told the Richland officers---that he found the shotgun in a suitcase he took from his mother's storage unit. RP 268-269. Sifuentez said he was at Olson's home sometime in December prior to December 3. RP 270. Sifuentez told the officers he was not there on December 3 and did not point a gun at anyone. RP 273.

Prior to the trial, Sifuentez moved to exclude any evidence related to any prior arrests, conviction charges, allegations of criminal acts and information related to his criminal history,

pursuant to ER 404 (b).³ CP 14-15. Sifuentes specifically requested any evidence of prior domestic violence acts with respect to Christina Olson be excluded. 1RP 11. The court granted the motion. 1RP 12.

The State moved to admit two 911 calls. One made by Jacquez on December 2 regarding an incident with Sifuentes that was unrelated to the charges and the one made on December 3 by Dalton. 1RP 21-22. The court excluded the December 2 call, finding it irrelevant. 1RP 25-26, 30. As to the December 3 Dalton call, the court ruled that call was admissible. 1RP 32.

At trial, the December 3 Dalton 911 call was played to the jury. RP 155; Ex. 2. Near the beginning of the call, Dalton tells the 911 operator that “There is an unwanted guest in the house, and he is abusive.” Ex 2 at 0.05-0.09. Dalton then identifies the person as Sifuentes and says, “He’s an abusive ex to my friend

³ Counsel also argued the evidence was inadmissible under ER 401, 402 and 404

3. CP 14-15.

and they have already had police contact.” Id. at 1:00-1:08.

Dalton then states her friend is not at the house. Id. at 1:12-1:13.

Immediately after the call was played, defense counsel objected to the above cited part of the call as a violation of the court’s ruling excluding evidence of prior allegations of domestic violence and requested it be stricken. RP 155, 157. The court granted the request to strike that part of the call and orally instructed the jury:

“You have heard evidence as to alleged prior domestic violence. I have ruled that that evidence is inadmissible. Do not speculate as to the reason for my ruling. You are instructed to disregard that evidence and not consider it in your deliberations, the portion about domestic violence, okay?”

RP 161.

During its deliberations, the jury sent an inquiry asking for a transcript of the 911 call or to listen to the call again. CP 70; RP 336. The court allowed the bailiff to play the call for the jury and the jury was provided with a written copy of the court’s previous oral instruction. CP 70-71; RP 345-346.

During Jacquez's direct examination the prosecuting attorney asked her if Sifuentez returned to the home after December 3, the date of the incident. She responded that he came back when she was moving out of the home to drop off some cats. RP 179-180. Jacquez then added "he had a gun" that was smaller than the shotgun she identified Sifuentez had during the December 3 incident. Id.

Fernando Sifuentez was convicted of second degree assault against Jacquez and second degree unlawful possession of a firearm.

D. ARGUMENTS

1. THE COURT OF APPEALS' DECISION
CONFLICTS WITH THOMAS AND ESTES.

Every accused person is guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). A defense attorney's

failure to object constitutes ineffective assistance where (1) the objection would likely have been sustained; (2) the failure was not a legitimate strategic decision; and (3) there is a reasonable probability the jury verdict would have been different with a proper objection. In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). A “reasonable probability” is lower than a preponderance standard; “it is a probability sufficient to undermine confidence in the outcome.” Estes, 188 Wn.2d at 457.

On appeal, Sifuentes argued that defense counsel was ineffective for failing to move to redact the statements in the 911 call identifying Sifuentes as abusive and abusive to his “ex” whose house it was and who was identified as Christina Olson. Sifuentes argued he was prejudiced by counsel’s deficient performance.

In support of his prejudice argument Sifuentes pointed to the weakness of the State’s case. Although the evidence indicates there were four people in the home at the time of the incident on

December 3, including Robert Olson, who Jacquez was the first person to confront Sifuentez, and Debra Olson, who police testified provided most of the information about the incident, only Jacquez testified at trial. A reasonable jury would question why other witnesses to an incident, including Robert Olson and Debra Olson, did not testify if their testimony would have been helpful to the State's case.

The only witness who testified, Jacquez, had credibility problems. She told police and the defense interviewer the shotgun was grey with a black handle, but the gun she identified at trial was green. RP 202-203. She testified that Sifuentez asked for Christina Olson but told the defense interviewer he said he was looking for a man. RP 204.

Additionally, the jury requested to listen to the 911 call during its deliberations indicating the call was an important piece of evidence for jurors. The jurors heard the prejudicial statement not once but twice.

The Court of Appeals agreed counsel's failure to move to redact the statements on the 911 call was deficient performance. Slip op. at 9. It concluded, however, there was not a reasonable probability the outcome of the trial would have been different. Slip op. at 12.

In reaching that conclusion the court ruled because the jury was instructed to disregard the prejudicial statement regarding the prior domestic violence allegation against Sifuentez, the jury presumably followed the instruction. Slip op. at 10-11. It also ruled because the jury is the arbiter of a witness's credibility, it necessarily found Jacquez's testimony credible despite the inconsistencies in her testimony. Slip op. at 11-12.

However, in determining whether counsel's deficient performance is prejudicial the standard is whether there is a reasonable probability the outcome would have been different but for that deficient performance. Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome.” Strickland, 466 U.S. at 694. A “reasonable probability” is lower than a preponderance standard; “it is a probability sufficient to undermine confidence in the outcome.” Estes, 188 Wn.2d at 457.

The Court of Appeals prejudice analysis fails to apply the proper standard for determining prejudice. In focusing on the presumption that jurors follow the court’s instructions and on their unfettered right to determine a witness’s credibility instead of the prejudicial nature of the statement in relation to the evidence presented, the Court of Appeals failed to properly analyze whether there was a reasonable probability the statement undermined the confidence of the verdict. Given that the jury twice heard allegations that Sifuentez was abusive towards his ex-girlfriend requiring police involvement, and given Jacquez was the only witness to the event to testify and her credibility was questionable, there is a reasonable probability the outcome would have been different absent counsel’s deficient performance.

Because the Court of Appeals failed to apply the proper standard for determining prejudice its decision conflicts with this Court's decisions in Thomas, and Estes, and review is appropriate under RAP 13.4(b)(1).

2. THE COURT OF APPEALS' DECISION
CONFLICTS WITH FREEBURG.

The Court of Appeals agreed that evidence Sifuentez possessed a gun on his subsequent visit to the house was irrelevant and inadmissible and if counsel had objected to the evidence the evidence would have been sustained. Slip op. at 12. It ruled, however, that counsel's failure to object was a legitimate trial strategy so as not to emphasize the evidence. Slip op. at 13.

"Evidence of weapons is highly prejudicial." State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). Evidence that an accused possessed or had access to a firearm is therefore unduly prejudicial and inadmissible unless that firearm is connected to the charged offense. Id. Courts "uniformly

condemn” evidence that the accused possessed a firearm when it has nothing to do with the crime charged. Id.

In Freeburg, the trial court erroneously admitted evidence Freeburg was in possession of a gun when he was arrested, where the prosecution had no evidence that gun was the murder weapon. 105 Wn. App. at 501. The court held the evidence of Freeburg’s possession of a gun, without proof it was connected to the charged crime, tended to show he was a “bad man,” or was likely to have been in possession of a gun at the time of the offense. Id. at 502. It improperly encouraged the jury to convict for unfair reasons and undermined the conviction. Id.

Moreover, ER 404(b) prohibits admission of other crimes, wrongs, or acts “to prove a defendant has a criminal propensity.” State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). “This prohibition encompasses not only prior bad acts and unpopular behavior, but any evidence offered to ‘show the character of a person to prove the person acted in conformity’

with that character at the time of a crime.” State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

There was no legitimate strategic or tactical reason to explain why defense counsel did not object to this highly prejudicial testimony and request it be stricken and/or the jury admonished not to consider it. In the absence of an objection and a request to strike the evidence, the jury was free to consider the evidence. Because the evidence tended to show that Sifuentez characteristically carried guns making it likely, consistent with that characteristic, that he possessed a gun at the time of the offense and that he likely assaulted Jacquez with a gun.

In concluding defense counsel’s failure to object to the gun evidence was a legitimate trial strategy so as not to emphasize the evidence, the Court of Appeals ignores how the evidence could have impacted the jury’s decision to convict Sifuentez for unfair reasons. The decision conflicts with Freeburg and review is appropriate under RAP 13.4(b)(2).

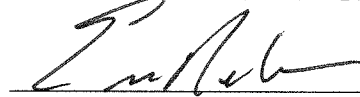
E. CONCLUSION

Sifuentez respectfully asks this Court to grant his petition and reverse the Court of Appeals decision in his case.

I certify that this petition contains 2,502 words excluding those portions exempt under RAP 18.17.

DATED this 24th day of July 2024.

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read "Eric Nielsen", is written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 39532-4-III
)	
v.)	
)	
FERNANDO SIFUENTEZ,)	UNPUBLISHED OPINION
)	
Appellant.)	

COONEY, J. — Fernando Sifuentez was convicted of second degree assault and unlawful possession of a firearm. He appeals his convictions, claiming ineffective assistance of counsel and cumulative errors deprived him of a fair trial. Mr. Sifuentez further challenges the trial court’s imposition of the victim penalty assessment (VPA) and DNA collection fee.

We affirm Mr. Sifuentez’s convictions but remand for the trial court to strike the VPA and DNA collection fee from the judgment and sentence.

BACKGROUND

Mr. Sifuentes and Christine Olsen began a relationship in fall 2021. Shortly thereafter, Mr. Sifuentes moved into Ms. Olsen's home. Sometime between Thanksgiving and December 3, 2021, their relationship ended. On December 3, the date that elicited Mr. Sifuentes's charges, Ms. Olsen was away from her home. Present at her home were her brother, her mother, Debra Olsen,¹ as well as a roommate, Blanca Jacquez, and a friend Anna Dalton. Ms. Olsen placed Ms. Jacquez in charge of the house while she was away.

Shortly before 6:00 p.m., Ms. Dalton called 911 to report "an unwanted guest in the house and he's abusive," "an abusive ex to my friend and they have already had police contact." Rep. of Proc. (RP) at 154; Ex. 2, 4 sec. to 9 sec.; 1 min., 0 sec. to 1 min., 6 sec. Ms. Dalton reported that Mr. Sifuentes had snuck into the house, had a shotgun, cocked it, and was pointing it at someone. Ms. Dalton clarified to 911 that another person had narrated the information to her.

In response to the 911 call, Officer Cody Albertin responded to Ms. Olsen's address. Upon arrival, Officer Albertin obtained statements from Ms. Dalton, Ms. Jacquez, and Debra. Officer Albertin described both Ms. Dalton and Ms. Jacquez as

¹ Debra Olsen is referred to by her first name for clarity. No disrespect is intended.

“disturbed,” “in shock,” and “definitely afraid.” RP at 215. The officer reported Debra’s demeanor as very odd.

Mr. Sifuentez was later charged with second degree assault and unlawful possession of a firearm in the second degree. The trial court issued a warrant for Mr. Sifuentez’s arrest. On January 3, 2022, Officer Jimmy George contacted Victor Sifuentez,² Mr. Sifuentez’s father, and requested permission to search his apartment for Mr. Sifuentez. Victor consented. When officers entered Victor’s apartment, they found Mr. Sifuentez hiding in a dark corner of the kitchen. Thereafter, the officers searched the apartment and found a loaded 12-gauge shotgun, a large black suitcase, and documents containing Mr. Sifuentez’s name. According to Officer George, the shotgun “was spray painted kind of like Army green and black” and had a black pistol grip. *Id.* at 225.

In advance of trial, the court granted Mr. Sifuentez’s motion to exclude evidence of domestic violence Mr. Sifuentez may have committed against Ms. Olsen. Mr. Sifuentez also moved to exclude the recording of Ms. Dalton’s call to 911. The trial court listened to a recording of Ms. Dalton’s call, made on December 3, as well as a call Ms. Jacquez made to 911 on December 2. The trial court found Ms. Jacquez’s call was not relevant and ordered it excluded from admission. Relying on the excited utterance

² Victor Sifuentez is referred to by his first name for clarity. No disrespect is intended.

and present sense impression exceptions to the hearsay rule, the trial court allowed for the admission of Ms. Dalton's call.

At trial, Ms. Dalton's call was admitted into evidence and published to the jury. At the conclusion of the recording, defense counsel objected to Ms. Dalton's statements that described Mr. Sifuentez as abusive and that referenced a prior altercation where Mr. Sifuentez and Ms. Olsen had police contact. The court seemed puzzled that defense counsel did not object to the alleged prejudicial statements during the motions in limine, but granted Mr. Sifuentez's motion to strike the statements and to provide a curative instruction to the jury. The judge orally instructed the jury:

You heard evidence as to an alleged prior domestic violence. I've ruled that that evidence is inadmissible. Do not speculate as to the reason for my ruling. You are instructed to disregard that evidence and not consider it in your deliberations, the portion about the domestic violence, okay?

Id. at 161.

Ms. Jacquez testified that Ms. Olsen was not at the house on the evening of December 3 because she went to "stay at a safe place." *Id.* at 174. She testified that while in a room with Ms. Dalton, she heard Mr. Sifuentez's voice. When Ms. Jacquez left the room to investigate, Mr. Sifuentez pointed a "gray and black[. . .]like a greenish" gun at her and cocked it. *Id.* at 175. Upon being presented a photograph of the shotgun found in Victor's apartment, Ms. Jacquez identified it as the gun Mr. Sifuentez had pointed at her. Ms. Jacquez testified she was able to go back into her room and found

Ms. Dalton under the bed on the phone with 911. She then relayed to Ms. Dalton what had occurred.

The State inquired of Ms. Jacquez whether Mr. Sifuentes had returned to the house at any point after December 3. In response, Ms. Jacquez provided an answer that was unresponsive to the question:

[MS. JACQUEZ]: He came to drop off some cats that belonged to them. That—anyways, that’s another story that’s irrelevant

[STATE]: Okay.

[MS. JACQUEZ]: And *he had a gun* on his—on his like belt or—I don’t know what he was holding

[STATE]: Okay.

. . . .

[MS. JACQUEZ]: I know it’s *smaller than the one you showed me* (indicating).

[STATE]: The State has no further questions, your Honor.

Id. at 179-80 (emphasis added).

On cross-examination, defense counsel challenged Ms. Jacquez’s trial testimony against previous statements she had provided to law enforcement and statements given in a defense interview. Specifically, at trial Ms. Jacquez testified the gun was “gray and black[. . .]like a greenish.” *Id.* at 175. In a December 3 written statement, Ms. Jacquez described the gun as “gray with [a] black handle.” *Id.* at 202. Similarly, during a defense interview Ms. Jacquez recalled describing the gun as “gray and black.” *Id.* at 203. Additionally, in response to a question from defense counsel, Ms. Jacquez admitted she

had stated during the defense interview that she told the officers that Mr. Sifuentes was “looking for some man” on December 3, not Ms. Olsen as she had earlier testified. *Id.* at 204.

Officer John McCauley testified that Mr. Sifuentes stated during an interview that he had found the shotgun in the suitcase, admitted to handling it, and to placing it under the bed. Mr. Sifuentes also admitted to being at Ms. Olsen’s residence in early December. Mr. Sifuentes implied that his mother was at Ms. Olsen’s residence and would confirm that he did not have a firearm during the incident.

Detective Dan Long testified that Mr. Sifuentes had suggested to him that he may have been in Spokane visiting a friend on December 3. However, Mr. Sifuentes was unable to provide Detective Long with his friend’s address or phone number.

During deliberations, the jury requested permission to listen to Ms. Dalton’s call to 911. The court granted the request, but directed the bailiff to read the curative instruction to the jury before playing the recording.

Ultimately, the jury convicted Mr. Sifuentes as charged. During sentencing, defense counsel argued that Mr. Sifuentes was indigent and asked the court to impose only the mandatory legal financial obligations. In response, the court waived the criminal filing fee and the court-appointed attorney fee. The court ordered Mr. Sifuentes to pay the then-mandatory DNA collect fee and the VPA.

Mr. Sifuentes timely appeals.

ANALYSIS

On appeal, Mr. Sifuentes argues he was afforded ineffective assistance of counsel, that cumulative errors deprived him of a fair trial, and that the trial court improperly ordered the DNA collection fee and VPA.

I. WHETHER MR. SIFUENTEZ’S TRIAL COUNSEL WAS INEFFECTIVE

Mr. Sifuentes contends he was afforded ineffective assistance of counsel based on his trial attorney’s failure to request the “abusive” comments be redacted from the 911 recording and his attorney’s failure to object to Ms. Jacquez’s unsolicited statement that Mr. Sifuentes possessed a smaller gun on a subsequent occasion. Br. of Appellant at 13-14.

Defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Ineffective assistance of counsel claims are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). In reviewing the record, “Courts engage in a strong presumption counsel’s representation was effective.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To succeed on an ineffective assistance of counsel claim, a defendant bears the burden of showing (1) that their counsel’s performance fell below an objective standard

of reasonableness based on consideration of all the circumstances and, if so, (2) that there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *Id.* at 334-35. If either element is not satisfied, the inquiry ends. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). On appeal, "[i]f a defendant [appellant] centers their claim on ineffective assistance of counsel on their attorney's failure to object, then 'the defendant must show that the objection would likely have succeeded.'" *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019)).

The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Defense counsel's actions will not be viewed as ineffective or deficient when their conduct can be classified as a legitimate trial strategy or tactic. *Kylo*, 166 Wn.2d at 863. "A classic example of trial tactics is when and how an attorney makes the decision to object during trial testimony." *Vazquez*, 198 Wn.2d at 248 (citing *State v. Madison*, 53 Wn. App. 754, 762-63, 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 justifying reversal." *Id.* at 250 (quoting *Crow*, 8 Wn. App. 2d at 508).

If there are legitimate trial tactics involved, "[a] few or even several failures to object are not usually cause for finding that an attorney's conduct has fallen below the

objective standard of conduct.” *Id.* However, defense counsel’s failure to object to inadmissible evidence will result in reversal only if a defendant can show the outcome of the trial would likely have been different without the inadmissible evidence. *Id.* at 248-49.

Even if a defendant can show counsel’s performance was deficient, they must also affirmatively prove prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This requires more than simply showing that “the errors had some conceivable effect on the outcome.” *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant demonstrates prejudice by showing that the proceedings would have been different but for counsel’s deficient representation. *McFarland*, 127 Wn.2d at 337.

A. TRIAL COUNSEL’S FAILURE TO REQUEST REDACTION OF THE
“ABUSIVE” COMMENTS

Mr. Sifuentes contends his trial attorney was ineffective for failing to request redaction of the “abusive” statements from the 911 recording. Although we agree defense counsel’s performance was deficient, Mr. Sifuentes is unable to show prejudice.

The trial court granted Mr. Sifuentes’s motion to exclude prior acts of domestic violence he may have committed against Ms. Olsen. In Ms. Dalton’s call to 911, she described Mr. Sifuentes as “abusive” (Ex. 2, at 9 sec.) and “an abusive ex to my friend.” *Id.* at 1 min. to 1 min., 5 sec. Ms. Dalton added, “they have already had police contact.”

Id. at 1 min., 4 sec. to 1 min., 7 sec. Because the statements related to a subject matter that was earlier excluded from evidence, the trial court certainly would have ordered the redaction of the prejudicial statements from the recording had a request been made.

Albeit defense counsel sought exclusion of the entire recording, considering the trial court excluded evidence of Mr. Sifuentes's prior act of domestic violence against Ms. Olsen, it was unreasonable for defense counsel not to seek redaction of the prejudicial statements. Consequently, defense counsel was deficient in failing to request redaction of the "abusive" statements from the recordings.

However, to succeed on appeal, Mr. Sifuentes must still establish prejudice. In other words, Mr. Sifuentes has the burden of demonstrating that had the jury not heard the "abusive" comments, the outcome of the trial likely would have been different. In an attempt to establish prejudice, Mr. Sifuentes contends the curative instruction was "insufficient to mitigate the prejudice of the evidence that [he] was an abusive person" and that Ms. Jacquez suffered credibility problems. Br. of Appellant at 16.

Absent a showing to the contrary, juries are presumed to follow curative instructions. *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984). Because juries are presumed to follow curative instructions, Mr. Sifuentes bears the burden of rebutting the presumption with a contrary showing. Mr. Sifuentes contends the 911 recording was important to the jury's decision-making because they requested to

listen to the recording during deliberations, allowing them to hear the inadmissible statements a second time, and because the State's case was not strong.

The record does not show the jury considered the improper evidence it was twice instructed to disregard. Because there is no showing that the jury considered the inadmissible evidence in reaching its verdicts, Mr. Sifuentes has not overcome the presumption that the jury followed the instructions.

As to the strength of the State's case, Mr. Sifuentes argues that the State's case was weak due to Ms. Jacquez's lack of credibility. Specifically, Mr. Sifuentes alleges Ms. Jacquez gave varying accounts of the color of the shotgun, that she testified that Mr. Sifuentes was looking for Ms. Olsen on December 3 after earlier telling defense counsel that Mr. Sifuentes was looking for a man, and in testifying that Mr. Sifuentes broke into the home after previously telling defense counsel he had used a key.³

"Credibility determinations are reserved for the trier of fact," and an appellate court "'must defer to the [trier of fact] on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence.'" *State v. Rafay*, 168 Wn. App. 734, 843, 285 P.3d 83 (2012) (alteration in original) (quoting *State v. Liden*, 138 Wn. App. 110,

³ As it relates to the means by which Mr. Sifuentes entered the home, Ms. Jacquez did not admit to making a prior inconsistent statement. Ms. Jacquez testified that Mr. Sifuentes "broke in." RP at 202. When asked if she remembered ever telling the police Mr. Sifuentes had used a key, Ms. Jacquez responded, "No, I don't remember that." *Id.*

117, 156 P.3d 259 (2007)). The jury was able to decide the weight to be given to Ms. Jacquez's testimony after considering the prior inconsistent statements.

Mr. Sifuentes has failed to establish a reasonable probability that the outcome of the trial would have been different but for his trial counsel's failure to request a redaction of the recording.

B. FAILURE TO OBJECT TO AND MOVE TO STRIKE UNRESPONSIVE TESTIMONY

Mr. Sifuentes contends his counsel was ineffective for failing to object to Ms. Jacquez's unsolicited comment that he had possessed a smaller gun on a subsequent occasion. Mr. Sifuentes asserts the testimony was irrelevant under ER 402 and inadmissible propensity evidence under ER 404(b).

Evidence that Mr. Sifuentes possessed a smaller gun on a subsequent visit to Ms. Olsen's house was irrelevant and therefore inadmissible. Because the evidence was inadmissible, had defense counsel objected, the trial court likely would have sustained the objection. However, in recognizing the strong presumption that defense counsel's representation was effective, the failure to object to the unresponsive remark does not amount to an egregious circumstance warranting reversal. Indeed, defense counsel's decision not to object was a legitimate trial tactic.

The challenged comment was unresponsive to the State's question, "Did he come back to the house at any point?" RP at 179. Unelicited by the State, Ms. Jacquez gave a

lengthy answer primarily concerning cats only to conclude with, “[H]e had a gun on his—on his like belt” “smaller than the one you showed me.” *Id.* at 180. The State did not inquire any further and the jury was dismissed for the day. Defense counsel could reasonably have decided not to object in order to avoid emphasizing the testimony only for the jury to be instructed to disregard the testimony. Because the decision not to object was a legitimate trial strategy, defense counsel’s performance was not deficient.

Even if defense counsel was deficient in failing to object, Mr. Sifuentes has failed to establish he was prejudiced by the deficiency. Mr. Sifuentes cites *State v. Freeburg* for the proposition that “[e]vidence of weapons is highly prejudicial, and courts have ‘uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.’” 105 Wn. App. 492, 501, 20 P.3d 984 (2001) (alterations in original) (quoting *United States v. Warledo*, 557 F.2d 721, 725 (10th Cir. 1977)). However, even if the irrelevant evidence that Mr. Sifuentes carried a smaller gun on a subsequent occasion was considered, he must still demonstrate prejudice.

The unsolicited gun comment was not central to the State’s case. The State presented numerous witnesses, physical evidence, and statements made to law enforcement officers by Mr. Sifuentes. Further, defense counsel reminded the jury during summation that they could find Mr. Sifuentes guilty only if they believed he possessed a shotgun on December 3.

Mr. Sifuentes has failed to demonstrate that his trial counsel's failure to object was not a legitimate trial strategy. Even if defense counsel was deficient in failing to object, Mr. Sifuentes has failed to establish a reasonable probability the outcome of the trial would have been different but for trial counsel's failure to object.

Mr. Sifuentes was not afforded ineffective assistance of counsel.

II. CUMULATIVE ERRORS

Mr. Sifuentes argues that the cumulative effect of the errors deprived him of a fair trial. Because there is an absence of prejudicial errors, we disagree.

“‘The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless.’” *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 310, 457 P.3d 1144 (2020) (quoting *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated in part on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)). To determine whether cumulative errors necessitate reversal of a defendant's conviction, courts contemplate whether “‘the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.’” *Id.*

Mr. Sifuentes contends that “[c]ounsel's separate ineffectiveness described . . . built upon each other augmenting their prejudicial effect.” Br. of Appellant at 24. Having concluded that no prejudicial errors exist, Mr. Sifuentes's argument fails.

III. LEGAL FINANCIAL OBLIGATIONS

Mr. Sifuentes contends that due to recent changes in the law, the VPA and the DNA collection fees must be struck from his judgment and sentence. The State concedes. We accept the State's concession.

Formerly, RCW 7.68.035(1)(a) (2016) required the imposition of a VPA on any adult found guilty of a crime in superior court. On July 1, 2023, an amendment to RCW 7.68.035 went into effect, requiring trial courts to refrain from imposing a penalty assessment if, at the time of sentencing, the defendant was found to be indigent as defined in RCW 10.01.160(3). *See* LAWS OF 2023, ch. 449, §§ 1, 4. Amendments to statutes that impose costs upon conviction apply to cases pending on appeal. *See In re Per. Restraint of Eastmond*, 173 Wn.2d 632, 638, 272 P.3d 188 (2012); *State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018).

Similarly, under former RCW 43.43.7541 (2018), a sentencing court was required to impose a DNA collection fee on every sentence imposed for the crimes specified in RCW 43.43.754. Effective July 1, 2023, the legislature amended RCW 43.43.7541 by removing language that authorized imposition of the DNA collection fee. *See* LAWS OF 2023, ch. 449, § 4.

Mr. Sifuentes's case is pending on direct appeal and is not yet final. Although the sentencing court did not check the indigency box on the judgment and sentence, it seemed to have found him to be indigent based on its decision to impose only mandatory

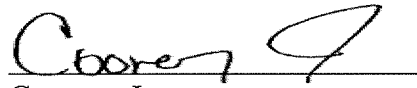
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legal financial obligations. Therefore, the amended statutes apply. We direct the trial court to strike the VPA and DNA collection fee from the judgment and sentence.

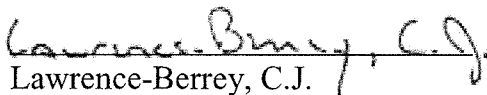
CONCLUSION

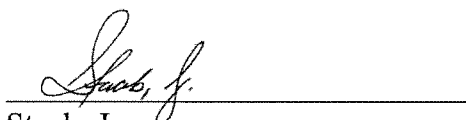
Mr. Sifuentes's trial attorney was not deficient in her performance. In concluding defense counsel was not ineffective, Mr. Sifuentes's cumulative error argument fails. We remand to the trial court to strike the VPA and DNA collection fee from the judgment and sentence.

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.


Cooney, J.

WE CONCUR:


Lawrence-Berrey, C.J.


Staab, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

July 25, 2024 - 1:18 PM

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