No. 1041993

(COA Number 872095)

THE SUPREME COURT

OF THE STATE OF WASHINGTON

State of Washington

v.

Stephen Vincent Vasquez

STATE'S ANSWER TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

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ISSUES PRESENTED

1. Mr. Vasquez claims the Court of Appeals erred in a variety of ways. Has he presented a basis for this Court to grant review under RAP 13.4(b)?

STATEMENT OF THE CASE

The factual and legal history of the case are fairly set forth in the Opinion of the Court of Appeals. Additional detail is given below where necessary.

ARGUMENT

I. Under RAP 13.4(b), the Court grants review only under limited circumstances.

The sole issue before this Court is whether to grant review of the Court of Appeals' decision. Under RAP 13.4(b), review shall be granted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Vasquez raises numerous issues, all in a conclusory fashion and without legal or factual support. He has failed to establish a basis for review.

II. Mr. Vasquez's Petition fails to raise a reviewable issue.

A. The court did not err by denying Vasquez's motion for new counsel.

Vasquez claims that communications between him and his counsel completely broke down, and that this is reflected in the record. Petition 12.[1] He argues that the trial court erred by denying his motion for new counsel. Petition 18. The denial of a motion for new counsel is reviewed for abuse of discretion. *State v. Lindsey*, 177 Wash. App. 233, 248, 311 P.3d 61 (2013). The Court should weigh "(1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel." *Id.* at 249.

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[1] The pages of the Petition are not numbered; page references are based on the page numbers of the PDF document.

The record does not support Vasquez's claim. He claims that "Judge Grimm recognized the complete breakdown in communication," citing RP 103-105, and in particular claims that his counsel did not convey plea offers to him. Petition 12-14. The court, however, made no such finding. In fact the court said "I'm not finding that there is sufficient -- a sufficient showing that his rights would be substantially impaired or denied if we were to proceed to trial with Ms. Burica and Mr. Haas as counsel of record." RP 103-04. The court also said that it accepted counsel's "representation to the Court that all settlement offers have been -- from the State have been relayed to his client." RP 103. The State put the full history of the offers it had made on the record. RP 95. And Vasquez himself acknowledged that he had been informed of the State's previous offer. RP 97-98. The record does not support Vasquez's claim that the court erred by refusing to appoint new counsel.

He claims that counsel did not keep him informed about issues related to the admissibility of evidence, and suggests that counsel failed to file motions to suppress. Petition 13. He refers to RP 170, where he complained to the court about the admission of photos from his Ignition Interlock Device (IID), and 208, where he complained that counsel should have filed a motion to suppress an identification. Petition 13. The only support in the record that his attorneys did not communicate with him about these matters is his own statements. CP 533-41. See Opinion 9 (Vasquez's "assertions…are not bolstered by credible evidence beyond what is written in his own letter[.]") Even if Vasquez's attorneys did not communicate with him about the admissibility of certain evidence, Vasquez fails to show either that this fell below a standard of professional competency, or that he was prejudiced thereby.

Vasquez claims that his attorneys deceived him as to several issues, and that if they had not, he would have accepted a plea deal. Petition 13-14. He specifically refers to the issue of severance of the charges. Petition 13-14. The record belies Vasquez's claim that he was deceived as to this issue. The defense made a tactical decision not to seek severance, for several reasons that were discussed in open court. First, if Vasquez's charges were severed and he were convicted, he could receive consecutive sentences, resulting in effectively a life sentence. RP 165. Second, the defense's theory of the case was that Vasquez was misidentified as the robber. RP 166. Severing the charges would have mean needing to win on that issue five times in five separate trials, instead of once. RP 166.

Finally, even if the charges had been severed, evidence of all the crimes would have been admissible in each trial, as ER 404(b) other bad act evidence relevant

to the issue of identity. Opinion 4. The court evaluated the facts of the different crimes and found that they were similar, with Vasquez wearing the same clothing and using a knife in each, and with the crimes occurring in a small geographic area and short period of time. 2RP 25-27. Considering purposes to which the evidence might be put, the court said, "[T]here's identification. We talk about what are in 404(b) are there distinctive features as to each case or similarities or anything unusual." 2RP 27. The court's written order said that each incident was "part of a series of events that featured nearly identical circumstances," and so "The evidence in each case that is similar to the evidence in the others is cross-admissible[.]" CP 104. Vasquez fails to show that a motion to sever would have been granted. And he was not prejudiced because even if a motion would have been granted, the evidence of all of the robberies would have been admissible in each trial.

B. Vasquez's ineffective assistance of counsel claims lack merit.

1. The ineffective assistance of counsel standard

To prove ineffective assistance of counsel, Vasquez must show first that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Second, he must show prejudice, i.e., that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

"If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts[.]" *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "If the petitioner's evidence is based on knowledge in the possession of others, he … must present their affidavits

or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify[.]" *Id.* "[T]he petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Id.*

To make the requisite showing of prejudice from counsel's performance, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

To the extent that Vasquez's claims of IAC are based on failure to move to suppress evidence, Vasquez bears the burden of demonstrating that "the trial court

likely would have granted the motion if made," and that he was prejudiced by counsel's failure to make the motion. *State v. McFarland*, 127 Wash. 2d 322, 334, 899 P.2d 1251 (1995).

2. Vasquez does not show that his attorneys failed to file meritorious motions.

Vasquez claims that his attorneys were ineffective for failing to file several motions. Vasquez claims that evidence derived from the police pursuit should have been suppressed, because there were no grounds to pursue under RCW 10.116.060. Petition 15. He fails provide any legal authority that a violation of the statute is grounds to suppress evidence. Regardless, he fails to demonstrate why the pursuit was not justified under the statute. The statute permits pursuit when there is reasonable suspicion of a crime, pursuit is necessary to identify or apprehend a person, and the person poses a threat to safety greater than the threat posed by the

pursuit. RCW 10.116.060(1)(a-c). The statute also imposes certain requirements on police to notify supervisors. RCW 10.116.060(1)(d).

Here, Vasquez was fleeing from an armed robbery and was suspected of an ongoing a series of armed robberies in close succession, so conditions a-c were met. Vasquez fails to demonstrate that police failed to comply with the notice requirements. He fails to state whether the jurisdiction had more or fewer than 15 sworn officers, and therefore whether paragraph (d)(i) or (d)(ii) applied. He also fails to meet his burden to provide citations to the record as to what police did or did not do to comply with the requirements of either (d)(i) or (d)(ii), or

to provide affidavits if he is relying on facts outside the record. His claim lacks both legal and factual support.[2]

Vasquez also claims that witness identifications should have been suppressed because the witnesses were coerced. Petition 15. His citation to the record—Pretrial RP 207-08—does not provide any basis to think that witnesses were coerced.

He also claims that an officer's identification of him should be suppressed because the officer said he did not see the suspect's face. Petition 15. He does not show why this would be a reason to suppress rather than to impeach or challenge the officer's testimony—which the defense did do. RP 601-04.

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[2] Okanogan County Sheriff's Sergeant Terry Shrable testified that although he tacitly authorized the pursuit by not telling Deputy Orr to cease, he did not explicitly tell Orr that the pursuit was authorized. RP 754, 767. Shrable testified that Okanogan County police required pursuits be authorized by a sergeant. RP 754. Shrable did not testify as to the requirements of the statute.

He argues that other witness identifications should have been suppressed. Police did treat one witness, Lee Morrison, as a confirmation witness, telling him that they thought the suspect on video was Vasquez and asking him to confirm. RP 659-60, 802. Vasquez fails to meet his burden to show that this was unduly suggestive under the circumstances. Furthermore, he was not prejudiced, as there were multiple ways in which he was identified. (See discussion below.)

Finally, he argues that a video or audio recording should have been suppressed because it was distorted, but fails to show why this would be a basis to suppress or to specify what the recording showed. Petition 16.

3. Counsel was not ineffective in failing to object to the State's closing argument.

Vasquez argues that it was ineffective assistance of counsel for his attorney to fail to object various comments by the State in closing argument. He argues that the

prosecutor “testif[ied] to the truthfulness of the witness,” referring to the prosecutor’s comments in closing argument on the credibility of Lee Morrison. Petition 17, citing RP 1129, 1158. Morrison and Vasquez had trained in wrestling and mixed martial arts together and were close friends. RP 801. Police showed Morrison videos of the robberies, and according to police, Morrison was 100 percent sure that the robber was Vasquez. RP 685. When Morrison testified, however, he claimed that he could not be certain the robber on video was Vasquez, and denied ever telling police that he was 100 percent certain. RP 804-05. In closing, the prosecutor argued:

> Now, Mr. Morrison came as a sur-- more of a surprise to me than probably you. But, you know, the state usually presents witnesses that are relevant to their case. And do you think I would have called Mr. Morrison had I known he was gonna show up and say, "I didn't identify anybody." He gave "the nod" nod. You get to judge credibility. You saw it. He gave "the nod" nod to Stephen. And then he sat there and smirked. Had he not told multiple cops that "Yeah, I'm sure that's Stephen", would I have called him?

RP 1129. In rebuttal the State argued:

> [Y]ou saw [Morrison's] demeanor, and you get to be the judge of credibility. And he told multiple officers that that was Stephen Vasquez. And then he came in here on an agenda and an attitude. And it didn't feel important to bring somebody back in and waste more time about: Yes, he did. Yes, he did. Blah, blah, blah. You saw his demeanor. You can judge his credibility.

RP 1158-59.

"If a defendant centers their claim of ineffective assistance of counsel on their attorney's failure to object, then the defendant must show that the objection would likely have succeeded. 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. Vazquez*, 198 Wash. 2d 239, 248, 494 P.3d 424 (2021) (citations, internal quotation marks omitted). As well as showing that the objection would likely have succeeded, the defendant must show a

reasonable probability that the objection would have changed the result of the trial. *Id.* at 267.

"Counsel may comment on a witness's veracity or invite the jury to make reasonable inferences from the evidence so long as counsel does not express a personal opinion." *State v. Stover*, 67 Wash. App. 228, 232, 834 P.2d 671 (1992). "[C]ounsel may comment on a witness' veracity as long as he does not express it as a personal opinion and does not argue facts beyond the record." *State v. Smith*, 104 Wash. 2d 497, 510–11, 707 P.2d 1306 (1985). "A prosecutor may not, however, directly or indirectly state a personal belief that a witness was telling the truth." *State v. Sandoval*, 137 Wash. App. 532, 540, 154 P.3d 271 (2007), abrogated on other grounds by *State v. Scanlan*, 193 Wash. 2d 753, 445 P.3d 960 (2019). "A prosecutor can tell the jury to believe one witness over another. Emphasizing the reliability of one witness over another is not witness vouching."

Id. at 541. "[P]rosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility, and prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion." *State v. Allen*, 176 Wash. 2d 611, 631, 294 P.3d 679 (2013) (citation omitted).

Here, the implication of the State's argument was that based on the evidence, including Morrison's demeanor while testifying and his prior statements to police, the jury should credit his statement to police that he was 100 percent sure that the robber was Vasquez, and not his trial testimony that he could not be sure. This was within the State's wide latitude to argue inferences from the evidence, and was not clearly and unmistakably a statement of personal opinion. In making the argument, the State reminded the jury that it was the sole judge of credibility.

The State's suggestion that Morrison's testimony was a surprise and that the State would not have called him to testify if the prosecutor had known he would deny identifying Vasquez were perhaps inapt, but stopped short of offering a personal opinion or suggesting facts not in evidence. The prosecutor did not suggest any reason for her surprise other than that Morrison's testimony conflicted with his statements to police, which were part of the trial evidence.

Her argument was not so clearly and unmistakably an expression of personal opinion that it was deficient performance not to object to it. Attorneys have wide latitude in choosing trial strategy, and Vasquez's counsel could reasonably have decided that interrupting the State's closing argument with an objection would have had little benefit and would have risked focusing the jury's attention on Morrison's statements identifying Vasquez to police and his apparent bias at trial. Vasquez has not

shown that his attorney's decision not to object was deficient performance.

Furthermore, there was no prejudice to Vasquez. The evidence identifying Vasquez as the robber was overwhelming. Vasquez fled from one of the robberies in his car. 1RP 293, 572-73. He abandoned the car and escaped, but the car was registered to him and contained clothing that he wore during the robberies, knives, and cartons of cigarettes stolen in the robberies. 1RP 298, 300. Deputy Orr, who pursued him, identified the man who fled from the car as Vasquez. RP 585. Vasquez's car was equipped with an ignition interlock device (IID) that recorded when the car ignition was on and the location of the car via GPS. 1RP 865-66; Exh. 51. The IID placed Vasquez's car near the stores at the times of the robberies; on some occasions it also took photos showing Vasquez was the driver. 1RP 864-919. Philip Skirko, who had been Vasquez's employer for three

years, identified Vasquez from the robbery videos based on how he moved and talked. RP 832-34. The jury also heard the police testimony that Morrison identified Vasquez with 100 percent certainty from the video. In light of the overwhelming evidence of identity and the nature of the prosecutor's remarks, there was no prejudice to Vasquez.

4. Vasquez's remaining ineffective assistance claims lack support.

Vasquez claims that it was objectionable misconduct for the State to ask the jury to mark "yes" on the special verdict forms. Petition 17. Asking the jury to find for the State is not misconduct. Vasquez also makes a conclusory argument that the State used inflammatory language, without identifying the language to which he refers but referring to RP 1114 and 1154. Petition 17. At RP 1114 the State argued, "And in this particular case the devil is in the details. You've heard that saying, 'the devil

is in the details'. In this particular case it's Mr. Vasquez who is in the details." At RP 1154 the State argued, "that's how addicts feed something, alcohol, their habits. They steal. Drugs, whatever." Vasquez's conclusory argument fails to overcome the presumption that his attorneys performed adequately, or to meet his burden to show prejudice.

He claims that the prosecutor testified by saying a letter Vasquez wrote "kind of reads like a confession." RP 1130. But the prosecutor read the letter to the jury, and characterizing the letter as a confession was a reasonable comment on it. "At trial, counsel are permitted latitude to argue the facts in evidence and reasonable inferences in their closing arguments." *State v. Dhaliwal*, 150 Wash.2d 559 at 577, 79 P.3d 432 (2003).

Vasquez claims that the prosecutor testified by telling the jury that the knives seized were deadly weapons. Petition 17; RP 1130. The jury instructions,

however, said that a knife with a blade over three inches is a deadly weapon, and the testimony was that the knives had blades of three and one-half or four inches. RP 765, 855, 1110. The State argued properly from the instructions and evidence.

Vasquez argues that his attorneys should have requested limiting and lesser included offense instructions, but fails to state what specific instructions should have been requested or why, or to provide any citation to the record or other support. Petition 17.

Vasquez's claims that the court and the prosecution were prejudiced against him, and that a venue change should have been granted, are unsupported by facts in the record or by citation to legal authority. Petition 18.

Vasquez's claim that he was forced to make a Hobbson's choice between a speedy trial or prepared counsel is belied by the record. Vasquez explicitly agreed to the continuance on June 26, 2022, and voiced no

objection to the continuance granted at his attorneys' request on October 3, 2022. Pretrial RP 46-53. When his case was continued on October 3, it was set for trial on December 6. CP 120. There was an additional short continuance order entered November 28, 2022, signed by defense counsel. CP 126. Trial began on January 10, 2023. RP 6.

Finally, Vasquez provides no citation or other support for his claims about a sleeping juror or about prejudicial social media posts by police. Petition 25.

CONCLUSION

Mr. Vasquez has failed to present any issue that is reviewable under RAP 13.4(b). Therefore this Court should deny review.

This document contains 5000 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 17rd day of June, 2025.

Respectfully submitted,

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