SUPREME COURT NO. 96231-6

NO. 75748-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LO SHENG SAELEE,

Petitioner.

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

The Honorable Tanya Thorp, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Lo Sheng Saelee, the appellant below, seeks review of the Court of Appeals decision in State v. Saelee, ___ Wn. App. 2d ___, 2018 WL 3026074, No. 75748-2-I (Jun. 18, 2018) (Appendix A), following denial of his second motion for reconsideration on July 23, 2018 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Saelee was charged with possession of a controlled substance (cocaine) with intent to manufacture or deliver. At trial, law enforcement testimony established that there was no amount of narcotics that would be "considered kind of a personal-use amount." Evidence also established that Saelee and the person who requested an eight-ball did not mention drugs, the exchange of money, or anything else related to sales. The principal law enforcement witness conceded that Saelee did not perform the activities that the officer had noted in a warrant application that narcotics traffickers "often" or "commonly" perform. Viewed in the light most favorable to Saelee, did this evidence support an inference that the lesser included crime of simple possession of a controlled substance was committed to the exclusion of the greater possession with intent to deliver charge such that the trial court erred in refusing to give the lesser included instruction to the jury?

2. At trial, one of Saelee's theories was that the cocaine in question did not belong to him. One of the reasons the trial court denied the lesser included instruction of simple possession was that "[t]he only argument from the defense is that it wasn't his." Did the trial court invade the province of the jury whose exclusive role it is to determine what weight to give competing or conflicting defense theories?

3. Does the poorly and cursorily reasoned Court of Appeals decision warrant review under all RAP 13.4(b) criteria?

C. STATEMENT OF THE CASE

The State charged Saelee with unlawful possession of cocaine with intent to manufacture or deliver. CP 1. Police agreed not to refer drug charges against Daedra Jotta to the prosecutor's office if she called her dealer to obtain an eight ball of cocaine. RP 547-49. An officer listened to Jotta call someone she referred to as "Lo," asking if she could get an eight-ball. RP 552-53. Jotta arranged a meetup in Seattle's International District. RP 553.

Jotta identified Saelee's car at the appointed meeting place; arrest teams moved in and Jotta identified the driver as Saelee. RP 333-34, 556-58. Saelee was arrested; no narcotics were found on his person following a search incident to arrest. RP 379.

Police obtained a search warrant for Saelee's car. RP 335-36, 414. When executed, police located crack and flake cocaine in front of the driver's

seat and in the vent under the center dash, packed in baggies. RP 418-21, 507-08. Cocaine residue was also found in packaging in the trunk. RP 417, 424. In its application for the search warrant, the State provided so-called "SUPPORTIVE EVIDENCE SUPPORTING SEARCH OR ITS SCOPE," which contained a litany of what "narcotics traffickers" "often" or "commonly" do. CP 46-48.

Saelee requested a lesser included offense instruction on simple possession. CP 51, 53-54; RP 523. The trial court denied the lesser included instruction, stating, "the Court sees before it only evidence and only argument from the State presenting possession with intent to deliver. The only argument from the defense is that it wasn't his." RP 622. However, officer Matthew Pasquan testified that there is no amount of narcotics that is considered solely a person use versus sale amount, that Saelee and Jotta never discussed money or pricing, or the quality of the product when Jotta asked for an eight-ball, and that there was no evidence that Saelee undertook several actions that are typical for narcotics dealers listed in the warrant application. RP 542, 572-73, 580-91.

The jury convicted Saelee of possession with intent to deliver. CP 60; RP 690-92. The trial court imposed a standard range sentence of 70 months. CP 86; RP 710.

Saelee appealed.[1] CP 93. He argued that the court erred in refusing to give a lesser included instruction on simple possession. Br. of Appellant at 4-10; Reply Br. at 1-4. Specifically, he pointed out that prosecution's principal witness, Officer Pasquan, indicated there was no amount that was a personal use amount and that Saelee and snitch witness Jotta never discussed money or the quality of the product, contending that this evidence alone supported an inference that Saelee possessed the drugs with intent to use rather than sell. Br. of Appellant at 6; Reply Br. at 1-3. Saelee also relied on the fact that Pasquan recited several actions frequently undertaken by drug dealers in his search warrant application but was forced to admit to the jury that Saelee undertook none of these actions. Br. of Appellant at 6-8; Reply Br. at 2-3. Finally, Saelee asserted that the trial court violated longstanding Washington Supreme Court and Court of Appeals precedent in denying the lesser included instruction merely because it was inconsistent with Saelee's alternative theory that the drugs did not belong to him. Br. of Appellant at 8-10; Reply Br. at 3-4.

The Court of Appeals rejected Saelee's arguments, failing even to acknowledge (1) Pasquan's testimony that generally there is no amount of cocaine that is considered just a personal use amount and (2) the trial court's

[1] Although Saelee appealed in March 2015, the notice of appeal was not forwarded to the Court of Appeals until September 2016.

refusal to instruct on the lesser included simple possession based in part on Saelee's inconsistent defense that the cocaine was not his.

D. ARGUMENT IN SUPPORT OF REVIEW

THE COURT OF APPEALS DECISION ON THE AVAILABILITY OF LESSER INCLUDED INSTRUCTION OF SIMPLE POSSESSION CONFLICTS WITH THIS COURT'S AND ITS OWN DECISIONS, AND UNDERMINES THE CONSTITUTIONALLY REQUIRED BEYOND-A-REASONABLE-DOUBT STANDARD

Under RCW 10.61.006, a defendant is entitled to an instruction on a lesser included offense upon showing two conditions. First, under the legal condition, each of the elements of the less offense must be a necessary element of the offense charged. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Second, under Workman's factual prong, the evidence presented at trial must support an inference that the lesser crime was committed to the exclusion of the greater. Id.

Simple possession of a controlled substance is a lesser included offense of possession with intent to manufacture or deliver. State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975). The question is thus whether the evidence presented at trial supported a lesser included instruction as a factual matter under Workman's second prong. The answer is yes and the Court of Appeals and trial court erred in straining to conclude otherwise.

"When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." State v. Fernandez Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The lesser included instruction must be given "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" Id. at 456 (alteration in original) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). "[T]he court cannot weigh the evidence; judgment as to the credibility of witnesses and the weight of evidence is the exclusive function of the jury." State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), abrogated on other grounds by State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013).

Evidence presented at trial amply supported Saelee's request for a lesser included instruction on simple possession of a controlled substance. In concluding otherwise, the Court of Appeals at once erroneously weighed the evidence and failed to consider the evidence in the light most favorable to Saelee, conflicting with the precedent cited in the preceding paragraph and thereby meriting RAP 13.4(b)(1) and (2) review.

Narcotics officer Matthew Pasquan was the principal witness at trial. He stated there is no "general kind of amount that would be considered kind of a personal-use amount." RP 542. This testimony alone, viewed in the light

most favorable to Saelee, supported a lesser included offense instruction. Tellingly, the Court of Appeals failed even to acknowledge this personal-use-amount testimony. Because this failure cannot be squared with the command to view the evidence in the light most favorable to the party requesting the instruction, the Court of Appeals decision conflicts with Workman, Fernandez Medina, Warden, and Williams, cited above. Review is therefore appropriate. RAP 13.4(b)(1)–(2).

Pasquan also stated very clearly for the jury that Saelee did not perform many of the activities that drug dealers normally perform. Pasquan applied for a search warrant to search Saelee's car, including a bulleted list of what "narcotics traffickers" "often" or "commonly" do. CP 46-48. During cross examination, defense counsel questioned Pasquan extensively about this list, prompting Pasquan's multiple concessions that Saelee did not do any of these activities, which included securing drugs or money in locked containers, keeping ledgers, maintaining photographs of associates and property, possessing large quantities of paraphernalia, using aliases, attempting to launder money in foreign and domestic banks, travelling to major drug distribution centers in Mexico and Canada, and availing themselves of "various methods of transportation" including commercial airlines and rental cars. RP 580-88; see also Br. of Appellant at 6-7. This testimony—that Saelee didn't do what drug dealers normally do—amply supported an inference that

Saelee possessed narcotics without the intent to deliver them, particularly when the evidence is viewed in the light most favorable to Saelee.

Nonetheless, the Court of Appeals held that the absence of "evidence that would typically indicate intent to deliver" does not "support[] an inference that only the lesser offense was committed, to the exclusion of the greater." Appendix A at 4. Not only is does this conclusion fail to consider the evidence in the light most favorable to Saelee (meriting review under RAP 13.4(b)(1)–(2)), it also undermines the reasonable doubt standard.

Saelee's jury was instructed that a reasonable doubt "may arise from the evidence or lack of evidence." CP 67 (emphasis added). "[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." Beck v. Alabama, 447 U.S. 625, 634, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (quoting Keeble v. United States, 412 U.S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). Because Pasquan's admissions regarding the absence of what drug dealers normally do could have been used by the defense to create a reasonable doubt in the minds of jurors as to whether Saelee acted with intent to deliver, the lesser included instruction on simple possession should have been given to the jury. The Court of Appeals' contrary view undermines the reasonable doubt standard itself and invades the province of

the jury, necessitating constitutional review under RAP 13.4(b)(1), (2), and (3).

The Court of Appeals also declined to acknowledge the record with respect to Saelee's claim that the trial court erred in denying the lesser included offense because it was inconsistent with Saelee's theory that the drugs did not belong to him. There is no requirement that all defenses be consistent to receive a lesser included offense instruction. Fernandez Medina, 141 Wn.2d at 457-61.

For this holding, the Fernandez Medina court relied primarily on Division One's decision in State v. McClam, 69 Wn. App. 885, 850 P.2d 1377 (1993). McClam was charged with possession of cocaine with intent to deliver; McClam testified and denied possessing cocaine at all. 69 Wn. App. at 887-88. However, some of the evidence supported an inference that McClam did not possess with intent to deliver, and McClam asked for a lesser included simple possession instruction which was denied. Id. at 888-89. Division One reversed: "Although there must be affirmative evidence from which a jury could find the facts of the lesser included offense as distinct from the charged offense, there is no requirement in the case law that the evidence must come from the defendant or that the defendant's testimony cannot contradict this evidence." Id. at 889. "[A]n inconsistent defense goes to the

weight of, but does not entirely negate the affirmative evidence which requires the instruction in the first place." Id. at 890.

The Fernandez Medina court adopted McClam's reasoning entirely. The denial of a lesser included offense instruction based on inconsistency with another defense theory

> would require the judge presiding at a jury trial to weigh and evaluate evidence, and would run afoul of the well-supported principle that "[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of the witnesses."

Fernandez Medina, 141 Wn.2d at 460 (alteration in original) (quoting State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)).

The Court of Appeals decision claims "the trial court did not decline to give a lesser included offense instruction because it might be inconsistent with Saelee's theory of denial of possession." Appendix A at 5. But the trial court denied the lesser included offense instruction in part because "[t]he only argument from defense is that [the controlled substance] wasn't [Saelee's]." RP 622. Thus, it could not clearer on this record that at least one of the reasons that the trial court denied Saelee's simple possession instruction was that it was inconsistent with his non-ownership or non-possession theory. Nor could it be clearer that the trial court's denial was error under Fernandez Medina, 151 Wn.2d at 460, and McClam, 69 Wn. App. at 890, because it usurps the

role of the jury as the factfinder whose exclusive province is to determine what weight to give competing or inconsistent defense theories. The Court of Appeals decision conflicts with both Fernandez Medina and McClam, meriting RAP 13.4(b)(1) and (2) review.

Finally, this case presents a clear example of Division One of the Court of Appeals turning the constitutional guaranty of the right to appeal into a sham. As discussed, Saelee has contended throughout this appeal that the testimony that there is no "general kind of amount that would be considered kind of a personal-use amount," viewed in the light most favorable to the defense, provides all the affirmative evidence necessary to support a lesser included simple possession instruction. But, curiously, the Court of Appeals decision reads as though this statement was not in evidence.

Along similar lines, the Court of Appeals decision states, "[t]he trial court did not decline to give the lesser included offense instruction because it might be inconsistent with Saelee's theory of denial of possession." Appendix A at 5. But the record flatly contradicts this statement. The trial court denied the lesser included offense instruction because, in the court's own words, "So at this time, the Court sees before it only evidence and only argument from the State presenting possession with intent to deliver. The only argument from defense is that it wasn't his." RP 622. Here, too, the Court of Appeals refuses even to acknowledge the trial court's clear statement that it was denying the

lesser included instruction at least in part because it was inconsistent with Saelee's theory of denial of possession. The Court of Appeals, thus, appears content to simply ignore the facts that support a criminal appellant's arguments.

Washington's constitutional right to appeal means nothing if the Court of Appeals is not expected to address facts contained in the appellate record that support the arguments an appellant raises. This is a matter of substantial public importance about the very nature of the constitutional right to appeal that merits RAP 13.4(b)(3) and (4) review.

E. CONCLUSION

Because Saelee satisfies every RAP 13.4(b) review criterion, he asks that this petition be granted.

DATED this 22nd day of August, 2018.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. LO SHENG SAELEE, Appellant.	No. 75748-2-I DIVISION ONE UNPUBLISHED OPINION FILED: June 18, 2018

APPELWICK, C.J. — A jury found Saelee guilty of possession with intent to deliver. Saelee argues that the trial court erred in not giving a lesser included offense instruction of possession, and that the imposition of mandatory LFOs against him is unconstitutional. We affirm.

FACTS

Seattle Police asked a drug informant to make contact by phone with a drug dealer. The informant had purchased drugs from this dealer before. The call was on speakerphone with police present so that police could hear what was said. The informant asked for an "eight ball.[1] The dealer and the informant agreed to meet at 12th Avenue South and South King Street in Seattle.

[1] An eight ball refers to roughly an eighth of an ounce of cocaine. The typical rate on the street for an eight ball is $200 to $300.

With the help of the informant, police apprehended the dealer at the arranged location. Police identified him as Lo Saelee. They recovered multiple packages of crack cocaine from a hidden compartment inside the vehicle.

The State charged Saelee with one count of possession with intent to deliver. The charges proceeded to trial. Saelee requested a lesser included offense instruction of possession of a controlled substance. The trial court denied this request. The jury found Saelee guilty of possession of a controlled substance with intent to deliver cocaine. As part of Saelee's sentence, the trial court imposed mandatory legal financial obligations (LFOs) for a mandatory victim penalty assessment (VPA) and deoxyribonucleic acid (DNA) collection fee.

Saelee appeals.

DISCUSSION

Saelee makes two arguments. First, he argues that the trial court erred by not giving a lesser included offense instruction for simple possession, because the facts warranted it. Second, he argues that RCW 7.68.035 and RCW 43.43.7541, which impose mandatory LFOs, are unconstitutional as applied to defendants who do not have the current or future ability to pay.

I. Lesser Included Offense Instruction

Saelee first argues that the trial court erred by not giving a lesser included offense instruction. He argues that the facts at trial, when viewed in the light most favorable to Saelee, supported the conclusion that Saelee committed only simple possession of a controlled substance, to the exclusion of possession with intent to deliver.

When a defendant is charged with an offense, the jury may find the defendant guilty of an offense that is necessarily included within that with which he or she is charged. RCW 10.61.006. Under State v. Workman, a defendant is entitled to an instruction on a lesser included offense if two elements are met. 90 Wn.2d 443, 447, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be an element of the offense charged. Id. at 447-48. Second, the evidence must support an inference that the lesser crime was committed. Id. at 448. Possession is a lesser included offense of possession with intent to deliver. State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975). Thus, the first, legal prong is not at issue. The outcome of this case turns on resolution of the factual prong.

When substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). The evidence must be viewed in the light most favorable to the party requesting the instruction. Id at 455-56. To satisfy the factual prong, the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt. Id. at 456. We review the decision not to give a lesser included offense instruction based on the facts of the case for an abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

This is a case arising out of an arranged drug distribution meet-up, not a happenstance discovery of Saelee in possession of narcotics. The unrefuted evidence at trial was that the informant spoke with someone named Lo on the phone. The informant arranged to buy an eight ball of narcotics from him at a specific time and place. Police found Saelee, at the arranged time and place, with prepackaged amounts of cocaine that officers testified were typical of drug dealing.

Saelee argues that the State did not present certain evidence that would typically indicate intent to deliver. Seattle Police Department Narcotics Detective Matthew Pasquan testified that drug dealers commonly: use storage lockers, keep transaction records, keep jewelry, have incriminating photographs, have processing paraphernalia, possess weapons, use aliases, launder money, travel abroad, and use rental vehicles. Pasquan admitted that none of these facts were present in Saelee's case. Saelee notes the informant's call did not discuss money or quality. Saelee argues that these deficiencies, apparent in the testimony, support an inference that Saelee did not have intent to deliver, "given that he did not do most of the activities that, according to the State's principal witness, drug dealers commonly do." The presence of those additional facts may have strengthened the State's case. However, the fact that they are not present is not substantial evidence supporting an inference that only the lesser offense was committed, to the exclusion of the greater.

Saelee argues that Fernandez-Medina, and State v. McClam, 69 Wn. App. 885, 850 P.2d 1377 (1993) nonetheless require reversal. Those cases generally hold that a trial court must not decline to give a lesser included offense instruction

merely because it would be inconsistent with one of the defense's theories. See Fernandez-Medina, 141 Wn.2d at 461; McClam, 69 Wn. App. at 890. It is the jury's job to determine whether to believe a theory of a lesser included offense, even if it might be inconsistent with another defense theory. McClam, 69 Wn. App. at 890 n.4. However, the trial court did not decline to give the lesser included offense instruction because it might be inconsistent with Saelee's theory of denial of possession. It denied the lesser included instruction, because Saelee's theory of simple possession was not supported by substantial evidence, to the exclusion of possession with intent to deliver. This authority does not require reversal.

Saelee fails to identify any evidence that would require an instruction of mere possession, to the exclusion of intent to deliver. The trial court did not abuse its discretion in refusing to instruct the jury on the lesser included offense possession of a controlled substance.

II. LFOs

Saelee next argues that the mandatory LFOs imposed against him under RCW 7.68.035 and RCW 43.43.7541 are unconstitutional as applied to him, because the trial court did not inquire into Saelee's ability to play. RCW 7.68.035 requires trial courts to impose a $500 VPA against defendants convicted of a crime. RCW 43.43.7541 requires trial courts to impose a $100 DNA collection fee.

Saelee contends that due process requires trial courts to inquire into the defendant's ability to pay before imposing mandatory LFOs such as these. But, this court addressed a virtually identical argument in State v. Shelton, 194 Wn. App. 660, 673-74, 378 P.3d 230 (2016), review denied 187 Wn.2d 1002, 386 P.3d

1088 (2017). There, Shelton challenged the DNA fee on as applied due process grounds, because, he argued, the trial court had not inquired into his ability to pay. Id. at 670. We held that "because imposition of the mandatory DNA fee does not implicate constitutional principles until the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay, the as-applied substantive due process challenge to RCW 43.43.7541 is not ripe for review." Id. at 674. As a mandatory fee, the same principle applies to the VPA.

Like Shelton, nothing here shows that the State has attempted to collect the challenged fees. Therefore, under Shelton these claims are not ripe for review.

We affirm.

Appelwick, C.J.

WE CONCUR:

Cox, J.P.T.

APPENDIX B

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

THE STATE OF WASHINGTON, Respondent, v. LO SHENG SAELEE, Appellant.	No. 75748-2-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Lo Saelee, has filed a motion for reconsideration of the opinion filed on June 18, 2018. The State has not filed a response. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, CJ

NIELSEN, BROMAN & KOCH P.L.L.C.

August 22, 2018 - 4:01 PM

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