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AUG 26 2010

King County Prosecutor  
Appellate Unit

64537-4

NO. 64537-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina S. Cahan, Judge

REPLY BRIEF OF APPELLANT

HARRY WILLIAMS, IV  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENTS IN REPLY

1. JOHNSON WAS ENTITLED TO A TO-CONVICT INSTRUCTION FOR SIMPLE POSSESSION.

Johnson was entitled to a to-convict instruction for simple possession because the two-prong test in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), was satisfied. See Brief of Appellant (“BOA”) at 9-11. The State concedes the legal prong of the Workman test is satisfied, but argues the factual prong is not because the “suspect in the buy-bust operation was found in possession of both the prerecorded buy money *and* a large amount of crack cocaine; thus, the evidence did not support an inference that *only* the lesser crime of possession was committed[.]” Brief of Respondent (“BOR”) at 10 (emphasis in original). The State misconstrues both the applicable legal standard and the relevant facts.

Under Workman’s factual prong, the evidence at trial must support an inference that only the lesser included offense was committed. BOA at 9; BOR at 10. What the State fails to recognize, however, is that “the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The State, however, does the opposite and construes the evidence in the light

*least* favorable to Johnson. Thus, in analyzing the lesser included instruction issue the State completely ignores the evidence Johnson presented at trial on the weaknesses of the State's case-in-chief. Yet in other instances, the State describes in detail the inconsistencies or "mistakes" in the police officers' trial testimony and police reports concerning the buy-bust operation. See BOR at 11-12. Moreover, the State recognizes that Johnson's defense witness, DOC Officer Bronkhorst, was "far more experienced," was credible, and "documented" Johnson's arrest for simple possession "at the same time and place as the alleged buy-bust." BOR at 13.

The evidence at trial supported giving a lesser included to-convict instruction for simple possession. At the least, it is reasonable to conclude that the jury could have found that the State's witnesses made a mistake about the events of the date in question and credited Officer Bronkhorst's testimony that "documented" Johnson's arrest for simple possession "at the same time and place as the alleged buy-bust." Johnson's evidence supports a conviction on only the lesser offense of simple possession to the exclusion of the charged crimes, therefore entitling Johnson to the instruction.<sup>1</sup> The State's argument to the contrary should be rejected.

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<sup>1</sup> In fact, the trial court specifically asked whether defense counsel was requesting that the jury be instructed on the lesser-included offense of simple possession, and also agreed to

2. DEFENSE COUNSEL DID NOT MAKE A REASONABLE STRATEGIC CHOICE TO FOREGO REQUESTING A TO-CONVICT INSTRUCTION FOR SIMPLE POSSESSION.

The trial evidence and counsel's arguments establish that the only reasonable chance Johnson had at a favorable outcome was a conviction on the lesser-included offense of simple possession. The State tries to paint Johnson's trial attorney's strategy as reasonable by reiterating what counsel did during trial and by claiming that she did it well. BOR 11-15. What is at issue here, however, is not what counsel did, but what she did not do: namely, choose a reasonable strategy given that Johnson admitted he committed the crime of simple possession.

Defense "counsel must reasonably select and present a defense." Mickey v. Ayers, 606 F.3d 1223, 1236 (9th Cir. 2010) (citations omitted). Washington courts "consider three factors 'to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.'" State v.

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give an instruction defining simple possession. 4RP 125;5RP 3. The trial court would not have done so had it believed the evidence did not support an inference that Johnson committed only the lesser-included offense.

Breitung, 155 Wn. App. 606, 615, 230 P.3d 614 (2010) (quoting State v. Grier, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010)). Contrary to the State's arguments, each of these factors establish that counsel acted unreasonably in failing to request a to-convict instruction for simple possession.

*a. Maximum Penalty*

There is no dispute that there is a substantial difference between the maximum penalty for the charged offenses and the lesser-included offense of simple possession – between 6 and 10 years. See BOA at 12-13; BOR at 18. This factor is critical to courts' analysis of whether defense counsel's decision to forego a lesser-included instruction was reasonable. See, e.g., Breitung, 155 Wn. App. at 615-16; State v. Ward, 125 Wn. App. 243, 249, 104 P.3d 670 (2004). The State attempts to downplay this disparity because "Johnson faced a virtually certain penalty on the greater offenses if the jury believed Detective Shepard's version of events, and an equally certain acquittal if the jury believed Officer Bronkhorst's version." BOR at 18. The State's argument proves too much, however, because it is always true that an acquittal is the possible result of not asking for a lesser included instruction, and Washington law is clear that an all-or-nothing strategy is not always reasonable. Breitung, 155 Wn. App. at 616-17. This is because in cases such as Johnson's –

where the defense's evidence demonstrates that the defendant is guilty of the lesser offense – counsel's failure to request the lesser included instruction exposes a defendant to the chance that the jury would convict him of the charged offenses, even if it had doubts, rather than let an admittedly guilty man go free. *Id.* Here, defense counsel's strategy was unreasonable because it forced the jury to choose between letting Johnson go unpunished, despite credible evidence of possession, or convict him (on less credible evidence) on the greater charge. Protecting juries from this impossible choice, and defendants from the consequences of that choice, is precisely why the Workman rule was created.<sup>2</sup>

*b. Defendant's Theory*

There was no conflict between Johnson's defense theory to the charged offenses and the lesser-included offense of simple possession. In fact, as the State notes repeatedly, Johnson's defense was that he was

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<sup>2</sup> For instance, Breitung, State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006), and Ward, all quote the following language from Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973):

[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

guilty of simple possession, not the charged offenses. BOR at 13,14, 17, 18-19. Courts have found deficient performance where the defendant admits to committing the lesser-included offense but defense counsel fails to request a to-convict instruction for that crime. Breitung, 155 Wn. App. at 616 (defendant charged with second degree assault admitted committing lesser offense of simple assault); State v. Pittman, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006) (defendant charged with attempted burglary admitted committing lesser offense of attempted criminal trespass). This factor also weighs in favor of finding defense counsel's performance deficient.

*c. Developments at Trial*

The risk Johnson faced due to counsel's failure to request a to-convict instruction for simple possession was significant in light of developments at trial. Defense counsel's strategy at trial was to show: (1) that the State had not proved beyond a reasonable doubt that Johnson committed the charged offenses on the date alleged in the information due to numerous discrepancies and mistakes in the officers' reports and testimony; and (2) that Johnson had actually committed simple possession on the date in question based on Officer Bronkhorst's testimony, but that the jury could not convict because the State did not charge Johnson with this offense.

Counsel's defense theory admitted several damaging facts to the jury. First, the jury heard directly from defense counsel that Johnson was guilty of simple possession. Second, the jury learned that Johnson was a drug user. And third, the jury knew Johnson had a criminal history due to Officer Bronkhorst's testimony that he was Johnson's DOC officer. Given these facts, it is highly unlikely that the jury would accept counsel's defense theory and acquit Johnson simply because he was charged with the wrong offense. Rather, as this Court has repeatedly recognized, the jury was likely to convict on the only option available to it rather than acquit a man with an unfavorable past who is plainly guilty of some offense. See Breitung, 155 Wn. App. at 617; Pittman, 134 Wn. App. at 388; Ward, 125 Wn. App. at 250. In other words, counsel's failure to request a lesser-included instruction was unreasonable because the "all or nothing strategy exposed [Johnson] to a substantial risk that the jury would convict on the only option presented," the charged offenses. Ward, 125 Wn. App. at 250.

The State argues that the jury was not placed in this "untenable position" because the evidence supporting the charged crimes was not lacking. BOR at 16. This argument is puzzling given the State's touting of defense counsel's trial performance in other parts of its brief, its concession that its witnesses' reports and testimony contained "mistakes,

discrepancies and omissions,” and its description of Officer Bronkhorst as “more experienced.” BOR at 11-13. The State can not have it both ways. Either Johnson presented a compelling defense that he was guilty of only simple possession or he did not. The record supports the first proposition. Unfortunately for Johnson, defense counsel did not finish what she started at trial and offer the jury a means to convict on the lesser-included she so persuasively argued her client committed.<sup>3</sup>

Thus, all three factors weigh in favor of finding defense counsel’s performance deficient. This Court should therefore hold that defense counsel’s failure to request a to-convict instruction for simple possession was not a reasonable strategic choice, but instead the product of constitutionally deficient representation.

3. JOHNSON WAS PREJUDICED BY DEFENSE COUNSEL’S FAILURE TO REQUEST A TO-CONVICT INSTRUCTION FOR SIMPLE POSSESSION.

Prejudice resulting from deficient performance of defense counsel “is established when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” In re

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<sup>3</sup> The State argues that Johnson somehow acquiesced to defense counsel’s all or nothing strategy. BOR at 19. Nothing in the record supports this proposition, and thus the State’s brief points only to counsel’s argument on jury instructions. Johnson did not affirmatively acknowledge that he understood counsel’s strategy and consent to it. Moreover, given the detailed discussions concerning the definitional instruction for simple possession, is it just as likely Johnson believed that the jury was receiving a to-convict instruction for this offense as well. In any event, without a record establishing that Johnson actually consented to counsel’s strategy, the State’s argument is meritless.

Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (internal quotation marks and citations omitted). However, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice in the context of counsel’s failure to request a lesser-included instruction, the defendant must show that there is a reasonable likelihood the jury would have convicted on the lesser offense if given the chance. Pittman, 134 Wn. App. at 390.

The State first argues Johnson can not establish prejudice because the trial court likely would not have given the lesser-included instruction. BOR at 20. But, as argued above, Johnson was clearly entitled to a to-convict instruction for simple possession. Moreover, the trial court expressly granted defense counsel’s request for an instruction defining simple possession *over the State’s objection*, and asked counsel if she wanted a to-convict instruction for that offense. See footnote 1, supra. The court would not have taken these actions if it believed the lesser-included instruction was unwarranted, and the State’s argument to the contrary is meritless.

Second, the State argues that Johnson was not prejudiced due to the overwhelming strength of its case, particularly in light of the fact that

the suspect was apprehended with prerecorded buy money. BOR at 20. This argument ignores the inconsistencies of the State's case-in-chief and the strength of Johnson's defense. First, as the State recognizes, its law enforcement officers did not agree in their reports on basic matters such as the date of the alleged offense, the particulars of the drug transaction and the description of the suspect. BOR at 3-4; BOA at 3-7. Second, Bronkhorst testified Johnson was arrested on the date in question for smoking cocaine and found to possess one gram of the drug. Unlike the police officers, Bronkhorst was an experienced officer who documented the events of June 6, 2008. BOR at 5; BOA at 7-8. In fact, Bronkhorst's report ultimately culminated in a DOC hearing at which Johnson's previous DOSA sentence was revoked. BOA at 7-8.

Thus, as the State recognizes, "[t]his case presented two different scenarios concerning Johnson's arrest, both supported by government witnesses." BOR at 1. There is a reasonable possibility that the jury could have concluded the police were mistaken about the date on which they arrested Johnson, or that he was not the suspect from the buy-bust transaction at the phone booth, and instead believed Bronkhorst that Johnson was detained for simple possession on June 6, 2008. However, without a to-convict instruction for simple possession, the jury was left in "an arduous position: to either convict [Johnson of the charged offenses]

or to let him go free despite evidence of some culpable behavior.” State v. Smith, 154 Wn. App. 272, 278, 223 P.3d 1262 (2009) (citing Pittman, 134 Wn. App. at 387-89). The fact that the jury knew Johnson was a drug user with a criminal history makes it all the more likely it would convict on the greater offenses even if it harbored doubt about his guilt rather than acquit simply because the State charged the wrong crimes.

Johnson has established a reasonable likelihood of a different outcome absent counsel’s failure to request a to-convict instruction for simple possession. This Court should therefore reverse and remand for a new trial. Breitung, 155 Wn. App. at 618-19; Ward, 125 Wn. App. at 251.

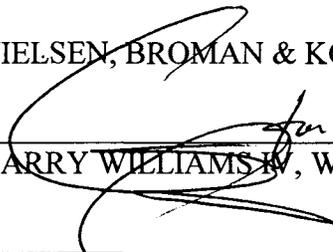
B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse Johnson’s convictions and remand for a new trial.

DATED this 26th day of August, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
HARRY WILLIAMS <sup>WSBA 25097</sup>, WSBA NO. 41020

CHRISTOPHER H. GIBSON, WSBA NO. 25097  
Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64537-46-I
	)	
DAVID JOHNSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26<sup>TH</sup> DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID JOHNSON  
DOC NO. 731208  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF AUGUST, 2010.

x *Patrick Mayovsky*