

FILED
COURT OF APPEALS

NO. 34611-7-II

COURT OF APPEALS

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

ALBERT NICKOLS

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable Richard L. Brosey, Judge
Cause No. 05-1-00823-1

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

- A. An appellant who challenges the sufficiency of the evidence admits the truth of the state's evidence and all rational inferences that may be drawn therefrom. Could a rational trier of fact find Nickols guilty of Delivery of Methamphetamine?
- B. Jury instructions must properly inform the trier of fact of the applicable law. The jury instruction which defined "knowledge" conformed to the WPIC. Did the lower court err in including language in that instruction which stated that acting intentionally establishes that a person acted with knowledge?
- C. Trial counsel's performance is deficient if it falls below an objective standard of reasonableness and affects the outcome of the proceedings. Nickols' trial counsel did not object to the "knowledge" instruction. Was his performance deficient?
- D. A court's determination whether multiple convictions constitute same criminal conduct is discretionary and factually based. At the sentencing hearing, Nickols failed to argue that some of his convictions were the same criminal conduct, leaving the determination to the trial court. Can he raise this issue for the first time on appeal?

II. STATEMENT OF THE CASE

Respondent accepts as adequate, for purposes of this Response, the "Statement of Facts and Prior Proceedings" appearing in the Opening Brief of Appellant, with the following additions and/or clarifications:

Detectives Fitzgerald and Hoium testified that informant Rob Sibley had set up purchases of methamphetamine from Nickols on

October 8, 2005, and on October 13, 2005.¹ After Nickols was arrested, he told Detective Fitzgerald that he had sold methamphetamine to Sibley, and that he knew that “Rob” was the informant.² Rob Sibley testified that the transactions were purchases of methamphetamine from Nickols.³

III. ARGUMENT

A. AN APPELLANT WHO CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADMITS THE TRUTH OF THE STATE’S EVIDENCE AND ALL RATIONAL INFERENCES THAT MAY BE DRAWN THEREFROM. COULD A RATIONAL TRIER OF FACT FIND NICKOLS GUILTY OF DELIVERY OF METHAMPHETAMINE?

Nickols first challenges the sufficiency of the evidence resulting in his conviction. Specifically, he asserts that the forensic scientist’s testimony that the substances delivered by Nickols were “methamphetamine hydrochloride” is insufficient to support the jury’s verdicts that Nickols was guilty of Delivery of a controlled substance.

Appellate courts review a challenge of insufficient evidence in the light most favorable to the State to determine “whether ... any rational trier of fact could have found guilt beyond a reasonable doubt.”⁴ “The court

¹ 1/18/06 RP 22-23; 33-35; 72; 76.

² 1/18/06 RP 45; 60; 64; 85.

³ 1/18/06 RP 101; 104.

⁴ *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

may infer criminal intent from conduct.”⁵ “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”⁶ “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.”⁷ The reviewing court considers circumstantial evidence equally reliable as direct evidence.⁸ “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.”⁹

Taking the evidence in the light most favorable to the State, and leaving credibility determinations to the jury, sufficient evidence existed to support Nickols’ conviction. Nickols admitted that he was a methamphetamine user and seller, and that he had sold methamphetamine to Sibley. The transactions Sibley set up were for the purchase of methamphetamine. Bruce Siggins, the forensic scientist, testified that the substances contained methamphetamine hydrochloride. A rational trier of fact could certainly find that a substance containing methamphetamine hydrochloride was a controlled substance, especially in light of the

⁵ *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

⁶ *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

⁷ *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

⁸ *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

⁹ *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

uncontested evidence that the substance Sibley sought, and Nickols sold, was methamphetamine on both occasions.¹⁰

B. JURY INSTRUCTIONS MUST PROPERLY INFORM THE TRIER OF FACT OF THE APPLICABLE LAW. THE JURY INSTRUCTION WHICH DEFINED "KNOWLEDGE" CONFORMED TO THE WPIC. DID THE LOWER COURT ERR IN INCLUDING LANGUAGE IN THAT INSTRUCTION WHICH STATED THAT ACTING INTENTIONALLY ESTABLISHES THAT A PERSON ACTED WITH KNOWLEDGE?

Nickols next claims that jury instruction 10 defining "knowledge" misstated the law because the instruction's language differed from the statutory language. He cites to RCW 9A.08.010(1)(b), which says:

A person knows or acts knowingly or with knowledge when:

- (i) he is aware of a fact, facts, or circumstances or result *described by a statute defining an offense*; or
- (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by *a statute defining an offense*.¹¹

The jury instruction read:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist

¹⁰ See also *State v. Cromwell*, 157 Wn.2d 529, 535-6, 140 P.3d 593 (2006).

¹¹ RCW 9A.08.010(1)(b) (emphasis added).

which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.¹²

Nickols claims that it is nonsensical for a "fact, circumstance or result" to be described by law as a crime. He says this is different from the statute, which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime. He says that the instruction was confusing and misleading and that the jury was unable to determine the meaning of the knowledge element of the possession of a stolen firearm instruction.

Nickols raises this claim for the first time on appeal. However, failure to properly instruct the jury on an element of a charged crime is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Roggenkamp*.¹³ This rule applies to errors in defining the terms in the "to convict" instruction as well as to the "to convict" instruction itself.¹⁴

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.¹⁵ An appellate court reviews the adequacy of jury instructions de novo as a

¹² Supp CP, Instruction 10.

¹³ 153 Wn.2d 614, 620, 106 P.3d 196 (2005).

¹⁴ See *Roggenkamp*, 153 Wn.2d at 620.

question of law.¹⁶ Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless.¹⁷

Relying on *State v. Goble*,¹⁸ Nickols asserts that the last sentence of Instruction No. 10 is a misstatement of the law and its inclusion creates a mandatory presumption.

In *Goble*, the “to convict” instruction contained an unnecessary element—that the defendant knew the victim of the assault was a law enforcement officer performing his official duties—which, based on the law of the case doctrine, the State was required to prove.¹⁹ Goble testified that he did not realize the person he assaulted was a police officer, and several of his witnesses supported this theory. A few days after the incident, Goble told the deputy that he was sorry and did not realize he was a police officer at the time.²⁰ During deliberations, the jury sent out a note indicating that they did not understand the “knowledge” instruction, which contained the language Nickols challenges in this appeal. This Court, in a 2 to 1 decision, found that the instruction was confusing to the jury, and that it relieved the State of the burden of proving that Goble

¹⁵ *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

¹⁶ *Clausing*, 147 Wn.2d at 626-27.

¹⁷ *Clausing*, 147 Wn.2d at 628.

¹⁸ 131 Wn.App. 194, 126 P.3d 821 (2005),

¹⁹ *Id.* at 201.

²⁰ *Id.* at 197-199.

knew the deputy's status as a law-enforcement officer.²¹ The *Goble* decision is of little assistance in the present case. Because the State, by including in the "to convict" instruction an unnecessary element—i.e., that Goble had to know that Deputy Riordan was a law enforcement officer and that he was on duty—the State took on the burden of proving that Goble knew Riordan was a police officer when he assaulted him. Because there was credible evidence that Goble's acted *intentionally* in assaulting the person approaching his grandson, but did not have *knowledge* that person was an on-duty police officer when he acted, the instruction allowed the jury to find that in acting intentionally, he had to know the person he assaulted was an officer. That the jury sent out a question indicating that it was confused by the instruction underscored the impropriety of including the last sentence of the instruction in that particular case.

In this case, the jury instruction properly informed the jury of the applicable law. The language in the jury instruction is not significantly different from the statutory language. Both refer to facts or circumstances that are crimes. Whether the crimes are described "by law" or in a "statute defining an offense" is not relevant in this instance. Furthermore, Nickols

²¹ *Id.* at 203.

cannot show that this instruction affected the trial's outcome. Therefore, this Court should reject his claim of error.

C. TRIAL COUNSEL'S PERFORMANCE IS DEFICIENT IF IT FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND AFFECTS THE OUTCOME OF THE PROCEEDINGS. NICKOLS' TRIAL COUNSEL DID NOT OBJECT TO THE "KNOWLEDGE" INSTRUCTION. WAS HIS PERFORMANCE DEFICIENT?

Continuing in his theme, Nickols next asserts that his trial counsel's performance was deficient in that he failed to object to the "knowledge" instruction discussed above. The law regarding ineffective assistance of counsel is well established. To prevail on a claim of ineffective assistance of counsel, a defendant must show both ineffective representation and resulting prejudice.²² To satisfy the first prong, a defendant must show that counsel's performance fell below an objective standard of reasonableness.²³ To satisfy the second prong, a defendant must establish that counsel's performance was so inadequate that there exists a "reasonable probability that, but for counsel's unprofessional

²² *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn.App. 44, 56, 896 P.2d 704 (1995).

²³ *Strickland v. Washington*, 466 U.S. 668, 693, 80 L.Ed 2d 674, 104 S.Ct 2052 (1984); *State v. Sardinia*, 42 Wn.App. 533, 540, 713 P.2d 1302 (1978).

errors, the result of the proceeding would have been different.”²⁴ A reasonable probability is a probability sufficient to undermine confidence in the outcome.²⁵

There is a strong presumption that counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions.²⁶ Furthermore, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong.²⁷

As argued above, the knowledge instruction in this case was proper. Thus, Nickols cannot prevail on the first *Strickland* prong, and his challenge must fail. Even assuming *arguendo* that failure to object to this standard WPIC instruction was error, Nickols fails to demonstrate that in this case, it deprived him of due process. The witnesses who observed his conduct testified to very purposeful acts. Nickols’ claim must be rejected.

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²⁴ *Strickland*, 466 U.S. at 694.

²⁵ *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

²⁶ *Strickland*, 466 U.S. at 689.

D. A COURT'S DETERMINATION WHETHER MULTIPLE CONVICTIONS CONSTITUTE SAME CRIMINAL CONDUCT IS DISCRETIONARY AND FACTUALLY BASED. AT THE SENTENCING HEARING, NICKOLS FAILED TO ARGUE THAT SOME OF HIS PRIOR CONVICTIONS WERE THE SAME CRIMINAL CONDUCT, LEAVING THE DETERMINATION TO THE TRIAL COURT. CAN HE RAISE THIS ISSUE FOR THE FIRST TIME ON APPEAL?

Finally, Nickols assigns error to the lower court's failure to find that his prior convictions constituted the same course of criminal conduct. He raises this for the first time on appeal, but fails to establish that such a decision is reviewable for the first time on appeal. Indeed, the Washington State Supreme Court has held that, while *some* offender score calculation errors may be raised for the first time on appeal, others may be waived.²⁸ Respondent herein asserts that in the present case, Nickols waived the alleged error.

In *In re Goodwin*, the court stated,

[W]e hold that in general a defendant cannot waive a challenge to a miscalculated offender score. There are limitations on this holding. While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or *where*

²⁷ *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

²⁸ *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

*the alleged error involves a matter of trial court discretion.*²⁹

The court went on to say that waiver may be found in a case like *State v. Nitsch*.³⁰ In *Nitsch*, the defendant explicitly agreed to a particular offender score, but later attempted to challenge it on appeal, asserting that the lower court should have sua sponte, found the two crimes for which he was convicted were the same criminal conduct.³¹ The Court of Appeals distinguished the case from those in which the offender score miscalculation was based on a “pure calculation error” or a case of “mutual mistake regarding calculation mathematics,”³² stating:

Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion. A defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they encompass the same criminal conduct. Offenses encompass the same criminal conduct when they are committed against the same victim, in the same time and place, and involve the same objective criminal intent. The trial court's determination on the issue is reviewed for abuse of discretion.³³

²⁹ *Id.* at 874 (emphasis added).

³⁰ 100 Wn.App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000).

³¹ *Id.* at 520.

³² *Id.*

The *Nitsch* court also went on to comment on the propriety of permitting review such cases for the first time on appeal:

Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. It is not merely a calculation problem, or a question of whether the record contains sufficient evidence to support the inclusion of out-of-state convictions in the offender score. We therefore see a fundamental difference between this case and *Ford* and *McCorkle*. Unlike the out-of-state conviction provision, the same criminal conduct statute is not mandatory, and sound reasons exist for the implicit grant of discretion contained in the legislative language ("if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime").³⁴

Thus, the *Nitsch* court recognized that the determination of whether offenses constitute the same course of conduct is discretionary with the trial court, requiring some factual basis on which to make such a determination. The *Nitsch* court discussed *State v. Anderson*,³⁵ in its ruling. In *Anderson*, the defendant took some wine from a convenience store without paying for it. When the store clerk tried to stop him from

³³ *Id.* at 520-521 (citations omitted).

³⁴ *Id.* at 523 (citations omitted).

³⁵ 92 Wn.App. 54, 960 P.2d 975 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1099

leaving, Anderson hit him with a bottle, ran out of the store, fired a bullet into the store, and fled. A jury found him guilty of first degree robbery while armed with a deadly weapon, and assault in the second degree while armed with a deadly weapon.³⁶ Anderson did not ask for a determination of same criminal conduct, and the lower court did not make such a determination. The lower court counted the robbery and assault convictions separately.³⁷ The Court of Appeals treated the lower court's calculation of Anderson's offender score as an implicit determination that the offenses did not constitute the same criminal conduct.³⁸ To this implicit finding, the *Anderson* court applied the abuse of discretion and misapplication of the law standards of review.³⁹ It then went on to theorize that the lower court could have found that Anderson's objective intent was to steal the wine, and that when he went outside, the court could have found that his objective intent changed to an intent to injure, threaten, or frighten. After pointing out again that the offender score reflected the lower court's implicit finding that Anderson's objective intent did not

(1999).

³⁶ *Id.* at 56-57.

³⁷ *Id.* at 61.

³⁸ *Id.* at 62.

³⁹ *Id.*

remain the same, it ruled that this finding was neither a misapplication of the law nor an abuse of discretion.⁴⁰

In the present case, Nickols failed to object to the State's calculation of his offender score, and failed to offer an alternative offender score calculation. Nickols and his attorney also signed the judgment and sentence, which states that the lower court found that none of the prior convictions constitute one crime for purposes of determining Nickols's offender score.⁴¹ This implicit statement by Nickols that none of his prior convictions merge for sentencing purposes constitutes a waiver.

Under *Goodwin* and *Nitsch*, such a waiver precludes review for the first time on appeal. Although the *Nitsch* court pointed out that the defendant in that case explicitly agreed with the calculation of his offender score, that factor does not distinguish it from the present case. Indeed, as pointed out above, the *Nitsch* court opined that same criminal conduct issues were not—or *should* not be—reviewable for the first time on appeal.

Further, as in *Anderson*, the lower court's determination of the offender score reflects its *implicit* finding that the offenses did not constitute the same criminal conduct. Nickols' argument should be rejected.

⁴⁰ *Id.* at 62.

IV. CONCLUSION

The evidence that the substance at issue was methamphetamine, and that Nichols knew that it was methamphetamine was sufficient to support the verdicts. The “knowledge” instruction, as given, was proper in this case. Thus, Nickols’ trial counsel’s failure to object to it did not render his performance deficient. Further, Nickols waived the claim that the sentencing court should have determined whether his prior convictions were the same criminal conduct.

V. REQUEST FOR COSTS

Should this Court determine that the State substantially prevails in this matter, the State requests that Nickols be required to pay all taxable costs of this appeal, pursuant to RAP Title 14.

Respectfully submitted this 23 day of October, 2006.

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Lewis County Prosecuting Attorney

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⁴¹ CP 5.

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CERTIFICATE

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STATE OF WASHINGTON

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I certify that on 10/23/06, I mailed a copy of the foregoing
response by depositing same in the United States Mail, postage pre-paid,
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