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Division III
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NO. 35368-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN THACKER,

Appellant.

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

The Honorable Henry Rawson, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural facts</u>	2
2. <u>Substantive Facts</u>	3
C. <u>ARGUMENTS</u>	6
1. THE “DUTY TO CONVICT” LANGUAGE IN INSTRUCTION 7 DEPRIVED THACKER OF HIS RIGHT TO PRESENT A DEFENSE BECAUSE IT NULLIFIED HIS UNWITTING POSSESSION DEFENSE.	6
2. THACKER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.....	11
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Dever v. Fowler</u> 63 Wn. App. 35, 816 P.2d 1237 (1991) <u>amended</u> , 824 P.2d 1237 (1992)	8, 10
<u>Donner v. Donner</u> 46 Wn.2d 130, 278 P.2d 780 (1955).....	8, 10
<u>Hall v. Corp. of Catholic Archbishop of Seattle</u> 80 Wn.2d 797, 498 P.2d 844 (1972).....	8
<u>Koker v. Armstrong Cork, Inc.</u> 60 Wn. App. 466, 804 P.2d 659 (1991)	8, 10, 11
<u>Renner v. Nestor</u> 33 Wn. App. 546, 656 P.2d 533 (1983).....	8
<u>State v. Allen</u> 182 Wn.2d 364, 341 P.3d 268 (2015).....	8
<u>State v. Cayetano-Jaimes</u> 190 Wn. App. 286, 359 P.3d 919 (2015).....	7
<u>State v. Fernandez-Medina</u> 141 Wn.2d 448, 6 P.3d 1150 (2000).....	7
<u>State v. Koch</u> 157 Wn. App. 20, 237 P.3d 287 (2010) <u>review denied</u> , 170 Wn.2d 1022 (2011)	7
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	11
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	9
<u>State v. Riley</u> 137 Wn.2d 904, 976 P.2d 624 (1999).....	8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Sundberg</u> 185 Wn.2d 147, 370 P.3d 1 (2016).....	9
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	11, 12, 13
<u>State v. Walden</u> 131 Wn.2d 469, 932 P.2d 1237 (1997).....	8
<u>State v. Wanrow</u> 88 Wn.2d 221, 559 P.2d 548 (1977).....	8
 <u>FEDERAL CASES</u>	
<u>Chambers v. Mississippi</u> 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	7
<u>Crane v. Kentucky</u> 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	7
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	11, 12
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RAP 2.5.....	9
RCW 9A.52.050	14
RCW 69.50.4013	9
U.S. Const. amend. V	7

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. Const. amend. VI	7, 11
U.S. Const. amend. XIV	7, 8
Wash. Const. art. I, § 3	7, 8
Wash. Const. art. I, § 22	7, 11

A. ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction 7. CP 58 (to-convict instruction for possession of methamphetamine).

2. Appellant was deprived of his right to present and to have jurors consider his unwitting possession defense.

3. Appellant was deprived of his right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

Appellant was charged and tried on several charges, including one count of unlawful methamphetamine possession. Evidence presented at trial allowed for a reasonable inference that Appellant was unaware of the methamphetamine in his possession until he found a syringe and vial while cleaning his car, which was shortly before his encounter with law enforcement began and resulted in the various charges. Appellant claimed any methamphetamine possession was unwitting, and the court instructed the jury on that affirmative defense, but he was convicted as charged.

1. Did the trial court deprive Appellant of his constitutional right to present and have jurors consider his unwitting possession defense to the charge of methamphetamine possession when it instructed them that if they found beyond a reasonable doubt Appellant possessed methamphetamine on the date in question while in the State of

Washington, “then it will be your duty to return a verdict of guilty,” when the trial court failed to also instruct jurors that no such “duty” existed if they also found Appellant’s methamphetamine possession was unwitting?

2. To the extent the instructional error above is attributed to Appellant’s counsel’s failure to object, then was Appellant deprived of his right to effective assistance of counsel because counsel’s failure nullified his defense was deficient performance that prejudiced Appellant by removing his defense from the jury’s consideration?

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 15, 2017, the Okanogan County Prosecutor charged appellant Jonathan Thacker with one count each of unlawful possession of methamphetamine, violation of a protection order, and obstructing. CP 95-96. The protection order violation charge also includes a special allegation that it was a domestic violent offense. Id. The prosecution alleged that on February 13, 2017, Thacker violated a protection order by being too close to the protected party’s residence, and that during the course of his arrest for that offense, obstructed the arresting officer by resisting, and that during that arrest a vial containing methamphetamine was discovered in Thacker’s possession. CP 93-94.

The prosecution filed amended charges on April 10, 2017. CP 83-90. In addition to the three original charges, the prosecution added seven additional protection order violation charges, two allegedly committed on March 9, 2017, and one each for the dates of March 14, 28, 30, 31, and April 4, 2017. The prosecution alleged these additional offenses occurred when Thacker contacted the protected party, either directly or indirectly through the protected party's sons, and that each offense constituted a domestic violence offense. CP 81-82.

A jury trial was held May 10-11, 2017, before the Honorable Henry Rawson, Judge. RP¹ 4-335. Thacker was convicted as charged. CP 45-47; RP 326-32. On June 2, 2017, Thacker was sentenced to 18 months. CP 19-31. Thacker appeals. CP 1-14.

2. Substantive Facts

On the evening of February 13, 2017, City of Omak Police Department Sergeant Donnelly Tallant, Jr., responded to the parking lot of an apartment complex in Omak in response to reports of a suspicious vehicle playing loud music. RP 84-85. When he arrived, he saw Thacker standing outside of his white Camaro parked in the lot, with no one else around. RP 88. When Tallant got out of his patrol car, Thacker

¹ There is a single volume of verbatim report of proceedings referenced as "RP."

approached telling Tallant that “he wasn’t in violation of any protection orders” because he was at least 100 feet away from the Linda Ottwell’s residence. RP 90-91, 122. Thacker explained he was waiting for “his son” who was at the laundromat and was to give Thacker some of his belongings so Thacker could leave Omak for Spokane. RP 91.

Prior to arriving at the scene, Tallant had confirmed there was a valid protection order prohibiting Thacker from coming within 300 feet of Ottwell’s residence. RP 86-87. After Thacker told him he was outside the 100-foot distance prohibition, Tallant checked again with his dispatch to confirm the distance restriction was 300 feet instead of only 100 feet. RP 91-92. Dispatcher confirmed the protection order (Ex. 4), prohibited Thacker from being within 300 feet of Ottwell’s residence. Id.

Upon confirming the order was valid and that Thacker was within 300 feet of Ottwell’s residence, Tallant arrested Thacker for the protection order violation and handcuffed him behind his back. RP 93. During a search incident to arrest, Thacker was initially cooperative. RP 94-95. Tallant testified, however, that Thacker seemed to be trying to prevent him from searching a particular pocket, and might be trying to retrieve a weapon, so Tallant pinned Thacker to his patrol car, and noted Thacker had a syringe in his hand, so he took him to the ground and called for back up. RP 95-97. Tallant eventually disarmed Thacker of the syringe and

also notice a vial containing a liquid substance on the ground after Thacker dropped the syringe. RP 99-100. The liquid in the vial contained methamphetamine. RP 73; Ex.5.

Following his arrest, Tallant took Thacker to jail for booking. RP 101. Tallant advised Thacker of his rights once at the jail. Id. Tallant then asked if Thacker had been trying to stab him with the syringe as they struggled during the arrest. RP 102. Thacker replied by denying he tried to assault Tallant, claiming he was just trying to prevent him from finding the syringe and vial because they were not his, implying he had discovered them while he was cleaning out his car in the parking lot. RP 103, 128. When asked by Tallant, Thacker suggested the vial might contain methamphetamine, but he really did not know. RP 103, 127.

Once jailed, Thacker made recorded phone calls over the next several months, which the prosecution claimed were to either to Ottwell directly, or to one or both of her sons, and involved requests by Thacker for them to pass messages to their mother. RP 167-204 (call recordings transcribed into the record); RP 259-70 (prosecutor's closing argument arguing why the calls violated the protection order).

Although not filed, it is apparent from the record that Thacker's counsel proposed a jury instruction setting forth the affirmative defense of unwitting possession that had language not contained in the one proposed

by the prosecution. RP 140. The trial court noted the defense version ended with, “If you find the defendant has established this defense . . . it will be your duty to return a verdict of not guilty.” RP 140. Noting the defense version was no a pattern instruction, the court refused to include the defense proposed language in the unwitting possession instruction. RP 140-42.

In closing argument, defense counsel did not dispute that the vial found during Thacker’s arrest contained methamphetamine. Instead, counsel argued the drugs did not belong to Thacker, and that he was unaware what drugs were in the vial. RP 287-89.

C. ARGUMENTS

1. THE “DUTY TO CONVICT” LANGUAGE IN INSTRUCTION 7 DEPRIVED THACKER OF HIS RIGHT TO PRESENT A DEFENSE BECAUSE IT NULLIFIED HIS UNWITTING POSSESSION DEFENSE.

Instruction 10 unequivocally informed jurors that if they found beyond a reasonable doubt that Thacker possessed methamphetamine in the State of Washington on or about February 13, 2017, “it will be your duty to return a verdict of guilty.” CP 56. This was an incorrect statement of the law. It is incorrect because there is no “duty” to convict if, despite finding beyond a reasonable doubt Thacker possessed methamphetamine in the State of Washington on February 13, 2017, jurors also found by a

preponderance of the evidence his methamphetamine possession was unwitting. CP 62 (Instruction 11). Unfortunately, the jury was never properly instructed on the interplay between instructions 7 and 11, leaving the false impression that if Thacker possessed the methamphetamine, the jury had to a “duty” to convict, even if it found the possession unwitting. This deprived Thacker of his right to present a defense, and this Court should therefore reverse and remand for a new trial on the possession charge.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

A defendant is also entitled to have the jury fully instructed on the defense theory of the case when there is evidence to support that theory. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const.

amend. XIV; Const. art I, § 3. Failure to so instruct is prejudicial error. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

Juries are presumed to follow the instructions provided by the court. State v. Allen, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). A trial court's instructions to the jury should not contradict each other. State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If the inconsistency relates to a material point, the error is presumed prejudicial because "it is impossible to know what effect [such an error] may have on the verdict." Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 483, 804 P.2d 659 (1991) (citing Hall v. Corp. of Catholic Archbishop of Seattle, 80 Wn.2d 797, 803-04, 498 P.2d 844 (1972)). Instructions providing "inconsistent decisional standards" require reversal.² Dever v. Fowler, 63 Wn. App. 35, 41, 816 P.2d 1237 (1991) amended, 824 P.2d 1237 (1992) (citing Renner v. Nestor, 33 Wn. App. 546, 550, 656 P.2d 533 (1983)). Such errors "are rarely cured by giving the stock instruction that all instructions are to be considered as a whole." Donner v. Donner, 46 Wn.2d 130, 137, 278 P.2d 780 (1955).

Although defense counsel did not object to Instruction 7 at trial, Thacker may challenge it for the first time on appeal because it involves

² Reversal is also required if the inconsistency is due to a "clear misstatement of the law." Walden, 131 Wn.2d at 478 (quoting State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977) (citations omitted)).

“manifest error affecting a constitutional right.” RAP 2.5(a)(3). Constitutional error is manifest when it causes actual prejudice or has practical and identifiable consequences. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). As discussed infra, the instructional error here caused actual prejudice to Thacker by eliminating from the jury’s consideration his unwitting possession defense.

A conviction for methamphetamine possession requires proof the accused possessed methamphetamine. RCW 69.50.4013(1); CP 58 (Instruction 7).

This statute sets forth a strict liability crime in that knowledge of the possession is not an element of the offense that the State has to prove. To reduce the harshness of this offense, courts have created an unwitting possession defense and placed the burden on the defendant to establish the defense by a preponderance of the evidence.

State v. Sundberg, 185 Wn.2d 147, 149, 370 P.3d 1 (2016).

Here, the court correctly instructed jurors that methamphetamine is a “controlled substance,” (CP 60, Instruction 9), that “possession” can be either “actual” or “constructive,” (CP 59, Instruction 8), and that a conviction for possession of heroin requires finding beyond a reasonable doubt that Thacker possessed heroin “on or about February 13, 2017,” in the State of Washington, (CP 58, Instruction 7). The court failed, however, to properly instruct jurors on Thacker’s unwitting possession

defense, despite ample evidence to support it, because it failed to make clear to jurors they had no “duty” to convict despite finding beyond a reasonable doubt that he possessed the methamphetamine in Washington on the date in question, if they also found by a preponderance of the evidence that his possession was unwitting.

The problem is with the to-convict instruction, Instruction 7. CP 58. Instruction 7 purports to identify what jurors must find to convict Thacker, even going so far as to assert they have a “duty” to enter a guilty verdict if they find the listed elements beyond a reasonable doubt. “[A]n instruction purporting to contain all the elements must in fact contain them all.” Donner v. Donner, 46 Wn.2d 130, 134, 278 P.2d 780 (1955).

Instruction 7, however, failed to advise jurors they must also conclude Thacker failed to establish his unwitting possession before they could convict. As such, the to-convict and unwitting possession instructions provide inconsistent decisional standards. Fowler, 63 Wn. App. at 41. Instruction 7 told jurors they must convict if the State met its burden, while Instruction 11 told jurors a person is not guilty of methamphetamine possession if they did not know they possessed it. CP 56-57. One can only speculate how jurors interpreted these two instructions when it convicted Thacker of methamphetamine possession. For this reason, the error must be presumed prejudicial. Koker, 60 Wn.

App. at 483. The State bears the burden of showing this constitutional error was harmless beyond a reasonable doubt. Cayetano-Jaimes, 190 Wn. App. at 303. The State cannot meet this burden.

The court's instructions contradicted one another. Koker, 60 Wn. App. at 483. The court's instructions effectively nullified Thacker's only defense to the possession charge. Thacker's possession of methamphetamine conviction must therefore be reversed. Id. at 485.

2. THACKER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

If this Court concludes Thacker may not properly raise on appeal the instructional issue discussed above because his trial counsel failed to object or otherwise raise the issue at trial, then Thacker was denied his right to effective assistance of counsel, for which reversal is required.

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. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Error! Bookmark not defined.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Here, defense counsel argued the jury should acquit Thacker of methamphetamine possession because Thacker was unaware the vial he found contained methamphetamine. RP 285-87. Unfortunately, Instruction 7 told jurors they had a "duty" to convict him of the charge if they found he possessed, wittingly or not, methamphetamine on February 13, 2017, in the State of Washington, all of which was uncontested. Yet Thacker's counsel implicitly approved of the instructions given by failing to register the appropriate objections. RP 233.

There is no reasonable strategic basis for defense counsel's failure to object to Instruction 7. There was no downside for Thacker in making such an objection. Either the court would agree and correct the instruction, or not, which would have left Thacker in no worse a position than not objecting. On the other hand, by failing to object, counsel allowed Thacker's only defense to the methamphetamine possession charge to be eliminated from the jury's consideration. There is no reasonable strategic basis for Thacker's counsel not to object and therefore counsel's performance was deficient.

Defense counsel's deficient performance prejudiced Thacker. As discussed, Instruction 7 eliminated the unwitting possession defense, thereby ensuring a conviction because it was undisputed that Thacker possessed methamphetamine on the date and place alleged. Had the jury been properly instructed, there is a reasonable probability the outcome of trial would have been an acquittal on that charge. Thacker's methamphetamine conviction should therefore be reversed. Thomas, 109 Wn.2d at 229.

D. CONCLUSION

For the reasons stated, this Court should reverse Thacker's methamphetamine possession conviction.

DATED this 18th day of December 2017.

Respectfully submitted,

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