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NO. 37203-1-III

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

STATE OF WASHINGTON,
Respondent,

v.

KAY DELESDERNIER,
Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Ms. Delesdernier was denied her constitutional right to effective assistance of counsel when her trial counsel failed to object to deficient jury instructions related to the lesser included offense for count five.
2. The state presented insufficient evidence to prove beyond a reasonable doubt that Ms. Delesdernier possessed methamphetamine with the intent to deliver it to another person.

Issues Presented on Appeal

1. Was Ms. Delesdernier denied her constitutional right to effective assistance of counsel when her trial counsel failed to object to deficient jury instructions related to the lesser included offense for count five?
2. Did the state present sufficient evidence to prove beyond a reasonable doubt that Ms. Delesdernier possessed methamphetamine with the intent to deliver it to another person?

B. STATEMENT OF THE CASE

Substantive Facts

The Spokane Police Department organized three controlled buys of methamphetamine targeting Kay Delesdernier during June of 2016. RP 86, 95. Ms. Delesdernier lived at 1608 East Providence Avenue in Spokane with members of a local gang known as the "Red Boys." RP 116, 134-39. The police used a confidential informant (CI) who had allegedly purchased methamphetamine from Ms. Delesdernier in the past to execute the buys and collect evidence. RP 85-87.

The first buy took place on June 2, 2016. RP 87. Police provided the CI with \$500 in cash to buy an ounce of methamphetamine. RP 87, 90. The CI set up a meeting with Ms. Delesdernier by phone and then drove to her home in Spokane while detectives followed him. RP 91-92. The CI entered Ms. Delesdernier's home and they went out to her shop where he gave her \$500 in cash in exchange for approximately an ounce of methamphetamine. RP 163; Ex.1.

Detectives secured authorization to have the CI wear a recording device during the second and third buys. RP 91, 97. The

second buy took place on June 21, 2016 and followed an identical procedure to the first buy. RP 96-99. The CI exited Ms. Delesdernier's house with another ounce of methamphetamine. RP 99. On the audio recording from the second buy, Ms. Delesdernier discusses how she was "fronting" a lot, which the CI interpreted to mean that she was fronting people drugs on their promise to pay later. RP 179. They also discussed "a full one" and a "ball," which the CI testified was slang for a full ounce of methamphetamine and an eighth of an ounce, respectively. RP 181.

The third buy took place on June 29, 2016 and followed a different procedure than the first two. RP 101-02. The CI arranged to buy an ounce of methamphetamine from Ms. Delesdernier in the parking lot of a motel in Spokane. RP 102.

The CI drove to the parking lot and parked as instructed by detectives. RP 103. Ms. Delesdernier arrived at the parking lot and invited the CI into her vehicle. RP 106. The CI entered Ms. Delesdernier's vehicle and gave her \$500 in exchange for approximately an ounce of methamphetamine. RP 171. On the audio recording from the third buy, Ms. Delesdernier discussed how she did not want to move out of Spokane because she did not want

to “lose her people,” which the CI interpreted to mean she did not want to lose drug customers. RP 170-71.

On February 10, 2017, detectives pulled Ms. Delesdernier over and arrested her for the controlled buys during the ensuing traffic stop. RP 109. Detectives stopped Ms. Delesdernier as she drove with a passenger who was also suspected of selling drugs. RP 137. They searched her incident to arrest and seized \$1,298 in cash and a small bag of methamphetamine from her purse. RP 110-12.

The detectives read Ms. Delesdernier her *Miranda* rights, which she waived. RP 47-48. She admitted to detectives that she had been buying pounds of methamphetamine before dividing it into ounces and reselling it but had not done so recently because her supplier had been arrested on federal drug charges. RP 112-13. The detectives booked Ms. Delesdernier for delivery of a controlled substance. CP 5-6. She was released from jail the next day and the trial court ordered her to appear for an out-of-custody arraignment on February 27. CP 5-6.

The detectives sought and were granted a search warrant for Ms. Delesdernier’s residence. RP 114. They executed the

warrant at her house on February 23, 2017 and contacted Ms. Delesdernier inside. RP 115. The detectives read Ms. Delesdernier her *Miranda* rights, which she waived. RP 116. Ms. Delesdernier said there were not any drugs in the house that she was aware of and the only large sum of cash was \$1,500 in an envelope for her lawyer. RP 116.

Detectives searched the living room and found a small baggie containing approximately 2.7 grams of methamphetamine, multiple glass pipes, and cash inside an envelope as Ms. Delesdernier had described. RP 119-21, 132, 210; Ex. 6, 15, 19. Police found digital scales and drug packing materials in two bedrooms belonging to the men Ms. Delesdernier lived with. RP 138-39. In the shop, detectives found more digital scales, plastic baggies, and residue they suspected to be methamphetamine. RP 122-31; Ex. 8-11, 13-14, 16.

Procedural Facts

The state charged Ms. Delesdernier with three counts of delivering a controlled substance based on the controlled buys, one count of possessing a controlled substance for the methamphetamine found in her purse during the traffic stop, and

one count of possessing a controlled substance with intent to deliver based on the methamphetamine found during execution of the search warrant. CP 116-17. Ms. Delesdernier elected to proceed to a jury trial. RP 5.

Ms. Delesdernier proposed a lesser-included offense instruction related to the possession with intent to deliver charge in count five for simple possession of a controlled substance. CP 144. The trial court granted Ms. Delesdernier's request and included an instruction modeled on WPIC 4.11 in its instructions to the jury. CP 144. However, the trial court's instructions to the jury do not include a "to convict" instruction related to the lesser included offense. The only instruction that listed the elements of simple possession of a controlled substance was the "to convict" instruction related to count four. CP 139. Despite the omission of this instruction, Ms. Delesdernier's trial counsel did not object to the final packet of jury instructions. RP 224.

The relevant jury instructions provide as follows:

To convict the defendant of the crime of possession with intent to deliver a controlled substance, as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 23, 2017, the defendant

- possessed a controlled substance to wit: methamphetamine;
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance to wit: methamphetamine; and
 - (3) that this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP 142.

The defendant is charged in count V with possession of a controlled substance with intent to deliver to wit: methamphetamine. If, after full and careful deliberation on this charge, you are not satisfied beyond reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Possession of a Controlled Substance to wit: methamphetamine. When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

CP 144.

The jury found Ms. Delesdernier guilty as charged. RP 273-75; CP 150-58. The trial court sentenced Ms. Delesdernier to a standard range sentence. RP 300. Ms. Delesdernier filed a timely notice of appeal. CP 231.

C. ARGUMENT

1. MS. DELESDERNIER WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL COUNSEL FAILED TO OBJECT TO THE LACK OF A TO-CONVICT INSTRUCTION FOR THE LESSER INCLUDED OFFENSE AFTER THE TRIAL COURT GRANTED COUNSEL'S REQUEST TO INSTRUCT THE JURY ON SIMPLE POSSESSION

Ms. Delesdernier was denied her constitutional right to effective assistance of counsel when her trial counsel failed to alert the court that the jury instructions did not contain the agreed upon lesser included "to convict" instruction on count five. Jury instruction 21 provided that the jury was entitled to consider the lesser included but omitted the lesser included "to convict" which effectively precluded the jury from finding guilt only on the lesser included offense in count 5.

A defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. *State v. Thomas*, 109 Wn.2d 222, 228, 743 P.2d 816 (1987); *State v. Acosta*, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984).

A defendant's right to effective assistance of counsel is

constitutionally guaranteed at all “critical stages” of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Counsel is considered ineffective if (1) their performance was deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel’s performance is deficient if it fell below an “objective standard of reasonableness based on consideration of all the circumstances.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of the proceeding would have been different but for counsel’s deficient performance. *Kylo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *Kylo*, 166 Wn.2d at 862.

Counsel’s failure to notice and object to erroneous jury

instructions may demonstrate ineffective assistance of counsel if the defendant can show that the inaccurate jury instruction prejudiced him or her. *State v. Wilson*, 117 Wn. App. 1, 17, 75 P.3d 573 (2003) (citing *State v. Howland*, 66 Wn. App. 586, 595, 832 P.2d 1339 (1992)). Jury instructions must properly inform the jury of the applicable law and allow the defendant to argue his or her theory of the case. *Wilson*, 117 Wn. App. at 17.

When a trial court decides to instruct the jury on a lesser included offense, it typically models the initial instruction on Washington Pattern Jury Instruction-Criminal (WPIC) 4.11.

Ms. Delesdernier's trial counsel proposed a jury instruction modeled on WPIC 4.11 and the trial court included this instruction in the final packet that was read to the jury. RP 214-15; CP 144. However, trial counsel failed to notice the omission of an accompanying "to convict" instruction that corresponded with the lesser included offense of possessing a controlled substance in count five. The omission of this instruction prevented Ms. Delesdernier from effectively arguing her theory of the case.

The comments to WPIC 4.11 state that any instruction modeled after it should be accompanied by another instruction

listing the elements of the lesser included offense for the jury's consideration, but Ms. Delesdernier's trial counsel failed to ensure the instructions related to the lesser included offense were complete. Instead, he only proposed an instruction that directs the jury to consider the lesser included offense but fails to distinguish the elements of that offense from the one charged.

The state bears the burden of proving every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Accordingly, to satisfy due process, the "to convict" instruction must contain every element of the crime charged. *State v. Fisher*, 165 Wn.2d 727, 753-54, 202 P.3d 937 (2009); *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal. *Fisher*, 165 Wn.2d at 754 (this does not include a requirement that all terms be separately defined).

Here, rather than simply omitting an essential element of the lesser included, the court omitted the entire to-convict instruction. Counsel failed to notice and failed to request the instruction in the packet sent to the jury. This denied the defendant his right to due

process because the jury was not permitted to find him guilty of the lesser included offense without a to-convict instruction. *State v. Grier*, 171 Wn.2d 17, 36, 246 P.3d 1260 (2011). As the United States Supreme Court stated in *Keeble v. United States*, 412 U.S. 205, 36 L.Ed.2d 844 (1973):

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—in this context or any other—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.

Keeble, 412 U.S. at 212-13.

In *Grier*, the Court addressed the related issue of the failure to request a lesser included instruction when warranted by the evidence as distinct from a tactical decision, to require the reviewing court to analyze the issue under *Strickland* not *Keeble*. *Grier*, 171 Wn.2d at 36-42. The Court explained that the issue in *Keeble* did not control because therein the issue addressed whether the jury would follow the existing instructions without a lesser, even if the state failed to establish all of the essential

elements of the greater offense. *Grier*, 171 Wn.2d at 41.

While not precisely on point, *Keeble*, *Grier* and *Fisher* suggest that once a lesser included is offered to the jury, the instructions must properly inform the jury of the elements and the failure to require correct instructions constitutes prejudicial ineffective assistance of counsel, because the defendant is denied due process. *Grier*, 171 Wn.2d at 41-42; *Fisher*, 165 Wn.2d at 754; *Keeble*, 412 U.S. at 212-13.

There is no tactical basis to justify failing to object to a missing instruction when the instruction is required to ensure due process and would weigh in the defendant's favor. The critical inquiry in examining whether counsel's performance deprived the defendant of due process is whether, "after considering the entire record, can it be said that the accused was an effective representation and a fair and impartial trial?" *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980).

Here, Ms. Delesdernier was denied her right to due process and to effective assistance of counsel because the court agreed she was entitled to a lesser included instruction on simple possession, but provided incomplete instructions the jury due to

counsel's failure to object. RP 236-37.

The risk of prejudice from instructional error is elevated when a defendant commits a crime similar to the one charged but the jury is not properly instructed on a lesser included offense. *State v. Pittman*, 134 Wn. App. 376, 390, 166 P.3d 720 (2006), *abrogated on other grounds by Grier*, 171 Wn.2d 17. Here, the fact that the crimes are distinguished by one element, the intent to deliver methamphetamine to another person, raises the possibility that the jury resolved its doubts about Ms. Delesdernier's intent in favor of conviction on the greater offense simply because they were not given the option of evaluating the evidence alongside the elements of the lesser crime.

Had the jury believed Ms. Delesdernier's defense that the gang members in her house were selling the methamphetamine, they could still have found her guilty of simple possession based on the evidence showing that she owned the home and police found methamphetamine inside. However, the trial court's instructions to the jury did not give the jury this option. Instead, trial counsel's error precluded the jury from returning this verdict and they were forced to choose between convicting Ms. Delesdernier as charged or

acquitting her on that count.

There is a reasonable probability that had the jury would have convicted Ms. Delesdernier of another count of possessing a controlled substance rather than the more serious offense of possession with intent to deliver had the jury been properly instructed on the elements of that lesser included offense. Ms. Delesdernier was denied her constitutional right to effective assistance of counsel and this court should reverse her convictions and remand for a new trial.

2. THE STATE FAILED TO PROVE THAT MS. DELESDERNIER POSSESSED METHAMPHETMAINE WITH THE INTENT TO DELIVER WHEN THE QUANTITY OF METHAMPHETMINE FOUND IN HER HOUSE WAS INSUFFICIENT FOR RESALE

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found

the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

To convict a defendant of possessing a controlled substance with the intent to deliver, the state must prove beyond a reasonable doubt that the defendant (1) possessed a controlled substance, (2) possessed the controlled substance with the intent to deliver it to another person, and (3) the possession occurred within Washington. RCW 69.50.401(1). The state failed to prove beyond a reasonable doubt that Ms. Delesdernier possessed methamphetamine with the intent to deliver it to another person when the police executed a search warrant at her home on February 23, 2017.

“Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver.” *State v. Hotchkiss*, 1 Wn. App. 2d 275, 280, 404 P.3d 629 (2017) (quoting *State v. O’Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010)). “Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of

possession.” *State v. Brown*, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993).

The finder of fact may infer the intent to deliver from possession of a significant amount of a controlled substance plus at least one additional factor such as possessing large amounts of cash or possessing “sale paraphernalia.” *Hotchkiss*, 1 Wn. App. 2d at 280; *O’Connor*, 155 Wn. App. at 290.

As a threshold matter, the state failed to prove that Ms. Delesdernier was in possession of a “significant amount” of methamphetamine on the day they executed the search warrant at her house. The only controlled substance seized during execution of the search warrant was a baggie in the living room containing less than an eighth of an ounce of methamphetamine. RP 118-19, 210; Ex. 6. This small amount of methamphetamine is insufficient for commercial resale and the establishes that it was in the home for personal use rather than distribution.

Furthermore, the evidence concerning the additional factors that can indicate the intent to distribute a controlled substance is insufficient to prove beyond a reasonable doubt that Ms. Delesdernier had that intent on the date police searched her home.

Police seized roughly \$1,500 in cash from Ms. Delesdernier's home, but she explained that the cash was for her lawyer and the evidence supports her explanation.

Police arrested Ms. Delesdernier almost two weeks before they executed the search warrant and she had an arraignment scheduled for February 27, which was 4 days after the search warrant was executed. CP 1, 11. The evidence establishes that Ms. Delesdernier had \$1,500 in cash in her house to pay her lawyer for a pending case, meaning there is no nexus between the cash and the methamphetamine found in the house.

Finally, the state's evidence fails to connect Ms. Delesdernier to the other paraphernalia found in the house. The state's lead detective testified that the scales and baggies were found either in the bedrooms of the two gang members who also lived in the house, or in the shop behind the house. RP 121-22, 129-30, 138-40.

The state's evidence only proves that there was a small amount of methamphetamine in the house and fails to show that it was being packaged for distribution. The state's evidence only proves that Ms. Delesdernier was in possession of a small amount

of methamphetamine for personal use at the time police executed the search warrant and is insufficient to sustain a conviction for possession with intent to distribute.

When an appellate court reverses for insufficient evidence and the jury was instructed on a lesser included offense, the court may enter judgment on the lesser offense and remand for resentencing on that charge when the jury necessarily found each element of that offense in reaching its verdict. *In re Heidari*, 174 Wn.2d 288, 292-94, 274 P.3d 366 (2012) (citing *State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980)).

In this case, the jury necessarily found the elements of possession of a controlled substance. The elements of simple possession are the defendant (1) possessed a controlled substance (2) within Washington. RCW 69.50.4013(1). Here, the state proved that Ms. Delesdernier lived at the house and that there was a small baggie of methamphetamine found inside. However, because the state failed to meet its burden to prove the intent to distribute beyond a reasonable doubt, this court should reverse Ms. Delesdernier's conviction on that charge and remand for resentencing on the lesser included offense of possessing a

controlled substance.

D. CONCLUSION

Ms. Delesdernier was denied her constitutional right to effective assistance of counsel when her trial counsel failed to propose a jury instruction containing the elements of the lesser included offense related to count five. For this reason, Ms. Delesdernier respectfully requests that this court grant her a new trial. In the alternative, Ms. Delesdernier asks that his court reverse her conviction for possession with intent to distribute and remand for resentencing on the lesser included offense of simple possession.

DATED this 4th day of May 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAAppeals@spokanecounty.org and Kay Delesdernier/DOC#420218, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332 a true copy of the document to which this certificate is affixed on May 4, 2020. Service was made by electronically to the prosecutor and Kay Delesdernier by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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