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Division III
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37203-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KAY DELESDERNIER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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 5.

2. The State presented insufficient evidence to prove beyond a reasonable doubt that Ms. Delesdernier possessed methamphetamine with intent to deliver to another person.

II. ISSUES PRESENTED

1. Has the defendant demonstrated either deficient performance or prejudice by defense counsel's failure to request a to-convict instruction that corresponded to the requested lesser included offense instruction, where the lesser included offense was adequately defined elsewhere in the jury instructions?

2. Under this Court's precedent in *State v. Zunker*,[1] and our Supreme Court's precedent in *State v. Goodman*,[2] may a conviction for possession of a controlled substance with intent to deliver be predicated upon the possession of one to two doses of a drug where other circumstances support the inference that the drugs were possessed with the intent to deliver?

III. STATEMENT OF THE CASE

Ms. Delesdernier was charged by amended information with three counts of delivery of a controlled substance occurring on or about June 2, 2016, June 21, 2016, and June 26, 2016; possession of a controlled

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[1] 112 Wn. App. 130, 136, 48 P.3d 344 (2002).

[2] 150 Wn.2d 774, 783, 83 P.3d 410 (2004)

substance occurring on or about February 10, 2017; and possession of methamphetamine with intent to deliver occurring on or about February 23, 2017. CP 116-17. Except for the possession of a controlled substance charge, all counts were charged with a school bus route stop enhancement. *Id*. The jury found Ms. Delesdernier guilty of all counts and enhancements. CP 150-58. On appeal, the defendant challenges only her conviction for possession of methamphetamine with intent to deliver occurring on or about February 23, 2017.

Detectives set up a series of "controlled buys" wherein a confidential informant (CI) would purchase methamphetamine from Ms. Delesdernier.[3] During the first controlled buy, the CI was to purchase an ounce of methamphetamine for $500 in the shop/garage area behind Ms. Delesdernier's residence[4] in Spokane; this controlled buy was successful. RP 87, 93-94, 203. During the second controlled buy, the same CI was to purchase an ounce of methamphetamine from Ms. Delesdernier at her residence for $500; the CI used a recording device and successfully made this purchase in the shop behind the house. RP 95-99, 164, 205. The

[3] Prior to each "controlled buy," the CI was searched to ensure he or she did not have any narcotics or money on his or her person before meeting with the suspect. RP 89.

[4] During a later search of the residence, detectives located "dominion and control" paperwork in the form of a mortgage payment schedule in Ms. Delesdernier's name. RP 127.

third controlled buy occurred on June 29, 2016; the same CI again was to purchase an ounce of methamphetamine from Ms. Delesdernier. RP 101. This time, the purchase was to occur at the Quality Inn parking lot in Spokane Valley, so detectives could visually identify her, and the CI used a recording device. RP 102-03. The CI entered Ms. Delesdernier's vehicle and again successfully purchased drugs from her. RP 107, 207.

On February 10, 2017, Ms. Delesdernier was arrested for the three deliveries. RP 109. A search of her person and purse incident to arrest yielded over twelve hundred dollars, a small amount of methamphetamine,[5] and other personal belongings. RP 110-11, 209. Ms. Delesdernier admitted that she had been purchasing pounds of methamphetamine approximately every three weeks and then typically selling ounces; however, after the source of her methamphetamine was arrested, she was only able to sell "smaller amounts of meth." RP 112-13.

After Ms. Delesdernier's arrest and after listening to the recorded conversations between Ms. Delesdernier and the CI, law enforcement obtained a search warrant for her residence. RP 113-14. Multiple officers executed the search warrant at the defendant's residence on February 23, 2017. RP 114-15. Ms. Delesdernier was present at the time of the search.

[5] Officers recovered approximately 0.6 grams of methamphetamine during this arrest. RP 209.

RP 115. She told officers that there were no drugs in the home "as far as she knew" and there were no large sums of money except for $1,500 in cash for her attorney. RP 116. Ms. Delesdernier identified her bedroom, as well as to whom each of the other bedrooms belonged. RP 116.

In a back living room, officers found Ms. Delesdernier's purse; in a cabinet next to the purse they found the $1,500 in cash and a baggie containing an eighth of an ounce of methamphetamine.[6] RP 117, 210. Officers also located meth pipes and spoons, and other drug paraphernalia within the home. RP 120. A large scale, which in the detective's experience is indicative of drug trafficking, was found in the shop of the residence. RP 122. Other digital scales were also found during the search. RP 123-25. Detectives seized drug packaging material and a metal tin containing baggies and methamphetamine residue. RP 128-29. These baggies are often used to apportion "eight balls" of narcotics, i.e., an eighth of an ounce – between one to two doses. RP 130.

During the jury instruction conference, the defendant requested two instructions – one regarding her right not to testify at trial, and the other for a lesser included possession of a controlled substance instruction for count 5. RP 215, 218. Thus, relevant here, the court gave the jury a "to-

[6] This sample was later weighed as 2.1 grams of methamphetamine. RP 210.

convict" instruction for count 4, possession of a controlled substance, methamphetamine (Instruction 16), a definitional instruction for "possession" (Instruction 17), instructions defining possession of a controlled substance and possession of a controlled substance with intent to deliver as crimes (Instruction 15, 18), a "to-convict" instruction for count 5, possession of a controlled substance with intent to deliver, a lesser included instruction directing the jury that, if after deliberation it was not satisfied of the defendant's guilt on count 5, it was to consider whether the defendant was guilty of the lesser crime of possession of a controlled substance, and, lastly, a concluding instruction that also directed the jury to consider the lesser included offense of possession of a controlled substance if it acquitted or could not agree on a verdict for count 5. RP 234-39; CP 138-46. The jury returned verdicts finding the defendant guilty of all counts as charged, leaving the lesser included verdict form blank. CP 150-58. The defendant timely appealed.

IV. ARGUMENT

A. THE DEFENDANT IS UNABLE TO SHOW DEFICIENT PERFORMANCE OR PREJUDICE BY DEFENSE COUNSEL'S FAILURE TO REQUEST A TO-CONVICT INSTRUCTION FOR A LESSER INCLUDED OFFENSE WHERE THE LESSER INCLUDED OFFENSE WAS DEFINED ELSEWHERE IN THE INSTRUCTIONS.

An appellate court reviews a claim of ineffective assistance of counsel de novo. *State v. Lopez*, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018). An appellate court gives great deference to trial counsel's performance and the court begins its analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record in the trial court. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Id.* at 334-35. Failure to establish either prong of the test ends the inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). There is a strong presumption of effective assistance and the

defendant bears the burden of rebutting that presumption by showing the lack of a legitimate strategic or tactical reason for the challenged conduct. *McFarland*, 127 Wn.2d at 336-37. "'*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.'" *Matter of Mockovak*, 194 Wn. App. 310, 322, 377 P.3d 231, 236 (2016) (citing *Harrington v. Richter*, 562 U.S. 86, 110, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)) (alteration in original). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

To determine if counsel acted deficiently, this Court must first determine whether the jury instructions as requested and as given were improper. Jury instructions are sufficient when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Pirtle*, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995). Jury instructions are read as a whole to determine whether they meet those requirements. *State v. Hardy*, 44 Wn. App. 477, 480, 722 P.2d 872 (1986). The notes to WPIC 4.11 indicate, "in order to have a complete set of instructions, there must be a separate elements instruction setting out what must be proved to convict a defendant of the lesser included crime or lesser degree." However, WPICs are not the law;

they are only persuasive authority. *State v. Knapp*, 11 Wn. App. 2d 375, 382, 453 P.3d 1006 (2019).[7] Defendant offers no authority, except for the comment to the WPIC, that a separate "to-convict" instruction must, under every circumstance,[8] accompany a lesser included offense instruction. The other ineffective assistance cases cited by defendant involve the outright failure to request a lesser included instruction at all. Br. at 12-13.

Here, reading the jury instructions as a whole, there *was* a "separate elements instruction" setting forth what must be proved in order to convict Ms. Delesdernier of the lesser included offense to count 5, possession with intent to deliver. The jury was fully instructed on the law pertaining to possession of a controlled substance for count 4, including an elements instruction. The only material difference between the "to-convict" instruction for count 4 and the absent "to-convict" instruction for the lesser included offense for count 5, would have been the date of the offense, which *was* included in the "to-convict" instruction that was given for count 5. The defendant's argument assumes that jury read the lesser included instruction in a vacuum, without regard to the elements and definitional instructions

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[7] Review was granted by the Supreme Court, and oral argument is scheduled for September 24, 2020. 195 Wn.2d 1014, 461 P.3d 1197 (2020)

[8] The State does not suggest that a to-convict instruction need never be given in conjunction with a lesser included offense instruction. In many cases, a "to-convict" instruction *would* be necessary to adequately inform the jury of the necessary elements to prove the lesser included offense.

given for a separate act of the same criminal offense. Defense counsel was not deficient for failing to request a "to-convict" instruction for the lesser included offense where the jury was properly instructed elsewhere on the elements of that offense. The jury was given the proper tools, at defense counsel's request, by which it could determine whether the defendant was guilty of the lesser offense in the event it determined that she was not guilty or could not decide her guilt on the greater offense.

For the same reason, even if a separate "to-convict" instruction corresponding to the lesser included instruction was necessary, the defendant is unable to demonstrate prejudice. She is unable to demonstrate that the outcome of the trial would have been different if the jury had been twice instructed on the elements of possession of a controlled substance. Ms. Delesdernier was able to argue her theory of the case – that she was not dealing drugs, suggesting that it was the gang members in her house or the passenger in her vehicle who took advantage of her. RP 258, 262-63. The jury is presumed to have read all of the instructions, as a whole and in light of all other instructions. *See e.g., State v. Hutchinson,* 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). Therefore, it is presumed that the jury read the lesser included offense instruction in light of the instructions the court gave for count 4, possession of a controlled substance. Additionally, the *only* material difference between possession of a controlled substance with intent

to deliver and possession of a controlled substance, is the intent element. Presuming the jury read its instructions, that distinction would have been clear.

Unlike those situations where defense counsel has been held to be deficient for failing to request a lesser included instruction at all, defense counsel did request, and the court gave, a lesser included instruction for count 5. The crime defined as a lesser included offense in that instruction was defined elsewhere in the instructions. The jury is presumed to have read and followed those instructions, and, under these circumstances, clearly found the defendant guilty of the greater offense. The defendant's ineffective assistance of counsel claim fails.

B. SUFFICIENT EVIDENCE EXISTED TO PROVE THE DEFENDANT POSSESSED METHAMPHETAMINE WITH INTENT TO DELIVER AS CHARGED IN COUNT FIVE.

Despite her admission that she was only dealing in small amounts of methamphetamine because her supplier had been arrested, as well as the presence of other factors suggesting that she was engaged in the sale of drugs, Ms. Delesdernier now challenges the sufficiency of the evidence for her conviction for possession of methamphetamine with intent to deliver.

The purpose for sufficiency of the evidence review is "to guarantee the fundamental protection of due process of law." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The test for

determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 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. *Id*. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id*. In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *Id*.

Our Supreme Court has stated:

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after

> reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (the court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

In order to prove unlawful possession of a controlled substance with intent to deliver, the State had to prove (1) unlawful possession (2) of a controlled substance (3) with the intent to deliver. RCW 69.50.401(1).

A finder of fact can infer intent to deliver from possession of a significant amount of a controlled substance plus at least one additional factor. As a general rule, "[m]ere 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. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010). Several courts have upheld convictions for intent to deliver based on a large amount of drugs and additional evidence. *See, e.g., State v. Hotchkiss*, 1 Wn. App. 2d 275, 281-82, 404 P.3d 629 (2017) (8.1 grams of methamphetamine and $2,150 in cash sufficient); *O'Connor*, 155 Wn. App. at 291 (a large amount of marijuana, a sophisticated grow operation, and a scale sufficient); *State v. Simpson*, 22 Wn. App. 572, 575-76, 590 P.2d 1276 (1979) (quantity of

drugs and nature of packaging sufficient); *State v. Harris*, 14 Wn. App. 414, 418-19, 542 P.2d 122 (1975) (quantity of drugs, and a scale sufficient). One of those additional factors is the defendant's possession of a large amount of cash. *O'Connor*, 155 Wn. App. at 290; *see also State v. Campos*, 100 Wn. App. 218, 223-24, 998 P.2d 893 (2000) (the defendant possessed a large amount of cocaine and $1,750 in cash). So is paraphernalia – to include scales or address lists. *Zunker*, 112 Wn. App. at 136.

However, this case poses a different issue – whether a small amount of a controlled substance plus additional factors, including the presence of a large sum of money, scales, and an admission by the defendant that she was only dealing in small amounts of controlled substances, is sufficient to sustain a conviction for possession with intent to deliver.

Zunker is instructive. A search of Mr. Zunker's person after a traffic stop yielded two grams of methamphetamine; a search of his car yielded ground up cold pills, a scale with methamphetamine residue, two notebooks containing names and phone numbers, and, a nearly empty tank of anhydrous ammonia in the trunk.[9] 112 Wn. App. at 133-34. The defendant was convicted of manufacturing a controlled substance and possession of a controlled substance with intent to deliver. *Id*. at 134. On appeal, the

[9] The tank was empty except for a trace amount. 112 Wn. App. at 134.

defendant challenged the sufficiency of the evidence – claiming that the two grams of methamphetamine was more consistent with personal use than with intent to deliver. *Id*. at 135. This Court analyzed whether a small amount of drugs could sustain a conviction for possession with intent to deliver, answering that question in the affirmative.

The amount of drugs possessed by Zunker was enough for one or two sales,[10] unlike cases in which a defendant only possessed residue or no drugs at all. *Id*. at 135 (citing *State v. Todd*, 101 Wn. App. 945, 6 P.3d 86 (2000)). This Court noted other jurisdictions such as Virginia and Pennsylvania uphold the sufficiency of the evidence for such convictions – the jury is entitled to weigh all the circumstances and may infer intent to deliver even though the quantity of drugs seized is consistent with personal use. *Id*. at 137.[11] This Court also noted that the circumstances may be such that a jury could reasonably infer that a dealer's stock of drugs for sale was running low. *Id*. (citing *United States v. James*, 494 F.2d 1007 (D.C. Cir. 1974)).

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[10] A similar amount of methamphetamine is at issue here. RP 117, 130, 210.

[11] Citing *Hussen v. Commonwealth*, 257 Va. 93, 101-02, 511 S.E.2d 106 (1999) (Poff, J., dissenting); *White v. Commonwealth*, 24 Va. App. 234, 242-43, 481 S.E.2d 486, *on reh'g*, 25 Va. App. 662, 492 S.E.2d 451 (1997); *Stanley v. Commonwealth*, 12 Va. App. 867, 869, 407 S.E.2d 13 (1991); *Commonwealth v. Ariondo*, 397 Pa. Super. 364, 384, 580 A.2d 341 (1990).

Citing *Zunker* with approval, our Supreme Court has also rejected a similar claim, stating, "it has never been suggested by any court that a large amount of a controlled substance is required to convict a person of intent to deliver." *Goodman*, 150 Wn.2d at 783 (2.8 grams of methamphetamine alone may not have been sufficient to sustain a conviction, but other factors, including scales and baggies and a link to a prior controlled buy could have led a reasonable jury to find defendant guilty beyond a reasonable doubt).

Defendant fails to cite either *Goodman* or *Zunker* or to distinguish those cases from her case. Here, the jury was free to disregard Ms. Delesdernier's explanation that the $1,500 in cash found with the methamphetamine in her house was for her lawyer. That large sum, in combination with (1) the scales and baggies found in the shed, RP 122, 130,[12] (2) evidence that she had previously requested the CI to come to her residence or shed to buy drugs, and (3) her explanation that she lost her supplier and was dealing in small amounts, was sufficient for the jury to convict her of possession of a controlled substance with intent to deliver. The defendant's sufficiency claim fails.

[12] This scale and baggies were found in an area known to be used by Ms. Delesdernier to sell her drugs, the shed. RP 87, 122, 130. The scales found in the bedrooms of the other occupants of the residence were unnecessary to sustain a conviction.

V. CONCLUSION

The evidence was sufficient for a rational jury to find Ms. Delesdernier guilty of possession of a controlled substance with intent to deliver. The lesser included offense instruction, in conjunction with the instructions for count 4 correctly set forth the law, allowed Ms. Delesdernier to argue her theory of the case, and was not misleading. The jury is presumed to have read the instructions as a whole and in light of all other instructions. The defendant's ineffective assistance claim also fails. The State respectfully requests this Court affirm the defendant's conviction.

Dated this 1 day of July, 2020.

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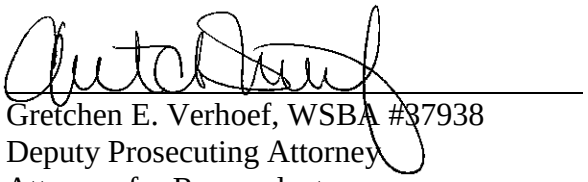

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. KAY DELESDERNIER, Appellant.	NO. 37203-1-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 1, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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