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FILED
Feb 26, 2013
Court of Appeals
Division III
State of Washington

No. 30572-4-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,
RESPONDENT,**

v.

**JAMIE JEROME MARSH,
APPELLANT.**

RESPONDENT'S BRIEF

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Edward A. Owens, WSBA #29387
Chief Deputy Prosecuting Attorney
Attorney for Respondent**

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

A. Was the State's evidence sufficient to support a finding of guilt beyond a reasonable doubt on the charge of Possession of Cocaine with the Intent to Deliver?

B. Was the defendant's counsel ineffective when he did not ask for the definition of intent to be included in the jury instructions?

C. Should the finding that the defendant had the likely future ability to pay LFOs be stricken from the judgment and sentence?

IV. STATEMENT OF FACTS

The defendant, Jamie Marsh, was charged by Information with possession of a controlled substance, cocaine, with the intent to manufacture or deliver, or in the alternative, possession of a controlled substance, cocaine. (CP 1, RP 5).

On the morning of July 1, 2010, officers from the Interagency Narcotics Enforcement Team (INET) set up to serve a search warrant on the defendant's residence, person, and car. (RP 58). As officers conducted their surveillance, they saw the defendant leave his home and drive away in his car. (RP 19, 20). When the officers started to follow the defendant, he drove around the block and back to his residence, pulled into his driveway, and got out of his vehicle. (RP 59-62). The officers pulled in behind the defendant's vehicle and activated their emergency lights to stop the defendant's vehicle. (RP 61, 10-18, 90, 5-9).

The defendant got out of his car and ran to his house as officers gave chase. (RP 62-63). The officers identified themselves as police officers and told the defendant to stop. (RP 62). The defendant did not stop and continued to run into his house and then into his bedroom with two officers giving chase. (RP 62-63). Once in the bedroom a twenty second struggle ensued as the defendant was reaching into a closet and was not stopping when ordered to do so by the officers. (RP 93-94). Not knowing what the defendant was attempting to reach for in the closet, and the defendant not following orders to stop, the officers tasered the defendant to make him compliant. (RP 64).

Once in custody the defendant waived his Miranda rights and spoke with the investigating officers. (RP 67). He told the officers that he

did not use cocaine and that he does not like drugs at all. (RP 183). He went on to say that he sells the drugs. (RP 182). He said he purchases between \$500 and \$550 for three ounces from his supplier daily. (RP 182, 186). The defendant said he purchases powder cocaine and rocks it up himself. (RP 182).

During the search of the residence there was no evidence that was found that was inconsistent to the information that the defendant was purchasing three ounces of powdered cocaine a day, turning the powdered cocaine into rock cocaine, and then selling the rock cocaine and not using cocaine. (RP 192, 194, 195).

INET officers explained at trial that crack cocaine is weighed and sold as little rocks. (RP 154). Testimony by the officers also disclosed that in their training and experience the 1.8 grams of cocaine the defendant had in his possession was an amount that a seller would possess for sale, rather than personal use. (RP 154). Evidence at trial also showed that the money found on the defendant was \$485 in his back pocket and \$100 in his front pocket, all in \$20 bills except a \$5 bill. (RP 230). This denomination of cash was testified by the detectives to be consistent to what one would receive and have in their possession if they were selling rock cocaine. (RP 161-162).

Contrary to the officers' testimony, the defendant stated he did not sell cocaine and the cocaine found in his possession was for his personal use. (RP 218-19). The defendant testified he had just smoked cocaine that morning and was now on his way to purchase more cocaine to sell. (RP 233-234, 164). The defendant testified that he smokes eleven grams of cocaine a day and was an eight on a scale of ten at the time he was arrested. (RP 237). Detective Lloyd, who is a trained Drug Recognition Expert, testified that the defendant showed no signs of using cocaine that day, or that the defendant was addicted to using drugs. (RP 199-201).

Evidence at trial also showed that only a metal marijuana pipe was found at the defendant's house and no other drug paraphernalia for use of cocaine was located. (RP 143). Testimony showed that a metal pipe is inconsistent to the use of smoking crack cocaine as the pipe does not get hot enough to burn the cocaine. (RP 143). The narcotics detectives testified that a glass pipe is used to smoke crack cocaine as a metal pipe does not produce the heat needed to smoke rock cocaine; and no glass pipes were found in the house. (RP 148).

The goals of INET members are to target mid to upper level drug dealers, and arrest the highest dealer possible. (RP 175). The INET officers testified they made a tentative offer to the defendant. If the defendant were willing to work with them in identifying drug dealers, they

would work with the prosecutor's office to potentially reduce or dismiss charges against him. (RP 223-225).

In response to their questioning about whether he could be of assistance to them, the defendant told the officers he could purchase cocaine (in the future) and "rock it up" and sell it for them. (RP 195-196). The defendant also identified two or three individuals as drug dealers. (RP 183). Although at trial he did not remember signing a contract with INET, he did, and was in fact allowed out of jail to make six buy attempts for INET. (RP 235, 245).

The court instructed the jury on simple possession as well as possession with intent to manufacture or deliver. The instructions included "intent" as an element of the offense, but did not define the term. The instructions did define the meanings of the terms "deliver" and "possession". (CP 37-39; RP 136, 250).

The court instructed the jury on simple possession as well as possession with the intent to manufacture or deliver. The defendant was found guilty on both counts. (RP 41). The simple possession case was dismissed based on its merger with the possession with intent to deliver. At sentencing, the court imposed 90 months of incarceration, 12 months of community custody, and \$1,650 of legal financial obligation. (CP 49, 50, 53).

P2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

Handwritten was:

"Defendant has likely future ability to pay LFO's imposed."

This appeal followed. (CP 66).

V. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

In order to convict the defendant of possession with intent to deliver, the State had to prove beyond a reasonable doubt that he (1) unlawfully possessed (2) with intent to deliver (3) a controlled substance. *State v. Sims*, 119 Wn.2d 138, 141, 829 P.2d 1075 (1992). The defendant now challenges the sufficiency of the State's evidence showing possession with intent to deliver the rock cocaine.

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 the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). When the sufficiency of evidence is challenged in a criminal

case, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (en banc) (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

In determining the sufficiency of the evidence, circumstantial evidence is not inherently less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)). Credibility determinations are for the trier of fact and will not be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

The specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. *Delmarter*, 94 Wn.2d at 638. It is firmly established by Washington law that mere possession of a controlled substance is generally insufficient to

establish an inference of intent to deliver; rather, at least one additional factor must be present. *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) (citing *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); *State v. Zunker*, 112 Wn. App. 130, 136, 48 P.3d 344 (2002)).

Our Supreme Court held that “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.” *State v. Goodman*, 150 Wn.2d 774, 782-83, 83 P.3d 410 (2004). In *Goodman*, our Supreme Court upheld an intent to deliver conviction involving 2.8 grams of methamphetamine. *Goodman*, 150 Wn.2d at 783-84. Division Three of the Court of Appeals affirmed an intent to deliver conviction where the defendant had 2.0 grams of methamphetamine. *State v. Zunker*, 112 Wn. App. 130, 133, 48 P.3d 344 (2002), *review denied*, 148 Wn.2d 1012 (2003). While the quantity of drugs alone may not be sufficient to establish intent to distribute, the fact that the amount of drugs is small does not invalidate a jury verdict of an intent to deliver if corroborating circumstances exist. *Zunker*, 112 Wn. App. at 137-38. Thus, the central question is whether corroborating evidence is present to support Marsh’s conviction because mere possession is insufficient to support an inference of intent to deliver. *See Goodman*, 150 Wn.2d at 782-83; *State v. Darden*, 145 Wn.2d 612, 624-25, 41 P.3d 1189 (2002); *Zunker*, 112 Wn. App. at 135-38.

As stated earlier, there must be evidence of other items or actions that are indicative of intent to sell or deliver. The intent must "logically flow as a matter of probability from the evidence." *State v. Davis*, 79 Wn. App. 591, 594, 904 P.2d 306 (1995). Additionally, the jury may infer criminal intent where "defendant's conduct plainly indicates the requisite intent as a matter of logical probability." *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41, review denied, 117 Wn.2d 1012, 816 P.2d 1225 (1991).

Applying the appropriate review standards, with that to the evidence that was produced at trial, the State produced sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that the defendant possessed a controlled substance with the intent to deliver. Officers testified that they chased the defendant into his room and arrested the defendant when he was attempting to grab the cocaine out of his bedroom closet. When they interviewed Marsh he told the officers he did not use cocaine. (RP 183). Marsh told the officers he bought 3 ounces of cocaine daily and sells cocaine. (RP 182, 186). The defendant went on to tell the officers that the cocaine costs him \$500 to \$550 for 3 ounces. (RP 182, 186). The defendant said that he would purchase powdered cocaine and "rocks it up" himself. (RP 182). Marsh also informed Detective Lloyd that he was going to order up two ounces that day, rock it up, and

sell it. (RP 194-195). When asked by the officers if he would assist the officers in purchasing cocaine for the police in order to receive a deal from the prosecutor's office the defendant stated he would purchase, rock up and sell for the police if they wished. (RP 68-71). Evidence produced at trial also showed that when Marsh was searched incident to his arrest, the officers found \$485 in his back pocket and another \$100 dollars in his front pocket. All the money was in \$20 bills which officers testified at trial are indicative to street level drug transactions. (RP 161-162, 230). The white powder the defendant was attempting to grab when he was arrested later weighed and tested positive for 1.8 grams of cocaine. (RP 154).

At trial the defendant then testified that the cocaine found at his residence was for him and was not for sale. He said that he uses approximately 11 grams of cocaine a day. Marsh also said that he had used cocaine moments before he was arrested on the morning of July 1, 2010 and felt on a scale of 10 he would have registered an 8. (RP 237). The Detectives testifying at trial contradicted the defendant's testimony at trial. The detectives testified that 1.8 grams of cocaine is more likely to be found by one who sells cocaine rather than using it. (RP 154, 164, 193). Detective Lloyd testified he was a trained DRE officer and that when he was interviewing the defendant the morning of July 1, 2010 he saw

absolutely no signs that the defendant had been smoking cocaine that morning. (RP 239). Detectives also testified that no evidence was found at the residence that would be consistent to someone smoking cocaine. (RP 143). Officers testified that rock cocaine is ingested by smoking. (RP 143, 148). The cocaine is smoked in a glass pipe as it provides a hotter burn for the cocaine to be ingested. (RP 143). During the search of the residence only one metal pipe was found in the house in the defendant's bedroom. Metal pipes are used to smoke marijuana as opposed to cocaine as metal pipes cannot provide enough heat to smoke the cocaine. (RP 148).

Based on the evidence that was produced at trial, a reasonable trier of fact could have determined that the defendant, Jamie Marsh, intended to deliver the cocaine found in his possession. The defendant admitted to the detectives that he was selling and not using. There was no evidence that he was using his product, and he had product and admitted he was going to purchase more that day to rock up and sell. His own words to the investigating officers were he bought and sold drugs daily. Thus a jury could reasonably find that the drugs he was found in possession of on the morning of July 1, 2010 were possessed with the intention to be sold.

B. THE DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO REQUEST A JURY INSTRUCTION ON THE TECHNICAL STATUTORY MEANING OF AN ESSENTIAL ELEMENT: INTENT.

The defendant next argues that his counsel was ineffective as he did not request a definition of the word “intent” be included in the jury instructions. The State argues this court should not even hear this argument as it was not raised in trial. A defendant may not raise an objection for the first time on appeal unless it relates to manifest error affecting a constitutional right. (RAP 2.5(a)(3)). The court clarified in *State v. Scott* that:

...[f]ailure to give a technical term instruction is not constitutional error that can be properly raised for the first time on appeal. Citing *Allen*, *Scott* said that “Intent” must be defined according to its statutory definition (when a party so requests) because that definition differs from common understandings of the meaning. *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988).

In the case at hand the defendant’s attorney did not request the technical definition of “intent” be included in the jury instructions.

Effective assistance of counsel is guaranteed by both the federal and state constitutions. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. The purpose of the guaranty is to ensure a reliable disposition of the case. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). It is well settled that to demonstrate ineffective

assistance of counsel, a defendant must show two things: “(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). A failure to make either showing terminates review of the claim. *Thomas*, 109 Wn.2d at 226.

Appellate review of counsel's performance starts from a strong presumption of reasonableness. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990); *see also*, *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). (“In assessing performance, ‘the court must make every effort to eliminate the distorting effects of hindsight.’” (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992))). Trial counsel owe several responsibilities to their clients, including the duty to research relevant law. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland*, 466 U.S. at 690-91). “[D]efense counsel has a duty to investigate all reasonable lines of defense,” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1

(2004) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)), but has no duty to pursue strategies that reasonably appear unlikely to succeed, *McFarland*, 127 Wn.2d at 334 n.2. Many state and federal cases have also concluded that an attorney's failure to raise novel legal theories or arguments is not ineffective assistance. See, e.g., *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir.) (“Counsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective.”), cert. denied, 546 U.S. 882 (2005); *Haight v. Commonwealth*, 41 S.W.3d 436, 448 (Ky. 2001) (“while the failure to advance an established legal theory may result in ineffective assistance of counsel under Strickland, the failure to advance a novel theory never will”), cert. denied, 534 U.S. 998 (2001), overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

The defendant has failed to show that, but for the defendant's attorney's actions, there is a reasonable probability that the result of the trial would be different. The definition of “intent” is not that difficult of a word to understand what it means to possess cocaine with the intent to deliver it. The State argues that a very common definition of intent is to have a purpose or reason to do something.

In defense counsel's final argument at trial the defendant's attorney argued many times that the State had not shown his client

possessed the cocaine with intent to deliver it. (RP 270). The defendant's attorney argued how there was no proof shown that the cocaine Marsh was found with was going to be sold at that time he was arrested. Defense counsel argued of conflicting stories between the detectives and the defendant. (RP 272). Counsel also argued that the State did not send the pipe that was found in the defendant's bedroom to the crime lab to be tested. (RP 271). Defense counsel also argued intent was not shown as the defendant's testimony was taken out of content. (RP 273). Finally, defense counsel argued that there was no evidence showing the cocaine Marsh possessed on the day he was arrested was to be sold in the future and intent to sell at that time was not shown by the State. (RP 273-276).

Defense counsel's failure to ask for an the instruction defining intent did not fall below an objective standard of reasonableness based on all the circumstances, and his actions certainly did not prejudice the defendant in any manner.

C. THE SENTENCING COURT PROPERLY FOUND MR. MARSH HAD THE LIKELY FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

On appeal, Mr. Marsh argues the court's finding regarding his ability to pay LFO's should be stricken from the Judgment and Sentence. In essence, the defendant supports this argument by claiming that the court

did not take into account his financial resources and the nature of the burden of imposing LFO's. Mr. Marsh's claim should be denied.

One of the leading cases regarding review of the imposition of LFO's is Division I's *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991). In *Baldwin*, the court articulated the standard of review regarding whether the trial court erred in finding a defendant had the future likely ability to pay LFO's should be the "clearly erroneous" standard. *Id.* at 312. In *Baldwin*, the court upheld the trial court's finding that Baldwin had the present and future ability to pay LFO's because the presentence report stated that "Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense." *Id.* at 311. Division I also noted that Baldwin made no objection to the court's finding.

In the present case, the sentencing judge clearly and directly found Mr. Marsh's ability to pay LFO's. It should be noted that the same judge who sentenced the defendant was the same judge who presided at trial. The court heard all the testimony which included the defendant's own testimony. During that time the court was able to form an opinion as to the defendant's ability to pay LFOs in the future. As conditions of sentence and following RCW 10.01.160 the court made the findings that the defendant has likely future ability to pay LFO's imposed. (CP 49).

Mr. Marsh's attorney did not respond that the defendant did not have the ability to pay LFO's and Mr. Marsh did not object. The court then listed out in the Judgment and Sentence the specific amounts Mr. Marsh was expected to pay and, again, Mr. Marsh did not object. There is nothing that shows the court was clearly erroneous when it came to finding the defendant was able to pay in the future.

Considering Mr. Marsh's attorney essentially stipulated that Mr. Marsh had the likely future ability to pay LFO's and Mr. Marsh failed to object, the court did not abuse its discretion in its finding. Therefore, Mr. Marsh's appeal should be denied.

Ability to pay LFO's should not be stricken from the Judgment and Sentence.

VI. CONCLUSION

For the forgoing reasons, the defendant's convictions for possession of cocaine with intent to deliver should be upheld.

Dated this 26th day of February 2013.

Respectfully submitted,

By: 
Edward A. Owens – WSBA #29387
Chief Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30572-4-III
)	
vs.)	
)	
JAMIE JEROME MARSH,)	DECLARATION OF SERVICE
)	
Appellant.)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

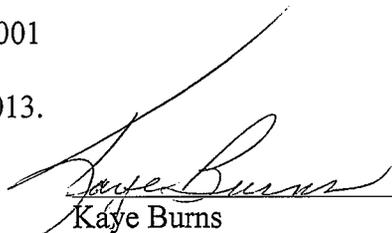
That on this day I served a copy of the Respondent's Brief in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Marie Jean Trombley
marietrombley@comcast.net

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

Jamie Jerome Marsh - #801802
Airway Heights Corrections Center
PO Box 2049
Airway Heights WA 99001

Dated: February 26, 2013.



Kaye Burns