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Washington State
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Division Two

December 18, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Plaintiff, v. MICHAEL WAYNE NAILLIEUX,	No. 50581-9-II UNPUBLISHED OPINION

SUTTON, J. — A jury found Michael W. Naillieux guilty of possession of a controlled substance with intent to deliver—methamphetamine and resisting arrest. Naillieux appeals his sentence for the possession of a controlled substance with intent to deliver—methamphetamine, arguing that the trial court incorrectly calculated his offender score. Naillieux also appeals the trial court's imposition of discretionary legal financial obligations (LFO) because the trial court mistakenly believed that it imposed mandatory LFOs when it imposed discretionary LFOs, an error the State concedes.

We hold that the trial court did not improperly calculated Naillieux's offender score, but the trial court erred when it imposed discretionary LFOs when it intended to impose only mandatory LFOs. However, we reverse Naillieux's sentence for possession of a controlled substance with intent to deliver and the trial court's imposition of discretionary LFOs—the jury demand fee and drug enforcement fund fee. We remand for resentencing. On remand, the trial court should consider all of the LFOs in light of our Supreme Court's recent decision in *State v.*

Ramirez, ___Wn.2d ___, 426 P.3rd 714 (2018), and the 2018 amendments to the LFO provisions, *see* LAWS of 2018, Ch. 269.

In a statement of additional grounds (SAG),[1] Naillieux appeals his conviction for possession of a controlled substance with intent to deliver—methamphetamine, claiming (1) the to-convict instruction for possession of a controlled substance with intent to deliver omitted an essential element by failing to identify the controlled substance, (2) the to-convict instruction for possession of a controlled substance with intent to deliver omitted an essential element by failing to include knowledge that the substance was a controlled substance, (3) he received ineffective assistance of counsel because counsel failed to object to admission of an additional bag of white crystalline substance that was not tested for methamphetamine, and (4) the search warrant authorizing the search of his apartment was not supported by probable cause.

The to-convict instruction was improper because it omitted essential elements of the charged offense by failing to include the controlled substance, methamphetamine, and by failing to identify knowledge that the substance was a controlled substance. And although the error is harmless as to Naillieux's conviction, it is not harmless as to his sentence. Naillieux's remaining SAG claims fail. Accordingly, we affirm Naillieux's conviction for possession of a controlled substance with intent to deliver, but we reverse his sentence and remand for resentencing.

FACTS

The State charged Naillieux with possession of a controlled substance with intent to deliver—methamphetamine, possession of a controlled substance—methamphetamine, and

[1] RAP 10.10.

resisting arrest. Prior to trial, the State amended the information to charge only possession of a controlled substance with intent to deliver—methamphetamine and resisting arrest.

Before trial, Naillieux filed a motion to suppress evidence found in his apartment. Naillieux argued that the search warrant authorizing the search was not supported by probable cause. The trial court disagreed and denied the motion to suppress.

Detective Kimberly Beedle of the Cowlitz County Sheriff's Office testified at trial. On September 20, 2016, Detective Beedle was assigned as a detective with the Cowlitz-Wahkiakum Narcotics Task Force. Detective Beedle was assisting officers from the Columbia Enforcement Narcotics Team (CENT) in Oregon with locating Naillieux because CENT had secured a warrant for Naillieux's arrest. Detective Beedle and a lieutenant from CENT set up surveillance outside of Naillieux's apartment.

After approximately two hours of surveillance, Detective Beedle observed two males walking out of Naillieux's apartment building. One of the males looked similar to the picture Detective Beedle had used as a reference for identifying Naillieux. Detective Beedle observed the two men get into a black truck. Detective Beedle followed the truck for a short distance and then returned to the apartment building. Detective Beedle entered the apartment building and observed Naillieux's name on the mailbox for apartment 7. Detective Beedle then went to apartment 7 and knocked on the door but there was no answer.

About 10 minutes later, the black truck returned. Detective Beedle observed Naillieux walking towards her and the CENT officer she was with. After a brief altercation, the officers were able to place Naillieux under arrest for the CENT warrant.

After Naillieux was arrested, Detective Beedle obtained a search warrant for Naillieux's apartment. Inside the apartment, Beedle found a small bag of white crystalline powder that appeared to be methamphetamine and a pipe commonly used for smoking methamphetamine. Detective Beedle also found a digital scale with a white crystal substance on it and a bindle a small plastic baggies which she recognized as commonly used to package methamphetamine. Detective Beedle also found another digital scale that did not work because the batteries had been removed from it.

Detective Sergeant Kimber Yund of the City of Kelso Police Department was also working with the task force on September 20, 2016. Detective Sergeant Yund assisted with Naillieux's arrest and performed the search incident to arrest. During the search incident to arrest, a bag of white crystalline substance fell out of Naillieux's pant leg. Detective Sergeant Yund suspected the bag contained approximately an ounce of methamphetamine. While Naillieux was being placed in the patrol car, a second bag of white crystalline substance, similar to the first, fell out of his pant leg.

Donna Wilson of the Washington State Patrol Crime Lab analyzed the substances found on Naillieux's person and in his apartment. Wilson tested one of the bags that fell out of Naillieux's pant leg and determined that the substance contained methamphetamine. Wilson also tested the substance from the smaller bag found in Naillieux's apartment and determined that the substance contained methamphetamine.

Naillieux also testified at trial. Naillieux testified that he bought two one-ounce bags of methamphetamine on September 20, 2016. However, Naillieux testified that he bought large quantities of methamphetamine in order to save money. And he kept scales and small baggies in

his apartment so he could portion out daily amounts of methamphetamine for his personal use. Naillieux denied possessing the methamphetamine with the intent to deliver.

The trial court instructed the jury on the elements required to convict Naillieux of possession of a controlled substance with intent to deliver:

> To convict the defendant of the crime of Possession [of] a Controlled Substance with Intent to Deliver as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 20, 2016, the defendant possessed a controlled substance;
>
> (2) That the defendant possessed the substance with the intent to deliver a controlled substance; and
>
> (3) That the acts 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 one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 62. The jury found Naillieux guilty of possession of a controlled substance with the intent to deliver—methamphetamine and resisting arrest.

Before sentencing, Naillieux filed a pro se motion for a new trial alleging that the jury instructions were improper because the to-convict instructions did not identify methamphetamine as the controlled substance, did not include knowledge that the substance was a controlled substance as an element, and did not identify Cowlitz County as the place the crimes occurred. Naillieux's attorney filed his own motion for a new trial based on the failure to identify methamphetamine as the controlled substance and the failure to include knowledge as an element. The trial court denied both motions.

At sentencing, Naillieux argued that his 2009 convictions for possession of a controlled substance with intent to deliver, unlawful storage of ammonia, and possession with intent to manufacture methamphetamine should be considered the same criminal conduct and counted as only one point on his offender score. The State argued that the 2009 convictions should not be considered the same criminal conduct:

> The possession with intent, the unlawful storage of ammonia, and the possession with intent to manufacture meth in itself on its face, even though they're all on the same date and the same criminal investigation, clearly would indicate that those are three different crimes, three different proof requirements, and three different statutory elements that have to be proven so therefore they would not be considered the same criminal conduct.

II Verbatim Report of Proceedings (VRP) at 368-69. The trial court ruled,

> Okay. It looks to me those are all different kinds of -- one is intent to deliver, one is storage, one is attempt to manufacture. Those would not seem to be identical.

II VRP 371. The trial court counted each conviction separately and, with Naillieux's additional criminal history, calculated Naillieux's offender score at 10.

The trial court imposed a standard range sentence and "standard costs, they're nonwaivable." II VRP at 382. The LFOs imposed were $500 victim assessment, $200 filing fee, $250 jury demand fee, $500 drug enforcement fund, and $100 DNA collection fee. Naillieux appeals.

ANALYSIS

I. SAME CRIMINAL CONDUCT

Naillieux argues that the trial court erroneously calculated his offender score by using an incorrect legal standard for determining whether Naillieux's 2009 convictions were the same

criminal conduct. We disagree.

We review a trial court's determination of whether two acts constituted the same criminal conduct for an abuse of discretion. *State v. Davis*, 174 Wn. App. 623, 641, 300 P.3d 465 (2013). "A trial court abuses its discretion when it relies on unsupported facts, applies the wrong legal standard, or adopts a view that no reasonable person would take." *Davis*, 174 Wn. App. at 641-42.

Under RCW 9.94A.589(1)(a), offenses are treated as one crime for sentencing purposes if they are the same criminal conduct. RCW 9.94A.589(1)(a) explicitly defines same criminal conduct for the purposes of offender score calculation:

> "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

For the purposes of the same criminal conduct, intent is not the mens rea of the offenses "but the defendant's 'objective criminal purpose in committing the crime.'" *Davis*, 174 Wn. App. at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)).

Here, the trial court did not abuse its discretion because there is a change in the objective criminal purpose between manufacturing a controlled substance, storing a controlled substance, and delivering a controlled substance. *See State v. Maxfield*, 125 Wn.2d 378, 403, 886 P.2d 123 (1994). Accordingly, we affirm the trial court's finding that Naillieux's 2009 convictions for possession of a controlled substance with the intent to deliver, storage of anhydrous ammonia, and possession with intent to manufacture methamphetamine are not the same criminal conduct.

II. DISCRETIONARY LFOS

Naillieux also argues that the trial court erred by imposing discretionary LFOs, a $250 jury demand fee and a $500 drug enforcement fund fee, when it stated that it was only imposing mandatory LFOs. The State concedes that the trial court mistakenly imposed discretionary LFOs. We accept the State's concession and reverse the trial court's imposition of the discretionary LFOs.

The mandatory LFOs are the victim assessment fee, the DNA collection fee, and the criminal filing fee. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). Here, although the trial court stated it was imposing only mandatory LFOs, the trial court imposed costs for a jury demand fee and the drug enforcement fund. Because the jury demand fee and drug enforcement fund are discretionary LFOs, they should not have been imposed under the trial court's ruling to impose only mandatory LFOs. Accordingly, we reverse the trial court's imposition of the jury demand fee and drug enforcement fund costs.

SAG

I. JURY INSTRUCTIONS

In his SAG, Naillieux claims that the to-convict instruction for possession of a controlled substance with intent to deliver was improper because (1) it did not identify methamphetamine as the controlled substance, and (2) it did not include knowledge that the substance was a controlled substance.[2] We agree that the to-convict instruction was improper, but the error was harmless as to Naillieux's conviction. However, the error was not harmless as to Naillieux's sentence.

[2] In "additional ground 5," Naillieux claims that the jury instructions are improper and refers this court to the motion he filed at the trial court. SAG at 2. Because those arguments are substantially similar to the arguments in his other SAG claims (that the to-convict instruction omitted essential elements), that motion is not addressed as a separate SAG claim.

Accordingly, we affirm Naillieux's conviction for possession of a controlled substance with intent to deliver, but reverse his sentence and remand for resentencing.

"A to-convict instruction must include all essential elements of the crime charged." *State v. Clark-El*, 196 Wn. App. 614, 618, 384 P.3d 627 (2016). The identity of the controlled substance is an essential element in this case because possession of methamphetamine with intent to deliver increases the statutory maximum sentence of the crime. *Clark-El*, 196 Wn. App. at 618. Likewise, "guilty knowledge, an understanding of the identity of the product being delivered" is an element of possession of a controlled substance with intent to deliver. *Clark-El*, 196 Wn. App. at 625; *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979).

Although the to-convict instruction was improper because it neither identified methamphetamine as the controlled substance nor included the element of knowledge, we do not reverse Naillieux's conviction because the error was harmless. A jury instruction that omits an essential element is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *Clark-El*, 196 Wn. App. at 620-21. The omitted element must be supported by uncontroverted evidence and we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Clark-El*, 196 Wn. App. at 620.

Here, Naillieux testified that he purchased two one-ounce bags of methamphetamine. There was no suggestion or evidence that the substance at issue was anything but methamphetamine. Therefore, there was uncontroverted evidence that the substance was methamphetamine. And there was uncontroverted evidence, through Naillieux's admission, that he knew the substance was methamphetamine. We conclude beyond a reasonable doubt that the jury verdict would have been the same absent the erroneous jury instructions. Accordingly, the

erroneous jury instructions were harmless as to Naillieux's conviction for possession of a controlled substance with the intent to deliver.

However, the failure to identify the controlled substance as methamphetamine in the to-convict instruction was not harmless as to Naillieux's sentence. In *Clark-El*, Division One of this court explained that, when the to-convict instruction fails to identify the specific controlled substance that the defendant possessed or delivered, the jury's verdict is limited to a finding that the defendant possessed or delivered an unspecified controlled substance. 196 Wn. App. at 624. Therefore, the jury's verdict "authorize[s] the court to impose only the lowest possible sentence . . . ." *Clark-El*, 196 Wn. App. at 624. And harmless error does not apply if the trial court imposes a sentence that is not authorized by the jury's verdict. *Clark-El*, 196 Wn. App. at 624.

Here, as in *Clark-El*, the jury's verdict only authorized the trial court to impose a sentence based on a conviction for possession of an unspecified controlled substance with the intent to deliver. Instead, the trial court imposed the more severe sentence for possession of methamphetamine with intent to deliver. Therefore, the trial court imposed a sentence that was not authorized by the jury's verdict. Thus, we reverse Naillieux's sentence and remand for resentencing.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Naillieux also claims that he received ineffective assistance of counsel because his counsel failed to object to the admission of the bag of methamphetamine that had not been tested. This claim fails because Naillieux cannot show prejudice.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an

objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *McFarland*, 127 Wn.2d at 335. If the defendant fails to establish either deficient performance or prejudice, the ineffective assistance of counsel claim fails. *Strickland*, 466 U.S. at 697.

Here, even if Naillieux's counsel was deficient for failing to object to the admission of one one-ounce bag of methamphetamine, Naillieux cannot show prejudice. One one-ounce bag of methamphetamine would still have been admitted at trial. Detective Beedle testified that a personal use amount of methamphetamine is generally between one-tenth of a gram and a gram. The bag of methamphetamine that was tested contained 27.5 grams. Therefore, the State would have still presented evidence that Naillieux was in possession of 27 to 275 times a personal use amount of methamphetamine, in addition to scales and small plastic baggies. Accordingly, there is not a reasonable probability that the outcome of the trial would have been different if defense counsel had objected to the admission of the bag of methamphetamine that was not tested. Because Naillieux has failed to show prejudice, his ineffective assistance of counsel claim fails.

III. SEARCH WARRANT

Naillieux also claims that the search warrant authorizing the search of his apartment was not based on probable cause because it included "stale" information regarding controlled buys performed out of state. SAG at 3. We disagree because the supporting affidavit established probable cause for the search warrant.

"A search warrant may issue only upon a determination of probable cause "based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is

occurring or that contraband exists at a certain location." *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists as a matter of law if the supporting affidavit contains sufficient facts and circumstances to establish a reasonable inference that the defendant probably engaged in illegal activity, and that evidence of that illegal activity is at the location to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Therefore, "'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Whether information contained in a probable cause affidavit is stale depends on the circumstances of each case. *State v. Lyons*, 174 Wn.2d 354, 361, 275 P.3d 314 (2012). A natural passage of time between observations of suspected criminal activity and presentation of the probable cause affidavit will not render the affidavit stale. *Lyons*, 174 Wn.2d at 360. However, when the passage of time is so prolonged that it is no longer probable that a search will uncover evidence of criminal activity, the information underlying the affidavit is deemed stale. *Lyons*, 174 Wn.2d at 360-61.

Naillieux claims that the probable cause affidavit was stale because Detective Beedle referenced the controlled buys that the Oregon drug task force performed with Naillieux three months earlier. However, this information was included in the probable cause affidavit to explain why the task force was assisting the Oregon task force with serving the arrest warrant for Naillieux. The probable cause affidavit also included a description of Naillieux's arrest and explained that the officers believed evidence of criminal activity was likely to be found in Naillieux's apartment because he had been returning to his apartment with two one-ounce bags of methamphetamine at

the time of his arrest. Because the probable cause affidavit was written the same day as Naillieux's arrest, it did not rely on stale information. Therefore, Naillieux's claim fails.

CONCLUSION

We affirm Naillieux's convictions for possession of a controlled substance with intent to deliver and resisting arrest. However, we reverse Naillieux's sentence for possession of a controlled substance with intent to deliver and the trial court's imposition of discretionary LFOs—the jury demand fee and drug enforcement fund fee. We remand for resentencing. On remand, the trial court should consider all of the LFOs in light of our Supreme Court's recent decision in *State v. Ramirez*, ___Wn.2d ___, 426 P.3rd 714 (2018), and the 2018 amendments to the LFO provisions, *see* LAWS of 2018, Ch. 269.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Maxa, C.J.
MAXA, C.J.

Johanson, J.
JOHANSON, J.