IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN MICHAEL TROIT, Appellant.	No. 41876-2-II UNPUBLISHED OPINION

Penoyar, J. — John Michael Troit appeals his unlawful possession of a controlled substance with intent to deliver (methamphetamine) conviction, asserting that his defense counsel was ineffective for misstating to him a plea deal the State offered and that sufficient evidence did not support his conviction. Troit also appeals his sentence, asserting that the trial court exceeded its statutory authority by imposing a $901 jury demand fee. In his statement of additional grounds for review (SAG),[1] Troit repeats his appellate counsel's argument that his trial counsel was ineffective for misstating the State's plea offer. We affirm Troit's conviction but remand for a correction of his sentence consistent with this opinion.

Facts

Shortly after midnight on November 11, 2010, Olympia Police Officer Duanne Hinrichs saw John Michael Troit jaywalking. Hinrichs approached Troit and asked for his identification. Troit gave Hinrichs his brother's name, "Rick Troit," and his brother's date of birth. Report of Proceedings (RP) (Jan. 24, 2011) at 54. After Hinrichs told Troit that "Rick Troit" had felony and misdemeanor warrants for his arrest, Troit admitted his true identity. Hinrichs then arrested

[1] RAP 10.10.

Troit for obstruction of justice.

Hinrichs searched Troit and found several plastic bags in his jacket pocket, some of which contained a white powdery substance that field tested positive for methamphetamine. Specifically, Hinrichs found one sandwich bag containing approximately 1.25 ounces[2] of methamphetamine, one small bag containing approximately 3.5 grams of methamphetamine, four small bags each containing approximately 1.7 grams of methamphetamine, and six small unused bags. During his search of Troit, Hinrichs also found $18 in cash, an address book, and a list containing "vehicle descriptions, colors, years, and license plate numbers." RP (Jan. 24, 2011) at 63-64. Hinrichs did not find any drug paraphernalia on Troit.

At trial, Hinrichs testified that the value of the methamphetamine found on Troit was approximately $4,500. Hinrichs also testified that drug dealers often keep a list of vehicles belonging to potential drug buyers so they can verify that the drug buyers are not undercover police officers. The jury returned a verdict finding Troit guilty of possession of a controlled substance (methamphetamine) with intent to deliver. The trial court sentenced Troit to 100 months of incarceration and 12 months of community custody. The trial court also imposed a $901 jury demand fee. Troit timely appeals his judgment and sentence.

[2] An ounce contains 28 grams.

analysis

I. Ineffective Assistance of Counsel[3]

Troit first asserts that his defense counsel provided ineffective assistance by misstating to him a plea agreement the State offered. Because Troit cannot demonstrate on this record that his defense counsel misstated the State's plea offer, we disagree.

We review ineffective assistance of counsel claims de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). A criminal defendant's constitutional right to effective assistance of counsel extends to the plea-bargaining process. *Lafler v. Cooper*, --- U.S. ---, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, ---U.S.---, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012). "Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). During plea bargaining, defense counsel must "actually and substantially assist[his or her] client in deciding whether to plead guilty." *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981). Defense counsel's duties include communicating actual offers, discussing tentative plea negotiations, and discussing the strengths and weaknesses of the defendant's case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987).

To prevail on an ineffective assistance of counsel claim, Troit must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland*

[3] In his SAG, Troit repeats his appellate counsel's argument that he received ineffective assistance when his trial counsel misstated the State's plea offer to him. We address this issue as argued by appellate counsel and do not discuss it further with reference to Troit's SAG.

v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In the context of a claim that counsel's ineffective assistance caused the defendant to reject a plea offer, a defendant demonstrates prejudice by showing that there is a reasonable probability he or she would have accepted the offer absent counsel's ineffective assistance. *Lafler*, 132 S. Ct. at 1385; *Frye*, 132 S. Ct. at 1409.

Citing *In re Personal Restraint of McCready*, 100 Wn. App. 259, 996 P.2d 658 (2000), Troit contends that, because his defense counsel misstated the State's plea offer, we should reverse his conviction and remand to allow him to accept the State's plea offer to the lesser charge of possession of a controlled substance. In *McCready*, a reference hearing found that defense counsel failed to inform the defendant of the mandatory minimum sentence for first degree assault with a firearm, which the State said it would charge if the defendant rejected the State's plea offer. 100 Wn. App. at 262-63. Division Three of this court held that because counsel failed to advise the defendant of the maximum and minimum sentences the trial court could impose for the charged offenses, the defendant made an uninformed decision to reject the plea offer. *McCready*, 100 Wn. App. at 263. The *McCready* court further held that defense counsel's "failure to advise [the defendant] of the available options and possible consequences constitute[d] ineffective assistance of counsel." 100 Wn. App. at 263.

Here, Troit claims that the following exchange at his sentencing hearing demonstrates that his defense counsel was ineffective for failing to communicate to him the State's plea offer:

> [Troit]: . . . There was a plea offer given to me the first time I got a visit from my attorney. . . . And then the day before trial he comes in, it was the next

> time I seen him, and I said, "What's up with the deal?" And he said that it was a mistake, and the only question was whether or not to give the jury an option at a lesser charge or not, and he was salivating at the opportunity to go all the way. So that's why I went to trial.
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> . . . .
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> [Defense counsel]: I want to clarify and not contradict what [Troit] said. The original offer was to plea as charged, but to accept a sentence within a range that was for simple possession, and so the offer, as I understood it, was to plea as charged, but the amount of time was not what—compatible with what he would have done, and that's what I told Mr. Troit.
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> [Trial court]: All right.
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> [State]: And Your Honor, if I can clarify that, [defense counsel] came to me and said specifically, if I understand it right, you're offering him possession with a 12-plus to 24-month sentence instead of delivery, and I said yes, that is correct. So we had a very distinct discussion about the offer to being possession, not to delivery.
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> . . . .
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> [Troit]: I didn't know that.

RP (Mar. 3, 2011) at 14-15, 17.[4] Although this exchange appears to show some disagreement between the State and defense counsel about the specifics of the State's plea offer, it does not demonstrate that defense counsel misstated the State's plea offer to Troit. Unlike in *McCready*, where Division Three of this court had the benefit of a reference hearing to determine factual issues related to the defendant's ineffective assistance of counsel claim, here there are no factual findings about the specifics of the State's plea offer or about defense counsel's communications to Troit regarding the State's plea offer. And, although the State indicated at Troit's arraignment that it had produced a copy of its plea offer to defense counsel, this document is not in the record on appeal. Accordingly, we hold that Troit cannot on this record meet his burden to prove his defense counsel was ineffective.[5]

[4] This is the only reference to the State's plea offer in the record on appeal.

[5] In holding that the record is insufficient for Troit to demonstrate ineffective assistance of counsel in his direct appeal, we do so without prejudice to his right to timely file a personal restraint

II. Sufficiency of the Evidence

Next, Troit asserts that the State failed to present sufficient evidence to support the jury's verdict finding him guilty of possession of a controlled substance with intent to deliver. We disagree.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict Troit for unlawful possession of a controlled substance 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. RCW 69.50.401(1), (2)(b); *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). Troit challenges only the sufficiency of the evidence of his intent to deliver.

A jury may infer the defendant's specific criminal intent from conduct plainly indicating such intent as a matter of logical probability. *Delmarter*, 94 Wn.2d at 638. Mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver; rather, at

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petition and seek a reference hearing on this issue.

least one additional factor must be present. *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). We hold that sufficient evidence supports the jury's verdict finding Troit guilty of possession of a controlled substance with intent to deliver.

Here, Troit not only possessed a large quantity of methamphetamine, but also possessed the methamphetamine in a manner from which any reasonable jury could infer that he intended to deliver it. When Hinrichs searched Troit, he found one sandwich bag containing approximately 1.25 ounces (35 grams) of methamphetamine as well as one small bag containing approximately 3.5 grams of methamphetamine, four small bags each containing approximately 1.7 grams of methamphetamine, and six small unused bags. Additionally, Troit possessed a vehicle list that Hinrichs testified was typical for drug dealers to use to verify that potential drug purchasers were not undercover police officers. Finally, Troit did not possess any drug paraphernalia suggesting that the methamphetamine was for his personal use. Accordingly, viewing the evidence in a light most favorable to the State, we hold that sufficient evidence supported the jury's verdict finding Troit guilty of unlawful possession of a controlled substance with intent to deliver.

III. Jury Demand Fee

Next, Troit contends that the trial court exceeded its statutory authority by imposing a $901 jury demand fee. Troit acknowledges that the State has not yet sought to enforce his legal financial obligations and, thus, his challenge to the jury demand fee is not properly before us as a matter of right. But Troit asks that we exercise our discretion to review his claim under RAP 1.2(c). The State concedes that the trial court exceeded its statutory authority by imposing a $901 jury demand fee contrary to RCW 36.18.016(3)(b).[6] Accordingly, we remand to the trial

[6] RCW 36.18.016(3)(b) provides, "Upon conviction in criminal cases a jury demand charge of one

court to correct Troit's sentence to reflect a proper jury demand fee consistent with RCW 36.18.016(3)(b). *State v. Hathaway*, 161 Wn. App. 634, 653, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011).

We affirm Troit's conviction but remand to the trial court for a correction of Troit's sentence consistent with this opinion.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Johanson, A.C.J.

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hundred twenty-five dollars for a jury of six, or two hundred fifty dollars for a jury of twelve may be imposed as costs under RCW 10.46.190."