NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL L. DE-JESUS, Petitioner-Appellant, v. JEFF PREMO, Superintendent; OREGON STATE PENITENTIARY, Respondents-Appellees.	No. 18-35054 D.C. No. 6:16-cv-01563-SI MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted March 8, 2019
Portland, Oregon

Before: GRABER and BERZON, Circuit Judges, and ROBRENO,** District Judge.

At Daniel De-Jesus's state trial for robbery and possession and delivery of methamphetamine, his attorney did not object to two jury instructions. One concerned the definition of delivery; the other was the uniform "natural and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

probable consequences" instruction, which the Oregon Supreme Court later held misstated state law, *State v. Lopez-Minjarez*, 260 P.3d 439, 583-84 (Or. 2011). In his federal habeas petition, De-Jesus contends that these failures to object constitute ineffective assistance of counsel. The district court denied the petition, and we affirm.

1. The delivery instruction ran afoul of *Sandstrom v. Montana*, 442 U.S. 510 (1979), with respect to the "substantial step" element but not as to intent. Given the available evidence that De-Jesus repackaged the stolen methamphetamine in a manner consistent with delivery, counsel's failure to object to the "substantial step" instruction was not reasonably likely to have influenced the verdict. The Oregon courts therefore permissibly ruled that De-Jesus did not establish ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

2. The erroneous "natural and probable consequences" instruction was irrelevant to the crimes charged and therefore harmless. *Lopez-Minjarez* clarified that that instruction could result in harm only where two crimes occurred in succession, so the jury might improperly have found a defendant guilty of the *second* crime because the defendant intended to aid and abet the *first* crime. 260 P.3d at 444-45. The district court correctly noted that, in De-Jesus's case, "no crime preceded the robbery." Accordingly, "the jury could not have found the

[robbery] to have been a natural and probable consequence of an earlier crime that defendant had aided in committing, because there was no earlier crime in the sequence of charged criminal acts. Necessarily, then, the instruction was harmless . . . ." *Id.* at 455. A fairminded jurist could not fault defense counsel for not objecting to a uniform instruction that had no bearing on her client's case. *See Harrington v. Richter*, 562 U.S. 86, 99, 101-102 (2011). The Oregon courts' denial of De-Jesus's second ineffective assistance claim was therefore not unreasonable.

AFFIRMED.