IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. XAVIER ARROYO CERVANTES, Appellant.	No. 41418-0-II UNPUBLISHED OPINION

Johanson, J. — Xavier Cervantes appeals his conviction for possession of a controlled substance. He argues that (1) insufficient evidence supports his conviction, (2) the "to convict" jury instruction relieved the State of its burden of proof, (3) he received ineffective assistance of counsel, and (4) the prosecutor committed misconduct. Finding no error, we affirm.

FACTS

While driving through an intersection, Cervantes's car collided with Kelly Morago's car. Cervantes briefly stopped his car and asked Morago why she had been traveling so fast. Cervantes got back in his car and drove away. Centralia police officer, Patricia Finch, observed the accident and Cervantes leaving the scene. She activated her lights, followed Cervantes for two blocks, and after he pulled over, she contacted him. Officer Finch asked Cervantes where he was going and why he left the scene of the collision. Cervantes replied that he had to go to work and that he did not leave but was moving his car out of the intersection. Officer Finch checked Cervantes's driver status and learned that the Department of Licensing had suspended his license. Officer Finch arrested Cervantes for driving with his license suspended and for hit-and-run. She handcuffed Cervantes, searched him incident to arrest, and found seven yellow pills in his pocket.

Without a *Miranda*[1] warning, Officer Finch asked Cervantes about the pills and according to Officer Finch's incident report, he told her they were valium, that he did not have a prescription for the pills but received them from his mother-in-law, and he was going to take them for a stomachache.[2]

A. Pre-Trial

The State stipulated that Cervantes's post-arrest statements were inadmissible because Officer Finch failed to give Cervantes a *Miranda* warning after his arrest. But the State advised Cervantes that it planned to offer his pre-arrest statements as evidence. Cervantes agreed.

The State moved in limine requesting that the trial court refuse any defense argument that the State must prove unlawfulness as an element of possession of a controlled substance. Cervantes agreed and the trial court granted the motion stating that it would restrict argument to the elements of possession of a controlled substance and that the "to convict" jury instructions would specify the elements. Report of Proceedings (RP) (Sept. 16, 2010) at 7.

B. Trial

The State presented the testimony of Morago, Officer Finch, and forensic scientist, Frank Boshears. After the State's case-in-chief, Cervantes moved to dismiss the possession of a controlled substance charge arguing that the State had not proven that he unlawfully possessed the diazepam because he did not have a valid prescription. The State responded that there was no evidence of any affirmative defense, such as a prescription, and that the State was not required "to

[1] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] The State charged Cervantes with four crimes but he appeals only from the possession of a controlled substance (RCW 69.50.4013) conviction.

prove lawfulness" as an element in its case-in-chief. RP (Sept. 16, 2010) at 47-48. The trial court denied Cervantes's motion to dismiss.

Cervantes presented the testimony of his girlfriend, Katie Weeks, and her mother, Paulette Weeks.[3] Paulette testified that her doctor prescribed diazepam to her and she identified a printout of her prescription medications, including diazepam. Paulette also testified that Katie is her licensed caregiver, holds a medical power of attorney, and monitors and controls Paulette's medications. Paulette explained that she agreed to house sit for a friend and ran out of her medication when her friend stayed away a few extra days. Paulette asked Katie to bring her more diazepam but because Katie was busy, Katie asked for permission to have Cervantes bring it instead. Paulette testified that she agreed to this arrangement because she trusted Cervantes and had been expecting him when the accident occurred. Katie also testified, corroborating Paulette's testimony. Katie explained that she had "nurse delegations," which entitled her to collect prescribed medicine and distribute it. RP (Sept. 16, 2010) at 62-63. Katie testified that although her mother signed a medical power of attorney, it may not have been signed at the time of the accident. Cervantes did not testify on his own behalf.

C. Jury Instructions and Closing Argument

The State proposed jury instructions 15 and 16; Cervantes did not propose alternative instructions. Jury instruction 15 stated:

> To convict the defendant of the crime of possession of a controlled substance; to wit: diazepam, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 17, 2009, the defendant possessed a controlled substance; to wit: diazepam; and
>
> (2) That this act occurred in the State of Washington.

[3] We refer to Katie and Paulette Weeks by their first names to avoid confusion.

> 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 42. Jury instruction 16 stated:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice.

CP at 43. Cervantes objected to only jury instruction 16 stating, "I think it's confusing as to who's allowed to have a prescription, where it's coming from." RP (Sept. 16, 2010) at 74. The trial court replied that it would give the instruction because it is the pattern instruction based on the statute and the State had requested it.

The State argued during closing argument:

> The defendant will have you believe that because he was carrying the pills on behalf or delivering them to his mother-in-law that his possession was not unlawful. The law [does not] support that proposition. The law says if you possess it, it's a controlled substance, it's unlawful.

RP (Sept. 16, 2010) at 95.

In Cervantes's closing argument, he told the jury that he admitted to all of his charges except for possession of a controlled substance, diazepam. Cervantes reminded the jury of instruction 16 and stated:

> Now, my client didn't get it directly from the doctor. But it is based on a valid prescription. He got it from his girlfriend Katie Weeks who is a medical provider. She got up here and said this is why I gave it to him, because I didn't have the time, my mom needed it.

RP (Sept. 16, 2010) at 101.

During rebuttal, the State argued:

> He testified he was going – or he told the officer he was going to work. He didn't say I'm on my way to my mother-in-laws, she needs some drugs, I have it in my pocket. What he said was I'm on my way to work.

RP (Sept. 16, 2010) at 106. Cervantes did not object. The jury found Cervantes guilty as charged.

ANALYSIS

I. Sufficiency of Evidence

Cervantes argues that the State failed to prove that his possession of diazepam was not pursuant to a valid prescription. We disagree because the burden to prove the existence of a valid prescription is on Cervantes.

A. Standard of Review

"Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt." *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)), *cert. denied*, --- U.S. ----, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the trier of fact's decision, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from the evidence. *Kintz*, 169 Wn.2d at 551. "Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We defer to the trier of fact on issues of conflicting

testimony, witnesses' credibility and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

B. Controlled Substance Obtained Pursuant to a Valid Prescription

RCW 69.50.4013 provides:

> (1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

Cervantes argues that under this plain statutory language, the State must prove not only possession, but that he did not obtain the substance "pursuant to" a valid prescription. Br. of Appellant at 10.

But Cervantes overlooks that RCW 69.50.506(a) specifically provides:

> (a) It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under this chapter. *The burden of proof of any exemption or exception is upon the person claiming it.*

RCW 69.50.506 (a) (emphasis added).

Cervantes also overlooks settled Washington case law holding that the State need prove only possession of controlled substances to establish illegal possession of controlled substances. *State v. Mantell*, 71 Wn.2d 768, 770-71, 430 P.2d 980 (1967). The defendant may then affirmatively defend against the charge by showing that the possession was unwitting, with a prescription, or otherwise lawful. *State v. Wilson*, 20 Wn. App. 592, 597-98, 581 P.2d 592 (1978).[4]

[4] We note that Cervantes did not propose an affirmative defense jury instruction regarding possession of the controlled substance pursuant to a valid prescription.

Additionally, practical considerations indicate that Cervantes properly bears the burden of an affirmative defense because:

> Requiring the State to prove the absence of the exceptions beyond a reasonable doubt would be a time-consuming burden, often impossible to sustain in the light of a defendant's right not to testify. . . . It is not an "undue hardship" to require the defendant to come forward with evidence of a defense, if one exists.

State v. Lawson, 37 Wn. App. 539, 542, 681 P.2d 867 (1984).

Here, the State had the burden to show that Cervantes possessed diazepam, a controlled substance. The burden then shifted to Cervantes to show he possessed the controlled substance pursuant to a valid prescription. The State does not have the burden to prove Cervantes did not have a valid prescription. The State met its burden. Viewed in the light most favorable to the State, the evidence is sufficient for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Kintz*, 169 Wn.2d at 551.

II. Prosecutorial Misconduct

Cervantes argues that the prosecutor committed reversible misconduct by inviting the jury (1) to infer guilt from his silence and from facts not in the record and (2) to consider arguments contrary to the jury instructions. These arguments fail.

Cervantes bears the burden of showing that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "Prejudice occurs where there is 'a substantial likelihood that the misconduct affected the jury's verdict.'" *In re Det. of Sease*, 149 Wn. App. 66, 81, 201 P.3d 1078 (quoting *State v. Thomas*, 142 Wn. App. 589, 593, 174 P.3d 1264, *review denied*, 164 Wn.2d 1026 (2008)), *review denied*, 166 Wn.2d 1029 (2009).

"We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009). In the context of closing arguments, the prosecuting attorney has "'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.'" *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1202 (2006)). But references to evidence outside of the record constitute misconduct. *Fisher*, 165 Wn.2d at 747. Although it is improper to imply that the defense has a duty to present evidence, a prosecutor may properly comment on the evidence. *Jackson*, 150 Wn. App. at 887.

Cervantes did not object to the prosecutor's conduct at trial. Thus, if Cervantes demonstrates that the prosecutor's conduct was improper, we evaluate whether the misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747 (quoting *Gregory*, 158 Wn.2d at 841). Additionally, Cervantes failed to request a curative instruction, thus we are not required to reverse. *Fisher*, 165 Wn.2d at 747.

B. Prosecutor's Closing Statements

1. Comment on Silence

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const. amend. V; Wash. Const. art. I, § 9. The Fifth Amendment prohibits impeachment based on a defendant's exercise of this

right where the defendant neither waives the right nor testifies at trial. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

In this case, the State argued:

> He testified he was going—or he told the officer he was going to work. He didn't say I'm on my way to my mother-in-laws, she needs some drugs, I have it in my pocket. What he said was I'm on my way to work.

RP (Sept. 16, 2010) at 106.

Here, the prosecutor's statement was a comment on what Cervantes did say when asked where he was going after the accident. A prosecutor may properly comment on the evidence. *Jackson*, 150 Wn. App. at 887. Additionally, a prosecutor may draw inferences from the testimony in the record. *State v. McKenzie*, 157 Wn.2d 44, 58-59, 134 P.3d 221 (2006). We hold that the prosecutor's statement is not an improper comment on Cervantes's Fifth Amendment right to remain silent nor is it a reference to facts not in evidence.

Even if Cervantes could show that the comment touched on his right to silence, Cervantes did not object, move to strike, or request a curative instruction. Here, the trial court did not have an adequate opportunity to prevent or remedy any error. *Fisher*, 165 Wn.2d at 747. Thus, even if we assume the comment was improper, Cervantes fails to show that the comment was flagrant and ill-intentioned or that a timely jury instruction, if requested, could not have cured it.

2. Statement of Law

Cervantes also argues that the prosecutor committed misconduct by making arguments that contradicted the court's jury instruction 16. Jury instruction 16 stated:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice.

CP at 43. The State argued during closing argument:

> The defendant will have you believe that because he was carrying the pills on behalf or delivering them to his mother-in-law that his possession was not unlawful. The law doesn't support that proposition. The law says if you possess it, it's a controlled substance, it's unlawful.

RP (Sept. 16, 2010) at 95. The prosecutor's dominant closing argument reminded the jury that despite some evidence that Paulette had a prescription and that Katie had authority to dispense it, there was no evidence that Cervantes had a prescription or authority to dispense another's prescription. The prosecutor also highlighted that Cervantes did not carry the prescription bottle with the medicine inside it, but carried seven yellow "loose pills in his pocket, loose [v]alium." RP (Sept. 16, 2010) at 97. When viewed in the context of the State's entire argument, we hold that the State's closing argument did not contradict the jury instruction nor misstate the law.

III. Jury Instruction

We review alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "'Jury instructions are proper 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. Hayward*, 152 Wn. App. 632, 641-42, 217 P.3d 354 (2009) (quoting *Barnes*, 153 Wn.2d at 382). "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995) (citation omitted). We analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Pirtle*, 127 Wn.2d at 656-57.

Cervantes similarly argues that jury instruction 15 failed to instruct the jury on every element and it relieved the State of its burden to show that he did not obtain the diazepam pursuant to a valid prescription.

As discussed above, Cervantes overlooks that under the statute and settled Washington case law, the absence of a valid prescription is not an element of a possession of controlled substances charge, and the State need prove only possession of a controlled substance to establish illegality. RCW 69.50.506(a); *Mantell*, 71 Wn.2d at 770-71; *Wilson*, 20 Wn. App. at 597-98. Thus, we hold that jury instruction 15 properly instructed the jury and did not misstate the law.

IV. Effective Assistance of Counsel

To establish ineffective assistance, Cervantes must show that (1) his trial "counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances"; and (2) his trial "counsel's deficient representation prejudiced [his case], 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); *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If Cervantes's claim does not satisfy either element of the test, the inquiry ends. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Cervantes argues that his defense counsel provided ineffective assistance by failing to propose a "to convict" instruction telling the jury that the State must prove that Cervantes lacked a valid prescription as an element. Br. of Appellant at 23. As discussed above, jury instruction 15

did not misinform the jury or misstate the law. In contrast, the instruction Cervantes proposes on appeal is a misstatement of the law. RCW 69.50.506(a); *Mantell*, 71 Wn.2d at 770-71; *Wilson*, 20 Wn. App. at 597-98. An attorney has no duty to propose an erroneous jury instruction. Because Cervantes does not show deficient performance, our inquiry ends. *Hendrickson*, 129 Wn.2d at 78.

Cervantes also claims ineffective assistance based on counsel's failure to object to the prosecutor's improper comments. As discussed above, a prosecutor may properly comment on Cervantes's pre-arrest statements and draw inferences from the evidence. *Jackson*, 150 Wn. App. at 887; *McKenzie*, 157 Wn.2d at 58-59. Because the prosecutor's comment was not improper, counsel did not give ineffective assistance by failing to object, and our inquiry ends. *Hendrickson*, 129 Wn.2d at 78.

Affirmed.

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.

Johanson, J.

We concur:

Van Deren, J.

Worswick, A.C.J.