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64424-6

NO. 64424-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TANYA RADCLIFFE,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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A. ISSUES

1. Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. Does a trial court's instructions properly instruct a jury on the crime of intentionally making or uttering a false prescription when the instruction parallels the statute and when the defendant takes no exceptions?

2. RCW 9.94A.505 requires a sentencing court to give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced. Does a trial court abuse its discretion if the court sentences an offender to a sentence lower than time already served?

B. FACTS

1. PROCEDURAL FACTS

Defendant, Tanya Radcliff, was charged in King County Superior Court with one count of Violation of the Uniform Controlled Substances Act – intentionally making or uttering a false or forged prescription. CP 4. A jury convicted Radcliffe of intentionally making or uttering a forged prescription. CP 5. At sentencing, the trial court imposed a one day

sentence in jail with credit for one day served. CP 33-38. Radcliffe appealed. CP 39-45.

2. SUBSTANTIVE FACTS

On January 29, 2008, Tanya Radcliffe was seen by Dr. Miguel Jimenez in the urgent care of SeaMar Clinic. 1RP 84-85. Dr. Jimenez wrote a prescription to the defendant for Lithium and Ativan. 1RP 85-88. In the same day, Radcliffe walked into the Bartell Drugs in White Center and dropped the prescription for Lithium and Ativan. 1RP 48¹, CP 32. Pharmacist, Melissa Goslin, took the prescription from Tanya Radcliffe. Id. Radcliffe was a regular customer at that particular Bartell Drug Store. 1RP 47. The prescription was written by Dr. Miguel Jimenez and immediately looked suspicious because some of the writing had been traced over. 1RP 49. Goslin called Dr. Jimenez's office and spoke with a nurse who confirmed that the number of Ativan pills had been changed from 12 to 120. Id. Dr. Jimenez verified a zero had been added to the actual prescription which he did not authorize. 1RP 87-89.

A couple of hours after the prescription was dropped off by Radcliffe, an unknown person came in to pick up Radcliffe's prescription. 1RP 52. This unknown person was someone who Goslin had seen with

Radcliffe before but did not know her name. 1RP 50. This unknown person was told that the filled prescription was only going to be released to Radcliffe. 1RP 51. Later that day, Radcliffe, herself, called to inquire about the prescription and Goslin told her she would have to pick up the prescription in person. 1RP 52. To Goslin's knowledge, Radcliffe never returned to the pharmacy. 1RP 53. Goslin had helped Radcliffe several times and remembered what she looked like. 1RP 47-48. On February 8th, Detective Chris Young showed Goslin a photo montage of possible suspects and immediately Goslin picked the defendant as the person who dropped off the prescription. 1RP 53. The parties stipulated as to the identity of the person who dropped off the prescription as Radcliffe. CP 23. The stipulation told the jurors that Radcliffe had in fact entered Bartell Drug Store in White Center on January 29, 2008 and dropped off a prescription for Lithium and Ativan. CP 32.

C. **ARGUMENT**

1. RADCLIFFE'S DUE PROCESS RIGHTS WERE NOT VIOLATED AS THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENTS OF THE CRIME OF INTENTIONALLY MAKING OR UTTERING A FALSE OR FORGED PRESCRIPTION.

¹The verbatim report of proceedings consists of two volumes, the volume containing the three days of trial proceedings will be cited as "1RP" and the volume containing the sentencing hearing will be cited as "2RP".

Radcliffe claims the trial court's instructions to the jury relieved the State of its burden of proving she knew the prescription was forged, thereby eliminating the requirement to establish the *mens rea* of the crime. The jury instructions properly informed the jury the elements of the crime charge and the State's burden of proving each of those elements beyond a reasonable doubt.

Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. State v. Barnes, 153 Wash. 2d 378, 382, 103 P.3d 1219 (2005). Alleged errors of law in jury instructions are reviewed de novo. Blaney v. Int'l Ass'n of Machinists & Aerospace workers, Dist. No. 160, 151 Wash. 2d 203, 210, 87 P.3d 757 (2004).

In determining error in jury instructions, an appellate court must ask whether the trial court's instructions, when read as a whole, accurately states applicable law, do[es] not mislead the jury, and permit each party to argue their theory of the case. Goodman v. Boeing Co., 75 Wash. App. 60, 68, 877 P.2d 703 (1994). The standard for clarity is higher than that of a statute, "[t]he instruction...must make the relevant legal standards 'manifestly apparent to the average juror'." State v. Allery, 101 Wash. 2d

591, 595, 682 P.2d 312 (1984). However, each legal principal need not be neatly summarized by a single instruction nor must the instructions quote verbatim from pattern instructions. See State v. Brown, 132 Wash. 2d 529, 605, 940 P.2d 546 (1997). Rather, the court must look to the cumulative legal accuracy and sufficiency of all the instructions given. State v. Peterson, 35 Wash. App. 481, 486, 667 P.2d 645 (1983). Finally, even if an instruction is erroneous, the conviction will not be reversed unless the party asserting error meets its burden of establishing consequential prejudice. Goodman, 75 Wash. App. at 68. Only errors prejudicial to the outcome of the trial warrant reversal. Peterson, 35 Wash. App. at 486.

a. The Trial Court's Instructions Were an Accurate Statement of the Law.

The trial court's instructions to the jury mimicked the statute and were an accurate statement of the law. See RCW 69.50.403(1)(e), CP 13-31. In instruction number 8, the court instructed the jury that to convict Radcliffe the jury must find she "intentionally did make or utter a false or forged prescription." CP 24. In instruction number 12, the court further instructed the jury that "utter" means "to put off as true a written prescription." CP 28. Radcliffe has not nor does she argue that the definition of "utter" used was incorrect or legally insufficient. Radcliffe has not nor does she make constitutional claims regarding the false or

forged prescription statute itself. She instead, attacks the jury instructions which come straight from the statutes and claims they are misleading. Radcliffe does not provide any reasonable or reliable authority regarding her claims.

b. The Trial Court's Instructions Made the Legal Rule Established by Statute Manifestly Apparent to the Average Juror.

In deciding whether an additional instruction regarding a defendant's "guilty knowledge" was required in a possession with intent to deliver a controlled substance case, in State v. Sims, our Supreme Court held:

"It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly. Without knowledge of the controlled substance, one could not intend to manufacture or deliver that controlled substance. Therefore, there is no need for an additional mental element of guilty knowledge."

State v. Sims, 119 Wash. 2d 138, 142, 829 P.2d 1075 (1992).

The Court in State v. Goble, held that submitting a confusing jury instruction was reversible error because it allowed the jury to conclude that a finding of an intentional act with respect to one element could satisfy a finding of knowledge with respect to a different element of the crime. State v. Goble, 131 Wash. App. at 203-04, 126 P.3d 821 (2005).

In State v. Gerdts, the Court then distinguished Goble as applying to cases where more than one mental state is before the jury. State v Gerdts, 136 Wash. App. 720, 728, 150 P.3d 627 (2007). In State v. Keend, the Court further clarified that Goble applied to cases where the instructions could confuse the jury. State v. Keend, 140 Wash. App. 858, 868, 166 P.3d 1268 (2007), review denied, 163 Wash. 2d 1041, 187 P.3d 270 (2008).

Radcliffe contends that instructions 8 and 12 relieved the State of its burden of proving Ms. Radcliffe knew the prescription she presented was forged are misplaced. CP 24 & 28. She further alleges the instructions fail to instruct the jury regarding a "guilty knowledge". Br. of App. at 5. Radcliffe persistently argues that a person can utter a false or forged prescription without knowingly that it is false or forged, however, this was not the law of the case. A person who acts intentionally also acts knowingly therefore a person who intentionally makes or utters a false or forged prescription also does so knowingly. RCW 9A.08.010(1)(a) & (2). The court instructed the jury they had to find she intentionally uttered a false or forged prescription and further defined a person acts intent or intentionally "when acting with the objective purpose to accomplish a result that constitutes a crime." CP 27. Certainly, the crime here is the false or forged prescription. A reasonable juror would understand that it is not merely a crime to intentionally make or utter a prescription but the

crime is to intentionally make or utter a prescription which is false or forged. The State did not argue nor did the Court even suggest to the jury that they should convict Radcliffe even if they had a belief she did not know the prescription was false or forged. The instructions in this case did not relieve the State the burden of proving the guilty knowledge of the defendant. Any additional instructions would just confuse the jury. Furthermore, Radcliffe has not asserted an error that resulted in consequential prejudice in this case because she has not made any reasonable argument against the validity of the instructions. This Court should affirm.

c. Radcliffe Failed to Take Exception to Instructions 8 and 12 and the Instructions Became the Law of the Case.

As just discussed, the jury instructions in this case complied with due process requirements. The to-convict instruction properly listed all elements of the crime. CP 24. The court instructed the jury that each element must be proven beyond a reasonable doubt. CP 13. Radcliffe failed to timely object to the instructions and they became the law of the case.

It is well-settled law that before error can be claimed on the basis of a jury instruction given by the trial court, an appellant must first show

that an exception was taken to that instruction in the trial court. State v. Salas, 127 Wash. 2d 173, 181-82, 897 P.2d 1246, 1250 (1995). CR 51 (f) requires that, when objecting to the giving or refusing of an instruction, “[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection.” CR 51 (f). The purpose of this rule is to clarify, at the time when the trial court has before it all the evidence and legal arguments, the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction. Id. Therefore, the objection must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal. State v. Baily, 114 Wash. 2d 340, 345, 787 P.2d 1378 (1990).

With respect to claimed errors in jury instructions in criminal cases, this general rule has specific applicability. CrR 6.15 (c) requires that *timely and well stated objections* be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” Salas, 127 Wash. 2d at 182. Citing this rule or the principles it embodies, courts on many occasions have refused to review asserted instructional errors to which no meaningful exceptions were taken at trial. State v. Scott, 110 Wash. 2d 682, 686, 757 P.2d 492 (1988).

Normally, if no exception is taken to jury instructions, those instructions become the law of the case. State v. Hardwick, 74 Wash. 2d 828, 831, 447 P.2d 80 (1968). However, an exception to the rule that a jury instruction must be excepted to exists in the case of "manifest error affecting a constitutional right". State v. Mearns, 7 Wash. App. 818, 501 P.2d 1228 (1972). The State filed proposed jury instructions. 1RP 101-106. Radcliffe did not propose any jury instructions nor have any objections to the jury instructions proposed by the court. 1RP 109. In fact, the State's original proposed jury instruction number 8, had both the "knowingly or intentionally" language of the statute. 1RP 102-103. The court proposed just using the "intentionally" language in which Radcliffe expressly concurred with the court. 1RP 103. Radcliffe then goes on to ask that the definition for "knowledge" be taken out of the instructions. 1RP 104. Furthermore, Radcliffe agreed to the proposed instructions and did not offer any alternative instructions. 1RP 109. Radcliffe has no good faith basis to argue instructional error given her failure to take any exceptions to the court's proposed instructions.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING RADCLIFFE WITHIN THE STANDARD SENTENCING RANGE.

Judges are afforded "nearly unlimited discretion" in determining an

appropriate sentence within the standard range. State v. Mail, 121 Wash.2d 707, 711, 854 P.2d 1042 (1993). "So long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law to the sentence's length. State v. Williams, 149 Wash. 2d 143, 146-47, 65 P.3d 1214 (2003).

Radcliffe argues that the trial court violated RCW 9.94A.505(6) which requires the court to give the offender credit for all confinement time served before sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced. RCW 9.94A.505(6). The court did so in this case by giving Radcliffe one days credit against the one day confinement imposed. Radcliffe's standard range was zero to six months. CP 33-38. The court's sentencing was within the standard range and was not an abuse of discretion.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm.

DATED this __26__ day of July, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, suite 701, Seattle, Washington 98101, containing a copy of the Brief of Respondent , in STATE V. TANYA RADCLIFF, Cause No. 64424-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Tuyen Lam
Done in Seattle, Washington

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