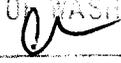


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DIVISION II

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STATE OF WASHINGTON
BY 
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No. 41418-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Xavier Cervantes,

Appellant.

Lewis County Superior Court Cause No. 09-1-00652-5

The Honorable Judges Brosey and Lawler

Appellant's Reply Brief

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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. CERVANTES OF UNLAWFULLY POSSESSING DIAZEPAM.

At trial, Mr. Cervantes produced evidence establishing that he was on an errand, delivering prescription medication to his girlfriend's mother while on his way to work. RP (9/16/10) 24-25, 32, 51, 54-55, 67-68. The prosecution did not attempt to disprove this evidence. Nor did the state suggest to jurors that Mr. Cervantes bore the burden of establishing his defense. Instead, the prosecutor argued to the jury that undertaking such an errand was illegal. RP (9/16/10) 95-97.

Now—for the first time on appeal—Respondent argues that Mr. Cervantes was required to prove the defense, and that the state had no burden once the defense was raised.¹ Brief of Respondent, pp. 5-7 (citing, *inter alia*, RCW 69.50.506(a) and *State v. Lawson*, 37 Wash. App. 539, 681 P.2d 867 (1984)). But Respondent did not ask for instructions placing the burden on Mr. Cervantes, and is therefore stopped from making such an argument now under the law of the case doctrine.² See, e.g., *State v. Abuan*, ___ Wash. App. ___, ___, ___ P.3d ___ (2011).

¹ Respondent does not specify any particular quantum of proof required to establish the defense. Brief of Respondent, pp. 5-7.

² In contrast, Mr. Cervantes is entitled to challenge the allocation of the burden of proof as part of his attack on the constitutionality of his conviction. See e.g., *State v.*

(continued)

In addition, Respondent's argument is undermined by the structure of RCW 69.50.4013, which outlines the elements of the offense and the prescription "defense" in the same sentence. RCW 69.50.4013(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..."). Under the statute, the absence of a valid prescription is an essential element because it establishes the very illegality of the behavior (at least where prescription medication is concerned). *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992).

Furthermore, even if Respondent is correct that Mr. Cervantes bore some burden, this does not mean the conviction should be affirmed. Neither the statute nor the cases cited by Respondent require an accused person to prove the existence of an applicable prescription by a preponderance of the evidence. RCW 69.50.506; *Lawson, supra*; *see also State v. Brown*, 33 Wash. App. 843, 847-848, 658 P.2d 44 (1983) (the accused must present "some evidence" of a valid prescription). Accordingly, under the rule of lenity, a lesser standard applies. *See, e.g., State v. Davis*, 160 Wash.App. 471, 477, 248 P.3d 121 (2011).

Summers, 120 Wash.2d 801, 813, 846 P.2d 490 (1993) (allowing challenge to allocation of burden of proof used to obtain predicate conviction for UPF charge).

Even assuming the correctness of Respondent’s position—that Mr. Cervantes bears some burden—two possible standards may apply. Under the first, an accused person need only present some evidence of a valid prescription, at which time the absence of a valid prescription becomes an additional element which the state must prove beyond a reasonable doubt. This is the familiar burden required in self defense cases.³ *See, e.g., State v. Brightman*, 155 Wash.2d 506, 520, 122 P.3d 150 (2005) (“Once a defendant has raised some evidence to support an instruction on justifiable homicide, the State must prove absence of self-defense beyond a reasonable doubt.”)

The second possible standard is outlined in *State v. Rosi*, 120 Wash. 514, 208 P. 15 (1922). Under this standard, “the burden is upon the accused to support his defense to the extent of establishing a reasonable doubt in the minds of the jurors as to the guilt of the accused of the crime charged.” *Rosi*, at 518. This standard was once the default for affirmative defenses. *Id.*

Mr. Cervantes prevails under either standard.

³ It may also be the burden which applies in theft cases involving a good faith claim of title. *See, e.g., State v. Hawkins*, 157 Wash.App. 739, 747, 238 P.3d 1226 (2010) (“When there is sufficient evidence to instruct on this defense, it is the prosecution’s obligation to disprove the defense beyond a reasonable doubt.”) (citing *State v. Hicks*, 102 Wash.2d 182, 683 P.2d 186 (1984)). The approach taken by the *Hicks* court has been abandoned, at least in part. *State v. Camara*, 113 Wash.2d 631, 781 P.2d 483 (1989).

As noted above, the prosecution presented no evidence negating Mr. Cervantes's defense, relying instead on a strict liability theory that required conviction even if he possessed valium at the direction of the prescription holder. RP (9/16/10) 95-97. The undisputed testimony thus established that Mr. Cervantes was on a legitimate errand delivering medication to his girlfriend's mother. The state did not disprove this evidence beyond a reasonable doubt; nor can it be said that the state undermined the reasonable doubt created by this evidence. Accordingly, the possession conviction must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

II. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

The prosecutor's closing argument implied to the jury that Mr. Cervantes remained silent when arrested, instead of providing an explanation for his possession of the valium. RP (9/16/10) 106. This misconduct infringed Mr. Cervantes's Fifth and Fourteenth Amendment privilege against self-incrimination.⁴ *Doyle v. Ohio*, 426 U.S. 610, 611, 96

⁴ It is therefore reviewable as a manifest error affecting Mr. Cervantes's constitutional right to remain silent. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009); *State v. Jones*, 71 Wash.App. 798, 809-810, 863 P.2d 85 (1993). Respondent's contention that Mr. Cervantes's failure to object precludes review is incorrect. Brief of Respondent, p. 10. Furthermore, reversal is required even if the misconduct were evaluated under the flagrant and ill-intentioned standard (reserved for misconduct that does

(continued)

S.Ct. 2240, 49 L.Ed.2d 91 (1976). Respondent fails to address this argument, or to argue that the error was harmless beyond a reasonable doubt. Brief of Respondent, pp. 8-11.

Furthermore, Respondent attempts to mislead by suggesting that the improper argument was based on undisputed facts. *See* Brief of Respondent, pp. 9-10 (“The comment was... a true statement...” “In actuality, what the defendant told the officer was...” “The state simply highlighted what Cervantes said...”) These implications are incorrect.

Mr. Cervantes’s position was that he *had* explained his possession to the officer, and that the officer misunderstood and garbled the explanation in her written report. RP (2/3/10) 3; CP 12. Because the statements were suppressed (by agreement), the dispute was not presented to the jury. This makes the prosecutor’s arguments doubly unfair, since jurors did not have the opportunity to evaluate Mr. Cervantes’s account of what he said to the officer.

Respondent also clings to the position asserted in closing that possession pursuant to a lawful prescription is permissible only for the patient named in the prescription. Brief of Respondent, p. 10. Even if this

not infringe a constitutional right). *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000).

position were legally correct,⁵ it was not supported by the court's instructions. CP 25. It was therefore misconduct.⁶ *State v. Davenport*, 100 Wash.2d 757, 760, 675 P.2d 1213 (1984).

The prosecutor's misconduct violated Mr. Cervantes's constitutional right to remain silent and his right to a verdict based solely on the court's instructions. Accordingly, his conviction must be reversed and the case remanded for a new trial. *Doyle, supra; Davenport, supra*.

III. THE COURT'S INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF THE CHARGE.

The court's instructions did not make manifestly clear that the prosecution bore the burden of proving the absence of a valid prescription. CP 25-48. Because the instructions relieved the prosecution of its burden, Mr. Cervantes's conviction must be reversed, and the case remanded for a new trial. *State v. Lorenz*, 152 Wash.2d 22, 31, 93 P.3d 133 (2004); *State v. Sibert*, 168 Wash.2d 306, 311, 230 P.3d 142 (2010) (plurality). Respondent argues that the burden of proof on this issue rested with Mr.

⁵ Thus criminalizing possession by a person caring for a sick spouse, a parent caring for a sick child, or an adult caring for an elderly parent.

⁶ Respondent also implies, in passing, that Mr. Cervantes produced insufficient evidence to support the defense. Brief of Respondent, p. 10. But nothing in RCW 69.50.4013 suggests that an accused person must produce the actual written prescription in court, rather than a computer printout or live testimony. Nor does Respondent argue for any particular standard of proof. Brief of Respondent, p. 10.

Cervantes. Brief of Respondent, pp. 4-7. This is incorrect, as outlined earlier in this brief.

Even if Respondent is correct, the failure to instruct the jury on the appropriate burden requires reversal. Jurors were left to speculate about the quantum of proof required to acquit Mr. Cervantes if his possession was pursuant to a valid prescription.⁷ Whether the defense burden is to raise a reasonable doubt or to prove the “prescription defense” by a preponderance of the evidence, the jury should have been advised of the appropriate burden. Without such instruction, jurors may have decided that acquittal required the defense to prove the defense beyond a reasonable doubt.

Respondent’s argument does not excuse the judge from instructing the jury on the appropriate burden of proof. Accordingly, Mr. Cervantes’s possession conviction must be reversed and the case remanded for a new trial.

IV. MR. CERVANTES WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Cervantes rests on the argument set forth in the Opening Brief.

⁷ Respondent also fails to specify the appropriate burden. *See* Brief of Respondent, generally.

CONCLUSION

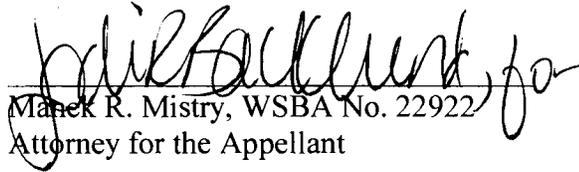
Mr. Cervantes's possession conviction must be reversed. The charge must either be dismissed with prejudice or remanded to the trial court for a new trial.

Respectfully submitted on July 13, 2011.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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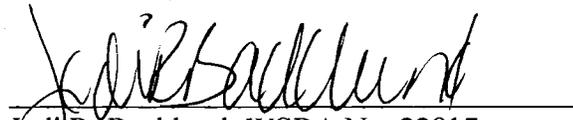
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 13, 2011.



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