

64424-6

64424-6

NO. 64424-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TANYA RADCLIFFE,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The court's instructions to the jury relieved the State of its burden of proving each element of the offense.

2. The court erred in providing Jury Instruction 8.

3. The court erred in providing Jury Instruction 12.

4. The trial court erred when it did not give Tanya Radcliffe credit for all time served prior to sentencing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. The court's instructions to the jury permitted the jury to convict Tanya Radcliffe of presenting a forged prescription without finding she knew the prescription was forged. Did the trial court relieve the State of its burden of proving the elements of the offense beyond a reasonable doubt?

2. RCW 9.94A.505(6) requires a sentencing court to give a defendant credit for all confinement time served prior to sentencing. Jail records stated Ms. Radcliffe had served nine days confinement prior to sentencing. Did the court err by only giving Ms. Radcliffe credit for a single day of confinement?

C. STATEMENT OF THE CASE

Because she was unable to see her normal physician at the SeaMar Clinic in order to refill her prescription for anxiety medication, Ms. Radcliffe saw Dr. Miguel Jimenez in the clinic's the urgent care. 1RP 84-85.¹ Dr. Jimenez provided Ms. Radcliffe a temporary refill of 12 Ativan pills. Id. 86-87.

When she returned home, because Ms. Radcliffe was not feeling well, her daughter Azaria offered to fill the prescription for her. 1RP 117-19. Azaria asked their landlord, Mary, to drive her to the pharmacy. Id. at 120. Mary first asked whether she could have any of the medication, but agreed to drive Azaria even after she was told no. 1RP 120. When they arrived at the pharmacy, Azaria remained at the car while Mary took the prescription into the store. 1RP 125-26. As she walked into the store Mary paused looked at the prescription, looked back at Azaria, and then continued into the store. Id. Mary soon returned, gave the prescription back to Azaria and told her she was unable to fill it. 1RP 126. Because Mary could not fill the prescription, Ms. Radcliffe returned later to do so. 1RP 128.

The pharmacist testified the prescription had been altered to call for 120 pills, and the “0” was written in different ink. 1RP 49. Because she believed it may have been altered and because it was written for a larger than normal amount of Ativan, the pharmacist called the clinic to confirm the accuracy of the prescription and was told it was for only 12 pills. Id.

Ms. Radcliffe stipulated that she presented the prescription to the pharmacist. 1RP 113.

The State charged Ms. Radcliffe with making or uttering a forged prescription. CP 4. A jury convicted Ms. Radcliffe of that charge.

D. ARGUMENT.

1. THE COURT’S INSTRUCTIONS TO THE JURY RELIEVED THE STATE OF ITS BURDEN OF PROVING MS RADCLIFFE KNEW THE PRESCRIPTION WAS FORGED.

- a. Due process requires the jury be properly instructed on the elements of the offense. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime

¹ The Verbatim Report of Proceedings consist of two volumes, the volume containing the three days of trial will be cited as “1RP” and the volume containing the sentencing hearing will be cited as “2RP.”

charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Instructions which relieve the State of this burden deprive the defendant of due process.

b. Instruction 8 and Instruction 12 relieved the State of its burden of proving Ms. Radcliffe knew the prescription she presented was forged. “It is unlawful for any person knowingly or intentionally . . . [t]o make or utter any false or forged prescription or false or forged written order.” RCW 69.50.403(1)(e).

The court instructed the jury that to convict Ms. Radcliffe it must find she “intentionally did make or utter a false or forged prescription.” CP 24. The court further instructed the jury that “utter means to put off as true a written prescription.” CP 28. These instructions required the jury find Ms. Radcliffe intentionally uttered the prescription; i.e. “put it off as true,” but did not require the jury find Ms. Radcliffe did so knowing that the prescription had been altered. Absent that knowledge, putting off as true a prescription is indistinguishable from the daily acts of thousands of patients at pharmacies. The instruction creates a strict liability crime, if a person intentionally presents a prescription – as does

every pharmacy customer – they have committed a felony if the prescription has been altered, regardless of their knowledge.

In a normal forgery prosecution that *mens rea* is established when the State proves the person uttered the forged instrument knowing it was forged and did so with the intent to defraud. RCW 9A.60.020; State v. Tinajero, 154 Wn.App. 745, 2009 WL 6026049, 2.² In that scenario a jury must find both actual knowledge of the nature of the instrument and the intent to defraud. Here, by contrast, the instructions do not require the State establish Ms. Radcliffe acted with intent to defraud, merely that she intentionally presented what turned out to be a forged prescription. Instead, all that these instructions required the jury find was Ms. Radcliffe presented the prescription and that the prescription had been altered without any guilty knowledge by Ms. Radcliffe.

To avoid criminalizing innocent conduct courts have previously inferred a *mens rea* elements in other crimes. For example, the Supreme Court implied a knowledge element for the crime of delivery of a controlled substance, recognizing that otherwise a postal employee could be prosecuted for delivering a

² Official page cites are not yet available.

package which contained a controlled substance where the postal worker could have no knowledge of that fact. State v. Boyer, 91 Wn.2d 342, 344, 588 1151 (1979). The same is true where a person is prosecuted for uttering a forged prescription but the jury is not required to find that the person knew the prescription was forged.

RCW 69.50.403(1)(e) makes it a crime to either “make or utter” a forged prescription. By using the conjunction “or” the statute recognizes different people may “make” and “utter” a forged prescription. The person who “makes” a forged prescription will necessarily know that the prescription is false, as she is the one who altered or created it. But the same is not true of the person who utters the same forged prescription. Thus, depending upon the facts of a case, proof of the single alternative means set forth in RCW 69.50.403(1)(e) will require proof of guilty knowledge by some while at the same time reaching innocent conduct of others. That inconsistency is resolved by simply requiring a jury find that a person who utters a forged prescription knew the prescription was false. The instructions in this case did not do that.

c. The court must reverse Ms. Radcliffe’s conviction.

An instruction which relieves the State of its burden of proof is

harmless only if the court can conclude “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot prove beyond a reasonable doubt the error here was harmless.

Neder recognized the error in that case was harmless because the evidence of the missing materiality element was so overwhelming the defendant had not argued otherwise to the jury or to the Supreme Court. 527 U.S. at 16. Here the State did not offer any evidence that Ms. Radcliffe made the forgery. Thus, the only means by which the jury could have convicted her was by finding she uttered the forged prescription. In contrast to the omitted element in Neder, the State’s evidence of her knowledge was very much in dispute.

Ms. Radcliffe’s daughter Azaria provided testimony that their landlord Mary had altered the prescription to meet her own desire to obtain medication after Ms. Radcliffe rebuffed her request that she share the pills. 1RP 120, 125-26. Ms. Radcliffe’s defense was that while she intentionally presented the prescription she did not know it had been altered, presumably by Mary. Instruction 8

and 12, however, allowed the jury to convict Ms. Radcliffe despite that lack of knowledge. In light of the testimony, the State cannot prove beyond reasonable doubt that the jury would have convicted Ms. Radcliffe had it been required to find she knew the prescription had been altered. This Court must reverse Ms. Radcliffe's conviction.

2. THE TRIAL COURT ERRED WHEN IT DID NOT CREDIT MS. RADCLIFFE FOR ALL TIME SERVED IN CONFINEMENT PRIOR TO SENTENCING.

"A trial court only possesses the power to impose sentences provided by law." In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Where a statutory term, phrase or directive is unambiguous, its meaning must be taken from its plain language. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)).

RCW 9.94A.505(6) provides:

The sentencing court shall 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

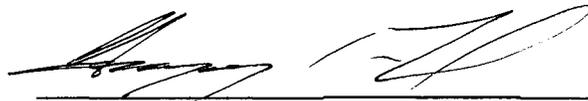
Here, the trial court stated the records before it indicated Ms. Radcliffe spent nine days in jail prior to sentencing. 10/30.09 RP 5.

However, the Judgment and Sentence provides Ms. Radcliffe credit for only one day of confinement prior to sentencing. CP 36. The court violated the plain terms of RCW 9.94A.505(6). This Court must reverse Ms. Radcliffe's sentence and remand for resentencing.

E. CONCLUSION.

For the foregoing reasons, this Court should reverse Ms. Radcliffe's conviction and sentence..

Respectfully submitted this 12th day of May 2010.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64424-6-I
)	
TANYA RADCLIFFE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] TANYA RADCLIFFE 13543 23 AVE. NE SEATTLE, WA 98125	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MAY, 2010.

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