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ASSIGNMENTS OF ERROR

1. Mr. Cervantes's conviction for Possession of a Controlled Substance infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The prosecution failed to prove that Mr. Cervantes's possession was not pursuant to a valid prescription.
3. The prosecution failed to prove that Mr. Cervantes's possession was inconsistent with Paulette Weeks's prescription.
4. The prosecutor improperly commented on Mr. Cervantes's Fifth and Fourteenth Amendment right to remain silent.
5. The prosecutor committed reversible misconduct in closing arguments, violating Mr. Cervantes's Sixth and Fourteenth Amendment right to a jury trial.
6. The prosecutor improperly referred to "facts" not in evidence.
7. The prosecutor committed misconduct by making legal arguments that contradicted the court's instructions.
8. Mr. Cervantes's possession conviction infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crime.
9. The court's instructions relieved the state of its burden to prove that Mr. Cervantes's possession was inconsistent with Paulette Weeks's prescription.
10. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
11. The trial court erred by giving Instruction No. 15.
12. Defense counsel was ineffective for failing to propose a proper "to convict" instruction.

13. Defense counsel was ineffective for failing to object to prosecutorial misconduct.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Mr. Cervantes of Possession of a Controlled Substance, the prosecution was required to prove that he unlawfully possessed the substance. Here, the evidence established that Mr. Cervantes was bringing Paulette Weeks her prescription medication at her request. Did Mr. Cervantes's conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?
2. A prosecutor may not ask a jury to presume guilt from an accused person's silence. Here, the prosecutor misrepresented facts to the jury by suggesting that Mr. Cervantes had remained silent when arrested, and then asked the jury to presume guilt from his silence. Did the prosecutor unconstitutionally comment on Mr. Cervantes's Fifth and Fourteenth Amendment privilege against self-incrimination?
3. A prosecutor commits misconduct by arguing "facts" that were not introduced into evidence. Here, the prosecutor misrepresented "facts" that were not introduced into evidence by arguing that Mr. Cervantes had remained silent instead of explaining why he had Paulette Weeks's pills. Did the prosecutor's misconduct violate Mr. Cervantes's Sixth and Fourteenth Amendment right to a jury trial by improperly suggesting that "facts" not in evidence supported conviction?
4. A prosecutor may not make legal arguments that contradict the court's instructions to the jury. In closing, the prosecutor argued that a valid prescription cannot authorize possession by anyone except for the patient. Did the prosecutor violate Mr. Cervantes's Sixth and Fourteenth Amendment right to a jury

trial by making legal arguments that contradicted the court's instructions?

5. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions allowed conviction absent proof that Mr. Cervantes's possession was inconsistent with Paulette Weeks's prescription. Did the trial court's instructions relieve the state of its burden to prove the essential elements of the crime in violation of Mr. Cervantes's Fourteenth Amendment right to due process?
6. An accused person is constitutionally entitled to counsel who is familiar with the applicable law. Here, defense counsel failed to propose a proper "to convict" instruction. Was Mr. Cervantes denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
7. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to object to prejudicial misconduct committed by the prosecutor in closing. Was Mr. Cervantes denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Paulette Weeks suffered many health problems, including coronary artery disease, hypertension, anxiety, and post-traumatic stress disorder. As of March of 2009, she had already endured a heart attack, triple bypass surgery, a stroke, and cancer, and was waiting for scheduled gall bladder surgery. RP (9/16/10) 50-52, 66. She took roughly twelve different medications daily. RP (9/16/10) 51. One of her medications was diazepam (Valium is a brand name version of diazepam), which she took as needed for anxiety. RP (9/16/10) 51. She needed assistance with her medication as well as with daily functions. Her daughter Katie Weeks was a Certified Nursing Assistant, and received state funding to assist Paulette Weeks. RP (9/16/10) 50-53, 55-58, 62-63.

Paulette Weeks lived with her daughter Katie and her child as well as Katie's boyfriend Xavier Cervantes. RP (9/16/10) 58, 70. The apartment was not large, and in November of 2009, Paulette Weeks agreed to house-sit for a friend. RP (9/16/10) 58. She brought medication for two days, but when her friend was gone longer, she needed additional medication. RP (9/16/10) 53-54, 58-60. She called her daughter and asked her to bring her the pills she needed, because her medications prevent Paulette Weeks from driving. RP 99/16/10) 54-55. Katie was on

her way to visit another of her patients, so she asked her mother if Mr. Cervantes could bring her the pills on his way to work. Paulette Weeks agreed. RP (9/16/10) 54-55, 67-68.

Mr. Cervantes put seven pills in his pocket and drove toward Paulette Weeks's friend's home. On the way there, he got into an accident at a four-way stop, and did not stay to exchange information with the other driver. RP (9/16/10) 24-25, 32.

Officer Finch saw the accident, and pulled Mr. Cervantes over. RP (9/16/10) 28-30. Mr. Cervantes gave a false name, then corrected himself. He had a suspended license, and Officer Finch arrested him. RP (9/16/10) 31-33. When searching Mr. Cervantes, the officer found the seven diazepam pills in his pocket. RP (9/16/10) 35, 38, 43-44.

The state charged Mr. Cervantes with Possession of a Controlled Substance, Driving While License Suspended in the Third Degree, Hit and Run Attended Vehicle, and Making a False Statement to a Police Officer. CP 1-5.

The parties agreed that the statements Mr. Cervantes made before his arrest could be admitted, but that those after his arrest were not admissible. RP (9/16/10) 8-9. Prior to his arrest, Mr. Cervantes told the officer that he was on his way to work, and the officer told the jury as much. RP (9/16/10) 8, 32. After his arrest, he told the officer, in response

to questions, that the pills were Valium, and that he had received them from his mother-in-law. Certificate of Counsel in Response to Defense *Knapstad* Motion, Supp. CP.

Mr. Cervantes moved to dismiss the charge, arguing the state had not proven that the possession of the pills was unlawful. RP (9/16/10) 47. The court denied the motion. RP (9/16/10) 48.

Both Paulette and Katie Weeks testified in the defense case. Paulette Weeks brought verification from her pharmacy that she was prescribed diazepam during the time period at issue. RP (9/16/10) 52-53. She also confirmed that she requested the pills be brought to her and consented to having Mr. Cervantes transport them. RP (9/16/10) 54-55.

The state proposed a “to convict” instruction on the possession charge which did not reference possession pursuant to a valid prescription:

No. 15

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.

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.

CP 42.

Defense counsel neither objected to this instruction nor proposed an alternative "to convict" instruction, and the court gave the instruction. CP 20-24; 42.

The state also proposed an instruction regarding the lawfulness of the possession:

No. 16

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 43. Mr. Cervantes's attorney objected to this instruction, but did not provide the court with a draft alternative. RP (9/16/10) 74; CP 20-24.

During closing argument, Mr. Cervantes's attorney urged the jury to convict him on all but the Possession of a Controlled Substance charge, arguing that he possessed it pursuant to Paulette Weeks's lawful prescription. RP (9/16/10) 98-104. The prosecutor argued, without objection, in her rebuttal: "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 (9/16/10) 106.

The jury convicted Mr. Cervantes on all charges. After sentencing, he timely appealed. CP 55-63, 66-75.

ARGUMENT

I. MR. CERVANTES'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE INFRINGED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The application of law to a particular set

of facts is a mixed question of law and fact reviewed *de novo*. *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009).

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel*, at 576.

B. A conviction for Possession of a Controlled Substance requires proof that the substance was not obtained pursuant to a valid prescription.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). An essential element is “one whose specification is necessary to establish the very illegality of the behavior.”

State v. Johnson, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992). The

remedy for a conviction based on insufficient evidence is reversal and

dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106

S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In interpreting a statute, a court must assume that the legislature means exactly what it says. *State v. Keller*, 143 Wash.2d 267, 276, 19

P.3d 1030 (2001), *cert. den. sub nom Keller v. Washington*, 534 U.S.

1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). If the statute is clear on its

face, its meaning is derived from the statutory language alone; an

unambiguous statute is not subject to judicial interpretation. *State v. Cramm*, 114 Wash.App. 170, 173, 56 P.3d 999 (2002); *State v. Chester*, 133 Wash.2d 15, 21, 940 P.2d 1374 (1997).

RCW 69.50.4013 criminalizes Possession of a Controlled Substance. It reads (in relevant part) as follows:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription...

RCW 69.50.4013(1). The statute is unambiguous. Under its plain terms, the prosecution is required to prove not only the fact of possession, but also that the substance was not obtained “pursuant to” a valid prescription.¹ *Johnson*, at 147.

The phrase “pursuant to” is not defined in the statute. Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wash.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wash.2d 196, 202, 172 P.3d 329 (2007).

¹ This exception undoubtedly applies to a patient who picks up a prescription drug from a pharmacy. However, nothing in the statutory language limits the exception to that circumstance.

When used as an adverb (as it is in RCW 69.50.4013(1))—the phrase “pursuant to” means “according [to]” or “in a manner conformable [to].” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. (2011). In other words, a person in possession of a controlled substance may not be convicted if s/he obtained the substance “in a manner conformable to” a valid prescription. By contrast, a person who obtains a controlled substance in a manner inconsistent with an existing prescription violates the express language of the statute and is guilty of unlawful possession. RCW 69.50.4013(1).

This reading is mandated by the plain language of the statute.² It also makes sense from a policy perspective, because it allows a person to assist a child, spouse, parent, relative, or friend who needs help in filling prescriptions or taking prescribed medication.

C. The prosecution failed to prove beyond a reasonable doubt that Mr. Cervantes obtained the valium in a manner inconsistent with Paulette Weeks’s prescription.

Here, the evidence established that Mr. Cervantes was fetching the pills for Paulette Weeks, who was unable to drive. RP (9/16/10) 53-55.

Paulette Weeks presented testimony and documentary evidence

² Even if the statute were found to be ambiguous, this construction would be mandated by the rule of lenity. *See, e.g., State v. Flores*, 164 Wash.2d 1, 17, 186 P.3d 1038 (2008).

establishing that she had a prescription for the pills. RP (9/16/10) 52.

Nothing in the record suggested that Mr. Cervantes intended to ingest the pills himself, or that he obtained them in a manner inconsistent with Paulette Weeks's prescription.³ RP (9/16/10) 21-74. Under these circumstances, Mr. Cervantes should have been acquitted.

The evidence was insufficient to prove that Mr. Cervantes unlawfully possessed a controlled substance. Accordingly, his conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. CERVANTES'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Schaler, at* 282. A manifest error affecting a constitutional right may be raised for the first time on review; this includes prosecutorial misconduct that affects a

³ The prosecution did not contest the validity of Paulette Weeks's prescription, or the legitimacy of Mr. Cervantes's errand in bringing the pills to her. Instead, the prosecutor argued that Paulette Weeks's prescription could not justify Mr. Cervantes's possession. RP (9/16/10) 95-97, 107. The prosecutor's interpretation of RCW 69.50.4013 is inconsistent with the plain language of the statute, and leads to absurd results. Under the prosecutor's interpretation, countless drug crimes are committed every day when people pick up prescriptions for their children, spouses, parents, or other relatives.

constitutional right.⁴ 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) (“*Jones I*”). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁵ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.⁶ *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely

⁴ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011). This includes constitutional issues that are not manifest. *Id.*

⁵ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

⁶ Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, such misconduct requires reversal if it is “so flagrant and ill-intentioned” that no curative instruction would have negated its prejudicial effect. *Id.*, at 800.

academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. The prosecutor committed reversible misconduct by asking the jury to consider “facts” not introduced at trial and to presume guilt from Mr. Cervantes’s silence.

An accused person has a constitutional privilege against self-incrimination.⁷ U.S. Const. Amend. V; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It is “well settled” that the prosecution may not comment on or otherwise exploit an accused person’s exercise of the privilege. *State v. Carnahan*, 130 Wash.App. 159, 168, 122 P.3d 187 (2005) (citing *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)).

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial.⁸ U.S. Const. Amend. VI;

⁷ The Fifth Amendment is applicable to the states through the Fourteenth Amendment’s due process clause. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

⁸ The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). It is misconduct for a prosecutor to suggest that information not presented at trial supports conviction. *State v. Jones*, 144 Wash.App. 284, 293-94, 183 P.3d 307 (2008) (“*Jones II*”); *State v. Perez-Mejia*, 134 Wash.App. 907, 916, 143 P.3d 838 (2006).

In this case, the prosecutor violated Mr. Cervantes’s right to a jury trial⁹ and his privilege against self-incrimination by misrepresenting “facts” relating to Mr. Cervantes’s alleged post-arrest silence. When arrested, Mr. Cervantes explained how he’d come into possession of Paulette Weeks’s pills.¹⁰ RP (9/16/10) 8-9; Certificate of Counsel in Response to Defense *Knapstad* Motion, Supp. CP. The prosecutor stipulated that those statements were inadmissible, and they were excluded. RP (9/16/10) 8-9. Accordingly, no evidence was presented regarding Mr. Cervantes’s statements about the pills. RP (9/16/10) 21-46. Despite this, the prosecutor argued in closing that Mr. Cervantes “didn’t say I’m on my way to my mother-in-laws [sic], she needs some drugs, I

⁹ And his due process right to a decision based on the evidence under *Sheppard, supra*.

¹⁰ The substance of his statement was disputed. The officer’s report contained what may have been a garbled version of the information presented by the defense at trial. Certificate of Counsel in Response to Defense *Knapstad* Motion, Supp. CP.

have it in my pocket.” RP (9/16/10) 106. This was misconduct for two reasons.¹¹

First, the prosecutor invited the jury to infer guilt from Mr. Cervantes’s alleged silence, in violation of *Miranda* and *Doyle*. This violated Mr. Cervantes’s constitutional right to remain silent, under the Fifth and Fourteenth Amendments. *Doyle*, at 611. Second, the prosecutor misrepresented what had happened (since Mr. Cervantes *did* discuss the pills with the arresting officer)¹² and urged a verdict based on “facts” not in evidence (since no evidence established that Mr. Cervantes remained silent about the pills). RP (9/16/10) 106. By inviting the jury to consider these (misrepresented) “facts,” the prosecutor violated Mr. Cervantes’s rights to due process and to a jury trial under the Fifth, Sixth, and Fourteenth Amendments. *Turner, supra; Sheppard, supra*.

The prosecutor’s misconduct created a manifest error affecting Mr. Cervantes’s constitutional rights.¹³ The improper argument directly

¹¹ The prosecutor’s comments would have been permissible if she had stopped after noting that Mr. Cervantes “didn’t say I’m on my way to my mother-in-laws [sic].” RP (9/16/10) 106.

¹² The substance of his explanation was disputed, which made the prosecutor’s claim even more unfair: it denied Mr. Cervantes an opportunity to provide his version of his statement.

¹³ Accordingly, it may be reviewed for the first time on appeal under RAP 2.5(a)(3).

undermined Mr. Cervantes's defense to the possession charge.

Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id*; *Doyle*, at 611.

C. The prosecutor committed misconduct by making arguments that contradicted the court's instructions to the jury.

A prosecutor's statements to the jury upon the law must be confined to the law set forth in the instructions. *State v. Davenport*, 100 Wash.2d 757, 760, 675 P.2d 1213 (1984); *State v. Huckins*, 66 Wash.App. 213, 218-219, 836 P.2d 230 (1992). Any statement of law not contained in the instructions is improper, even if it is correct. *Davenport*, at 760. Such misconduct is a "serious irregularity having the grave potential to mislead the jury." *Id*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury's verdict. *Id*, at 762.

In this case, the prosecutor made arguments that contradicted the court's instructions. Instruction No. 16 notified the jury that possession of a controlled substance is unlawful "unless the substance was obtained... pursuant to... a valid prescription..." CP 43. The prosecutor's argument—that Mr. Cervantes's possession was unlawful even if jurors believed he'd legitimately undertaken an errand for Paulette Weeks—contradicted this instruction. RP (9/16/10) 95-97.

The prosecutor's comments violated Mr. Cervantes's constitutional right to a verdict based solely on the court's instructions. This infringed his Sixth and Fourteenth Amendment rights to due process and to a jury trial.¹⁴ *Davenport*, at 764. Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

III. MR. CERVANTES'S POSSESSION CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S "TO CONVICT" INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CHARGE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Schaler*, at 282. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). The court may also accept review of any issue argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see *Russell*, at ____ .

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. See, e.g., *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v.*

¹⁴ In the alternative, defense counsel's failure to object deprived Mr. Cervantes of his right to the effective assistance of counsel, as argued elsewhere in this brief.

Berg, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. A trial court must instruct the jury on every element of the charged crime.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wash.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the "to convict" instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997).

C. Instruction No. 15 relieved the prosecution of its obligation to prove that Mr. Cervantes did not obtain the substance "pursuant to" a valid prescription.

Possession of a controlled substance is unlawful "unless the substance was obtained directly from, or pursuant to, a valid prescription..." RCW 69.50.4013(1). In appropriate cases, the lack of a valid prescription (or the failure to obtain the substance pursuant to such a prescription) is an essential element of the offense: proof of such failure

“is necessary to establish the very illegality of the behavior.” *Johnson*, at 147.

Here, the court’s “to convict” instructions omitted this element. Instead, the instruction allowed conviction upon proof of possession, without reference to whether or not the substance was obtained pursuant to a valid prescription. Instruction No. 15, CP 42. This instruction did not make the state’s burden manifestly clear to the average juror. *Kyllo*, 864.

Mr. Cervantes’s entire defense rested on evidence that he’d obtained the valium pursuant to a valid prescription. The omission of this element from the “to convict” instruction had practical and identifiable consequences at trial. *Nguyen*, at 433. Accordingly, the omission of this element created a manifest error affecting Mr. Cervantes’s Fourteenth Amendment right to due process.¹⁵

D. The error prejudiced Mr. Cervantes.

Failure to instruct on an essential element requires reversal. *Smith*, *supra*. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *Toth*, at 615.

¹⁵ Because of this, the error can be argued for the first time on appeal. RAP 2.5(a)(3); *Kirwin*, *supra*. In the alternative, the court may exercise its discretion to review the issue. RAP 2.5(a)(3); *Russell*, *supra*. Furthermore, counsel’s failure to propose a correct instruction deprived Mr. Cervantes of the effective assistance of counsel, as argued elsewhere in this brief.

To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke*, at 222.

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. Instruction No. 16, which included language about obtaining a substance pursuant to a valid prescription, did not outline the burden of proof on this element. CP 43. Accordingly, Mr. Cervantes's possession conviction must be reversed and the case remanded for a new trial. *Id.*

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

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865,

16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80

(2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Pittman*, 134 Wash. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel provided ineffective assistance by failing to propose a proper "to convict" instruction.

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. See, e.g., *State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions on the justifiable use of force constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309

(2007); *see also State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004).

Mr. Cervantes's entire trial strategy rested on evidence that he obtained the pills "pursuant to... a valid prescription," under RCW 69.50.4013(1). A reasonably competent attorney would have been familiar with the statute, and would have proposed instructions making clear that the prosecution bore the burden of proving that the pills were not obtained pursuant to a valid prescription. *Tilton, supra*.

There is "no conceivable legitimate tactic" explaining counsel's failure to propose proper instructions. *Reichenbach, at* 130. Nor is there any indication in the record suggesting that counsel was actually pursuing a strategy that required him not to propose such instructions, especially in light of his objection to Instruction No. 16, which he recognized as "confusing." RP (9/16/10) 74. *See Hendrickson, supra*.

Furthermore, counsel's failure to propose a proper instruction prejudiced Mr. Cervantes. Given the testimony of Paulette Weeks (and that of her daughter), a reasonable juror could have entertained doubts about Mr. Cervante's guilt. However, because of counsel's mistake, the jury was not able to properly evaluate this evidence: nothing in the court's instructions made clear that the state bore the burden of disproving Mr. Cervantes's defense. CP 42-43.

The defense attorney's failure to propose proper instructions deprived Mr. Cervantes of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Tilton*. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

D. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing.

A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'"

Hodge v. Hurley, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, defense counsel should have objected when the prosecutor misrepresented "facts," relied on "facts" that were not in evidence, and made arguments that were inconsistent with the court's instructions, as outlined earlier in this brief. Counsel's failure to object constituted deficient performance. At a minimum, defense counsel should

have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Counsel's failure to object prejudiced Mr. Cervantes. The prosecutor's improper comments went directly to the defense theory of the case. The misconduct undermined Mr. Cervantes's position—that he lawfully possessed the valium pursuant to a valid prescription, because he was legitimately on an errand relating to Paulette Weeks's medical condition. Had counsel objected, the court could have stricken the prosecutor's improper comments and instructed the jury to disregard them.

The failure to object deprived Mr. Cervantes of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley*. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

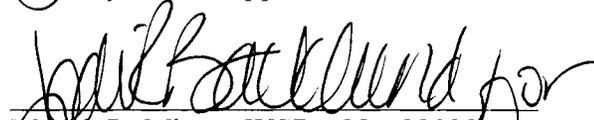
For the foregoing reasons, Mr. Cervantes's possession conviction must be reversed, and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial. Upon retrial, the court must properly instruct the jury on the state's burden to prove that the substance was not obtained pursuant to a valid prescription.

Respectfully submitted on March 25, 2011.

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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF MAILING

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

Xavier Cervantes, DOC #780784
Larch Corrections Center
15314 NE Dole Valley Road
Yacolt, WA 98675-9531

and to:

Lewis County Prosecutors Office
345 W Main St Fl 2
Chehalis WA 98532-4802

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 25, 2011.

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 March 25, 2011.



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