

NO. 41418-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

XAVIER ARROYO CERVANTES,

Appellant.

11 JUN 17 AM 9:42
STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
LEWIS COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00652-5

BRIEF OF RESPONDENT/RESPONSE TO MOTION OF
APPELLANT'S COUNSEL TO WITHDRAW

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I. STATEMENT OF THE CASE

The defendant, Xavier Cervantes, was driving through Centralia, Washington without a valid driver's license because his was suspended in the third degree and was also driving without insurance as required by law. RP1 31 and 33¹. Cervantes struck a vehicle driven by Kelly Morago. RP1 23-24 and 29-30. Cervantes then fled the scene, failing to stop and give the information required by law. RP1 29. All of this was witnessed by on-duty Centralia Police Officer Patty Finch. RP1 29.

Officer Finch followed the defendant and conducted a traffic stop approximately two blocks away from the scene of the accident. RP1 30. Upon contact, Cervantes admitted to not having a license, but claimed to have left his license at home. RP1 31. Cervantes then provided Officer Finch with a false name and date of birth. RP1 31-32. Cervantes eventually provided his true name and date of birth. RP1 32. It was then that Cervantes's true driving status was discovered. RP1 33. Cervantes told Officer Finch that he was on his way to work. RP1 32. As a result of Cervantes's criminal activity, he was arrested. RP1 35.

¹ RP1 refers to Report of Proceedings for September 16, 2010.

Cervantes was searched pursuant to arrest. RP1 35. During the search, seven (7) yellow pills were discovered in Cervantes's pocket. RP1 35. The pills were subsequently tested and identified as diazepam. RP1 38, 39, 44, 45. Diazepam, also known as valium, is a controlled substance in the state of Washington. RP1 45.

As a result of the above, Cervantes was charged in the Lewis County Superior Court with Possession of a Controlled Substance (Diazepam), Count One, Hit and Run-Attended Vehicle, Count Two, Making a False or Misleading Statement to a Public Servant, Count Three, and Driving While License Suspended, Count Four.

Pretrial, the defendant, through his attorney of record, filed a *Knapstad*² motion. That hearing was held on February 3, 2010. RP2 1³. The trial court denied the motion. RP2 6. The trial court's decision is not challenged on appeal.

As a result, Cervantes elected to take his case to trial, which began on September 16, 2010. RP1 1. Testimony was consistent with the above facts. In addition, Cervantes called two witnesses.

² *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

³ RP2 refers to Report of Proceedings for February 3, 2010.

The first was Paulette Weeks⁴. Paulette indicated that she was the mother of Cervantes's girlfriend and, at the time of the incident, was residing with Cervantes and her daughter, but was staying away from the home because she was house sitting for a friend. RP1 50, 53. During this time, Paulette was suffering from several medical issues that required a multitude of pills daily. RP1 50-51. Paulette produced a partial list of medications that she had obtained from a local pharmacy. RP1 52. Paulette indicated that these medications were prescribed to her, but no prescription was produced. RP1 52. Paulette went on to testify that, while house sitting, she ran out of diazepam and, as a result, called her daughter because she, Paulette, could not drive and her daughter was her care-provider and had a medical power of attorney⁵. RP1 53. According to Paulette's testimony, she gave her daughter, Katie⁶, permission to give her pills to her boyfriend, the defendant, to deliver them to her. RP1 54-55.

Katie then testified that she was given a "nurse delegation" which authorized her to dispense medication as directed by a

⁴ This brief will use the first names of the defense witnesses due to the commonality of their last name. No disrespect is intended.

⁵ Her daughter, Katie Weeks, later testified that she was unsure if the medical power of attorney was in place at the time of this incident. RP1 72-73.

⁶ Again, because of the commonality of the last names, this brief will refer to Katie weeks as "Katie". No disrespect is intended.

nurse. RP1 64. Katie further testified that her mother, Paulette, was a “client” that she was paid to care for. RP1 62-66. Katie also testified that this was, in part, because Paulette’s doctor felt it would be best for Katie to keep track of Paulette’s medication intake. RP1 66. Katie further testified that she gave Paulette’s pills to Cervantes to deliver. RP1 67. The jury returned verdicts of “guilty” on each count charged. RP1 110.

II. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS BEYOND A REASONABLE DOUBT.

“Evidence is sufficient to support a conviction if, taking the evidence in the light most favorable to the state, it allows a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.” *State v. Kruger* 116 Wn. App. 685, 689-690, 67 P.3d 1147 (2003); citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here, when the standard set forth by *Salinas* and followed by *Kruger* is applied, the conviction must be affirmed. The State proved that Cervantes possessed a controlled substance. Cervantes, however, believes that this court should require the State to prove that no valid exemption existed.

Cervantes attempts to convince this court to ignore plain, unambiguous statutory language and decades of well-settled case law. “It is not necessary for the state to negate **any** exemption or exception....The burden of proof of any exemption is **upon the person claiming it.**” RCW 69.50.506(a) (emphasis added). The defendant was charged with Possession of a Controlled Substance pursuant to RCW 69.50.4013. Under that statute, “[i]t is unlawful for any person to possess a controlled substance....” RCW 69.50.4013(1). This has been affirmed by court decisions as well.

Guidelines for determining what constitutes an affirmative defense are set out in *McGuire v. Seattle*, 31 Wn. App. 438, 443, 642 P.2d 765 (1982), *rev. denied*, 98 Wn.2d 1017 (1983):

[T]he state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression..

State v. Lawson, 37 Wn. App. 539, 542, 681 P.2d 867 (1984), *citing Morrison v. California*, 291 U.S. 82, 88-89, 54 S.Ct. 281, 284, 78 L.Ed. 664 (1933).

In *Lawson*, the court followed well-established case law. “The State need prove only possession of controlled substances to

establish illegal possession of controlled substances. The defendant may then affirmatively defend against the charge by showing that the possession was unwitting, with a prescription, or otherwise lawful.” *Id* at 542, footnote 1; *citing State v. Mantell*, 71 Wn.2d 768, 770, 430 P.2d 980 (1967); *State v. Wilson*, 20 Wn. App. 592, 581 P.2d 592 (1978).

Here, the state showed that Cervantes possessed a controlled substance. The drugs were found on Cervantes and tests confirmed that the substance found was a controlled substance. The court will not disturb the findings of the jury when there is substantial evidence that supports the verdict reached by the jury. See e.g. *State v. Lee*, 74 Wn.2d 967, 968, 447 P.2d 169 (1968).

At that point, it became Cervantes’s burden to show his possession was somehow excusable. RCW 69.50.506(a). He could not/did not and, as a result, was found guilty. Cervantes failed to prove the existence of a prescription that allowed **HIM** to possess the controlled substance. RCW 69.50.506(a). Even if such evidence did exist, that does not mean that a jury is going to believe the defense put forth.

Paulette testified that she had a prescription for diazepam although one was not produced. RP1 52. As a result, Cervants produced no proof of a prescription for anyone, let alone him.

Katie testified that one of the reasons that she was a “nurse delegated” was because her mother/client “...had suffered a little bit of a stroke....The doctor felt like it would be best that I knew exactly what she was taking and when she was to take them.” RP1 66. If that were the case, it seems highly unlikely that she would give an unknown quantity of medication (RP1 67) that she has been named a “nurse delegated” to dispense to her mother/client because her mother/client needed to be monitored. RP1 66. It seems further unlikely that those pills would simply be stored in someone’s pocket, RP1 35.

Cervantes’s attempt at burden shifting and requiring the state to prove a negative must fail. The state cannot be given the task of searching all doctors, pharmacies, hospitals, medical clinics, etc. to determine if, when or under what circumstances the defendant, or someone connected with the defendant, regardless of how remotely, was ever given a prescription. Such a position is nonsense and should not be considered by this court.

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT THEREFORE CERVANTE'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

A defendant making a claim of prosecutorial misconduct must meet a certain burden to establish his or her claim.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. A defendant can establish prejudice only if there is a **substantial** likelihood that the misconduct affected the jury's verdict.

State v. Jackson, 150 Wn. App. 887, 882-83, 209 P.3d 553 (2009), citing *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004), (emphasis added). The contexts in which the alleged improper statements are made are an important part of the analysis in regards to the claim of prosecutorial misconduct.

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. at 883, citing *State v. Carver*, 122 Wn. App. at 306.

When defense counsel fails to object a prosecutor's improper statements, reversal is required only if the misconduct was so ill-intentioned and flagrant that no instruction could have cured the resulting prejudice. *State v. Jackson*, 150 Wn. App. at

883, citing *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Cervantes's claim of misconduct in closing relies on the hopes that this court will find "facts" that do not exist, were not inferred and cannot be found.

During closing, the state's attorney said "...he told the officer he was going to work. He didn't say I'm on my way to my mother-in-laws [sic], she needs some drugs, I have it in my pocket. What he said was I'm on my way to work." RP1 106. The comment was: a) a true statement; b) contained in closing argument; and c) made without objection from the defendant's trial attorney.

To bolster his argument, Cervantes quotes only part of the state's closing argument and then makes a passing reference to the defendant's explanation of his reasoning for possessing the controlled substance that was given to the officer. Appellant's Brief 15-16. In actuality, what the defendant told the officer was that he "...did not [have a prescription for the pills] and that he received them from his mother in law [sic] and was going to take them for a 'stomach ache.'" CP 12.

Cervantes cannot point to any prejudice that arose from this comment because there is none. The state simply highlighted what

Cervantes said and compared it to what was said on his behalf by his witnesses. Cervantes is simply trying to find fault with the State pointing out the inconsistencies with the information that was presented by Cervantes; such an effort must fail.

Finally, the comment should not be reviewed because it was made without objection. "Without a proper objection, request for a curative instruction, or a motion for mistrial, the defendant cannot raise the issue of misconduct on appeal unless it was so flagrant and ill intentioned that no curative instruction could have obviated the resulting prejudice." *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995).

Nor did the state commit misconduct by arguing that even if Cervantes was bringing medicine to Paulette; he was still guilty of Unlawful Possession of a Controlled Substance. Cervantes's possession was not pursuant to a valid prescription. There was no production of the valid prescription at trial. Even if, *arguendo*, Paulette produced a valid prescription at trial, that does not make Cervantes's possession lawful. "In the absence of proof that a **person is the duly authorized holder** of an appropriate registration or order form issued under this chapter, he is presumed not to be the holder of the registration or form. The burden is upon

him to rebut the presumption.” RCW 69.50.506(b) (emphasis added). The position taken by the state was not contrary to the law, nor contrary to the instructions given to the jury because Cervantes’s possession was not pursuant to a valid prescription.

The defense, during the trial, in essence, admitted that Cervantes’s conduct was illegal. Paulette testified that Katie was her care-giver and had a medical power of attorney. RP1 52-54. Katie testified that because she was the “nurse delegated” and the medical power of attorney, she was able to dispense medicine. RP1 64-66, 72. There was no such “nurse delegated” or medical power of attorney given to Cervantes. As a result, Cervantes’s possession of the diazepam was illegal and the conviction should stand.

C. CERVANTES RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL.

Claims for ineffective assistance of counsel are reviewed *de novo* and require that a defendant show that trial counsel’s representation was deficient and that deficiency prejudiced him; however, there is a strong presumption against deficiency. See e.g. *In re Crace*, 157 Wn. App 81, 104-05, 236 P.3d 914 (2010). When such a standard is applied here, it shows that no such claim can stand.

Here, Cervantes first argues that his trial counsel was ineffective because he failed to argue the burden shifting theory put forth here. See Appellant's Brief, page 23. Such an argument fails for the plethora of reasons set forth above. In support of his argument, Cervantes urges this court to rely on *State v. Woods*.⁷ By doing so, Cervantes highlights the absurdity of his own argument. In *Woods*, the defendant was charged with assault and the defendant wanted a self-defense instruction. In other words, the state proved a crime and defendant was then required to prove a legal excuse for the committed crime; as is the case here. Cervantes's trial counsel did not request a different "to convict" instruction because doing so was not supported by the law. Cervantes's trial counsel was not deficient, therefore he is not prejudiced.

Cervantes next claims ineffective assistance because trial counsel "failed" to object to the state's closing argument. Appellant's Brief 25. Trial counsel did not "fail" to object because, for the reasons stated above, there was nothing to object to. The state's closing argument was well grounded in law, in fact and was based upon the proper instructions given to the jury.

⁷ *State v. Woods*, 138 Wn. App 191, 156 P.3d 309 (2007)

III. CONCLUSION

The reasons given in support of a reversal in this matter are not well grounded in the facts of the case, the laws or case law of the State of Washington. As a result, the conviction should be affirmed.

DATED June 16, 2011

Respectfully submitted,



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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

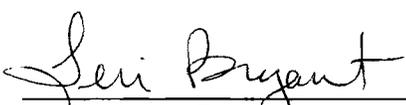
STATE OF WASHINGTON,) NO. 41418-0-II
Respondent,)
vs.) DECLARATION OF
XAVIER A. CERVANTES.,) MAILING
Appellant.)
_____))

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STATE OF WASHINGTON
BY _____
DEPUTY

Ms. Teri Bryant, paralegal for Jonathan L. Meyer,
Prosecuting Attorney, declares under penalty of perjury under the
laws of the State of Washington that the following is true and
correct: On June 16, 2011, the appellant was served with a copy of
the **Brief of Respondent** by depositing same in the United States
Mail, postage pre-paid, to the attorney for Appellant at the name
and address indicated below:

Jodi R. Backlund & Manek R. Mistry
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DATED this 16 day of June, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office