STATE V. MEDINA

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHRISTOPHER MEDINA,
Defendant-Appellant.

No. 31,443

COURT OF APPEALS OF NEW MEXICO

December 10, 2013

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker, District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, Sri Mullis, Assistant Attorney General, Albuquerque, NM, for Appellee

The Romero Law Firm, P.A., Romn R. Romero, Albuquerque, NM, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: RODERICK T. KENNEDY, Chief Judge, CYNTHIA A. FRY, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Defendant Christopher Medina appeals his conviction on charges of driving under the influence of intoxicating liquor or drugs with an alcohol concentration of eight

one-hundredths (.08) or more, driving with an expired registration plate, and failure to obey a stop sign.

{2} Defendant claims that he was denied a fair trial and is entitled to a new proceeding, or, if re-trial is barred by double jeopardy, is entitled to go free. In support of that claim Defendant raises five arguments: (1) he was coerced into testifying; (2) prosecutorial misconduct denied him a fair trial; (3) his requested jury instructions were improperly denied; (4) counsel was ineffective; and (5) cumulative error occurred in the course of the proceedings. We affirm and therefore deny Defendant a new trial. Because Defendant is not entitled to a new trial, we do not consider the double jeopardy issue.

BACKGROUND

{3} On October 3, 2009, Defendant was driving in the Nob Hill area of Albuquerque. Defendant was stopped by an Albuquerque Police Department (APD) officer for traffic violations. Upon further investigation, an officer who specializes in driving while intoxicated (DWI) was called to the scene.

{4} DWI investigator Officer Daniel Carr administered three field sobriety tests to Defendant. Officer Carr observed Defendant as having slurred speech, bloodshot and watery eyes, and an odor of alcohol. Based on Defendant's performance on the field sobriety tests and physical evidence of alcohol consumption, Officer Carr concluded that Defendant was driving under the influence of alcohol. Defendant was placed under arrest.

{5} Defendant underwent a twenty-three minute deprivation period in preparation for a breath-alcohol test (BAT). During the deprivation period, Defendant was under observation, and he did not eat, drink, smoke, or do anything else that might affect the result of a BAT. Officer Carr drove Defendant to the Prisoner Transport Center, where Defendant was read the New Mexico Implied Consent Act.

{6} At the Prisoner Transport Center, Defendant agreed to take a BAT requested and then administered by Officer Carr. Defendant blew two samples into an Intoxilyzer 8000 breath-alcohol testing machine. Both samples registered .08.

{7} Defendant was transported to the Metropolitan Detention Center (MDC), where a member of correctional medical services administered another BAT. This test was performed on a portable testing machine of unknown type. Defendant registered .04. Adjacent to the notation of the .04 result, which was handwritten, was ".00[,]" also handwritten and then struck through. Written next to the result, as part of the typewritten form, was "[f]or medical use only—not calibrated for legal use[.]"

COERCED TESTIMONY

{8} Defendant filed a pre-trial motion in limine to admit into evidence the document on which the .04 test result was recorded. At the hearing on the motion in limine, Defendant called the medical records custodian at the MDC to testify. The record custodian verified that the document being offered was from the MDC files. She did not have personal knowledge concerning the administration of the test to Defendant or any particulars concerning the device that produced the .04% result. Thecourt determined that the records custodian could not provide sufficient foundation for the reliability of the information in the document and denied the motion in limine. The court held out the possibility of admission of the result contingent upon Defendant laying a foundation for the test at trial.

{9} Defendant argues that, as a consequence of the court's rulings on the admissibility of the .04 test result document, he was presented with a "Hobbesian choice" and was "compelled to testify against his will[.]" Defendant points out that on the day of the trial, outside of the presence of the jury, the court pronounced to counsel for both parties that if Defendant wished to testify, the court would admit testimony that he took a second breath-alcohol test and the result of that test.[1] The court noted that it was not yet clear whether Defendant intended to testify. As characterized by Defendant, the court's pronouncement improperly presented him with a choice of "either refuse to testify and all but guarantee a conviction that would have to be appealed, or testify and do so with the understanding that his testimony would likely not be received well with little preparation and little aforethought."

{10} When the court pronounced prospectively to the parties that Defendant's potential testimony about the favorable result of his second breath test would be admitted, it did not limit or narrow Defendant's choices. Defendant retained the choice to testify or remain silent, depending on Defendant's tactical calculation. In fact, the court facilitated a more informed calculation by providing to Defendant a relevant, indeed favorable, ruling. Instead of Defendant being forced to choose whether to take the stand without knowing whether the court would admit testimony on the result of the second test if an objection was tendered, the court told Defendant in advance that such testimony would be admitted. In effect, the court answered a question Defendant had not yet asked and thus allowed him to factor that answer into a decision on whether to testify. Because the court made it clear that favorable testimony would be admitted, the court facilitated a better-honed judgment on the part of Defendant. Defendant retained the option provided by right not to testify. The court did not limit his choices.

{11} The court's pronouncement also did not cause Defendant to "potentially lose his right to appeal the [c]ourt's denial of the motion in limine" if he did not testify, as he argues. The motion in limine requested admission of the document with the results of the second breath test. It did not directly relate to Defendant's testimony about the test or its results. The pronouncement on the day of trial was a prospective ruling that Defendant had sufficient personal knowledge to testify as to the results of the second, favorable test. The pronouncement did not alter the opportunity for Defendant to present a witness with sufficient personal knowledge to authenticate the document on which the

results of the second test were noted, and thereby secure the desired admission of the document itself.

{12} In sum, the court did not compel Defendant to testify, coerce him to testify, or limit his choice of defense. If anything, the court sua sponte offered Defendant information that allowed him to make a more informed choice about whether to testify. Defendant chose to testify in order to present an important element of his defense. His dilemma—deciding between silence and presenting a defense—was no different from that of other defendants. *See State v. Padilla*, 1994-NMCA-067, ¶ 18, 118 N.M. 189, 879 P.2d 1208 (holding no violation against self-incrimination when defendant decided to testify consequent to an unfavorable evidentiary ruling); *see also State v. Smith*, 1975-NMCA-139, ¶ 13, 88 N.M. 541, 543 P.2d 834 (finding no violation against compelled self-incrimination when defendant chose to testify consequent to the court excluding all other alibi testimony).

PROSECUTORIAL MISCONDUCT

{13} Defendant claims that he was denied a fair trial because of prosecutorial misconduct. Defendant alleges that the prosecutor committed misconduct by: (1) using false and misleading evidence in closing argument; (2) improperly referring to Defendant's exercise of his right to silence; (3) disparaging defense counsel; (4) vouching; (5) using inflammatory language; and (6) misstating the law.

{14} The standard of review for a claim of prosecutorial misconduct depends on whether the misconduct at issue was subject to a specific and timely objection at trial. When an issue of prosecutorial misconduct is preserved by a specific and timely objection, we review the ruling for abuse of discretion. *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728. We employ this deferential standard of review because the trial court is in the best position to evaluate the significance of any alleged prosecutorial error. *Id.* A ruling is disturbed under an abuse of discretion standard when it is arbitrary, capricious, or beyond reason. *State v. Duffy*, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110, ¶ 37 n.6. But when a claim of prosecutorial misconduct has not been properly preserved by a specific and timely objection at trial, we review the claim on appeal for fundamental error. *Allen,* 2000-NMSC-002, ¶ 95. Prosecutorial misconduct reaches the level of fundamental error when it is egregious and so pervasive and prejudicial that the defendant was deprived of a fair trial. *Id.* It applies only when a defendant's conviction would shock the conscience if allowed to stand, or when an error is such that the fundamental integrity of the judicial process is implicated. *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223 P.3d 348.

{15} Our Supreme Court has identified three factors that are important under either standard of review in evaluating a claim of prosecutorial misconduct at closing: (1) whether the statement invaded some distinct constitutional protection; (2) whether the statement was isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by the defense. *Id.* ¶ 26. When a statement invades some

constitutional protection, we are more likely to find reversible error. *Id.* ¶ 27. When improper prosecutorial comments are extensive, pronounced, persistent, or repeated we are also more likely to find reversible error. *Id.* ¶¶ 29-32. But when the remark is isolated or brief, we have consistently upheld convictions. *Id.* ¶ 31. Finally, when the defense has "opened the door" to the prosecutorial comments by argument or reference to facts not in evidence, we are least likely to find reversible error. *Id.* ¶ 33.

False and Misleading Evidence

{16} Defendant argues that the prosecutor presented false and misleading evidence in two circumstances. First, he contends that the prosecution called Officer Carr as a rebuttal witness to "help establish the idea that the second test was faulty knowing all along that the witness had absolutely no knowledge of the second test [at the MDC]." Second, Defendant maintains that the prosecutor, without supporting evidence in the record, told the jury in rebuttal closing argument that Defendant's second BAT was administered on a breath-alcohol testing device that was not calibrated, not certified, and did not test for alcohol. With respect to both instances of alleged misconduct, Defendant objected, asked for a curative instruction, and requested a mistrial. Therefore, we review the court's denial of Defendant's objections and motions under an abuse of discretion standard.

{17} We find no abuse of discretion. First, we examine Officer Carr's testimony as a rebuttal witness. As part of Defendant's case in chief, the jury heard testimony from Defendant and from the MDC records custodian that Defendant's second test was performed on a handheld, portable breath testing machine. Both Defendant and the records custodian testified that the result of the test was .04. However, neither witness had personal knowledge about the methodology of Defendant's test, or the workings of the machine on which it was given. Thus, although Defendant was allowed to offer the result of the test, the prosecution did not have a witness with knowledge to cross-examine about the MDC test.

{18} Officer Carr was called by the prosecution to rebut Defendant's case in chief. The court was aware that Officer Carr did not have personal knowledge about Defendant's test at the MDC and instructed the prosecution accordingly. Officer Carr testified about the type of breath machines used at the MDC and about handheld, portable breath testing machines generally. His personal knowledge about the type of machine used at the MDC was based on having driven arrestees there for two and one-half years early in his career and occasionally since. His personal knowledge about handheld, portable breath testers, generally, was derived from the fact that he carried and used one in the course of his duties and from information he received from other officers. Officer Carr testified that he had seen the machines used at the MDC and that they are portable. He testified that he uses his portable breath machine in the course of his DWI investigations, but only to show the presence of alcohol, not to establish how much alcohol is in a person's blood. He testified that unlike the Intoxilyzer machine, portable breath machines are not regulated by the Scientific Laboratory Division, are not self-calibrating, and do not use air blanks. He explained that a breath result card from an

Intoxilyzer contains the date, time, serial number, and calibration check result, unlike the document containing the results of the portable breath testing machine.

{19} At one point, Officer Carr's rebuttal testimony was subject to an instruction to disregard. Officer Carr testified that he would not use a portable breath test to establish whether a driver was at or above the legal limit. He was then asked why. He answered:

> Portable breath tests are not calibrated. They aren't certified, the reliability of them is in question, and they cannot be used in court, which is why we never use a portable breath test to determine if someone [ ] at or above the per se limit. I had to know from my experience that we cannot use the result of the portable breath test in court; so I would not do that.

This testimony was subject to an immediate objection from Defendant, who requested a curative instruction and a mistrial. The judge denied the mistrial, but, because the statement was beyond the personal knowledge and expertise of the witness, instructed the jury to disregard the question and the answer.

{20} Defendant made an issue of the reliability of the test relied on by the prosecution and vigorously cross-examined Officer Carr about the procedure and equipment used for the prosecution's test. However, Defendant offered the result of the favorable MDC test without putting on a witness with personal knowledge about the procedure or equipment. Unlike Defendant, the prosecution had no witness to cross-examine about the test that was unfavorable to its cause. The prosecution was properly allowed to rebut Defendant's case in chief, which included the result of the MDC test, through testimony about portable breath-alcohol testing machines, generally, based on the personal knowledge of Officer Carr.

{21} We also note that prior to the testimony of Officer Carr as rebuttal witness, Defendant elicited testimony from Officer Carr on the same subject matter—portable breath testing machines—that Defendant protests as improper. It is clear from this line of questioning that Defendant attempted to have Officer Carr testify based on his experience with portable breath testing machines in a way that would shed positive light on Defendant's MDC test. Defendant's argument that the prosecution should not have been permitted to question Officer Carr about portable breath testing machines is undermined by the fact that Defendant questioned Officer Carr on this topic prior to the prosecution.

{22} In addition, during cross-examination of rebuttal witness Officer Carr, Defendant elicited testimony that clearly pointed out Officer Carr's lack of personal knowledge about the particular test taken by Defendant at the MDC. This cross-examination served to reinforce the court's instruction to the jury to disregard the testimony that was beyond the personal knowledge of Officer Carr.

{23} We find no abuse of discretion on the part of the district court when it properly allowed rebuttal testimony by Officer Carr on portable breath-alcohol testing machines,

generally, and instructed the jury to disregard on the occasion when that testimony went beyond personal knowledge. *See Allen*, 2000-NMSC-002, ¶ 100 (finding no abuse of discretion when there was no showing that prompt sustaining of objections failed to cure the effect of prosecutorial overreaching).

{24} We next examine Defendant's argument that he should be granted a new trial because the State committed prosecutorial misconduct when it argued at closing that the second, favorable test taken by Defendant was administered on a device that was "not calibrated and not certified, and did not test for alcohol." Defendant asserts that "[e]ach and every one of those allegations was never properly in evidence, was misleading, and false." Defendant cites to the record in three places. One citation is inapposite and, in fact, took place on a day different from closing argument. Another cites a statement that is supported by the record, contrary to Defendant's assertion. We do not consider rulings on either of these statements. The third statement cited by Defendant took place during the State's rebuttal to Defendant's closing statement. Quoted in context, the State's statement was as follows:

> Now, the defense has also suggested that you put more reliability—I think this was their suggestion—on the .04 than the .08. And the .04, you'll remember the [D]efendant came up and testified that when he—sometime after he was stopped and took the initial breath test, he took a test at the [MDC]. And that in a different kind of machine, which is not calibrated and not certified, he blew .04.

The defense objected, arguing that the statement was not in the record. This led to a bench conference during which the court denied Defendant's request for a curative instruction. The court noted that this was argument.

{25} Indeed, during closing argument, both the prosecution and defense are permitted wide latitude. *Duffy*, 1998-NMSC-014, ¶ 56. Although it is beyond the bounds of valid argumentation to recite prejudicial "facts" that are entirely outside the evidence presented at trial, fair and reasonable inferences can be drawn from the evidence presented. *Id.* Should the defendant open the door by invoking matters outside the evidence, the prosecution is thereby invited to comment, even if such comments are improper. *Id.*

{26} Neither party put on evidence about the functioning or maintenance of the MDC's breath-alcohol testing machine. Thus, although it was improper to assert that the machine was "not calibrated and not certified[,]" as the prosecution did once, it was proper to state that there was no evidence that the machine was calibrated, nor evidence that it was certified. During closing argument, prior to the rebuttal statement at issue here, the prosecution properly characterized the lack of evidence about the MDC machine reliability twice. Also, immediately after the improper statement during rebuttal, the prosecution corrected itself: "[a]s I was saying, folks, there was no evidence brought before you as the jurors in this case that the portable breath test was either calibrated or certified."

{27} We consider the single improper characterization of the evidence by the State to be an isolated, minor impropriety that does not warrant reversal. *See Allen*, 2000-NMSC-002, ¶ 95 ("An isolated, minor impropriety ordinarily is not sufficient to warrant reversal, because a fair trial is not necessarily a perfect one[.]" (internal quotation marks and citations omitted)); *see also Duffy*, 1998-NMSC-014, ¶ 51 (finding that an improper statement by the prosecution that was not emphasized did not deprive defendant of a fair trial).

{28} It is also worth noting that during Defendant's closing argument, prior to rebuttal, Defendant attacked the validity of the prosecution's test. The court allowed him wide latitude. Defendant argued:

> [s]o even if we give their test appropriate credence, in light of the burden of proof—which you have to find the test reliable beyond a reasonable doubt—that test could have been a .06, if done properly, if done in a scientific manner, if done correctly. Was it done correctly? Was it done in a scientific manner? Was it done by a scientist? Was it in laboratory-like conditions? He testified. We don't have to guess. Imagine the insanity of performing a breath-alcohol test when you have alcohol-based hand cleaners in the same room. And you rely upon that. That's insane. Imagine the insanity of doing that and trying to sell it to you as science.

Both parties were given latitude at closing argument.

{29} Given that the sole improper characterization of the relevant evidence by the prosecutor took place in the context of numerous correct characterizations both before and after the improper characterization, and also the vigorous argument made by both sides, the trial was fair, if not perfect. *See Allen*, 2000-NMSC-002, ¶ 95 ("a fair trial is not necessarily a perfect one."). The district court was in the best position to determine the significance of the prosecutorial error, and because its ruling was not arbitrary, capricious, or beyond reason, it did not abuse its discretion in allowing the argument to continue. *See State v. Trujillo*, 2002-NMSC-005, ¶ 49, 131 N.M. 709, 42 P.3d 814 (trial court rulings on questions of prosecutorial error will not be overturned absent a showing that the ruling was arbitrary, capricious, or beyond reason).

Reference to Defendant's Exercise of His Right to Silence

{30} Defendant argues that a new trial is warranted because the prosecution committed misconduct when it referred to Defendant's absence at the grand jury hearing. The comment in question occurred during rebuttal to Defendant's closing argument. The prosecutor referred to Defendant's mention of his own absence at the grand jury: "[y]ou'll remember that defense counsel mentioned 'grand jury.' That's how indictments are generated. And it's the indictment that determines what the charges are. Any defendant is invited to the grand jury. Defense counsel stated that the defendant wasn't there. I can't tell you why."

{31} Generally, reference by the prosecutor to the defendant's silence constitutes reversible error. *State v. Ruffino*, 1980-NMSC-072, ¶ 9, 94 N.M. 500, 612 P.2d 1311. But when the defendant opens the door by reference to his or her failure to testify, it is well established that the prosecutor may comment. *Id.* ("[t]hat the prosecutor can refer to the defendant's failure to testify if the door is opened by the defense, is well supported by case law."); *see also State v. Henry*, 1984-NMSC-023, ¶ 6, 101 N.M. 266, 681 P.2d 51 (observing that it is the rule that the prosecutor may refer to the defendant's failure to testify if the door is opened by the defense).

{32} Defendant opened the door in his closing statement:

> [f]rom the inception of this case, in a criminal complaint drafted by [Officer] Carr, [Defendant] was...never even charged with this alternative theory. Where did it come from? Well, it came from them. It came from them. They presented this other theory to a grand jury. [Defendant] wasn't there. And now he's facing two different options that hang him.

Because Defendant opened the door, and the prosecutor comments about Defendant's absence at the grand jury were a fair response, they were properly allowed. *See id.* ¶ 11 (fair comments on the defendant's failure to testify after defendant opened the door did not constitute reversible error).

Disparaging of Defense Counsel and Vouching

{33} Defendant also suggests that he is entitled to a new trial because of disparaging of defense counsel and vouching by the prosecutor. With regard to disparaging of defense counsel, Defendant asserts that the prosecutor argued that "defense counsel wants you to take a leap" and that "defense counsel suggests" but does not cite to the record. We decline to review an argument when the facts are recited without citation to the record and when arguments are unclear. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that there is no duty to entertain appellate arguments when facts are cited without citation to the record and arguments are undeveloped and unclear).

{34} Vouching for the credibility of witnesses is improper. *Allen*, 2000-NMSC-002, ¶ 102. Vouching generally consists of the prosecutor invoking the authority and prestige of the prosecutor's office or by suggesting the prosecutor's special knowledge. *State v. Pennington*, 1993-NMCA-037, ¶ 27, 115 N.M. 372, 851 P.2d 494. The prohibition against vouching stems from concerns that the prosecutor's authority or personal integrity may substitute for the evidence presented in the mind of the jury. *Id.*

{35} Defendant points out seven statements that he considers to be instances of vouching. Two of these simply are not vouching ("We don't know if it tests alcohol[;]" "We don't know"). Therefore we only consider the others. The remaining five took place during rebuttal to Defendant's closing. None of the statements was subject to objections by Defendant, therefore we review for fundamental error.

{36} There is no fundamental error. Defendant does not develop his argument by explaining how the cited statements constitute vouching. After a careful review of the record, including the context in which the statements were made, we observe that the prosecutor was rebutting charges and arguments made by Defendant during closing argument.

{37} The prosecutor's comments did not serve to substitute the prosecutor's authority or integrity for the evidence, nor was the prosecutor arguing based on the prosecution's special knowledge, and therefore the prosecutor was not vouching. *See Pennington*, 1993-NMCA-037, ¶ 27 (vouching occurs when the prosecutor invokes the authority and prestige of his office or suggests special knowledge on the part of the prosecutor). Defendant is not entitled to a new trial on the ground of prosecutorial vouching.

Inflammatory Language

{38} Defendant also argues that he is entitled to a new trial because the prosecution used inflammatory language during rebuttal to Defendant's closing. The quote in question, taken in context, is as follows:

> What I want to point out here to begin with is an overall theme that's been promoted to you by the defense. And that is the theme that the State of New Mexico, in enforcing its laws, uses flawed equipment, flawed procedures, officers who are trained to come in and "sell themselves"—he used those words—to you as a jury, as if they were prostitutes standing out on the street corner.

Defendant objected on grounds that the prosecutor said "[he] called the cops prostitutes[,]" which he "didn't say." Defendant further stated that it was "getting outlandish" and "coming at [him]." Although Defendant did not specifically object on the ground that the prosecution's statement was inflammatory, the objection was close enough to preserve the issue. We therefore review the court's ruling under an abuse of discretion standard.

{39} The court overruled the objection on the basis that the prosecution was responding to Defendant's characterization. We agree. The prosecutor was responding directly to Defendant's closing argument by analogy:

> [Defense counsel speaking as Officer Carr] Why would I use a belt tape? Why would I make it so there's no doubt of what I said or what he said? Why would I? We got to go into court and testify like I was taught, to sell myself, instead of relying upon facts in evidence.

Furthermore, Defendant argued that the State relied on "junk science[,]" and used "faulty equipment[,]" and that one of the officers who testified "came to court today a different person" with "all his tattoos covered up[.]" Although the prosecutor's analogy is questionable, the court did not abuse its discretion in allowing argument to continue without instruction given that the analogy was in response to Defendant's

characterization of the State selling itself, as well as the wide latitude afforded both parties in argument. *See Duffy*, 1998-NMSC-014, ¶ 56 (parties are given wide latitude during closing argument); *see also State v. Taylor*, 1986-NMCA-011, ¶ 25, 104 N.M. 88, 717 P.2d 64 (prosecutor's comments, even if improper, do not constitute reversible error if the "door is opened" by the defendant).

Misstatement of the Law

{40} Defendant argues that he is entitled to a new trial because the prosecution misstated the law when it argued "[b]ut let's ask ourselves, what do we know as citizens of this community? We know that we're not supposed to drink and drive. We know that we're not supposed to—" Defendant argues that this statement effectively lowered the burden of proof in this case by "misleading the jury into believing that any alcohol consumption would require a finding of criminal wrongdoing (guilt)." Because Defendant objected and invoked a ruling of the court, we review for abuse of discretion.

{41} It is improper for the prosecution to misstate the law, as to do so is the province of the court. *Taylor*, 1986-NMCA-011, ¶ 31.

{42} To establish that the prosecution misstated the law, Defendant cites two State of Washington Court of Appeals cases. In both cases, the prosecution made comments that served to undermine the presumption of innocence by directly and improperly commenting on how the jury should evaluate the evidence. *See State v. Venegas*, 155 Wash. App. 507, 523, 228 P.3d 813 ("[i]n order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is'—blank."; *see also State v. Johnson*, 158 Wash. App. 677, 684-5, 243 P.3d 936 (prosecutor improperly "trivialized" the State's burden of proof and made the "same fill in the blank argument as the prosecutor in...*Venegas*). This case is different. In the comment at issue, the prosecution did not discuss the presumption of innocence or how the jury should evaluate the evidence.

{43} We also note that immediately after the bench conference at which Defendant tendered his objection, the prosecution clarified the distinction between public policy and the law. The prosecution did not misstate the law. The court properly exercised its discretion in foregoing a curative instruction and declining to order a mistrial when the prosecution touched on public policy but did not instruct about the law.

JURY INSTRUCTIONS

{44} Defendant argues that the court committed reversible error when it rejected two proposed jury instructions. Whether a Defendant's tendered jury instruction was properly refused is a question we review de novo. *State v. Hill*, 2001-NMCA-094, ¶ 5, 131 N.M. 195, 34 P.3d 139. The evidence is viewed in the light most favorable to the giving of the instruction. *Id.* When the instructions, "considered as a whole, fairly present the issues and the law applicable thereto, they are sufficient." *Hudson v. Otero*, 1969-NMSC-125, ¶ 5, 80 N.M. 668, 459 P.2d 830, *overruled on other grounds by Allsup's*

Convenience Stores, Inc. v. North River Ins. Co., 1999-NMSC-006, 127 N.M. 1, 976 P.2d 1. "Denial of a requested instruction is not error where the instructions given adequately cover the issue." *Id.*

{45} Defendant proposed a jury instruction pursuant to NMSA 1978, Section 66-8-110(B) (2007) indicating that, when the jury deliberates the charge of driving while under the influence of intoxicating liquor (slightest degree), the jury must consider that if it finds that Defendant had an alcohol concentration of at least four one-hundredths but less than eight one-hundredths,"no presumption shall be made that the [D]efendant was or was not under the influence of intoxicating liquor." The court denied this instruction and instead offered two Uniform Jury Instructions altered only to fill in blanks with the appropriate date and count number. Jury Instruction No. 9 stated:

> For you to find the [D]efendant guilty of driving with a blood or breath alcohol concentration of eight one-hundredths (.08) or more as charged in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The [D]efendant operated a motor vehicle;
>
> 2. Within three (3) hours of driving, the [D]efendant had an alcohol concentration of eight one-hundredths (.08) grams or more in two hundred ten liters of breath and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle;
>
> 3. This happened in New Mexico, on or about the 3rd day of October, 2009.

Jury Instruction No. 10 stated:

> For you to find the [D]efendant guilty of driving while under the influence of intoxicating liquor, as charged in the alternative to Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The [D]efendant operated a motor vehicle;
>
> 2. At the time, the [D]efendant was under the influence of intoxicating liquor; that is, as a result of drinking liquor the [D]efendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;
>
> 3. This happened in New Mexico, on or about the 3rd day of October, 2009.

In refusing Defendant's instruction, the court found that the tendered instructions subsumed Defendant's proposed instruction, rendering the rejected instruction unnecessary. The State so argues, and we agree.

{46} Both instructions clearly indicate that each element of each offense must be proven beyond a reasonable doubt. Jury Instruction No. 10 instructs the jury in the situation that is of concern to Defendant. Jury Instruction No. 10 indicates that, absent a finding of an alcohol level of .08 or higher, a finding beyond a reasonable doubt that Defendant was, in fact, impaired, is a prerequisite to a finding of guilt. The instruction that the State must meet each requirement of this charge, including actual impairment, by proof beyond a reasonable doubt rendered duplicative Defendant's proposed instruction that there is no presumption of impairment.

{47} Defendant's reliance on *Hill*, 2001-NMCA-094, is misplaced. In *Hill*, the defendant was denied an instruction on his self-defense theory. *Id.* ¶ 1. Because there was sufficient evidence of self-defense to allow the jury to decide the question, this Court ruled that the instruction was improperly denied. *Id.* ¶ 10-11. But here, the jury received adequate instruction on the issue raised by Defendant. Thus, Defendant's instruction was properly denied.

{48} Defendant argues that he is entitled to a new trial on the basis that the court refused to modify Jury Instruction No. 16, which was as follows:

> As previously stated, you have received all the testimonial and physical evidence which has been admitted in this case and you must rely upon your collective memories of it. Specifically, transcripts will not be prepared, additional reports and statements cannot be provided. You must decide this case solely on the evidence you have already received.

Defendant requested an addition of the sentence "In light, of course, of the fact that the State has the burden of production of evidence in this matter." Defendant argues that the instruction, as given, is in conflict with the law.

{49} The court rejected Defendant's modification as subsumed in the tendered instructions. We agree. Defendant's addition was superfluous. Jury Instruction No.2 informed the jury that the burden of proof "is always on the [S]tate to prove guilt beyond a reasonable doubt" and that the "law presumes [D]efendant to be innocent unless and until [the jury is] satisfied beyond a reasonable doubt of [D]efendant's guilt." Jury Instruction No. 3 explained that the facts were to be adduced from the evidence produced in court. As already noted, Jury Instruction Nos. 9 and 10 informed the jury that each individual element of the driving while under the influence crimes must be proven beyond a reasonable doubt. The instructions given to the jury on the burden faced by the State adequately presented the issue to the jury. Defendant's argument fails. *See Hudson*, 1969-NMSC-125, ¶ 5 (denial of requested jury instruction is not error where tendered instructions adequately address the issue).

INEFFECTIVE ASSISTANCE OF COUNSEL

{50} Defendant claims that he is entitled to a new trial on the basis of ineffective assistance of counsel. Unless the defendant demonstrates both that counsel was not

reasonably competent and that there was consequent prejudice, counsel is presumed effective. *Trujillo*, 2002-NMSC-005, ¶ 38. Error occurs only when representation falls below an objective standard of reasonableness. *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289. Any claimed error that can be justified as a trial tactic or strategy is not unreasonable. *Id.* Defendant must point to specific errors by trial counsel. *Trujillo*, 2002-NMSC-005, ¶ 38. Defendant must show a reasonable probability that the result of the proceeding would have been different but for the unprofessional errors of counsel. *Bernal*, 2006-NMSC-050, ¶ 32.

{51} Defendant points to two omissions that purportedly demonstrate ineffective assistance of counsel. The first instance was when counsel failed to object when the prosecution argued that the breath-alcohol testing machine "did not test for alcohol[,]" a statement we have not found in the record. We therefore do not evaluate this claim of error.

{52} The second error pointed to by Defendant is the failure to object when the prosecution stated in rebuttal that Defendant was not at the grand jury. As we stated, the prosecutor was not in error to mention Defendant's absence because Defendant opened the door himself by mentioning his own absence. Thus, the failure to object was not error, much less unreasonable error.

{53} Defendant is not entitled to a new trial on the basis of ineffective assistance of counsel.

CUMULATIVE ERROR

{54} Defendant argues that this case was "riddled with errors" such that he was denied a fair trial and he is therefore entitled to a new trial under the doctrine of cumulative error. Under the doctrine of cumulative error, a series of lesser prosecutorial improprieties may amount to reversible error. *Duffy*, 1998-NMSC-014, ¶ 47. When the record as a whole demonstrates that the defendant received a fair trial, the doctrine cannot be invoked. *See State v. Sills*, 1998-NMSC-009, ¶ 51, 125 N.M. 66, 957 P.2d 51 (concluding that the doctrine of cumulative error did not apply when the Court decided that the defendant received a fair trial). We so conclude. Defendant is not entitled to a new trial on the basis of cumulative error.

CONCLUSION

{55} For the foregoing reasons the judgment of the district court is affirmed.

{56} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

CYNTHIA A. FRY, Judge

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1 Although this exchange was thought to be on the record, no record exists. The trial record was supplemented on June 4, 2012, pursuant to a motion by Defendant. This section of this opinion reflects the record as supplemented.