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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN RICHARD MARTINEZ,

Defendant and Appellant.

F061556

(Super. Ct. No. F10903018)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

David D. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon, Rachelle A. Newcomb and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

—ooOoo—

John Richard Martinez was convicted of possessing the prescription drug Oxycodone (the generic name of Oxycontin) for sale and related offenses. During a search of his apartment, conducted two days after he received 120 pills from a pharmacy,

officers found in his shirt pocket a prescription bottle containing only 49 1/2 pills and \$1,500 in cash. Martinez testified at trial, but did not account for the absent pills. In this appeal, he argues that the jury should not have been instructed that, in evaluating the evidence, it could consider his failure to explain where the other pills went. He also argues that there was insufficient evidence to prove his intent to sell the drug and that his trial counsel rendered ineffective assistance in violation of the Sixth Amendment because of certain statements he made and omitted during closing argument. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 2009, a group of police officers searched Martinez's apartment in Clovis.¹ In a closet in Martinez's bedroom, Detective Steve Cleaver found a flannel shirt or jacket with pockets. In one pocket was a pill bottle containing Oxycodone pills and a large amount of money. The bottle was from a pharmacy. The label showed that 120 pills had been dispensed to Martinez under a prescription on June 15, 2009, two days before. Martinez told an officer he took four of the 80-milligram pills each day. However, there were only 49 1/2 pills in the bottle when it was found. The total included three half-pills. The money came to \$1,500. Detective Cleaver also found a live .22-caliber bullet in a pocket of another shirt in the closet.

A search of Martinez's kitchen yielded additional evidence. On top of the refrigerator was a wicker basket containing two pill bottles and post-it notes. One of the pill bottles had a prescription label on it for a David Avila. Three capsules in the bottle were marked Kadian, a brand name of morphine. The other bottle was a vitamin bottle. It contained two white pills and one blue pill. The white pills were methadone. Written

¹ The search was conducted pursuant to a search warrant, but the jury was not informed of the basis for the search.

on the post-it notes were telephone numbers and arithmetic calculations. Under some decorative grapes three glass smoking pipes were found.

The district attorney filed an information charging Martinez with five counts: (1) possession of Oxycodone for sale (Health & Saf. Code, § 11351); (2) unlawful possession of morphine (Health & Saf. Code, § 11350, subd. (a)); (3) unlawful possession of methadone (*ibid.*); (4) possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1)); and (5) possession of instruments for unlawful injection or smoking of controlled substances (Health & Saf. Code, § 11364).

At trial, Clovis Police Corporal Joshua Kirk testified to his opinions about the drugs. He said 80-milligram Oxycodone pills are sold illegally in the Clovis area for about \$40 per pill. Detective Cleaver testified that abuse of Oxycodone usually involves crushing the pills to defeat their designed time-release effect, allowing the drug to be absorbed by the body quickly. Once crushed, the drug can be snorted, smoked or injected. Cleaver said the 80-milligram pills are the most commonly abused. Corporal Kirk testified that the effect of a crushed Oxycodone pill is similar to the effect of heroin.

Responding to a hypothetical question, Corporal Kirk testified that if he found pills under the circumstances in which Martinez's pills were found, it was his "position" that the pills were possessed for the purpose of selling them. Explaining the basis for his opinion, he pointed out that only eight pills should have been missing from the bottle and 112 would be left if Martinez had merely been using them himself, but only 49 1/2 were left. Further, some of the pills had been cut in half. This would not have been the case if Martinez had been using them correctly, since cutting the pills (like crushing them) defeats their time-release feature. The 40-milligram half-pills can be sold for \$20.

There was some ambiguity in the manner in which Kirk testified. He never stated that he held the "opinion" that the drugs were possessed for sale; instead he said would "suspect" this and it would be his "position":

“That finding in that hypothetical situation, as you described, I would be very suspicious of that and I would suspect that it was someone possessing pills with the intent to sell them. [¶] ... [¶] ... Very suspicious to me and that is why I come to the position that they are being [held] with the intent to sell.”

A conference on jury instructions took place while the prosecution was still presenting its case-in-chief. The prosecution requested CALCRIM No. 361. That instruction (in the form in which it was ultimately given) stated:

“If the defendant failed in his testimony to explain or deny evidence against him and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must prove the defendant guilty beyond a reasonable doubt.

“If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

The court deferred its decision on whether to give this instruction. “Have to wait on the evidence to determine whether that will be appropriate.” Martinez made no objection when this remark was made, and none a moment later when the court asked whether the parties had any questions about the proposed instructions.

Martinez testified in his own defense. He said he had had prescriptions for Oxycodone, morphine and methadone since the beginning of 2006. He identified several exhibits as prescriptions he had received for these medications. There were two Oxycodone prescriptions, issued on July 15, 2009, and September 2, 2010. A methadone prescription was issued on September 2, 2010. These dates were all after the date Martinez’s apartment was searched, but he testified that they were refills. A prescription for morphine was issued on December 5, 2008. All the prescriptions were written by Dr. Richard Guzzetta. David Avila was a friend of Martinez’s who had stayed with him for a week, and had left a prescription bottle in the apartment. Martinez did not remember putting anything in that bottle.

Martinez was aware of the value of the Oxycodone pills and testified that he took special care to keep track of them for that reason. Asked why he kept the Oxycodone in his shirt pocket instead of in the kitchen with the other medicines, he said, "I kept them in the pocket because they're very valuable and I couldn't afford to lose them, but if it fell and got lost so I knew exactly where they were at in that one room."

Martinez testified that the \$1,500 in cash found in his shirt pocket with the Oxycodone came from a Social Security settlement he had received. He cashed a Social Security check for \$6,251 at Clovis Check Cashing on May 31, 2009, a little over two weeks before the police searched his apartment. The owner of Clovis Check Cashing testified to confirm this. Martinez also testified that he was convicted of a crime of moral turpitude in 2003.

Dr. Guzzetta testified that he was a specialist in addiction with an interest in pain management. He prescribed Oxycodone to Martinez on May 28, 2009. He said "I may have" prescribed methadone and morphine to Martinez, but he was uncertain.

After Martinez testified, the court provided the parties with copies of the jury instructions it intended to use and asked whether they had any comment. They did not. CALCRIM instruction No. 361, failure to explain or deny adverse evidence, was given to the jury without objection.

In his closing argument, the prosecutor emphasized the failure of the Oxycodone bottle to contain the full number of pills. "Ladies and Gentlemen of the Jury, this is the case of the missing pills," he said. "There should have been 112 pills in this bottle when the police showed up. There were 49 and a half. And there was a wad of money right next to it. That by itself is pretty firm evidence that when Mr. Martinez possessed the Oxycodone, that he was possessing it not only for his own personal use but for sale." The prosecutor returned to this theme at the end of his argument: "There's missing pills. Why is something valuable missing? Because it has been converted into something else that is valuable. What is that? That is cash. And how much cash do we have and what

denominations is it in? Is right here (indicating). Hundreds and 20s. A lot of them. A wad of them.”

Defense counsel attempted to account for the missing pills in his closing argument by suggesting that the pharmacy had “shorted” the prescription, meaning that the prescription was partially filled when it was issued in May 2009, and then the remainder was filled on June 15, 2009, with the result that the number of pills in the bottle when it was found was about right.

In his rebuttal argument, the prosecutor mentioned CALCRIM No. 361. Discussing defense counsel’s theory that the prescription was filled partially in May 2009 and partially in June 2009, the prosecutor pointed out that Martinez never made that claim, and instead testified that he got 120 pills in June. The prosecutor argued that Martinez had failed to explain the number of pills remaining and the jury could draw adverse inferences from this.

“Now, the defendant did testify. He did take the stand. And you can read instruction 361 about failure to explain or deny adverse evidence. But the defendant did not testify that he was shorted on the stand. There were—I specifically asked him, ‘You received 120 pills in this bottle on June 15th, 2009?’ You can check the record. And he said, ‘Yes.’ He didn’t say, well, I got the prescription in May and I had it partially filled in May and then in June I had another partial—another partial prescription filled. That’s not what he said. I asked a direct question. He gave a direct answer. He got 120 pills on June 15, 2009. That is what he said earlier today.”

Defense counsel did not object to the reference to CALCRIM no. 361.

The jury found Martinez guilty as charged. The court imposed the three-year middle term for count one, concurrent two-year terms for counts two, three and four, and time served for count five.

DISCUSSION

I. CALCRIM NO. 361

Martinez argues that the court erred when it instructed the jury with CALCRIM No. 361. We disagree.

It is true, as the People point out, that Martinez did not raise an objection to the instruction in the trial court. However, we will consider the merits of the issue in spite of this. An appellate court “may ... review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” (Pen. Code, § 1259.) Determining whether a defendant’s substantial rights were affected “necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.” (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

Martinez argues that the jury could not properly draw an adverse inference from his silence on the whereabouts of the absent pills because “the prosecution never asked” him where the pills were and he “was under no obligation to explain” where they were. He is mistaken about both points.

The applicability of the instruction does not depend on whether the prosecution asked about the matter the defendant failed to explain. In *People v. Saddler* (1979) 24 Cal.3d 671 (*Saddler*), the Supreme Court considered a claim that the trial court erred in giving CALJIC No. 2.62, which includes language substantially similar to CALCRIM No. 361. The court first stated general rules on the selection of jury instructions: The trial court must “instruct on general principles of law relevant to the issues raised by the evidence,” and must “refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.” (*Id.* at p. 681.) Further, “before a jury can be instructed that it may draw a particular inference, evidence must appear which, if believed by the jury, will support the suggested inference” (*Ibid.*) In determining whether the challenged instruction was appropriate under these standards, the court considered two factors: (1) whether there were “facts or evidence in the prosecution’s case within [the defendant’s] knowledge which he did not explain or deny”

or “material gaps in defendant’s explanation” of those facts or evidence; and (2) whether the point the defendant did not explain was “within the scope of relevant cross-examination.” (*Id.* at pp. 682-683 & fn. 9.) The court held that the issue was within the scope of relevant cross-examination, but that there were no facts or evidence in the prosecution’s case within the defendant’s knowledge that he failed to explain or deny, and no material gaps in his alibi. (*Ibid.*) Whether the defendant was asked by the prosecution about the matters he failed to explain was not a factor the court considered in *Saddler*.

In *People v. Redmond* (1981) 29 Cal.3d 904 (*Redmond*), two years after *Saddler*, the Supreme Court made clear that there is no requirement that the prosecution ask about the evidence the defendant has failed to explain. Redmond stabbed an acquaintance with whom he had been drinking. His defense was that he stabbed the victim accidentally. (*Redmond, supra*, 29 Cal.3d at p. 908.) At trial, evidence was presented that Redmond concealed the knife in his bedroom for two months after the stabbing, revealing its location while he was incarcerated. He testified, but did not explain why he took two months to disclose the knife. The court instructed the jury in accordance with CALJIC No. 2.62 that it could consider Redmond’s failure to explain this evidence. (*Id.* at p. 910.) The Supreme Court held that the instruction was proper. It specifically rejected Redmond’s claim that it was improper because the prosecution did not ask him to explain the evidence, holding instead that the controlling considerations were whether the issue was within the scope of his direct examination and whether the evidence supported the instruction.

“[W]e find no merit in defendant’s contention that because at trial he was not asked to explain or deny the adverse evidence against him, the CALJIC No. 2.62 instruction was improper and violated both his federal and state constitutional privileges against self-incrimination. The scope of his direct examination was a tactical trial choice of his counsel. The record contained evidentiary support for the instruction including defendant’s delay for two months in disclosing the location of the knife These matters, in our view, were the proper subject of discussion by the prosecutor in his closing argument.” (*Id.* at p. 911.)

The rule of *Redmond* is the logical rule. Defense counsel may make a strategic decision not to ask a testifying defendant about certain evidence introduced by the prosecution, since the defendant's truthful testimony on that subject would be incriminating. In dealing with a client who chooses to testify, defense counsel might take this course of action as the lesser evil, even while realizing that the scope of the direct examination will leave the defendant open to cross-examination on the avoided subject. The defendant's silence on the matter might leave a gap in the defense case and might support an incriminating inference. That the prosecution fails to go into the matter on cross-examination would not undermine the logical strength of this inference. It is the evidence the prosecution introduced regarding the missing pills, combined with the defense decision not to address it that provides the inference's support, not the defendant's failure to respond to a question by the prosecution on cross-examination.

In this case, the prosecution's case-in-chief placed great emphasis on the failure of the bottle to contain the number of pills that would have remained if Martinez had merely been taking them himself at the rate of four per day. The omission of any questioning of defendant on this by defense counsel was glaring. The adverse inference to be drawn—that there was no innocent explanation and the pills had been sold—was obvious. It was not error to give the instruction under these circumstances.

We do not know why the prosecutor did not ask the question on cross-examination. Certainly it was within the scope of permissible cross-examination. Martinez testified about the pills, why he had them, why they were in his shirt pocket along with \$1,500 in cash, and how he was careful to keep track of the pills because they were valuable. The prosecution's failure to ask where the absent pills were, however, did nothing to diminish the logical impact of the defense decision not to try to account for them.

Martinez cites a passage in the *Saddler* opinion that refers to the prosecution not asking the defendant about something, but he takes that passage out of context and it does

not support his point. In a footnote, the court discussed and rejected the People's argument that there were gaps in the defendant's case that warranted the instruction. One of these supposed gaps was "that defendant failed to testify whether he owned or drove a light colored compact car on the night in question," (*Saddler, supra*, 24 Cal.3d at p. 683, fn. 9) like the car driven by the perpetrator. In reaching the conclusion that there was no gap, the Supreme Court reasoned:

"Defendant was not asked whether he owned such a car or any car, but he was asked to name and did name persons he knew who owned light-colored compact cars. Further, Officer Sanders testified for the defense that when he went to defendant's house, within four minutes after the police learned of the robbery, he saw a light colored compact car next to the house and ascertained by feeling parts of it that it had not been recently driven."
(*Ibid.*)

This passage does not say the instruction was improper because the defendant was not asked about the car. It says the instruction was improper because there was no gap in the defense. In the present case, there was a major gap in the defense.

Martinez also relies on dicta in *People v. Roehler* (1985) 167 Cal.App.3d 353 (*Roehler*) and *People v. Mask* (1986) 188 Cal.App.3d 450 (*Mask*), dicta which we believe are erroneous. In *Roehler*, the defendant was convicted of murdering his wife and stepson by battering their heads and necks and capsizing the boat they were riding in, attempting to make it appear that there had been an accident. The trial court instructed the jury in accordance with CALJIC No. 2.62 and the defendant argued on appeal that this was error. In the appellate court's view, the main issue was that the defendant testified that he did not know what happened during a 60-second interval during which the victims drowned and he was trapped under the boat. The court reasoned that the instruction was improper if the defendant's testimony amounted to an explanation of what happened; it needed to determine whether his claim that he did not know "was an explanation of these events which precluded the giving of CALJIC No. 2.62." (*Roehler, supra*, at pp. 393-394.) The court concluded that the jury apparently found his claim that

he did not know to be false, so it could properly determine that he failed to explain the evidence, and therefore the instruction was proper. (*Id.* at p. 394.)

Before carrying out this analysis, the appellate court recited general principles about the giving of the instruction, citing *Saddler* and other cases. (*Roehler, supra*, 167 Cal.App.3d at p. 392.) As part of this discussion, the court stated that “[i]f a defendant has not been asked an appropriate question calling for either an explanation or denial, the instruction cannot be given, as a matter of law.” (*Ibid.*)

This statement was unnecessary to the holding in *Roehler*, since there was no contention that a relevant prosecution question had not been asked. Moreover, the statement is incorrect for the reasons we have stated. *Saddler* did not state that a prosecution question is a prerequisite to the giving of the instruction; *Redmond* expressly rejected that idea; and the notion is unsupported by logic.

In *Mask*, the appellate court stated that “[i]f the defendant has not been asked a question calling for an explanation or denial, as a matter of law [CALJIC No. 2.62] may not be given.” (*Mask, supra*, 188 Cal.App.3d at p. 455.) It cited *Roehler* for this proposition. The issue before the appellate court, as in *Roehler*, was whether testimony the defendant gave amounted to an explanation, thereby precluding the instruction. There was, again, no contention that the instruction could not be given because the prosecutor did not ask about the matter in question. We conclude that *Mask* and *Roehler* both made erroneous remarks on an issue unnecessary to their decisions, and we decline to follow these remarks.

We turn to Martinez’s notion that the lack of an “obligation” to say where the pills were meant the jury could not infer anything from his failure to say it. This notion is based on the fact that Martinez came into possession of the drug legally, and on the nonexistence of any law requiring people with prescription drugs to account for their whereabouts. He says, “[T]here is no known law, nor any conceivable law, which forbids a person from taking some of the legally prescribed pills out of its bottle and storing them

elsewhere.” He contrasts his situation with that of a pharmacist, who has a legal duty to keep records on the drugs he or she dispenses.

These considerations are entirely irrelevant. The rule that jurors can consider a failure to explain evidence has nothing to do with whether a person has an independent legal obligation to explain something, and nothing to do with whether the unexplained evidence involved conduct that is legal in itself. Suppose a prosecution witness in a murder case says he saw the defendant’s car legally parked in front of the victim’s house at the time when the crime was being committed. The defendant testifies, saying he did not kill the victim and was asleep at home when it happened, but he does not explain why his car was at the victim’s house. The fact that the car was legally parked, and that no law required the defendant to explain why it was parked there, simply have nothing to do with the propriety or impropriety of giving CALCRIM No. 361.

Finally, in a variation on this theme, Martinez contends that the instruction was not supported by the evidence because the evidence he failed to explain—the prescription bottle containing pills that were too few in light of the date on the bottle—was not incriminating. We agree, of course, that the instruction can only be given where the prosecution’s evidence, combined with the defendant’s non-explanation, supports an incriminating inference. But as we have said, that requirement was satisfied in this case. The absence of the pills *was* incriminating *under the circumstances*, just as the legally parked car is incriminating under the circumstance in our hypothetical.

For all these reasons, there was no error. The instruction was correctly given.

II. SUFFICIENCY OF THE EVIDENCE

Martinez next argues that the evidence was insufficient to support the verdict on the charge of possession of Oxycodone for sale, specifically with respect to the element of intent to sell. When the sufficiency of the evidence is challenged on appeal, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is

reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d. 557, 578.)

From an evidentiary point of view, this was a simple case. The prosecution presented evidence that a prescription for Martinez for 120 Oxycodone pills was filled two days before the prescription bottle was found in his shirt pocket with only 49 1/2 pills inside, which was 62 1/2 pills less than would have remained if Martinez had been taking the pills himself according to his doctor’s instructions. In the same pocket was \$1,500 cash, in 20- and 100-dollar bills. The prosecution presented evidence that the pills not in the bottle were more than enough to account for this amount of money if they had been sold illegally; the going rate in the area was \$40 a pill.² Three half-pills were in the bottle, and the prosecution presented evidence that although there was no legitimate use for half-pills, they could be sold illegally for \$20 each. Corporal Kirk testified to his “position” that under these circumstances, the pills were possessed for the purpose of selling them. Martinez testified in his defense, but offered no explanation for the absence of the 62 1/2 pills from the prescription bottle, even though he said he was careful to keep track of the pills. Further, his testimony was impeached by evidence of his prior crime of moral turpitude. Together with the inference permissible under CALCRIM No. 361, this evidence was enough to allow a reasonable jury to find beyond a reasonable doubt that Martinez possessed the Oxycodone with intent to sell it.

A key part of Martinez’s argument, of course, is that CALCRIM No. 361 was given improperly and the jury could not properly make any adverse inference from the evidence Martinez failed to explain. We have already explained why the instruction was properly given and the inference could properly be made.

² \$40 x 62.5 = \$2,500.

Martinez makes a number of other arguments. First, he says the \$1,500 found with the drugs was too small an amount to support a finding of an intent to sell. This argument makes little sense. The 62 1/2 pills that were unaccounted for were worth \$40 each or \$2,500 total. Martinez could have sold them for that amount and spent the other \$1,000. Martinez also says the “\$1,500 was reasonably explained by showing that Martinez had cashed a \$6,251 Social Security disability check only 17 days prior to the search.” That this evidence could have been disbelieved by the jury, or “reasonably explained” by a conclusion other than the one the jury reached, is immaterial on appeal. The only question is whether the evidence was sufficient to support the conclusion the jury actually reached.

Martinez attempts to support the view that \$1,500 was not enough money to support the prosecution’s case by citing several civil forfeiture cases. He says there is a “divide” between how much money is and is not enough to indicate drug sales, and the cases show that it is “somewhere in the \$30,000 to \$50,000 range.”

These cases do not help Martinez. In the primary case on which he relies, *People v. \$47,050* (1993) 17 Cal.App.4th 1319, police found \$47,050 in cash in the claimant’s house along with 0.34 grams of cocaine and 84.53 grams of marijuana. A scale, a shotgun and a pistol were found. The house had a fence and two guard dogs. Tax returns and bank records showed that the claimant’s annual income was only \$67,000, yet he had made deposits of \$570,000 over a 26-month period. A prosecution witness opined that the claimant had the cash in the house in order to buy cocaine, and stated that this opinion was based in part on the fact that a significant amount of cocaine was *not* found in the house: the claimant had the money because he hadn’t bought the cocaine yet. The claimant testified that he was a building contractor and that the large amounts going into and out of his bank account were funds that financed building projects. (*Id.* at pp. 1321-1322.)

The Court of Appeal held that there was insufficient evidence to support the forfeiture. “The government must establish some nexus between the seized funds and a narcotics transaction,” the court stated. (*People v. \$47,050*, *supra*, 17 Cal.App.4th at p. 1323.) “[I]n this case the presence of the large amount of cash, and the apparent discrepancy between recorded deposits in [the claimant’s] account and his reported income, may indeed support the inference that [the claimant] was engaged in some kind of illegal activity. What is lacking in this case is sufficient evidence to support the conclusion that the illegal activity specifically related to narcotics trafficking, or evidence linking the cash to a narcotics transaction.” (*Id.* at p. 1324.) The expert opinion had no value because it was based on a mere assumption that drug trafficking was taking place. (*Id.* at p. 1325.)

This holding has nothing to do with a minimum amount of money necessary to give rise to an inference of drug trafficking. The case provides no support at all to Martinez’s position.

Martinez also cites *People v. \$497,590 United States Currency* (1997) 58 Cal.App.4th 145, which does contain a discussion of how much is ““enough cash, standing alone, to justify more than a suspicion of illegal activity,”” and which cites a variety of cases reaching a variety of conclusions about the evidentiary value of various amounts. (*Id.* at p. 155.) In the present case, the verdict does not depend on a finding that \$1,500 standing alone justifies a suspicion of illegal activity. It depends on a finding beyond a reasonable doubt that all the evidence proved Martinez’s intent to sell the Oxycodone. It goes without saying that if the police had merely found \$1,500 in Martinez’s apartment, there may not have been a case against him. Instead, it was found in the same pocket with the Oxycodone. The *\$497,590* case is not on point.

Next, Martinez argues that the two pills of methadone, three pills of morphine, and three half-pills of Oxycodone were not enough evidence to support an inference of an intent to sell Oxycodone. This may be true. The verdict on count one obviously does not

rest on an inference from that evidence alone, however. Further, the possession of the three half-pills, in conjunction with the other evidence, did help support a finding of intent to sell. There was evidence that there was no legitimate use for cut pills and that they had an illegal sale value of \$20.

Martinez argues that there was no evidence of pay-owe sheets. He says the post-it notes with telephone numbers and calculations were not pay-owe sheets. He also says Corporal Kirk never testified to an opinion that the post-its were pay-owe sheets and did not base his opinion that Martinez possessed the Oxycodone for sale on the existence of pay-owe sheets.

We agree with Martinez that the post-it notes, copies of which are in the appellate record, do not have any features that would distinguish them as pay-owe sheets. Each of the 17 post-its shows a name and/or a telephone number. One shows a telephone number and the figure 18,000. One shows several three-digit numbers and a two-digit number. Two more show addition problems. The number 180 appears repeatedly in the addition problems. Corporal Kirk testified that this attracted his attention because Oxycodone pills are often dispensed in bottles of 180. But this is a very tenuous connection that has nothing in particular to do with what Martinez's customers might owe or might have paid, and Kirk never said the post-its were pay-owe sheets. Further, contrary to assertions in the People's brief, Corporal Kirk's opinion that the Oxycodone was possessed for sale was not based in part on the post-it notes. The prosecutor included a description of the post-it notes in his hypothetical question to Kirk, but when Kirk explicitly stated the basis for his opinion, he did not mention them. In sum, the post-it notes did not contribute anything of significance to the prosecution's case. As we have said, however, the prosecution's other evidence was sufficient to support the verdict.

Next, Martinez contends that Kirk's testimony did not express an opinion that the Oxycodone was possessed for the purpose of sale. It is true that Kirk did not use the word "opinion." He began by saying he would "suspect" an intent to sell and concluded

by saying it was his “position” that the drugs in the prosecutor’s hypothetical were possessed for sale. “Position” has been defined as “A point of view or attitude on a certain question” (American Heritage Dict. (3d college ed. 2000) p. 1067), and includes an opinion. This difference in terminology, however, might have affected the weight of Kirk’s testimony, and the jury was entitled to consider whether it was important that he did not call his view an “opinion.” But that does not mean that the testimony had no value and it does not show that the evidence of intent was insufficient.

Martinez also argues that Kirk’s opinion was not supported by adequate facts. An expert opinion is ““valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions.”” (*People v. Lawley* (2002) 27 Cal.4th 102, 132, italics omitted.) Kirk’s testimony was supported by facts. When asked for the basis of his opinion, he referred to the missing pills and the fact that Martinez would have had 112 pills left if he had been using the drug for himself as prescribed, the presence of cut pills in the bottle, the lack of a legitimate reason for cutting pills, and the illegal market for cut pills. These were probative facts, as we have already said.

Martinez’s next argument is that Kirk could not competently testify to an opinion about intent to sell because Martinez possessed the Oxycodone legally. He relies on *People v. Hunt* (1971) 4 Cal.3d 231, in which it was held that a police officer’s opinion testimony about drug possession is valid as to illegal drugs, but may not be valid as to lawfully prescribed drugs:

“A different situation is presented where an officer testifies that in his opinion a drug, which can and has been lawfully purchased by prescription, is being held unlawfully for purposes of sale. In the heroin and marijuana situations, the officer experienced in the narcotics field is experienced with the habits of both those who possess for their own use and those who possess for sale because both groups are engaged in unlawful conduct. As to drugs, which may be purchased by prescription, the officer may have experience with regard to unlawful sales but there is no reason to believe that he will have any substantial experience with the numerous citizens who lawfully purchase the drugs for their own use as medicine for illness.

“In the absence of evidence of some circumstances not to be expected in connection with a patient lawfully using the drugs as medicine, an officer’s opinion that possession of lawfully prescribed drugs is for purposes of sale is worthy of little or no weight and should not constitute substantial evidence to sustain the conviction. No such special circumstances were shown here as to the methedrine in the blue and white travel case.” (*Hunt, supra*, 4 Cal.3d at pp. 237-238, italics added.)

In this case, there were “circumstances not to be expected in connection with a patient lawfully using the drugs as medicine.” (*Hunt, supra*, 4 Cal.3d at p. 238.) Those circumstances were the entire basis of the prosecution’s case. It is not to be expected that a patient lawfully using Oxycodone as medicine will have only 49 1/2 pills out of 120 two days after his prescription is filled, or that he will be in possession of pills that have been cut in half, or that he will keep large numbers of 20 and 100 dollar bills in his pocket with the medicine. Kirk’s testimony was entitled to be weighed and considered by the jury under these circumstances.

For these reasons, we reject Martinez’s contention that the verdict on count one was not supported by substantial evidence.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Martinez contends that his trial counsel failed to render effective assistance as required by the Sixth Amendment because of remarks he made in closing argument. To establish ineffective assistance of counsel, a defendant must show that his trial counsel’s performance “fell below an objective standard of reasonableness,” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see also *People v. Hester* (2000) 22 Cal.4th 290, 296.) It is not necessary to determine whether counsel’s challenged action was professionally unreasonable in every case, however. If the reviewing court can resolve the ineffective assistance claim by proceeding directly to the issue of prejudice—i.e., the issue of whether there is a reasonable probability that the outcome would have been different absent counsel’s

challenged actions or omissions—it may do so. (*Strickland v. Washington, supra*, at p. 697.)

In closing argument, defense counsel stated several times that the pills might have been missing because the pharmacy shorted the prescription. According to Martinez, this argument violated the Sixth Amendment for two reasons. First, it conflicted with the testimony of Martinez, who said he received all 120 pills. Second, reasonably competent counsel would have decided instead to make the arguments Martinez makes on appeal: that he had no legal obligation to account for the pills and that the prosecution never asked him what happened to them.

Defense counsel’s argument was not professionally unreasonable. It was entirely reasonable, given the inherent weaknesses of his client’s case. As we have said, Martinez is mistaken in his view that the jury could not properly draw an incriminating inference from the absence of most of the pills that would have remained in his possession if he had been using them legally. To argue that he was not “obligated” to explain this absence would only have highlighted for the jury the incriminating nature of his choice not to do so.

Similarly, there would have been no advantage in arguing that he did not explain this because the prosecution did not ask him to explain it. The jury’s ability to draw the inference did not depend, as we have said, on the prosecution asking for an explanation. To ask the jury to disregard the lack of an explanation because the prosecution did not ask for one would be to invite the jury to contemplate the fact that the *defense* also did not ask for one. This would naturally lead to the question of why the defense did not ask for one, which from the defense perspective would not have been a profitable direction for the jury’s thought to take.

The conflict between trial counsel’s theory that Martinez was shorted by the pharmacy and Martinez’s own testimony that he got all 120 pills on June 15, 2009, certainly was a matter counsel needed to consider carefully before making his argument.

The central problem of his case, however—the failure of Martinez to account for the pills not in the bottle—called for some solution. To offer nothing but what Martinez argues on appeal—that he had no obligation to account for them and was not asked—would be virtually to invite conviction. The solution counsel settled on was better than the alternative Martinez urges now, and was probably about the best that could be done with a weak case. As the People say, “it was more reasonable that appellant would have failed to count the exact number of pills given to him in his prescription bottle or would have forgotten about picking up his prescription on two different dates a year before the trial had occurred, especially since the prescription was a refill for a medication he had been receiving for three years, than that appellant would have known exactly where the sixty missing pills were and yet failed” to account for them.

We conclude that trial counsel’s closing argument was within the bounds of professional reasonableness. There was no denial of effective assistance of counsel.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Dawson, Acting P.J.

Kane, J.