No. 44790-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ROLAND DOUGLAS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 09-1-00177-4

BRIEF OF RESPONDENT

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A. RESTATEMENT OF APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in not taking count II, bail jumping, from the jury for lack of sufficient evidence.

2. The trial court erred in not taking count II, bail jumping, from the jury for lack of sufficiency of the information.

B. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Where Douglas was identified by an eye-witness as the person who was arrested and charged for the underlying offense of rape of a child in the third degree, and where the underlying charge was tried in the same trial as the bail jumping charge, was the evidence sufficient to sustain the jury's verdict of guilty on the charge of bail jumping?

2. Where the information charging bail jumping in the instant case charged the underlying crime in a separate count in the same information, and where the underlying crime was referenced by case number in the count that charged bail jumping, did the information charging bail jumping fail to allege a particular underlying crime?

C. FACTS

For the purposes of consideration of the issues raised by Douglas in this appeal, the State accepts Douglas's statement of facts, but the State

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supplements with additional facts where needed to develop the State's arguments, below. RAP 10.3(b).

Officer Hinton of the Shelton Police Department identified Roland Douglas, the defendant, in open court. RP 71. The victim, also, identified Roland Douglas, the defendant, in open court. RP 72-73. Detective Heldreth identified Douglas in open court and described arresting him and booking him into jail on the underlying charge of rape of a child in the third degree. RP 96, 107.

Sharon Fogo, a clerk with the Mason County Superior Court, testified and identified Exhibit 2. RP112-14. In describing the document, Ms. Fogo testified that "it appears the defendant's signature is on the bottom of the page...." RP 114. The document was admitted into evidence without objection. RP 114.

Ms. Fogo also identified and explained Exhibit 3. RP 114-15. In answer to the question, "does Mr. Douglas'[s] signature appear on this document?", Ms Fogo answered, "It does." RP 115. Exhibit 3 was admitted without objection. RP 115.

With Ms. Fogo's testimony, Exhibits 4, 5, and 6 were also admitted into evidence without objection. RP 115-17. When asked to

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identify Exhibit 5, Ms. Fogo testified that it was "the clerk's minutes from the calendar -- criminal calendar from September 24, 2012, for 09-1-00177-4, State of Washington v. Roland Douglas." RP 116. When asked whether Douglas appeared at that hearing, Ms. Fogo answered that, "It's indicated that the defendant failed to appear." RP 117. Ms. Fogo explained that Exhibit 6 was an order for a bench warrant, which was issued because Douglas "failed to appear for his omnibus hearing." RP 117.

D. ARGUMENT

1. Where Douglas was identified by an eye-witness as the person who was arrested and charged for the underlying offense of rape of a child in the third degree, and where the underlying charge was tried in the same trial as the bail jumping charge, was the evidence sufficient to sustain the jury's verdict of guilty on the charge of bail jumping?

Douglas asserts that there was insufficient evidence at trial to prove beyond a reasonable doubt that he was guilty of bail jumping because, he asserts, there was insufficient evidence to prove that it was he, and not some other person, who appeared in court and signed the notice setting the hearing at which he subsequently failed to appear. Br. of Appellant at p. 4.

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On appeal, sufficiency of evidence claims are to be viewed in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Drum,* 168 Wn.2d 23, 34–35, 225 P.3d 237 (2010). An appellant who challenges the sufficiency of evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Id.* at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of "conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

To prove the allegation of bail jumping, the State was required at trial to prove that Douglas was "released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance" before the court and that he failed to appear as required. RCW 9A.76.170(1). Thus, to prove the offense of bail jumping, the State had to

prove beyond a reasonable doubt that Douglas knew that he was required to appear at the scheduled September 24, 2012, court appearance at which he subsequently failed to appear. RCW 9A.76.170(1).

Douglas relies on *State v. Huber*, 129 Wn. App. 499, 119 P.3d 388 (2005), to argue that that there is insufficient evidence of his identity as the person who signed for the September 24, 2012, hearing because the only evidence the State presented was documentary evidence that showed Douglas's name. Br. of Appellant at p. 4. The State concedes in the instant case that "identity of names alone" does not provide sufficient evidence to uphold a conviction that depends on a link between the identity of an individual named in documents and the identity of the defendant at trial, because different persons may bear the same names. *Huber* at 502. But in the instant case, the State presented more than merely a single document that bore the same name with Douglas.

First of all, unlike *Huber*, in the instant case the bail jumping charge and the underlying charge of theft of rape of a child in the third degree were tried together in a single trial. RP 62-161; CP 57-58. The initial information, which charged Douglas with the sole count of rape of a child in the third degree in cause number 09-1-00177-4, included

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identifying information such as Douglas's height, weight, hair-color and eye-color, which were printed on the document. The first amended information, which added the charge of bail jumping, also included this information. CP 57-58; Ex. 10 This exhibit was provided to the jury at trial. RP 135.

On August 20, 2012, Roland Douglas appeared in court and signed an "ORDER AND NOTICE SETTING TRIAL DATE, OMNIBUS AND OTHER HEARINGS" in case number 09-1-00177-4. Ex. 3. This order set a subsequent hearing of September 24, 2012. *Id.* Douglas then failed to appear at the September 24, 2012, hearing. Ex. 5; RP 117.

The instant case is unlike *State v. Huber* in three important respects. Because the bail jumping charge and the underlying charge of rape of a child in the third degree were tried together, there was testimony to identify Douglas in open court. RP 71, 72-73, 96, 107. The jury had evidence that Douglas was the one initially arrested in this case for rape of a child and that he subsequently appeared in court. RP 96, 107; Trial Exhibits 2, 3.

Finally, the reasonable inference to be drawn from the appearance of a person who answered to the name of Douglas Roland and who signed

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court documents in that name -- and where the person who appeared for trial was then identified in open court as Roland Douglas and as the person who was initially arrested on the underlying charge -- is that it was the defendant, Douglas, who appeared and then subsequently failed to appear. "Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated." *State v. Hill,* 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The jury was not required to give weight to the theoretical, random possibility that an imposter appeared at the August 20 hearing. *Id.* There was no direct testimony to identify Douglas as the person who appeared in court on August 20, 2012, and signed for notice of the September 24, 2012, court hearing, but there was ample circumstantial evidence from which the jury could conclude that it was the same Roland Douglas who initially was arrested and appeared to answer the underlying charge in cause number 09-1-00177-4, and who was then identified in open court during the trial. See, *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (circumstantial evidence and direct evidence are equally reliable).

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2. Where the information charging bail jumping in the instant case charged the underlying crime in a separate count in the same information, and where the underlying crime was referenced by case number in the count that charged bail jumping, did the information charging bail jumping fail to allege a particular underlying crime?

The language in the information that charged Douglas with bail jumping reads as follows:

> In the County of Mason, State of Washington, on or about the 24th day of September, 2012, the above-named Defendant, ROLAND K. DOUGLAS, did commit BAIL JUMPING, a Class C felony, in that said defendant having been released by court order or admitted to bail with knowledge of the requirement of subsequent personal appearance before a court of this State, to wit: the Mason County Superior Court in the case of State of Washington v. ROLAND K. DOUGLAS, Mason County cause number 09-1-00177-4, did fail to appear as required: contrary to RCW 9A.76.170 and against the peace and dignity of the State of Washington.

CP 58; Ex. 10.

Douglas contends that the count of the information charging him with bail jumping is defective because it does not specify the title of the underlying charge on which he failed to appear. Br. of Appellant at 8. Douglas was charged with bail jumping in Count II of the information; the underlying charge of rape of child in the third degree, a Class C felony, was charged in Count I of the same information. CP 57-58; Ex. 10.

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Douglas initially cites *State v. Pope*, 100 Wn. App. 624, 999 P.2d 51 (2000), to support his contention. *Pope*, however, is distinguishable because Pope involved a defendant, Kaija, who was charged with bail jumping because he failed to appear at a probation violation hearing. *Id.* at 626-27. Thus, in *Pope*, the bail jumping charge was not charged in the same information or tried together with the underlying charge. *Id.* at 626-27. In the instant case, however, the underlying Class C felony was charged in the same information with the bail jumping, and the two offenses were tried together. CP 57-58; RP 62-161.

Additionally, the facts of *Pope* do not discuss the language of the charging document. Instead, the issue in *Pope* was that the jury instructions provided to the jury were defective because the *to-convict* instruction identified the underlying charge simply as "a felony matter" and did not "inform the jury of the elements necessary to convict under RCW 9A.76.170(2)(c); that Kaija was held for, charged with, or convicted of a class B felony." *Pope* at 629. In the instant case, the *to-convict* instruction correctly informed the jury that as the underlying crime, Douglas "was charged with Rape of a Child in the third degree a Class C Felony...." CP 54 (Jury Instruction No. 13). In the instant case, Douglas

takes issue with the charging information rather than the jury instructions, and in the instant case, the information identified the underlying charge by its cause number, which was the same cause number with the bail jumping, because the two charges were charged on the same information. CP 58.

Douglas next cites *State v. Green*, 101 Wn. App. 885, 6 P.3d 53 (2000), for its holding supporting Douglas's contention that an information that charges bail jumping is "insufficient where the charging language, as here, did not include the underlying offense but merely referenced the cause number." Br. of Appellant at 8. But *Green* is distinguishable from the instant case because in *Green* the bail jumping charge was not charged in the same information with the underlying charge, and in *Green*, both the information and the jury instructions were deficient. *Green* at 887-88. Whereas in the instant case, only the charging information is at issue.

The charging information in *Green*, which contained only one count, bail jumping, identified the underlying offense by its cause number but did not provide the title of the underlying offense or its sentencing classification. *Id.* In the instant case, there was a two-count information,

which charged bail jumping in Count II and charged the underlying crime in Count I. CP 57-58. Count II of the information, which charged bail jumping, was similar to *Green*, because it identified the underlying offense by its cause number but did not provide the title of the underlying offense or its sentencing classification. But unlike *Green*, the instant case identified the underlying offense in Count I of the same information. *Green* at 887-88; CP 57-58.

The Court in *Green* provided the following explanation in the preamble to its opinion:

> In a post-conviction challenge, Green argues that neither the information charging him nor the "to convict" jury instruction contained all of the elements of bail jumping because the underlying crime was never specified. In *State v. Ibsen,* 98 Wash.App. 214, 989 P.2d 1184 (1999), we held that the underlying offense of a bail jumping charge is an essential element of the crime. Thus, even liberally construed, the information charging Green omitted an element of bail jumping. We reverse and dismiss without prejudice.

Id. at 887. But *State v. Ibsen,* 98 Wn. App. 214, 989 P.2d 1184 (1999), was subsequently abrogated our Supreme Court in *State v. Williams*, 162 Wn.2d 177, 170 P.3d 30, 32 (2007), which held that the penalty

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classification of the underlying offense to a bail jumping charge is not an essential element of bail jumping.[1]

However, *Williams* cites *Ibsen* with approval for the following point:

> Additionally, when a charging document is challenged for the first time on appeal, it must be construed liberally. Thus, we need only determine if the necessary facts appear *in any form* in the charging document.

Williams, 162 Wn.2d at 185, citing *Ibsen* at 216. In the instant case, the necessary facts appear in the charging document in Count I, which charges rape of a child in the third degree, which is referenced in Count II of the same charging document. CP 57-58.

In *Williams*, the Court reiterated prior precedent, explaining that:

> The test for the liberal interpretation of the document is: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?"

Williams at 185. quoting *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). As argued above, in the instant case the necessary facts do appear in any form in the charging document.

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[1] But *Williams* did not abrogate the pronouncement by *Ibsen* that a correct jury instruction cannot cure a deficient information. *Ibsen*, 98 Wn. App. at 216, citing *State v.*

Still more, "[t]he second prong of the *Kjorsvik* test allows the court to look outside the information to determine whether the defendant suffered actual prejudice." *Williams* at 186, citing *Kjorsvik* at 106. In the instant case the bail jumping charge was charged and tried together with the underlying charge of rape of a child in the third degree. CP 57-58; RP 62-161. On these facts, Douglas suffered no actual prejudice.

E. CONCLUSION

For the reasons stated above, the State asks the court to deny Douglas's appeal and to sustain his conviction.

DATED: December 4, 2013.

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Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995).

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