

No. 44642-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jesse Clark,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-01099-3

The Honorable Judge Michael H. Evans

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT..... 1

I. The state presented insufficient evidence that Mr. Clark was informed of the dates and times he was required to appear in court or that he failed to appear that the required times..... 1

A. The evidence is insufficient to prove that Mr. Clark received notice of the dates and times he was required to appear in court..... 1

B. There was insufficient evidence that Mr. Clark failed to appear in court at the required time. 3

II. Mr. Clark’s convictions violated his right to be free from double jeopardy. 4

A. The evidence necessary to support Mr. Clark’s conviction for extortion was also sufficient to support his conviction for possession of stolen property. 4

B. “Unit of prosecution” analysis demonstrates that Mr. Clark is guilty of no more than two counts of bail jumping.
4

III. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct. 7

IV. The accomplice liability statute unconstitutionally criminalizes protected speech. 7

V. Mr. Clark's extortion and possession of stolen property convictions should have been scored as one point because they comprised the same criminal conduct. 7

CONCLUSION 7

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Larson, 495 F.3d 1094 (9th Cir. 2007)..... 2

United States v. Lo, 231 F.3d 471 (9th Cir. 2000)..... 2

WASHINGTON STATE CASES

Coluccio Constr. v. King County, 136 Wn. App. 751, 150 P.3d 1147 (2007)..... 2

State v. Cardwell, 155 Wn. App. 41, 226 P.3d 243 (2010) *review granted, cause remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1114 (2011)..... 1, 3

State v. Coleman, 155 Wn. App. 951, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011)..... 3, 4

State v. Morales, 174 Wn. App. 370, 298 P.3d 791 (2013)..... 4, 6

State v. O'Brien, 164 Wn. App. 924, 267 P.3d 422 (2011)..... 5

State v. Prestegard, 108 Wn. App. 14, 28 P.3d 817 (2001) 2

WASHINGTON STATUTES

RCW 9A.76.170..... 4, 5, 6

OTHER AUTHORITIES

ER 406 2

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT MR. CLARK WAS INFORMED OF THE DATES AND TIMES HE WAS REQUIRED TO APPEAR IN COURT OR THAT HE FAILED TO APPEAR AT THE REQUIRED TIMES.

A. The evidence is insufficient to prove that Mr. Clark received notice of the dates and times he was required to appear in court.

Evidence is insufficient to convict for bail jumping if the state fails to prove that the accused received notice of the required court dates. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010) *review granted*, *cause remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1114 (2011).

The state did not offer any evidence that Mr. Clark received written notice of the dates and times of his required court appearances. RP 412-59. No witness testified that the court told Mr. Clark when he was required to appear. RP 412-59. Instead, the prosecution relied exclusively on testimony that the court clerks generally do not check the “ordered to appear” box on the minutes unless the accused is told of the date and time of the hearing. RP 424, 441-42, 444.¹

¹ Notably, there was no evidence at all regarding when the appearance Mr. Clark is alleged to have missed in Count IV was supposed to begin. RP 412-59; Ex. 205.

Testimony regarding a person or organization's usual practices may not be sufficient to prove that an event occurred in accordance with those practices on a particular occasion. *United States v. Lo*, 231 F.3d 471, 477 (9th Cir. 2000) *holding modified on other grounds by United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007). Nonetheless, Respondent argues that testimony about the court's general practice is sufficient. Brief of Respondent, pp. 20-21.

In support of this contention, the state relies on authority providing that evidence of routine practice can be admissible. Brief of Respondent, p. 20 (*citing* ER 406; *State v. Prestegard*, 108 Wn. App. 14, 28 P.3d 817 (2001)). But Mr. Clark challenges the sufficiency of the evidence, not its admissibility. The evidence did not prove beyond a reasonable doubt that the court acted in conformance with its practice on two specific occasions.

The state offers no authority to support its argument that evidence of routine practice is sufficient to prove conformity with the practice beyond a reasonable doubt. Brief of Respondent, pp. 20-21. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

The state presented insufficient evidence that Mr. Clark was informed of the dates and times at which he was required to appear in

court. *Cardwell*, 155 Wn. App. at 47. Mr. Clark's bail jumping convictions must be reversed. *Id.*

B. There was insufficient evidence that Mr. Clark failed to appear in court at the required time.

To support a bail jumping conviction, the state must prove that the accused person was absent at the specific time at which s/he was notified the hearing would occur. *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011).

The state did not present any evidence regarding the time when the court determined that Mr. Clark was not present for Counts III and V. Exs. 207, 214; RP 412-59. Regarding Counts IV and VI, the state presented evidence that Mr. Clark was not in court at 8:53am and 8:57am respectively. Exs. 209, 216. There was no evidence regarding when Mr. Clark was supposed to appear for the hearing in Count IV. Ex. 205; RP 412-59. The clerk testified that at least one of Mr. Clark's hearings was not supposed to begin until 9:00am. RP 444.

The state responds only that Mr. Clark did not subsequently appear until about a month later on each occasion. Brief of Respondent, p. 21. Respondent does not explain how this evidence demonstrates Mr. Clark's absence from court at a specific time.

The state presented insufficient evidence for a rational jury to find that Mr. Clark failed to appear in court at a specified time. *Coleman*, 155 Wn. App. at 964. Mr. Clark’s bail jumping convictions must be reversed. *Id.*

II. MR. CLARK’S CONVICTIONS VIOLATED HIS RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

A. The evidence necessary to support Mr. Clark’s conviction for extortion was also sufficient to support his conviction for possession of stolen property.

Mr. Clark relies on the argument in his Opening Brief.

B. “Unit of prosecution” analysis demonstrates that Mr. Clark is guilty of no more than two counts of bail jumping.

The “unit of prosecution” determines whether multiple convictions for a single offense violate double jeopardy. *State v. Morales*, 174 Wn. App. 370, 384, 298 P.3d 791 (2013).

The bail jumping statute provides that:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state..., and who fails to appear ... as required is guilty of bail jumping.

RCW 9A.76.170.

The bail jumping statute is ambiguous as to the unit of prosecution. *State v. O'Brien*, 164 Wn. App. 924, 929-30, 267 P.3d 422 (2011). This ambiguity must be construed in Mr. Smith's favor. *Id.*

Mr. Clark was convicted of four counts of bail jumping. CP 2, 4. But he was only released from custody on two occasions. RP 419-20, 431-33. Because he was only "released by court order or admitted to bail" two times, the evidence supports at most two units of prosecution for bail jumping. RCW 9A.76.170.

In *O'Brien*, the state charged four counts of bail jumping when the accused had been released on one occasion under multiple court orders to appear at a subsequent hearing. *O'Brien*, 164 Wn. App. at 929-30. Those facts could sustain only one unit of prosecution for bail jumping. *Id.* at 932-33.

Respondent's analysis supports Mr. Clark's argument that he can only be convicted of two counts of bail jumping. The state claims that the inquiry turns on the legislature's use of the modifier "a" in the phrase "a subsequent personal appearance" in the bail jumping statute. Brief of Respondent, pp. 28-31. The state relies on this grammatical point to argue that each failure to appear constitutes one unit of prosecution for bail jumping. Brief of Respondent, pp. 28-31.

But, based on the state’s reasoning, if the legislature had intended for each failure to appear to represent one unit of prosecution, it would have phrased the statute as follows:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state..., and who fails to appear *for a subsequent hearing...* is guilty of bail jumping.

As Respondent points out, courts presume the legislature is aware of prior judicial interpretations of statutes. Brief of Respondent, p. 30. If the legislature had intended one unit of prosecution for each failure to appear, it would have written the statute as above.

By its plain language, being “released by court order or admitted to bail” is not the same as merely being ordered to appear in court. RCW 9A.76.170. But the state argues that the court “released” him each time he was ordered to appear. Brief of Respondent, p. 31. The state cites no authority for its interpretation contrary to the plain language of the statute. The facts support only two units of prosecution for bail jumping.

The court violated Mr. Clark’s protection against double jeopardy when it entered convictions for four counts of bail jumping based only on two units of prosecution. *Morales*, 174 Wn. App. at 384. Mr. Clark’s bail jumping convictions must be reversed. *Id.*

III. THE PROSECUTOR COMMITTED FLAGRANT, ILL-INTENTIONED, PREJUDICIAL MISCONDUCT.

Mr. Clark relies on the argument in his Opening Brief.

IV. THE ACCOMPLICE LIABILITY STATUTE UNCONSTITUTIONALLY CRIMINALIZES PROTECTED SPEECH.

Mr. Clark relies on the argument in his Opening Brief.

V. MR. CLARK'S EXTORTION AND POSSESSION OF STOLEN PROPERTY CONVICTIONS SHOULD HAVE BEEN SCORED AS ONE POINT BECAUSE THEY COMPRISED THE SAME CRIMINAL CONDUCT.

Mr. Clark relies on the argument in his Opening and Supplemental Briefs.

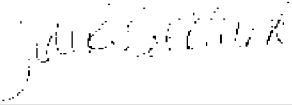
CONCLUSION

The state presented insufficient evidence to convict Mr. Clark of bail jumping. Mr. Clark's four bail jumping convictions violate the constitutional protection against double jeopardy.

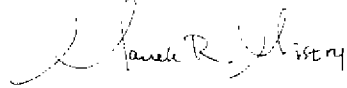
For these reasons and those in Mr. Clark's Opening and Supplemental Briefs, his convictions must be reversed.

Respectfully submitted on February 26, 2014.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Jesse Clark, DOC #364621
Cedar Creek Corrections Center
PO Box 37
Littlerock, WA 98556-0037

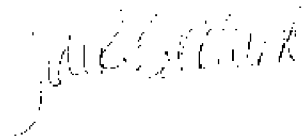
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 26, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

February 26, 2014 - 4:24 PM

Transmittal Letter

Document Uploaded: 446421-Reply Brief.pdf

Case Name: State v. Jesse Clark

Court of Appeals Case Number: 44642-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

bours@co.cowlitz.wa.us