

No. 47069-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Justin Hart,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00772-7

The Honorable Judge Stephen Warning

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court's to-convict instruction violated Mr. Hart's Fourteenth Amendment right to due process.
2. The court's to-convict instruction violated Mr. Hart's Wash. Const. art. I, § 3 right to due process.
3. The court's to-convict instruction impermissibly relieved the state of its burden of proof.
4. The court's to-convict instruction erroneously omitted the element that Mr. Hart had failed to appear in court "as required."
5. The court erred by giving instruction number 8.
6. The violation of Mr. Hart's due process rights constitutes manifest error affecting a constitutional right.

ISSUE 1: An accused person has a due process right to have the jury instructed on each element of an offense. Did the court's to-convict instruction violate Mr. Hart's due process right by allowing conviction without proof that he failed to appear in court "as required"?

7. The state presented insufficient evidence to convict Mr. Hart for bail jumping
8. No rational jury could have found beyond a reasonable doubt that Mr. Hart failed to appear in court "as required" at the time he had been ordered to appear.

ISSUE 2: Evidence is insufficient to prove bail jumping unless the state shows that the accused failed to appear at the specific time ordered. Did the state present insufficient evidence to convict Mr. Hart when there was no evidence regarding the time at which he was determined to be absent from court?

9. No rational jury could have found beyond a reasonable doubt that Mr. Hart had been "released by court order or admitted to bail" as required to convict him for bail jumping.

ISSUE 3: To convict for bail jumping, the state must prove that the accused had been "released by court order or admitted

to bail.” Was there insufficient evidence to convict Mr. Hart when no evidence showed that he was released by court order or admitted to bail?

10. The admission of exhibits 1 and 5 violated Mr. Hart’s Sixth and Fourteenth Amendment right to confront the state’s witnesses.

11. The admission of exhibits 1 and 5 violated Mr. Hart’s Wash. Const. art. I, § 22 right to confront the state’s witnesses.

12. The court erred by admitting exhibit 1.

13. The court erred by admitting exhibit 5.

ISSUE 4: The confrontation clause prohibits admission of testimonial hearsay unless the witness is unavailable and the accused has had a prior opportunity for cross-examination. Did the court violate Mr. Hart’s right to confront adverse witnesses by admitting a video and court document containing testimonial hearsay when Mr. Hart never had the opportunity to cross-examine the declarants?

14. The court exceeded its statutory authority by ordering Mr. Hart to pay the cost of his incarceration when he did not have the present ability to pay.

15. The court erred by entering finding of fact 2.5. CP 65.

ISSUE 5: A court may order an offender to pay the cost of incarceration only if s/he has the *present* ability to pay. Did the court exceed its authority by ordering Mr. Hart to pay the cost of incarceration while also finding him indigent and without any evidence that he had the current means to pay?

16. The court erred by ordering Mr. Hart to pay \$2,025 in legal financial obligations without conducting any inquiry into his ability to pay.

ISSUE 6: A court may not order a person to pay legal financial obligations (LFOs) without conducting an individualized inquiry into his/her means to do so. Did the court err by ordering Mr. Hart to pay \$2,025 in LFOs, while also finding him indigent and without analyzing whether he had the money to pay?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Justin Hart was charged with several felonies that were eventually dismissed. CP 65. In the meantime, however, the state alleged that he failed to appear for a pretrial hearing on September 9, 2013 and charged him with bail jumping. CP 3.

At trial, the state offered the minutes from a July 12, 2013 hearing as evidence that he had been “released by court order or admitted to bail.” Ex. 2; RP 27, 59. The form indicated that Mr. Hart was out of custody. Ex. 2. The portions of the minutes form regarding release, bail, and conditions of release were blank. Ex. 2. The portion of the form related to the “Judgment and Sentence of the Court,” however, had the following language: “RSTITUTN: Booked / Released.” Ex. 2.

The clerk who testified about the July 12th hearing did not explain what the language on the form meant. RP 21-34. She did not say Mr. Hart was ever released by court order or admitted to bail. RP 21-34.

Then the state offered a video of the next hearing, which was on July 22, 2013. RP 30-32. On the video, the judge tells Mr. Hart that the pretrial hearing will be held on September 9th. RP 31; Ex. 1. The judge asserts that Mr. Hart is required to attend that hearing. RP 31; Ex. 1.

The court overruled Mr. Hart's hearsay objection to the video. RP 8, 29. Mr. Hart did not have the opportunity to cross-examine the judge who made the statements on the video.

The court also admitted an "Order to Appear" generated at the July 22nd hearing. RP 27-28; Ex. 5. The clerk who worked the hearing testified that she did not create the document. RP 28. Rather, it was created by a defense attorney who was standing in for Mr. Hart's regular counsel. RP 28, 31. Mr. Hart did not have the opportunity to cross-examine the stand-in attorney.

Finally, the court admitted the minutes from the September 9th hearing, which indicated that Mr. Hart had failed to appear. Ex. 6. The minutes did not say anything regarding what time the case was called, or when the court had determined that Mr. Hart was absent. Ex. 6.

Likewise, the clerk from the September 9th hearing did not testify about the time at which it was determined that Mr. Hart was not in court. RP 35-39.

The court's to-convict instruction listed the element of bail jumping as follows:

- (1) ... on or about September 9, 2013, the defendant failed to appear before a court;
- (2) ...the defendant was facing charges that he had committed crimes classified as class B and C felonies in Cowlitz County Superior Court; and

- (3) ... the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court; and
- (4) ... all of these act occurred in the State of Washington. CP 58.

The jury convicted Mr. Hart of bail jumping. RP 70.

At the hearing during which the judge signed the Judgment and Sentence, defense counsel asked the court to waive court costs and to find that Mr. Hart did not have the means to pay legal financial obligations (LFOs). RP 78. He pointed out that Mr. Hart was indigent. RP 78.

The judge said that “the day somebody goes into custody nobody has the ability to pay... It’s obviously a long term issue.” RP 78. The judge did not conduct any individualized inquiry into Mr. Hart’s financial situation. RP 78. The court ordered \$2,025 in LFOs and found that Mr. Hart had the present ability to pay the cost of his incarceration. CP 65, 68.

This timely appeal follows. CP 74.

ARGUMENT

I. MR. HART’S BAIL JUMPING CONVICTION VIOLATED DUE PROCESS BECAUSE THE TO-CONVICT INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CRIME.

To convict for bail jumping, the state must prove both a requirement of subsequent personal appearance and that the accused failed to appear “as required.” *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d

30 (2007); RCW 9A.76.170(1). Absent such a showing, the jury could convict for activity that is not illegal: such as missing a non-mandatory hearing or simply failing to be in the courthouse on a random day on which no hearing is held.

In Mr. Hart's case, the court's to-convict instruction did not tell the jury that it had to find he had failed to appear "as required." CP 58. Rather, it required proof only that Mr. Hart "failed to appear before a court" on a specified date. CP 58.

The to-convict instruction violated Mr. Hart's right to due process by relieving the state of its burden to prove an element of the offense.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

Jurors have the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if the missing element is

supplied by other instructions. *Id*; *Lorenz*, 152 Wn.2d at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Instruction No. 8 relieved the state of its burden to prove each element of bail jumping beyond a reasonable doubt.¹

In order to convict a person for bail jumping, the state must prove that s/he: (1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with knowledge of a required subsequent personal appearance; and (3) failed to appear as required. *Williams*, 162 Wn.2d at 184; RCW 9A.76.170(1).

The court's to-convict instruction permitted conviction even if Mr. Hart did not fail to appear "as required." CP 58. The instruction was not available as an accurate "yardstick," and thus did not make the state's burden manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not

¹ Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Instruction No. 8 creates a manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal. RAP 2.5(a)(3).

Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make

prejudicial to the accused person's substantial rights, and if it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Without the missing element (that Mr. Hart failed to appear "as required,") the jury could have found him guilty based on non-appearance in court at some irrelevant date and time. The jury could have convicted Mr. Hart even if it found that there was insufficient evidence that the September 9th hearing was required. Indeed, as argued below, the state failed to meet its burden of proof because it neglected to introduce evidence that Mr. Hart was absent from court at the specific time when he had been ordered to appear.

The error here is presumed prejudicial, and the state cannot establish harmless error under the stringent test for constitutional error. *Watt*, 160 Wn.2d at 635. Accordingly, Mr. Hart's bail jumping conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. HART OF BAIL JUMPING.

To convict for bail jumping, the state must prove beyond a reasonable doubt that the accused:

the relevant legal standard manifestly apparent to the average juror. *State v. Kyлло*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

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,... fails to appear... as required.

RCW 9A.76.170(1). Here, the state failed to prove two of these elements.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found the charge proved beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013). Even when taken in a light most favorable to the state, the evidence here was insufficient to convict Mr. Hart of bail jumping.

First, the state produced no evidence that he failed to appear “as required” at the appointed time. Second, the state failed to prove that he had been released by court order or admitted to bail.

A. No rational jury could have found beyond a reasonable doubt that Mr. Hart failed to appear in court at the specific required time.

Mr. Hart’s hearing on September 9th was supposed to start at 9:00am. Ex. 5. The clerk who was present at the hearing did not say anything about when the court determined that Mr. Hart was not present. CP 35-39. The minutes from that hearing are, likewise, silent as to when they were created or the time at which Mr. Hart was absent. Ex. 6.

Without any evidence that Mr. Hart failed to appear in court at 9:00am, as required, no rational jury could have found him guilty of bail jumping beyond a reasonable doubt.

Evidence is insufficient to convict for bail jumping unless the state proves that the accused was absent from court 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).

Even taking the evidence in the light most favorable to the state, the prosecution established only that Mr. Hart was not in the courtroom at some unspecified time on September 9th. CP 35-39; Ex 6. That determination could have been made either before the hearing started at 9:00am or sometime in the afternoon after it was over. No rational jury could have found beyond a reasonable doubt that Mr. Hart failed to appear at 9:00am, as specifically required.

The state presented insufficient evidence to convict Mr. Hart of bail jumping. *Coleman*, 155 Wn. App. at 964. His conviction must be reversed and the charge dismissed with prejudice. *Id.*

B. No rational jury could have found beyond a reasonable doubt that Mr. Hart had been “released by court order or admitted to bail.”

The clerk who was present at Mr. Hart’s first hearing did not say that he was ever in custody or that the court had released him or admitted him to bail. RP 21-34. No order of release or order admitting him to bail was ever introduced into evidence.

The minutes from that hearing indicate that Mr. Hart was out of custody. Ex. 2. The areas of the minutes form regarding whether Mr. Hart was released on bail or on personal recognizance are blank. Ex. 2. The form does not list any conditions of release. Ex. 2.

No rational jury could have found beyond a reasonable doubt that Mr. Hart was “released by court order or admitted to bail” as required to convict him for bail jumping.

To prove the essential elements of bail jumping the state must establish beyond a reasonable doubt that the accused was “released by court order or admitted to bail.” RCW 9A.76.170(1); *Williams*, 162 Wn.2d at 183 (*citing State v. Pope*, 100 Wn. App. 624, 627, 999 P.2d 51 (2000)).

Here, there was no testimony that Mr. Hart was ever released by court order or admitted to bail. RP 31-34. The minutes form from his first appearance is silent on the matter. Ex. 2.

The closest thing to evidence on this element is the following language on the minutes form in the portion regarding the “Judgment and Sentence of the Court”: “RSTITUTN: Booked / Released.” Ex. 2. That vague language does not prove that Mr. Hart was released by court order or admitted to bail. No witness ever clarified that language for the jury.

No rational jury could have found beyond a reasonable doubt that Mr. Hart was “released by court order or admitted to bail.”

The state presented insufficient evidence to convict Mr. Hart of bail jumping. RCW 9A.76.170(1); *Chouinard*, 169 Wn. App. at 899. His conviction must be reversed. *Id.*

III. THE COURT VIOLATED MR. HART’S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The state and federal constitutions guarantee an accused person the right to confront adverse witnesses. U.S. Const. Amend. VI, XIV; art. I, § 22. The Confrontation Clause prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable and the accused has had a prior opportunity to cross-examine.² *State v.*

² A denial of the Sixth Amendment right to confront adverse witnesses is reviewed *de novo*. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Such an error requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.* at 117. Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

Jasper, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Testimony is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51. A statement is testimonial if it is “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Jasper*, 174 Wn.2d at 115 (citing *Crawford*, 541 U.S. at 52).

The state bears the burden of establishing that a statement is nontestimonial under *Crawford*. *State v. Hurtado*, 173 Wn. App. 592, 600, 294 P.3d 838 review denied, 177 Wn.2d 1021, 304 P.3d 115 (2013).

Here, the court violated Mr. Hart’s right to confront the state’s witnesses by admitting a video containing testimonial hearsay from another judge and an “Order to Appear” created by a non-testifying declarant. Those two pieces of evidence provided the state’s only proof that Mr. Hart was required to appear for the September 9th hearing.

- A. The court violated Mr. Hart’s confrontation right by admitting testimonial hearsay via video without the opportunity to cross-examine the declarant.

Over Mr. Hart’s objection, the court admitted a video of the July 22nd hearing. RP 8, 29-31; Ex. 1. On the video, the previous judge

asserted that the next hearing in Mr. Hart’s case was on September 9th and that Mr. Hart was required to appear on that day. RP 31; Ex. 1.

The judge’s statement that Mr. Hart was required to appear for the September 9th hearing was testimonial hearsay. Mr. Hart never had the opportunity to cross-examine the judge regarding his statement or the conditions under which it was made. The court violated Mr. Hart’s right to confront adverse witnesses by admitting the video.

The judge’s assertion in the video that Mr. Hart was required to appear for the September 9th hearing was a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”³ *Crawford*, 541 U.S. at 51. The video (along with exhibit 5, discussed below) provided the state’s only evidence that Mr. Hart was required to attend the September 9th hearing.

Because the hearing was videotaped, an objective witness would reasonably have believed that it would have been available for later use at trial. *Jasper*, 174 Wn.2d at 115 (citing *Crawford*, 541 U.S. at 52). The judge’s statement on the video that Mr. Hart was required to appear for the September 9th hearing was testimonial. *Id.* Because Mr. Hart was not

³ In response to Mr. Hart’s hearsay objection, the court ruled that the evidence on the video was not offered for the truth of the matter asserted. RP 8. Absent the video and Ex. 5 (whose admission is challenged below), however there would have been no evidence that Mr. Hart was required to appear at the September 9th hearing. If the hearsay evidence was

given the opportunity for cross-examination, their admission violated his right to confront adverse witnesses. *Id.*

The state cannot demonstrate that this violation of Mr. Hart's right to confront adverse witnesses was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 108. Mr. Hart was unable to cross-examine the judge regarding her statements or their context. At some points during trial, Mr. Hart was doubled over in pain from a chronic health issue. RP 10. He was not able to ask the judge whether he was exhibiting similar symptoms at the videotaped hearing, which could have demonstrated that he was not aware of his required appearance. Mr. Hart's cross-examination of the previous judge could have made a difference in his case.

The court violated Mr. Hart's right to confront the state's witnesses by admitting a video containing testimonial hearsay from a previous judge whom Mr. Hart had never had the opportunity to cross-examine. *Jasper*, 174 Wn.2d at 115. Mr. Hart's conviction must be reversed. *Id.*

not offered to prove the truth of that fact, then the state would have presented insufficient evidence to meet that element of the charge.

- B. The court violated Mr. Hart's confrontation right by admitting a testimonial document, created by a stand-in defense attorney who was not available for cross-examination.

The court admitted exhibit 5, which purported to be an order for Mr. Hart to appear at the September 9th hearing. RP 27. But the testifying clerk said that she did not prepare that document. RP 28. Rather, a stand-in defense attorney had filled out the form. RP 28, 31. Mr. Hart did not have the opportunity to cross-examine the attorney who had created the exhibit.

Because exhibit 5 contained testimonial assertions that Mr. Hart was required to appear for the listed hearings, its admission violated his right to confront adverse witnesses.

Besides the prior judge's videotaped assertions (addressed above), exhibit 5 provided the state's only evidence that Mr. Hart was required to appear in court on September 9th. As such, its portions stating that Mr. Hart's attendance was required constituted a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51.

An objective witness would also reasonably have believed that exhibit 5 would have been available for later use at trial. *Jasper*, 174 Wn.2d at 115. Indeed, the entire purpose behind requiring Mr. Hart's signature on the form appears to be so it can later be used as evidence that

he was given notice of the required future hearings. Exhibit 5's assertions that Mr. Hart was required to appear at the September 9th hearing are testimonial. *Id.*

Because Mr. Hart did not have the chance to cross-examine the document's creator, its admission violated his right to confront adverse witnesses. *Id.*

The state cannot demonstrate that this violation of Mr. Hart's confrontation right was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 108. Absent the two pieces of testimonial evidence admitted without a chance to cross-examine, the state would not have been able to demonstrate that Mr. Hart's attendance at the September 9th hearing was required.

The court violated Mr. Hart's right to confront state witnesses by admitting exhibit 5, which contained testimonial hearsay, absent an opportunity for cross-examination of its creator. *Id.* Mr. Hart's conviction must be reversed. *Id.*

IV. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. HART TO PAY THE COST OF HIS INCARCERATION WHILE ADMITTING THAT HE DID NOT HAVE THE PRESENT MEANS TO DO SO.

A court derives the authority to order payment of legal financial obligations (LFOs) from statute. *State v. Hathaway*, 161 Wn. App. 634,

651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).

A sentencing court may only order a person to pay the cost of his/her incarceration upon finding that s/he “*at the time of sentencing*, has the means to pay the cost of incarceration.” RCW 9.94A.760(2) (emphasis added). The plain language of the statute permits the court to require payment of incarceration costs only of someone who has the *current* ability to pay. RCW 9.94A.760(2).

This requirement stands in contrast to that regarding other LFOs, of which the court may order payment as long as the person “is or will be able to pay them.” RCW 10.01.160(3). This language – which applies to all LFOs except for costs of incarceration – permits an order of payment even if the accused cannot pay at the time of sentencing but will be able to pay at some future date. RCW 10.01.160(3).

A court’s finding of ability to pay must be vacated if it is not supported by any evidence in the record. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

Here, the court checked the box next to the boilerplate finding that Mr. Hart had the present means to pay the cost of his incarceration over his objection. CP 65; RP 78. At the hearing on that same day, however, the court acknowledged that Mr. Hart did not have the ability to pay at that

time. RP 78. The court also found him indigent at both the beginning and the end of trial. RP 78; CP 75-76; Ex. 2. Still, the court checked the box, saying it was a “long term issue.” RP 78.

But *present* ability to pay is not a “long term issue.” The court’s boilerplate finding is not supported by any evidence and must be vacated. *Bertrand*, 165 Wn. App. at 404.

Absent any evidence of current ability to pay, the court exceeded its statutory authority by ordering Mr. Hart to pay the cost of his incarceration. RCW 9.94A.760(2); *Hathaway*, 161 Wn. App. at 651-653. The order that Mr. Hart pay the cost of his incarceration must be vacated. *Id.*

V. THE COURT ERRED BY ORDERING MR. HART TO PAY \$2,025 IN LEGAL FINANCIAL OBLIGATIONS ABSENT ANY PARTICULARIZED INQUIRY INTO HIS ABILITY TO PAY.

Mr. Hart was found indigent at both the beginning and end of trial. RP 78; CP 75-76; Ex. 2. Still, the court ordered him to pay \$2,025 in legal financial obligations (LFOs), over his objection. CP 68; RP 78.

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 65. But the court did not conduct any particularized inquiry into Mr. Hart’s financial situation at sentencing or at any other time. RP

74-79. The court erred by ordering Mr. Hart to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that “[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3); *State v. Blazina*, --- Wn.2d ---, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court from ordering LFOs absent an individualized inquiry into the person’s ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person’s other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Hart’s ability to pay LFOs. RP 74-79. The court did not consider his financial status in any way. Indeed, the court also found Mr. Hart indigent at both the beginning and the end of trial. RP 78; CP 75-76; Ex. 2.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* (“[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs”). Because he is indigent, the court should have

presumed that Mr. Hart was unable to pay LFOs instead of simply ordering them without any inquiry.

The court erred by ordering Mr. Hart to pay \$2,025 in LFOs absent any showing that he had the means to do so. *Blazina*, --- Wn2d at ---, 344 P.3d at 685. The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

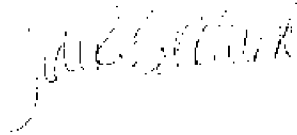
CONCLUSION

The court's to-convict instruction violated Mr. Hart's due process right to have the jury instructed on each element of the offense. No rational jury could have found that the state proved all of the elements of bail jumping beyond a reasonable doubt. The court violated Mr. Hart's right to confront the state's witnesses. Mr. Hart's conviction must be reversed.

In the alternative, the court erred by ordering Mr. Hart to pay \$2,025 in LFOs without any inquiry into his means to do so. The court exceeded its statutory authority by ordering Mr. Hart to pay the cost of his incarceration when he did not have the present ability to pay. The court's cost orders must be vacated.

Respectfully submitted on May 13, 2015,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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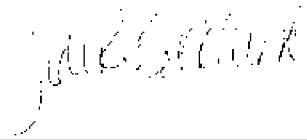
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening 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 May 13, 2015.



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BACKLUND & MISTRY

May 13, 2015 - 11:23 AM

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