

NO. 47069-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JUSTIN M. HART,

Appellant.

RESPONDENT'S BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
AILA R. WALLACE/WSBA 46898
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

TABLE OF CONTENTS

	PAGE
A. REPLY TO ASSIGNMENTS OF ERROR.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	2
1. THE “TO CONVICT” INSTRUCTION WAS PROPER.	2
2. THERE IS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF BAIL JUMPING.	4
A. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO FIND THAT THE DEFENDANT FAILED TO APPEAR AT THE REQUIRED TIME.	5
B. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO FIND THAT THE DEFENDANT HAD BEEN RELEASED BY COURT ORDER OR ADMITTED TO BAIL... 	7
3. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT’S CONFRONTATION RIGHT, AS NEITHER THE JUDGE’S STATEMENT NOR EXHIBIT 5 ARE TESTIMONIAL HEARSAY.....	8
A. NEITHER THE JUDGE’S STATEMENT ON THE VIDEO NOR EXHIBIT 5 ARE TESTIMONIAL HEARSAY, SO THE CONFRONTATION CLAUSE WAS NOT VIOLATED BY THEIR ADMISSION.....	9
B. BOTH THE JUDGE’S STATEMENT ON THE VIDEO AND EXHIBIT 5 FALL UNDER THE PUBLIC RECORDS HEARSAY EXCEPTION AND ARE THEREFORE ADMISSIBLE.	10

4.	THE TRIAL COURT SHOULD NOT HAVE ORDERED THE DEFENDANT TO PAY THE COST OF HIS INCARCERATION WITHOUT FINDING THAT HE WAS ABLE TO DO SO; NOR SHOULD THE COURT HAVE ORDERED HIM TO PAY LFOS WITHOUT A PARTICULARIZED INQUIRY INTO HIS ABILITY TO PAY.....	12
D.	CONCLUSION	12

TABLE OF AUTHORITIES

	PAGE
United States Cases	
<i>Crawford v. Washington</i> , 541 U.S. 36, 51, 124 S. Ct. 1354 (2004).	9
Washington State Cases	
<i>Gregoire v. City of Oak Harbor</i> , 170 Wn.2d 628, 635, 244 P.3d 924 (2010).	2
<i>State v. Blazina</i> __ Wn.2d __, 344 P.3d 680 (March 12, 2015).	12
<i>State v. Coleman</i> , 155 Wn. App. 951, 964, 231 P.3d 212 (2010).	6
<i>State v. Hassan</i> , 184 Wn. App. 140, 148, 336 P.3d 99 (2014).	2
<i>State v. James</i> , 104 Wn. App. 25, 31, 15 P.3d 1041 (2000);	8, 10
<i>State v. Jasper</i> , 174 Wn.2d 96, 115, 271 P.3d 876 (2012)	9
<i>State v. Jones</i> , 63 Wn. App. 703, 708, 821 P.2d 543 (1992).	4
<i>State v. Joy</i> , 121 Wn.2d 333, 338–39, 851 P.2d 654 (1993).	4
<i>State v. Kyllö</i> , 166 Wn.2d 856, 864, 215 P.3d 177 (2009).	3
<i>State v. Monson</i> , 113 Wn.2d 833, 841, 784 P.2d 485 (1989).	8
<i>State v. Price</i> , 127 Wn. App. 193, 202, 110 P.3d 1171 (2005).	5
<i>State v. Smith</i> , 104 Wn.2d 497, 509, 707 P.2d 1306 (1985).	4
Constitutional Provisions	
Const. art. I, § 22.	8

U.S. Const. Amend. VI 8

U.S. Const. Amend. XIV 2

Statutes

RCW 5.44.010 10, 11

RCW 5.44.040 11

RCW 9.94A.760..... 12

Other Authorities

ER 803 11

WPIC 120.40..... 3

WPIC 120.41..... 3

A. REPLY TO ASSIGNMENTS OF ERROR

1. The “to convict” instruction did not relieve the State of its burden to prove each element of the crime of bail jumping beyond a reasonable doubt because the instruction was an accurate statement of the law that contained all the elements of the crime.
2. There was sufficient evidence to convict the defendant of bail jumping.
3. The trial court did not violate the defendant’s confrontation right because neither the judge’s statement ordering the defendant to appear nor exhibit five are testimonial hearsay.
4. The State concedes that the trial court should not have ordered the defendant to pay the cost of his incarceration without a finding that he was able to do so; nor should the court have ordered the defendant to pay LFOs without a particularized inquiry into his ability to pay.

B. STATEMENT OF THE CASE

Justin Hart, the defendant, was charged with multiple felonies on June 19, 2013, which were later dismissed. While the case was pending, the defendant was ordered to appear at a pretrial hearing on September 9,

2013. Exhibit 5. He was not present at that hearing and the State filed an amended information charging him with one count of bail jumping. CP 1.

The parties proceeded to jury trial on the bail jumping charge on December 16, 2014. The State presented evidence indicating the defendant signed a promise to appear on September 9, 2013, and then was not present on that date. RP 22–39. The defendant was found guilty. RP 70–71.

At sentencing, the court required the defendant to pay court costs and the costs of his incarceration, stating that “generally, the day somebody goes into custody nobody has the ability to pay,” and that “it’s obviously a long term issue.” RP 78. Defense counsel did not object but did indicate that he was appointed to represent the defendant and that he had been appointed federal counsel. RP 78.

C. ARGUMENT

1. The “to convict” instruction was proper.

Jury instructions are reviewed de novo. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). A trial court’s failure to instruct the jury as to every element of the crime charged violates due process. *State v. Hassan*, 184 Wn. App. 140, 148, 336 P.3d 99 (2014); U.S. Const. Amend. XIV. Therefore, a “to convict” jury instruction must contain all the elements of the crime and “must make the relevant legal standard

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

The “to convict” instruction given in this case, instruction number eight, mirrored Washington Pattern Jury Instruction 120.41. CP 58; WPIC 120.41. The court’s instruction read:

To convict the defendant of the crime of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 9, 2013, the defendant failed to appear before a court;
- (2) That the defendant was facing charges that he had committed crimes classified as Class B or C felonies in Cowlitz County Superior Court;
- (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
- (4) That all of these acts occurred in the State of Washington.

CP 58. Additionally, the trial court’s instruction number six, which mirrors the definition of bail jumping in WPIC 120.40, states that a person commits the crime of bail jumping only when he “fails to appear as require to appear after 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 while charged with a Class B or C felony.” CP 56.

The defendant here argues that jury instruction eight relieved the State of its burden to prove the element that he failed to appear at a hearing “as required.” However, both instructions eight and six contain language

requiring the defendant to appear. Instruction eight requires the jury to find that the defendant had knowledge that he had a subsequent personal appearance before the court. Therefore, the court's instructions were sufficient to inform the jury of the elements of bail jumping.

2. There is sufficient evidence to convict the defendant of bail jumping.

The standard of review for a claim of insufficient evidence is, after viewing the evidence in the light most favorable to the prosecution, whether “any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” *State v. Smith*, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985). In such review, “circumstantial evidence is not to be considered any less reliable than direct evidence, and specific criminal intent may be inferred where a defendant’s conduct plainly indicates the requisite intent as a matter of logical probability.” *Id.* All reasonable inferences must be drawn in the State’s favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338–39, 851 P.2d 654 (1993). A reviewing court need not itself be convinced beyond a reasonable doubt. *State v. Jones*, 63 Wn. App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and

the persuasiveness of the evidence. *State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005).

In order for the jury to have reached a verdict of guilty in the case at hand, they had to find that the defendant failed to appear as required before a court on or about September 9, 2013, after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance, and having been charged with crimes classified as class B and C felonies, and that all these acts occurred in Cowlitz County, Washington. The State presented sufficient evidence that the defendant failed to appear at the time of his hearing and that he had been released by court order or admitted to bail.

a. There was sufficient evidence for a rational jury to find that the defendant failed to appear at the required time.

The defendant was ordered to appear on September 9, 2013, at 9 am, and he signed the order to appear. RP 31; Exhibit 5. A deputy clerk with the Superior Court clerk's office then testified that the defendant did not appear for his court date on September 9, 2013. RP 37. She knew that he did not appear because she circled "did not" on exhibit six. RP 37; Exhibit Six. This testimony and exhibit show that the defendant did not merely fail to be in the courthouse at a random time, but in fact he failed to appear as required at the appointed time.

This case is distinguishable from *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010). In *Coleman*, the defendant signed an order to appear that required his presence in court on February 4, 2009, at 9:00 am. 155 Wn. App. at 963. The clerk's minutes and the clerk's testimony indicated the defendant failed to appear at an 8:30 am status conference. *Id.* There was no testimony or evidence given that the defendant was not present at 9 am, the time specified on his notice. *Id.* at 964. The reasonable inference to be made in that case is that the defendant failed to appear at 8:30, but could have been present at 9 am. The evidence was therefore insufficient. However, in this case, there was no 8:30 am status conference like there was in *Coleman*. Taking the evidence and reasonable inferences in the light most favorable to the State, a reasonable jury could find that the docket started at nine, the defendant's case was called sometime thereafter, and the defendant was not present.

First, Ms. Benneman testified that criminal court dockets consist of several different defendants all on a calendar at the same time for a variety of different things, including arraignments, pleas, sentencing hearings, and pretrial hearings. RP 22. She also explained how the clerk prepares docket minutes and that the dockets are recorded. RP 23. The State then showed a video of the defendant's July 22, 2013, hearing, wherein he was ordered to appear on September 9, 2013. RP 31. In that video, the judge says, "Next

case?” RP 31. The defense attorney states, “Number 18, Justin Hart.” RP 31. This exchange shows that there are multiple people on one docket, and that every person would not have their case called exactly at 9 o’clock. Then Ms. Myklebust testified that the defendant did not appear at his September 9, 2013, hearing, as indicated by the docket minutes she prepared. CP 37.

A reasonable juror could infer from this evidence that the defendant’s case was called on September 9 at 9 am or shortly thereafter, as the docket continued down the list of defendants. It would be unreasonable for a juror to infer that the defendant’s case was called some time in the afternoon when the docket was over, given the evidence presented. A reasonable juror could then also infer that the defendant was not present when his case was called. Therefore, there was sufficient evidence for a rational jury to find the defendant failed to appear at the required time.

b. There was sufficient evidence for a rational jury to find that the defendant had been released by court order or admitted to bail.

The minutes from the defendant’s July 12, 2013, hearing indicate that he was out of custody on that date. Exhibit 2. Likewise, the minutes from the defendant’s July 22, 2013, indicate that he was out of custody. Exhibit 4. Furthermore, a stipulation was read into the record at trial that indicated the defendant was facing charges that he had committed crimes

classified as Class B and Class C felonies. RP 43, CP 47. Viewing this evidence in the light most favorable to the state, a rational juror could infer that the defendant had been released either by court order or was out on bail.

3. The trial court did not violate the defendant's confrontation right, as neither the judge's statement nor exhibit 5 are testimonial hearsay.

Both the Washington constitution and the U.S. Constitution require a defendant have the opportunity to confront the witnesses against him. *State v. James*, 104 Wn. App. 25, 31, 15 P.3d 1041 (2000); Const. art. I, § 22; U.S. Const. Amend. VI. However, the right to confrontation does not apply when the statement to be admitted is not testimonial. Furthermore, even if a statement is hearsay, it does not violate the confrontation clause if the declarant is unavailable and the statement "bears adequate indicia of reliability," or falls under a firmly rooted hearsay exception. *James*, 104 Wn. App. at 31, citing *State v. Monson*, 113 Wn.2d 833, 841, 784 P.2d 485 (1989). Here, neither the judge's statement nor Exhibit 5 are testimonial. If this court finds that they are testimonial, they nonetheless fall under a firmly rooted hearsay exception and bear adequate indicia of reliability.

- a. *Neither the judge's statement on the video nor Exhibit 5 are testimonial hearsay, so the confrontation clause was not violated by their admission.*

Testimony is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354 (2004). A statement is considered testimonial if it is made under circumstances that would lead an objective person to believe that it would be available for use at trial. *State v. Jasper*, 174 Wn.2d 96, 115, 271 P.3d 876 (2012).

In the video presented by the State at trial, the judge presiding over the hearing stated that the trial would be set for October 14, readiness would be set for October 10, and the pretrial would be September 9. The judge then said, “You are required to appear on those dates and times.” RP 31. This statement is not testimonial because an objective person would not believe that the statement was made for the purpose of use in a later trial. The statement was made to set trial and hearing dates, and to order the defendant to appear. An objective person would not think that a judge’s statement setting trial dates would be made for the purpose of use in a trial. The fact that the hearings are recorded does not change this. While a reasonable person may believe that the recorded would be available if needed in a later trial, that does not mean the judge’s statement was made

for that purpose. Because the judge's statement was not testimonial, its admission was not improper.

The same is true for Exhibit 5, the document ordering the defendant to appear on September 9, 2013. An objective person would not believe that Exhibit 5 was made for purposes of use in a later trial. Rather, Exhibit 5 was made to give the defendant his court dates in writing, show by his signature that he agreed to appear, and warn him of the consequences if he fails to appear. The fact that the document could later be used to show that the defendant knew he was to appear on September 9 does not alone make the document testimonial. Because Exhibit 5 was not made solely for use in trial, it is not testimonial and its admission was not improper. However, even if this court finds that either the judge's statement or Exhibit 5 were testimonial, they fall under a hearsay exception.

b. Both the judge's statement on the video and Exhibit 5 fall under the public records hearsay exception and are therefore admissible.

This court has held that court documents that are authenticated under RCW 5.44.010 fall within the public records "firmly rooted" hearsay exception if they meet the public records independent judgment test. *James*, 104 Wn. App. at 33. RCW 5.44.010 allows for court records and proceedings to be admissible as evidence in all cases when certified by the clerk. Public records are also admissible in evidence when certified,

pursuant to RCW 5.44.040. In this case, the video of the previous hearing was certified by the clerk as a recording of a hearing that took place on July 22, 2013, in the case regarding the defendant, and that it was a fair and accurate recording of what occurred in court on July 22. RP 30, 29. Under RCW 5.44.010 and RCW 5.44.040, this record of a court proceeding is therefore admissible in evidence. Finally, it is worth mentioning that judge's statement in the video was not offered for its truth at trial. Rather, it was offered to show that the defendant knew he was required to appear on September 9. Therefore, even if the court finds the video was not properly certified, the statement at issue was not hearsay under ER 803.

Similarly, Exhibit 5 was certified by the clerk as being an order to appear for the defendant, and it is titled "Superior Court of Washington for County of Cowlitz." This document was therefore properly certified under RCW 5.44.040 and RCW 5.44.010 and is admissible in evidence. Additionally, the defendant did not object to the admission of Exhibit 5 at trial, so this court should decline to hear this issue. Even if the court reaches the issue, neither Exhibit 5 nor the video are testimonial, nor are either Exhibit 5 or the video hearsay.

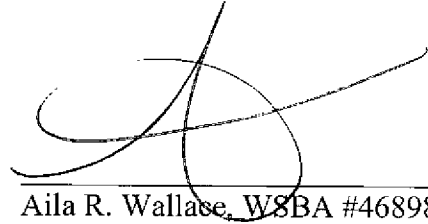
4. **The trial court should not have ordered the defendant to pay the cost of his incarceration without finding that he was able to do so; nor should the court have ordered him to pay LFOs without a particularized inquiry into his ability to pay.**

The State concedes that the sentencing court did not make a finding that the defendant was able to pay the costs of his incarceration, and that RCW 9.94A.760 requires such a finding. The State also concedes that the sentencing court did not make an adequate inquiry into the defendant's ability to pay before imposing legal financial obligation, as required by *State v. Blazina* __ Wn.2d __, 344 P.3d 680 (March 12, 2015). Furthermore, there is evidence in the record that the defendant was indigent and that counsel was appointed. RP 78. Therefore, the case should be remanded for resentencing on the issue of legal financial obligations only.

D. CONCLUSION

The defendant's conviction for bail jumping should be affirmed as the jury instructions were proper, there was sufficient evidence to convict the defendant of bail jumping, and the defendant's confrontation right was not violated. The appeal on these issues should be denied. However, the imposition of legal financial obligations was not proper so the case should be remanded for resentencing on the issue of legal financial obligations.

Respectfully submitted this 8th day of September, 2015.



Aila R. Wallace, WSBA #46898
Attorney for the State


CERTIFICATE OF SERVICE

Hannah Bennett-Swanson, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. Box 6490
Olympia, WA 98507
backlundmistry@gmail.com

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

Signed at Kelso, Washington on September 8th, 2015.



Hannah Bennett-Swanson

COWLITZ COUNTY PROSECUTOR

September 08, 2015 - 2:11 PM

Transmittal Letter

Document Uploaded: 5-470691-Respondent's Brief.pdf

Case Name: State of Washington v. Justin Hart

Court of Appeals Case Number: 47069-1

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: Respondent's

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: Han Bennett Swanson - Email: bennetth@co.cowlitz.wa.us

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

backlundmistry@gmail.com