No. 48116-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN AQUINO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. Under the law of the case doctrine, the State assumed the burden of proving an additional element on the offense of identity theft. The State did not meet this burden.

a. The State does not challenge the validity of the law of the case doctrine. The doctrine is soundly based on long-standing Washington law.

Under the law of the case doctrine, jury instructions not objected to became the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Under this doctrine, the State assumes the burden of proving any added element or requirement. Id. at 102-03. The State does not express disagreement about the validity of law of the case doctrine. Br. of Resp't at 5-8.

For purposes of federal law, the United States Supreme Court recently held that a challenge to the sufficiency of the evidence "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." Musacchio v. United States, 577 U.S. ___, 136 S. Ct. 709, 715, 193 L. Ed. 2d 639 (2016). The State does not discuss Musacchio. Because the Washington Supreme Court has not addressed whether to adopt the holding in Musacchio and the State does not ask this Court to apply this case, this Court should continue to apply existing Washington law. State v.

Makekau, No. 46929-4-II, 2016 WL 3188944, at *4 n. 2 (Wash. Ct. App. June 7, 2016).

In any event, Musacchio does not overrule Hickman or abrogate long-standing Washington precedent on the law of the case doctrine. The law of the case doctrine in Washington is not premised on the due process clause of the Fourteenth Amendment. Rather, it is premised on the Washington Constitution and the rules of appellate review as crafted by Washington courts since the birth of this state. See Hickman, 135 Wn.2d at 101-02 (collecting cases); Br. of App. at 8-9. As the Washington Supreme Court has indicated, the law of the case doctrine arises "from the nature and exigencies of appellate review," not simply from the constitutional principle that the State must prove every element of the crime beyond a reasonable doubt:

> This case is framed by two fundamental principles of law: the first constitutional, the second arising from the nature and exigencies of appellate review. The first principle is that constitutional due process requires that the State prove every element of the crime beyond a reasonable doubt. The second principle is that "jury instructions not objected to become the law of the case." If the jury is instructed (without objection) that to convict the defendant, it must be persuaded beyond a reasonable doubt of some element that is not contained in the definition of the crime, the State must present sufficient evidence to persuade a reasonable jury of that element regardless of the fact that the additional element is not otherwise an element of the crime.

State v. France, 180 Wn.2d 809, 814, 329 P.3d 864 (2014) (emphasis added) (citations omitted).

The standard used to evaluate the sufficiency of evidence in criminal cases can be traced to Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) and In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Winship held that the due process clause of the Fourteenth Amendment requires the State to prove every element of a criminal offense beyond a reasonable doubt. Winship, 397 U.S. at 364. Jackson held that in evaluating whether the State has met this burden, the Court should view the evidence in the light most favorable to the prosecution and analyze whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 319. Shortly after Jackson, the Washington Supreme Court adopted this standard in evaluating the sufficiency of the evidence. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

The Washington Supreme Court also adopted the same standard in reviewing whether the State has met its burden to prove an added requirement in a jury instruction. Hickman, 135 Wn.2d at 103. But it does not therefore follow that the law of the case doctrine is dependent on the due process clause of the Fourteenth Amendment, as construed by the United States Supreme Court. The law of the case doctrine was applied in

criminal cases predating Winship, Jackson, and Green. See, e.g., State v. Hames, 74 Wn.2d 721, 724-25, 446 P.2d 344 (1968).

Accordingly, Musacchio did not overrule Hickman. Because the issue is not a matter of federal constitutional law, States throughout the union remain free to continue use the jury instructions as the yardstick in deciding whether the parties—including the government, have met their burden. See Michigan v. Long, 463 U.S. 1032, 1040, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds). Hickman remains good law and must be followed.

b. The State failed to prove the additional requirement in the to-convict instruction on identity theft.

Under the law of the case doctrine, the State assumed the additional burden of proving that Mr. Aquino, through his use or possession of identifying information, obtained something valued at $1500 or less, or that he obtained nothing of value. Br. of App. at 6-9. The State did not prove either. Br. of at 9-10.

The State argues that the evidence proved beyond a reasonable doubt that Mr. Aquino obtained nothing of value from the identifying information contained on the check because he unsuccessfully tried to cash this check on October 3, 2014 at the casino. Br. of Resp't at 6-8.

The gravamen of the offense, however, is the identifying information, not the check itself. See RCW 9.35.020(1). Identity theft may occur in a "myriad" of ways. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013); RCW 9.35.001 ("The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain, possess, use, and transfer another person's means of identification or financial information."). Thus, that the casino did not cash the check does not prove that Mr. Aquino obtained nothing of value from his possession or use of the identifying information.

The State emphasizes that the check itself contained no markings indicating that it had been cashed before. Br. of Resp't at 7. Mr. Aquino, however, could have used the identifying information on the check to obtain something of value. Moreover, remote deposits of checks are ubiquitous.[1] For example, a person can electronically deposit checks to a bank using the internet. The person uses a scanner or smartphone to copy the check and then uploads the copy to the bank. This leaves no physical marks on the check.

[1] https://en.wikipedia.org/wiki/Remote_deposit (last accessed July 21, 2016).

Hence, the State did not affirmatively prove that Mr. Aquino obtained nothing of value from his possession or use of the identifying information. Because the State did not meet its burden, this Court should reverse the conviction and order it dismissed.

A recent unpublished decision from this Court is persuasive authority in support of the foregoing analysis. State v. Lippincott, No. 71522-4-I, noted at 188 Wn. App. 1032 (2015). Under amendments to GR 14.1(a), adopted on June 2, 2016 and set to go into effect on September 1, 2016, "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."[2] By the time this Court hears this case, this rule should be in effect.

Lippincott involved the same issue as in this case. There, officers found bags full of identity documents in an apartment where the defendant lived. Lippincott at *1. The defendant was charged with multiple counts of identity theft in the second degree. Id. Similar to this case, the "to-

[2] https://www.courts.wa.gov/court_rules/?fa=court_rules.adopted (last accessed July 18, 2016); https://www.courts.wa.gov/court_rules/adopted/GR14.1.doc (last access July 18, 2016).

convict" instructions on the third element required the State to prove: "That the defendant obtained credit or money or goods or services or anything else that is $1500 or less in value from the acts described in element (1); or did not obtain any credit or money or goods or services or other items of value." Id. at 3. Because none of the evidence established that the defendant used the stolen identifying information to obtain something valued at less than $1500 or that she did not obtain anything of value by possessing the information, this Court reversed. Id.

As in Lippincott, the State did not prove the third element in the to-convict instruction for second degree identity theft. The conviction should be reversed and dismissed.

2. The information alleging bail jumping failed to provide notice of the essential element that the defendant had notice of the requirement to appear before a particular court on a particular date.

The bail jumping statute has a knowledge requirement and reads 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, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1). "In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of *the* required court dates." State v. Cardwell, 155 Wn. App. 41, 47, 226 P.3d 243 (2010) (emphasis added), remanded on other grounds, 172 Wn.2d 1003, 257 P.3d 1114 (2011). Proving that someone had notice of a requirement to appear before *a* court on *a* date is inadequate. Id. (rejecting argument that "as long as [the defendant] knew that he would have to appear at some time in the future, it did not have to prove that he knew about *the* December 14, 2005 court hearing date.") (emphasis added). The State has to prove that the person had notice to appear at *the* specific court proceeding.

Here, the information failed to convey to Mr. Aquino that the State had to prove that he had knowledge (i.e., notice) of the requirement to personally appear in *Pierce County Superior Court* on *the* court dates (January 22, 2015 and March 18, 2015). Rather, the charging document told Mr. Aquino that he was guilty of bail jumping if he had "knowledge of the requirement of *a* subsequent personal appearance before *any* court in this state." CP 5-6 (emphasis added). This violated Mr. Aquino's right to adequate notice under our state and federal constitutions. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, § 22; U.S. Const. amend. VI.

"More than merely listing the elements, the information must allege the particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). The State correctly recounts that "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

Thus, in Zillyette, the court reversed a conviction for controlled substances homicide because, under the circumstances, it was an element of the offense and the information did not contain this requirement. Id. at 161. Merely alleging that a person delivered a controlled substance was inadequate because delivery of some controlled substances did not qualify for the offense. Id. at 159-61. The allegation is over inclusive. Id. at 160 ("Simply alleging that an accused person delivered a controlled substance in violation of RCW 69.50.401 does not satisfy the essential element rule because it is over inclusive.").

A similar analysis applies to bail jumping. It is not a crime to miss a court appearance if the person did not have notice beforehand of the requirement to appear before that court on the specific date. Notice or knowledge of a requirement to appear in court on a different date or before any court is inadequate.

The State cites to State v. Allen, 176 Wn.2d 611, 294 P.2d 679 (2013) and State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004) in support of its argument, contending that even if the State must prove a fact at trial, this does not necessarily make that fact an essential element. Br. of Resp't at 10. True enough. State v. Porter, No. 92060-5, slip. op. at 9 (Wash. July 14, 2016) ("not all aspects of proof that are necessary at trial constitute essential elements that must be included in the information."). But what Allen and Lorenz stand for is that *definitions* of elements need not be contained in the information. Allen, 176 Wn.2d 629-30; Lorenz, 152 Wn.2d at 36; accord State v. Johnson, 180 Wn.2d 295, 302, 325 P.3d 135 (2014) ("The State need not include definitions of elements in the information."). Here, Mr. Aquino's argument is not premised on a definition of an element in bail jumping. The general rule that definitions are not essential elements does not help the State's argument.

The State next cites a number of cases involving the offense of bail jumping. Br. of Resp't at 11-13, citing State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007); State v. Pope, 100 Wn. App. 624, 999 P.2d 51 (2000); State v. Gonzalez-Lopez, 132 Wn. App. 622, 632-33, 132 P.3d 1128 (2006). These cases do not support the State's position because they involved different issues from the one here. Williams, 162 Wn.2d at 180-81 (whether classification of the underlying felony or misdemeanor is an

essential element of bail jumping); Gonzalez-Lopez, 132 Wn. App. at 622 (whether the penalty classifications of bail jumping are essential elements of that crime); Pope, 100 Wn. App. at 629-30 (to-convict instruction omitted element that defendant was held for, charged with, or convicted of a class B felony).

In fact, while not involving the issue before this Court, the charging documents in Williams and Gonzalez-Lopez illustrate the deficiency in this case. In both Williams and Gonzalez-Lopez, the information alleged that the defendant had knowledge of "the requirement of *the* subsequent personal appearance." Williams, 162 Wn.2d at 182 n.1 (emphasis added); Gonzalez-Lopez, 132 Wn. App. at 627 (emphasis added).[3] In contrast, the charging document in this case alleged that Mr. Aquino had knowledge of "the requirement of *a* subsequent personal appearance." CP 5-6.

The State asserts that "Knowledge of the specific date of the required subsequent appearance is not an element of the crime of bail jumping." Br. of Resp't 11. In support, the State cites State v. Carver, 122 Wn. App. 300, 305, 93 P.3d 947 (2004). The State misstates (or

[3] The charging documents in these cases also informed the defendants of which Washington court they failed to appear before. Gonzalez-Lopez, 132 Wn. App. at 627; State v. Williams, 133 Wn. App. 714, 719, 136 P.3d 792 (2006), aff'd, 162 Wn.2d 177, 170 P.3d 30 (2007).

misrepresents) Carver. Carver stated that "knowledge on the specific date of the hearing is not an element of the crime." Carver, 122 Wn. App. at 305 (emphasis added). Thus, this Court held that the "State must prove only that [the defendant] was given notice of his court date—not that he had knowledge of this date every day thereafter—and that "I forgot" is not a defense to the crime of bail jumping. Id. at 306.

The offense of bail jumping requires proof that the defendant had knowledge of the requirement of the subsequent personal appearance before a specific Washington court. Because the information omitted these elements, it was deficient. "If the State fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice." Porter, slip op. at 4. Accordingly, this Court should reverse Mr. Aquino's convictions for bail jumping.

3. Impeachment evidence must be turned over to the defense. The State's mismanagement in failing to disclose impeachment evidence justified dismissal of the charges or exclusion of the interrogating officer's testimony.

Under Brady,[4] the prosecution has a duty to disclose not only exculpatory evidence, but also impeachment evidence. State v. Mullen, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). In other words, the

[4] Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

prosecution must disclose evidence affecting the credibility of witnesses. Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). This includes evidence possessed by law enforcement. Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

Officer Gary Tracey interrogated Mr. Aquino and was a key witness for the State in its prosecution. Video evidence and emails exchanged by the prosecution and Mr. Aquino's defense attorney, however, established that Officer Tracey was dishonest in a previous case. CP 8, 22-23; Pretrial (6/30/15) Ex. 1.

In the earlier case, Officer Tracey alleged that a suspect had tried to run him over with a motor vehicle, leading to a charge for second degree assault with a deadly weapon. CP 8, 12, 21. The prosecutor assigned to the case agreed that Officer Tracey lied about what happened. CP 22. As the video and the following screenshots of the video show, the suspect actually turned to avoid Officer Tracey, who kicked the vehicle as it drove by him:

Pretrial (6/30/15) Ex. 1.[5] The assault charge was later dismissed. CP 23.

This was plainly impeachment evidence. ER 608 (permitting evidence attacking the credibility of a witness). In reviewing this evidence, which consists of videos and documents, this Court is in the same position as the trial court. See Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989). Appellate courts should not pretend that reasonable minds can disagree on an issue when video evidence resolves the matter. See Scott v. Harris, 550 U.S. 372, 378-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (in considering officer-defendant's motion for summary judgment in excessive use of force case, lower courts should have viewed facts in the

[5] The file is named "WIRELESS PL PTZ 122_iv---10.3.8.195_2013-05-09_08-22-30(1)."; RP 60.

light depicted by videotape which captured events underlying the plaintiff's claim). That Officer Tracey was apparently not disciplined for his dishonesty is irrelevant. Br. of Resp't at 16. The trial court erred in ruling the evidence was not impeachment evidence.

The State's comparison of this case to Blackwell should not be well taken. There, the State did not comply with a trial court order requiring production of officers' personal files, resulting in the trial court dismissing the prosecution under CrR 8.3(b). State v. Blackwell, 120 Wn.2d 822, 824, 845 P.2d 1017 (1993). The Supreme Court reversed, reasoning in part that the trial court's discovery order rested on speculative claims by the defense and should not have been granted. Id. at 829. The defendant's bare assertion that discovery of the records "might" result in material evidence was insufficient. Id. at 830.

In contrast, here the evidence was material and Mr. Aquino obtained it after the State failed to disclose it. Moreover, Mr. Aquino raised a Brady violation, not a mere violation of court rules. The late discovery of this Brady material was prejudicial because it impacted Mr. Aquino's ability to prepare for the case. Br. of App. at 21. Besides Officer Tracey, no witness was scheduled to testify about the misconduct. CP 10. Contrary to the State's contention below, if Officer Tracey decided to perjure himself and deny the misconduct on the stand (rather

than admit to his dishonesty), ER 608(b)'s prohibition against extrinsic evidence would have had to give to way to Mr. Aquino's constitutional right to present a defense. See State v. Jones, 168 Wn.2d 713, 720-22, 230 P.3d 576 (2010); State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980); Br. of App. at 22-23.

The State argues that Mr. Aquino should have moved for a continuance. Br. of Resp't at 17-18. The State did not make this argument below and has abandoned the arguments it made below. Compare Br. of Resp't 17-18 with CP 27-28; RP 58-62. In any event, requiring Mr. Aquino to seek a continuance would be improper because it would have placed Mr. Aquino in the untenable position of having to sacrifice his right to a speedy trial. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (prejudice under CrR 8.3(b) includes the right to a speedy trial and the right to be represented by adequately prepared counsel).

The trial court should have granted Mr. Aquino's motion to dismiss. Alternatively, the trial court should have suppressed Officer Tracey's testimony. State v. Salgado-Mendoza, No. 46062-9-II, 2016 WL 3004544, at *8 (Wash. Ct. App. May 24, 2016). Salgado-Mendoza is instructive. There, the prosecution failed to disclose which lab toxicologist would testify at the defendant's trial for driving under the

influence. Id. at *1-2. This Court held this was mismanagement. Id. at *6. Applying the Hutchinson factors,[6] this Court held that exclusion of the toxicologist's testimony was the proper remedy. Id. at *7-8. Likewise, the mismanagement in this case justified the exclusion of Officer Tracey's testimony. As argued, the failure to exclude Officer Tracey's testimony was prejudicial. Br. of App. at 23.

This Court should reverse and order the charges dismissed. Alternatively, this Court should reverse and remand for a new trial with instruction that Officer Tracey may not testify at a retrial.

4. This Court may direct in the decision that no costs will be awarded.

This Court has discretion under RAP 14.2 to direct in its decision that no costs will be awarded. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d (2000); State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612 (2016). If the State prevails in this appeal, Mr. Aquino has requested that this Court direct that no costs be imposed against him. Br of App. at 23-24. "The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill." Sinclair, 192 Wn. App. at 391. The State has not done so. Rather, the State contends the issue is premature. Br. of Resp't at 24. The State's

[6] State v. Hutchinson, 135 Wash.2d 863, 882-83, 959 P.2d 1061 (1998).

argument is contrary to Nolan and Sinclair, and should be rejected. If Mr. Aquino does not prevail, this Court should direct that no costs will be imposed.

B. CONCLUSION

Under the law of the case doctrine, the State failed to prove identity theft. The charging document alleging bail jumping was constitutionally deficient. And the Brady violation by the State warranted dismissal of the charges or exclusion of the interrogating officer's testimony. The convictions should be reversed.

DATED this 21st day of July, 2016.

Respectfully submitted,

s/ Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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DIVISION TWO

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	)	
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	)	NO. 48116-2-II
v.	)	
	)	
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	)	
Appellant.	)	

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[X] JOHN AQUINO 952 SW CAMPUS DR APT 38-A1 FEDERAL WAY, WA 98023	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
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Phone (206) 587-2711
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