No. 97053-0
COA No. 50390-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SARAH MARIE BROWNING,

Petitioner.

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

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS DECISION.....1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE.....3

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED.....5

1. The affirmative defense to bail jumping impermissibly shifted the burden of proof to Ms. Browning. 5

2. The building Ms. Browning entered was not a dwelling. 8

3. Under *Ramirez* , the change in the law regarding legal financial obligations applies to cases on appeal, thus the $300 in discretionary legal financial obligations should be stricken. 9

F. CONCLUSION 11

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. Const. amend XIV 5, 7

FEDERAL CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 5, 8

Dixon v. United States, 548 U.S. 1, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006) 6

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 5, 8

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 8

Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) 6

Mullaney v. Wilbur, 421 U.S. 684, 704, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 6

Smith v. United States, —— U.S. ——, 133 S.Ct. 714, 719, 184 L.Ed.2d 570 (2013) 6

WASHINGTON CASES

State v. Deer, 175 Wn.2d 725, 287 P.3d 539 (2012) 7

State v. McDonald, 123 Wn.App. 85, 96 P.3d 468 (2004) 8

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, (2018) 9, 10

State v. Stinton, 121 Wn.App. 569, 89 P.3d 717 (2004) 8

State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014) 5

STATUTES

RCW 10.01.160 9

RCW 36.18.020 9

RCW 43.43.7541 10

RCW 9A.76.170 ..... 6, 7

RCW 9A.04.110 8

RCW 9A.52.025 8

RULES

RAP 13.4..... 1

A. IDENTITY OF PETITIONER

Sarah Browning asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Sarah Marie Browning*, No. 50390-5-II (January 29, 2019). A copy of the decision is in the Appendix.

The Court of Appeals denied Ms. Browning's motion for reconsideration on April 5, 2019. A copy of the Court's ruling is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State prove each essential element of the charged offense beyond a reasonable doubt. The Legislature cannot place the burden of proof on the defendant to prove an affirmative defense where the defense necessarily negates an element of the offense. Placing the burden on the defendant to prove the affirmative defense to bail jumping impermissibly shifts the burden of proof because the capability of the defendant in attending the hearing, the

actus reus of the offense, negates an element of the offense. Is a significant issue under the United States and Washington Constitutions involved requiring reversal of Ms. Browning's conviction and remand for a new trial?

2. Whether the building was a dwelling is an element of residential burglary. Where the house had not been lived in for many months, the electricity had been turned off, there had been a substantial water leak months prior to the Ms. Browning's entry, and the building was so full of boxes and detritus as to make it difficult to move from room to room, is a significant issue under the United States and Washington Constitutions involved requiring reversal of Ms. Browning's residential burglary conviction?

3. Recent changes to the statutes authorizing imposition of Legal Financial Obligations (LFO) bar imposition of discretionary LFOs where the defendant is indigent. These amendments apply to all those whose appeal is pending at the time of the legislation's passage. Is an issue of substantial public interest presented requiring this Court to remand to the trial court to strike the $300 in discretionary LFOs imposed by the trial court?

D. STATEMENT OF THE CASE

At around 11:00 pm on the evening of November 28, 2015, Shirley Cuccia went to the house she owns in Bremerton to do some work. RP 151-152. She had not lived at that location for many months and was then in the process of cleaning out the many boxes of items that filled each room and lined the hallways. *Id.*

When she arrived she noticed that a screen door she had left locked earlier in the day was now open. RP 164. She also later noticed that the kitchen window had recently been broken. RP 174. After entering the house, Ms. Cuccia said she heard a noise upstairs and went to investigate. RP 164. Once she got upstairs she encountered Sarah Browning coming out of the bedroom. *Id.* Ms. Cuccia was not acquainted with the Ms. Browning and had not given her permission to be in the house. RP 175. Upon seeing Ms. Browning, Ms. Cuccia confronted her and began hitting her on the head with a flashlight. RP 164. Ms. Browning fled, leaving one of her shoes and a backpack in the building. RP 167-169. Ms. Cuccia called "911." RP 162.

Two deputy sheriffs responded to the scene. RP 82-88, 132-136. The first deputy found Ms. Browning running down the street missing one of her shoes. RP 87-90. He stopped his vehicle, put Ms. Browning

in handcuffs, and placed her in the back of his patrol car. RP 91-92. He found a number of items of jewelry in Ms. Browning's pockets that she claimed belonged to her. *Id.* Ms. Cuccia later claimed those items belonged to her. RP 104-105.

Upon her arrest, Ms. Browning told the deputy that she was acquainted with Ms. Cuccia, that she had been in the house with permission, that she and Ms. Cuccia had gotten into a dispute, and that Ms. Cuccia was probably now making false claims to get her arrested. RP 91-92, 137. Ms. Browning later acknowledged that her statements to the officer were false and that she did not really know the person who owned the house. RP 239. Ms. Browning did admit being present in the house, that she had fled without one of her shoes and left without her backpack. RP 253-254.

A search of Ms. Browning's backpack revealed a number of items, including a jewelry box and a key fob with the keys to one of Ms. Cuccia's vehicles on it. RP 104-112. The deputies also found other items in it that Ms. Cuccia claimed belong to her. *Id.* Both Ms. Browning and Ms. Cuccia claimed ownership of the jewelry box. *Id.*

Ms. Browning was charged with one count of residential burglary and one count of bail jumping. CP 1-6, 41-47, 68-70.[1] The Information also alleged the existence of the aggravating factor that the "victim of the burglary was present in the building or residence when the crime was committed." CP 41-47. Following a jury trial, Ms. Browning was convicted as charged, including the aggravating factor.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The affirmative defense to bail jumping impermissibly shifted the burden of proof to Ms. Browning.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "A corollary rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged." *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014).

The Legislature may allocate to the defendant the burden of proving an affirmative defense without offending due process when the

[1] Ms. Browning was also charged with a second bail jumping count and a count of witness tampering. Both of these counts were dismissed prior to trial.

defense "excuses[s] conduct that would otherwise be punishable." *Dixon v. United States*, 548 U.S. 1, 6, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006); *see also Martin v. Ohio,* 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). But when a defense negates an element of an offense, the Legislature may not shift the burden to the defendant of proving the defense. *Smith v. United States,* ––– U.S. ––––, 133 S.Ct. 714, 719, 184 L.Ed.2d 570 (2013); *Mullaney v. Wilbur,* 421 U.S. 684, 699, 704, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

The affirmative defense to bail jump, RCW 9A.76.170(2) violates due process because it requires the defendant to prove she was incapable of appearing at the required hearing instead of requiring the State to prove she was capable of appearing. The statute takes the *actus reus* element of bail jumping, the volitional act of failing to appear, and makes the lack of that volitional act an affirmative defense. By doing so, this provision shifts the burden of proof to the defendant to disprove the essential *actus reus* element of the crime that the Constitution requires the State to prove.

The *actus reus* of this offense is to "fail[] to appear" after having had "knowledge of the requirement of a subsequent person appearance." Although stated in the negative, it still requires, as do all

crimes, a volitional act on the part of the defendant. Thus, when a defendant does not appear because he or she is physically incapable of doing so, he or she has not committed the *actus reus* of the crime because there has been no volitional act. Here, Ms. Browning testified on the day she was supposed to appear in court she was in the hospital, thus impliedly incapable of going to court.

Contrary to the Court of Appeals conclusion, the affirmative defense here is not similar to the "I was asleep" defense in *State v. Deer*, which this Court proof of which did not impermissibly shift the burden of proof. 175 Wn.2d 725, 740, 287 P.3d 539 (2012). In *Deer*, this Court found such evidence is far more likely to be within the defendant's knowledge and ability to establish. Here, the defendant's capability of attending court is presumably in the State's ability to establish as well as Ms. Browning.

This Court should grant review, find the affirmative defense noted in RCW 9A.76.170(2) negates an element of the offense of bail jumping, thus impermissibly shifting the burden to the defendant. This Court should reverse Ms. Browning's conviction for bail jumping.

2. The building Ms. Browning entered was not a dwelling.

Due process requires the State prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi*, 530 U.S. at 471; *In re Winship*, 397 U.S. at 364. The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In order to establish that Ms. Browning committed residential burglary, the State had to prove: (1) that she entered or remained unlawfully in a dwelling, and (2) that she intended to commit a crime against a person or property therein. RCW 9A.52.025; *State v. Stinton*, 121 Wn.App. 569, 573, 89 P.3d 717 (2004). RCW 9A.04.110(7) defines a "dwelling" as "any building or structure . . . which is used or ordinarily used by a person for lodging." *State v. McDonald*, 123 Wn.App. 85, 90, 96 P.3d 468 (2004).

Here, the building had not being used or ordinarily used by a person for lodging. In fact, as Ms. Cuccia admitted in her testimony she

had not lived in the house for many months, the electricity had been turned off, and there had been a substantial water leak months prior to the defendant's unlawful entry. The two deputies who testified confirmed this testimony in their description of the building as so full of boxes and detritus as to make it difficult to move from room to room. Thus, there was a lack of substantial evidence that at the time the defendant was unlawfully in the building it was a dwelling.

This Court should grant review and hold the building Ms. Browning entered was not a dwelling and reverse here conviction for residential burglary.

3. Under *Ramirez* , the change in the law regarding legal financial obligations applies to cases on appeal, thus the $300 in discretionary legal financial obligations should be stricken.

At sentencing, the trial court, in addition to the mandatory $500 victim penalty assessment, the court imposed $200 filing fee and $100 DNA collection fee in discretionary LFO. Although she did not originally challenge these fees, since her matter is still on direct appeal, she can raise this issue under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714, (2018).

In 2018, the law on legal financial obligations changed. Laws of 2018, ch. 269. Now, it is categorically impermissible to impose

discretionary costs on indigent defendants. RCW 10.01.160(3). Now, the previously mandatory $200 filing fee cannot be imposed on indigent defendants. RCW 36.18.020(2)(h). It is also improper to impose the $100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. RCW 43.43.7541.

The Supreme Court in *Ramirez* held that these changes apply prospectively to cases on appeal. 191 Wn.2d at 747. In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. *Id.* at 747-48. Applying the change in the law, the *Ramirez* Court ruled the trial court impermissibly imposed discretionary legal financial obligations, including the $200 criminal filing fee and the $100 DNA collection fee. *Id.*

Here, Ms. Browning was indigent at trial and the trial court found her indigent for the purpose of appeal. The trial court imposed the $200 filing fee against Ms. Browning and the $100 DNA fee. As in *Ramirez*, the change in the law applies to Ms. Browning's case because it is on direct appeal and not final. Accordingly, this Court should strike the $200 filing fee. *Ramirez*, 191 Wn.2d at 747-48. Further, because Ms. Browning has previously had her DNA collected as a result of

prior convictions, the Court should also order the $100 DNA collection fee stricken. *Id.*

This Court should remand Ms. Browning's matter to the trial court to strike the discretionary financial obligations.

F. CONCLUSION

For the reasons stated, Ms. Browning asks this Court to grant review and reverse her conviction for bail jumping and remand for a new trial. Alternatively, Ms. Browning asks that this Court remand her matter to the trial court to strike the $200 filing fee and $100 DNA collection fee.

DATED this 8th day of April 2019.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Petitioner

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

April 5, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SARAH M. BROWNING, Appellant.	No. 50390-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Sarah M. Browning, filed a motion for reconsideration of this court's unpublished opinion filed on January 29, 2019. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Maxa, Lee, Menick

LEE, J.

Filed
Washington State
Court of Appeals
Division Two

January 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SARAH MARIE BROWNING, Appellant.	No. 50390-5-II UNPUBLISHED OPINION

LEE, J. — Sarah M. Browning appeals her residential burglary and bail jumping convictions. She contends (1) the burden of proof on an essential element of bail jumping was wrongly shifted to the defense, (2) the trial court violated her CrR 3.3 time for trial rights when granting defense counsel's motion to withdraw, (3) sufficient evidence does not support her residential burglary conviction, and (4) ineffective assistance of counsel for failing to object to impeachment evidence. In her statement of additional grounds for review (SAG), Browning argues the sentencing court miscalculated her offender score. We affirm.

FACTS

A. FACTUAL BACKGROUND

Shirley Cuccia, previously known as Shirley Lewis, lived in a house at 321 Charlotte Avenue in Bremerton. After Cuccia bought the house, she and her husband reconciled. Nevertheless, she would go back and forth between the Charlotte Avenue home and the family home.

Cuccia had plants, personal items, and boxes of items belonging to her children and grandmother in the Charlotte Avenue house. She took care of the yard and upkeep of the home. The power was on. And the water and plumbing worked. Cuccia's identification listed the Charlotte Avenue address as Cuccia's address.

One morning, Cuccia went to the Charlotte Avenue home to work on a water main leak and install storage shelves. She returned to her other home to make dinner for her family and then returned to the Charlotte Avenue home later that night.

When Cuccia returned to the Charlotte Avenue house, the gate was open, which was not how she left it, and the screen to one of the bedroom windows was removed. Cuccia called 911. Cuccia then went inside the home. As she went upstairs, Cuccia saw Browning coming out of Cuccia's bedroom. Cuccia did not know Browning. Browning began throwing items out of her backpack at Cuccia and then ran out of the house.

Kitsap County Sheriff's Deputy Joseph Hedstrom was dispatched to the residence. As he neared the home, he saw Browning running down the street. Deputy Hedstrom stopped Browning.

Browning told Deputy Hedstrom that she was being set up by "Vicki Lewis." Verbatim Report of Proceedings (VRP) (May 17, 2017) at 91. She said she was in the home to help Lewis move boxes.

Kitsap County Sheriff's Deputy Donald Moszkowicz arrived and in a search incident to arrest, he found a small jewelry box and various pieces of jewelry in Browning's pockets. Inside the jewelry box was Cuccia's class ring with her initials.

B. PROCEDURAL BACKGROUND

On December 3, 2015, the State charged Browning with residential burglary with a special allegation that the victim was present during the burglary. The trial court released Browning on bail pending trial. The trial court's pre-trial release order required Browning to appear at an August 17, 2016, review hearing and a November 30, 2016, omnibus hearing. Browning did not attend either hearing. The State also learned that Browning had contacted the victim. On December 13, 2016, the State additionally charged Browning with two counts of bail jumping and witness tampering. A new omnibus hearing was set for January 12, 2017.

On January 12, 2017, defense counsel moved for a continuance and to reset the omnibus hearing and trial dates. He explained that as a result of the amended information, he needed more time to prepare a *Knapstad*[1] motion. The State did not object. The trial court granted the continuance. Browning refused to sign the continuance order. Trial was set for March 6, 2017.

On March 2, 2017, defense counsel filed a motion to withdraw. He argued that "this would be . . . mutual between myself and my client, that communication has been irretrievably broken."

[1] *State v. Knapstad*, 107 Wn.2d 346, 357, 729 P.2d 48 (1986) (a motion to dismiss when the undisputed facts do not establish a prima facie case of guilt).

VRP (March 2, 2017) at 6. The trial court inquired about the breakdown in communication, and defense counsel replied, "There have been incidents which have now — prevent me from adequately preparing for trial because of new things that have been divulged to me by Ms. Browning." VRP (March 2, 2017) at 7. Defense counsel stated he would not be prepared to go to trial the following week.

The trial court granted the motion to withdraw and advised Browning that she had now "gone through" two attorneys[2] and she did not get "to pick and choose" because they did not "have an exhaustive list." VRP (March 2, 2017) at 12. Defense counsel then advised the trial court that Browning was concerned about her time for trial rights. The trial court responded that Browning "ask[ed] for new counsel" and the trial court was "not going to make another attorney be ready by Monday." VRP (March 2, 2017) at 13-14.

The State ultimately dismissed one of the bail jumping charges (relating to the August 17, 2016, hearing) and the witness tampering charge. Browning went to trial on the residential burglary and bail jumping charges.

Prior to trial, the State moved to introduce 14 of Browning's prior burglary, theft, and possession of stolen property convictions under ER 609. The State argued it would go to Browning's credibility if she testified. Defense counsel did not object. The trial court granted the motion.

[2] The details of the withdrawal of Browning's first attorney are not in our record, but the trial court inquired at the March 2, 2017 hearing if this was Browning's first attorney. The State responded, "No . . . this will be the second attorney that Ms. Browning has had relieved of duty." VRP (March 2, 2017) at 11.

C. TRIAL AND SENTENCING

Trial commenced on May 15, 2017. During trial, Deputy Hedstrom testified that in his opinion, the house looked like someone lived there and that he has "seen worse." VRP (May 17, 2017) at 127. He also testified there were functional lights in the house.

After the State rested, Browning testified. During her testimony she admitted that she had gone into Cuccia's house without permission. However, she denied taking Cuccia's property and stated that she only entered the home to get out of the cold. Browning also testified that she was unable to attend the November 30, 2017, omnibus hearing because she was sick and in the hospital.

During Browning's testimony, the State asked her about her "fairly significant theft history." VRP (May 18, 2017) at 269. Browning admitted to multiple prior theft convictions and one burglary conviction from 2010.

The trial court instructed the jury, without objection, that

> [i]t is a defense to a charge of bail jumping that:
>
> (1) uncontrollable circumstances prevented the defendant from personally appearing in court; and
> (2) the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear; and
> (3) the defendant appeared as soon as such circumstances ceased to exist.
>
> For the purposes of this defense, an uncontrollable circumstance is an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

> If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 144. The trial court also instructed the jury that evidence of prior convictions may "only" be considered "in deciding what weight or credibility to give to the defendant's testimony." CP at 124.

A jury found Browning guilty as charged. The sentencing court calculated Browning's offender score as an eight on the bail jumping conviction and a nine on the residential burglary conviction. Browning agreed to a 100-month aggravated exceptional sentence as part of a plea deal to have other unrelated charges dropped. The sentencing court sentenced Browning to 100 months on the residential burglary conviction and 57 months on the bail jumping conviction to be served concurrently.

Browning appeals.

ANALYSIS

A. BAIL JUMPING

Browning first contends the trial court violated her due process rights because the bail jumping defense jury instruction relieved the State of its burden of proof of an essential element of bail jumping. Specifically, she argues that the State must prove she was capable of appearing instead of her having to prove she was incapable of appearing as an affirmative defense. We disagree.

Due process requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Jury instructions are appropriate if they allow the parties to argue their theory of the case, do not mislead the jury, and do not

misstate the law. *State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). We review de novo whether the jury instructions adequately state the applicable law. *Id.*

The essential elements of bail jumping are that the defendant "(1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required." *State v. Williams*, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007) (emphasis omitted); RCW 9A.76.170(1). Under RCW 9A.76.170(2),

> It is an affirmative defense to a prosecution [for bail jumping] that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

The trial court instructed the jury on the affirmative defense to a bail jumping charge.

Here, no legal authority directly supports Browning's argument. However, *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012), *cert. denied*, 568 U.S. 1148 (2013), is instructive. There, our Supreme Court considered whether the State must prove volition as an element of rape of a child in the third degree. Deer argued that once she produced evidence of a lack of a voluntary action, the State had the burden of proving volition beyond a reasonable doubt. *Id.* at 731-32. Deer claimed she was sleeping during several acts of intercourse and, therefore, could not be guilty of rape. The Court held that Deer's lack of volition claim was an affirmative defense that she was required to prove by a preponderance of the evidence:

> We must reject Deer's contention that the State is required to prove as an element of child rape that she was awake during the alleged acts. While she is entitled to argue a lack of conscious action, her claim is properly treated as an affirmative defense, much like claims of involuntary intoxication, insanity, or unwitting possession

Id. at 733.

Browning's contention is similar to Deer's. Browning argues that the State was required to prove that she was capable of appearing at the required time. She relies on *Carter v. United States*, 530 U.S. 255, 257, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000), to argue that every crime must have an actus reus that the State must prove. However, the *Deer* court recognized there is a divergence between the importance of actus reus in "criminal law philosophy" and its relevance in practice, and explained that

> [t]he law has "deviated" for good reason; theory and practice sometimes diverge. Breaking criminal responsibility into its component parts of actus reus and mens rea is fine in theory, but requiring the prosecution to establish volition—here consciousness—as an "element" in the strict sense is unreasonable.

Deer, 175 Wn.2d at 732-33.

The defense to bail jumping is very similar to the lack of volition defense noted in *Deer* in that the excuse cannot have been caused by the defendant's own acts. As the *Deer* court observed, the defendant generally bears the burden of proving an affirmative defense by a preponderance of the evidence. *Id.* at 734; s*ee also State v. Lawson*, 37 Wn. App. 539, 542, 681 P.2d 867 (1984) ("It is within the defendant's knowledge and ability to establish the existence of one of the statutory exceptions to the charge of unlawful consumption. . . . It is not an 'undue hardship' to require the defendant to come forward with evidence of a defense, if one exists."). The sole exception is when a defense "negates" an element of the charged offense, in which case due process requires the State to bear the burden of disproving the defense. *Deer*, 175 Wn.2d at 734 (citing *State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996)).

Bail jumping requires the State to prove that the defendant knew that she was required to appear. *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). The affirmative defense does not negate that element. *Id.* To the contrary, the failure to appear element is essentially a strict liability element because the State only has to prove the defendant's absence, not the reason. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). Moreover, the *Deer* court went on to explain that "the reason for putting the burden of proof on the defendant in such cases is 'because generally, affirmative defenses are uniquely within the defendant's knowledge and ability to establish.' " 175 Wn.2d at 737 (quoting *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994)).

Browning contends she was not able to attend because she was in the hospital. But she did not present any documentation for her alleged hospital stay. This is exactly the type of evidence in the "unique[]" control of the defendant that justifies placing the burden on the defense. *Deer*, 174 Wn.2d at 737.

The trial court's affirmative defense instruction did not relieve the State of its burden to prove the essential elements for a bail jumping charge. Accordingly, Browning's due process challenge fails.

B. TIME FOR TRIAL RIGHT

Browning next contends the trial court erred by granting defense counsel's motion to withdraw and that this error violated her CrR 3.3 time for trial rights. We disagree.

We review a trial court's ruling on an attorney's motion to withdraw for abuse of discretion. *State v. Stark*, 48 Wn. App. 245, 252-53, 738 P.2d 684, *review denied*, 109 Wn.2d 1003 (1987). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State*

v. Nguyen, 131 Wn. App. 815, 819, 129 P.3d 821 (2006). We review applications of the CrR 3.3 time for trial rules de novo. *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003).

Browning alleges the trial court abused its discretion by not inquiring more regarding the relationship between her and defense counsel before granting counsel's motion to withdraw. However, Browning did not object to Defense counsel's withdrawal below; rather, Browning joined in the motion. Defense counsel stated that the motion was "mutual between myself and my client, that communication has been irretrievably broken." VRP (March 2, 2017) at 6. Thus, the trial court concluded that there was no time for trial violation because Browning "ask[ed] for new counsel" and the trial court was "not going to make another attorney be ready for trial on Monday." VRP (March 2, 2017) at 13-14.

Based on the record, Browning acquiesced in the motion for a new counsel, which would necessitate additional time to prepare for trial. There was no abuse of discretion in granting the motion. Moreover, a time for trial waiver " 'forced solely by defense counsel's conduct, and not in any way attributable to the State or the court, is not a violation of Criminal Rule 3.3, and does not justify a dismissal of charges.' " *State v. Vicuna*, 119 Wn. App. 26, 34, 79 P.3d 1 (2003) (quoting *State v. Thomas*, 95 Wn. App. 730, 739, 976 P.2d 1264 (1999), *review denied*, 139 Wn.2d 1017 (2000)), *review denied*, 152 Wn.2d 1008 (2004). "Requiring dismissal in such situations would inappropriately place the State in an adversarial position against withdrawal to protect its interest in preventing [time for trial] violations." *Vicuna*, 119 Wn. App. at 34-35. Thus, given the facts below, Browning's time for trial violation challenge based on the trial court allowing defense counsel to withdraw fails.

C. SUFFICIENCY OF EVIDENCE FOR RESIDENTIAL BURGLARY

Browning next contends sufficient evidence does not exist to support her residential burglary conviction, which violates her constitutional due process right to have every element proved beyond a reasonable doubt. Browning contends the State's evidence was insufficient to prove that she entered a dwelling, which is an essential element of residential burglary under RCW 9A.52.025(1). We disagree.

As previously discussed, in a criminal prosecution, due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *W.R.*, 181 Wn.2d at 762. Evidence is sufficient if, when viewed in the light most favorable to the State, any rational trier of fact could find that all of the crime's essential elements were proven beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). When challenging the evidence as insufficient, the defendant admits the truth of the State's evidence and all reasonable inferences that arise therefrom. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). Circumstantial and direct evidence are equally reliable. *Id.* at 266. Because it is the jury's responsibility to resolve credibility issues and determine the weight of the evidence, we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove residential burglary, the State had to prove beyond a reasonable doubt that Browning entered or remained in a "dwelling." RCW 9A.52.025(1). A "dwelling" is "any building or structure . . . which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7). Browning argues the home was not a dwelling because it was not used for lodging.

However, whether a home is used for lodging is but one factor determining "dwelling." *See State v. Hall*, 6 Wn. App. 2d 237, 430 P.3d 289 (2018). The factors considered in determining "dwelling" include:

> (1) [W]hether the occupant deemed the house his or her abode and treated it as such, (2) whether the house was furnished and rented out periodically, (3) whether the occupant intended to return, (4) whether the house usually was occupied by someone lodging there at night, (5) whether the house was maintained as a dwelling, and (6) how long the house had been vacant.

Id at 240. (citing *State v. McDonald*, 123 Wn. App. 85, 91 n.18, 96 P.3d 468 (2004)).

Here, Cuccia testified that after she and her husband reconciled she would go back and forth between the Charlotte Avenue home and the family home. She had plants, personal items, and boxes of items belonging to her children and grandmother in the house. She took care of the yard and upkeep of the home. The power was on. And the water and plumbing worked. Cuccia's identification listed the Charlotte Avenue address as Cuccia's address.

Deputy Hedstrom testified that in his opinion the house looked like someone lived there. He also testified there were functional lights in the house.

Viewing this evidence in the light most favorable to the prosecution, it permits any rational trier of fact to find beyond a reasonable doubt that the Charlotte Avenue home was a dwelling. Accordingly, the evidence was sufficient to convict Browning of residential burglary.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Browning next contends she was denied effective assistance of counsel because counsel did not object to the admission of her 2010 burglary conviction, which was admitted under ER 609(a)(2). We disagree.

To prove that she received ineffective assistance of counsel, Browning must show that defense counsel's conduct was deficient and that the deficient performance resulted in prejudice. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842, (2018). "Because both prongs must be met, a failure to show either prong will end the inquiry." *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

Defense counsel's representation is deficient if it falls " 'below an objective standard of reasonableness.' " *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "There is a strong presumption that defense counsel's conduct is not deficient." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because of this presumption, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Performance is prejudicial if there is reasonable probability that but for the deficiency the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. Where the issue is counsel's failure to bring a motion, the defendant can establish prejudice only if the motion would have been granted and the outcome of the proceeding would have been different. *State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005), *aff'd*, 158 Wn.2d 630, 146 P.3d 1183 (2006).

ER 609 governs the admission of a prior conviction for impeachment purposes. Relevant to this appeal is ER 609(a)(2), which states:

> For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . involved dishonesty or false statement, regardless of the punishment.

A burglary conviction generally qualifies as a crime of dishonesty if the underlying crime the burglar intends to commit is a crime of dishonesty. *State v. Garcia*, 179 Wn.2d 828, 847, 318 P.3d 266 (2014); *State v. Black*, 86 Wn. App. 791, 793, 938 P.2d 362 (1997), *review denied*, 133 Wn.2d 1032 (1998).

Here, the record does not show whether the predicate offenses to Browning's prior burglary conviction was a crime of dishonesty. However, even if we assume deficient performance, Browning cannot show prejudice. Browning had an extensive criminal background. Several theft convictions were introduced to the jury. The jury was instructed to consider the prior conviction only in assessing Browning's credibility. We presume that juries follow the trial court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

Further, even assuming the jury disregarded the trial court's limiting instruction, there is no reasonable possibility that the jury convicted Browning based solely on her 2010 burglary conviction. The State's other evidence overwhelmingly supports Browning's convictions. The record does not support Browning's claim that she received ineffective assistance of counsel.

Browning also appears to argue that defense counsel should have objected because ER 609(a)(2) violates a defendant's due process right to a fair trial under both the state and federal constitutions because it is unfairly prejudicial. Because there is no legal authority holding that ER 609(a)(2) violates the state and federal due process clauses, defense counsel's decision to not object would not be considered deficient performance or prejudicial.

Based on the above, Browning's ineffective assistance of counsel claim fails.

E. MISCALCULATED OFFENDER SCORE

Lastly, Browning argues in her SAG that the sentencing court miscalculated her offender score. She, however, does not explain how the court miscalculated her offender score. Under RAP 10.10(c), Browning is required to "inform the court of the nature and occurrence of alleged errors." Browning fails to do so. Moreover, she agreed to a 100-month aggravated exceptional sentence as part of a plea deal. Accordingly, we decline to address this issue further.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, C.J.

Melnick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 50390-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Randall Sutton
[kcpa@co.kitsap.wa.us][rsutton@co.kitsap.wa.us]
Kitsap County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 8, 2019

WASHINGTON APPELLATE PROJECT

April 08, 2019 - 4:39 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50390-5
Appellate Court Case Title:	State of Washington, Respondent v. Sarah M. Browning, Appellant
Superior Court Case Number:	15-1-01355-4

The following documents have been uploaded:

- 503905_Petition_for_Review_20190408163825D2636589_5599.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.040819-08.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190408163825D2636589